IW v IX
[2005] SGCA 48

Case Number : OM 24/2005

Decision Date : 13 October 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

Counsel Name(s) : Michael Hwang SC (Michael Hwang) and Bernice Loo Ming Nee (Allen and Gledhill) for the applicant; Quentin Loh SC, Vivien Teng, Kee Lay Lian (Rajah and Tann) for the respondent

Parties : IW — IX

Civil Procedure – Appeals – Leave – Husband in matrimonial case heard in district court appealing to High Court and thereafter wife seeking leave to appeal to Court of Appeal – Principles for court to apply when considering whether to grant leave to appeal – Whether leave should be granted based on test of realistic prospect of success – Whether proposed appeal raising custody issue involving question of law of importance

13 October 2005

Chao Hick Tin JA (delivering the judgment of the court):

1 This was an application by motion for leave to appeal against the decision of the High Court which reversed the decision of the district court (the Family Court) on a custody matter involving a child aged nine. Having heard the oral arguments of the parties, we refused leave. These grounds are issued in response to the arguments advanced by the applicant-wife that the circumstances under which the courts in Singapore should grant leave to appeal should be expanded following the English Court of Appeal decision in *Smith v Cosworth Casting Processes Ltd* [1997] 4 All ER 840 ("*Smith v Cosworth*").

The background

2 The applicant-wife and the respondent-husband were married in 1991. They have two daughters. The older child is now aged 11 and the younger is nine years old.

3 In March 2001, the wife's employer posted her to New York to take up a new appointment there. In April 2001, her husband and the two children went over to New York to join her. Within a matter of a day or two, the wife dropped a bombshell on the husband indicating that she wanted a divorce and asking him to sign a deed of separation prepared by her lawyer. About two months later the husband returned to Singapore with the older daughter, leaving the younger daughter in New York with the mother. Apparently, the husband could not take the younger child back to Singapore because the wife had insisted on keeping the child with her and refused to release the child's passport to him to enable the child to make the journey home. We ought to add here that the wife claimed that there was an agreement with the husband, following the parties' separation, that the younger daughter could remain with her. This assertion was disputed by the husband.

4 Soon after the husband returned to Singapore, the wife (together with the younger daughter) moved in to live with her male companion, who has three children (aged six to nine) from his first wife. On 19 October 2001, the wife filed a petition for divorce in Singapore. On 6 August 2002, a decree *nisi* dissolving the marriage was granted. The parties managed to agree on other ancillary matters except in respect of the custody of the two children. On 1 December 2004, the

district judge, after considering all the circumstances of the case, including three custody evaluation reports, granted custody of the older daughter to the husband and the younger daughter to the wife. The district judge also made provisions for access by both parties to the child not in his or her custody so that the two children would have sufficient time together.

5 The husband was dissatisfied with the custody order made by the district judge with regard to the younger child and filed an appeal. The appeal came before Andrew Ang JC (as he then was) who made the following orders:

(a) There shall be joint custody of the younger child to the husband and the wife but care and control of the younger child shall be with the husband.

(b) That the husband and the wife agree on access, if possible, failing which there would be liberty to apply.

Before arriving at this conclusion, the judge had an extensive interview with the younger child to gauge her feelings on the matter.

Appeal framework

6 Section 28A(1) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA") empowers the Chief Justice, "where he considers it necessary or expedient to improve efficiency in the administration of justice and to provide for more speedy disposal of proceedings commenced in the High Court" to, by order, direct that such proceedings be heard and determined by the district court. Section 28A(2)(*b*) of the SCJA further provides that the Chief Justice may, in any such order, make provision governing appeals relating to proceedings so transferred to the district court.

7 Pursuant to the powers under s 28A, the Chief Justice made the Supreme Court of Judicature (Transfer of Matrimonial, Divorce and Guardianship of Infants Proceedings to District Court) Order 2003 (S 557/2003) which is the Order now in force. Under para 2 of this Order, proceedings under Part X of the Women's Charter (Cap 353, 1997 Rev Ed), which covers divorce, custody and maintenance matters, commenced in the High Court, are transferred to be heard and determined by a district court. However, under the same paragraph, where the gross value of the matrimonial assets is asserted by any party to the proceedings to be of or above the value of $1.5m, the application for division of matrimonial assets must be transferred to and be heard and determined by the High Court.

8 Finally, in para 6 of the same Order, it is provided that an appeal shall lie to the High Court in respect of a decision of the district court in relation to any proceedings heard and determined by the district court pursuant to the Order. The paragraph further provides that no further appeal shall lie against such a decision of the High Court "[e]xcept with the leave of the Court of Appeal or a Judge of the High Court".

9 There was no dispute between the parties that in relation to the custody order made by Andrew Ang JC, leave must be obtained before the matter could be brought to this court.

Principles governing leave

10 We now turn to consider the principles on which such leave should be granted. In terms of local jurisprudence, we need not go further back than *Anthony s/o Savarimiuthu v Soh Chuan Tin* [1989] SLR 607, where the High Court had to decide whether leave should be granted to enable an appeal to be taken in the case as the amount involved was below the limit set by s 21 of the SCJA. In

this regard, Lai Kew Chai J examined two previous cases, namely, *Wong Yin v Wong Mook* [1948] 1 MLJ 164 and *Pang Hon Chin v Nahar Singh* [1986] 2 MLJ 145, and came to the conclusion (at 608, [2]):

> The circumstances for granting leave would include (though obviously not limited to) cases where an applicant is able to demonstrate a *prima facie* case of error or if the question is one of general principle upon which further argument and a decision of a higher tribunal would be to public advantage.

11 Next is the case of *Lee Kuan Yew v Tang Liang Hong* [1997] 3 SLR 489, where leave was applied for to appeal against a costs order. Under s 34(2)(*b*) of the SCJA, leave is required where the only issue in the appeal relates to costs. There this court declared at [16] that:

> [I]t is apparent that there are at least three limbs which can be relied upon when leave to appeal is sought: (1) *prima facie* case of error; (2) question of general principle decided for the first time; and (3) question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage.

12 In the present case, in requesting us to grant leave, the wife effectively asked us not to follow what this court had laid down in *Lee Kuan Yew v Tang Liang Hong* to be the applicable guidelines in granting leave, but to adopt the more liberal approach enunciated by the English Court of Appeal in *Smith v Cosworth* ([1] *supra*) where the plaintiff's (Smith's) action was struck out under the English County Court Rules O 17 r 11. There, the plaintiff sought leave to appeal from a single Lord Justice who granted it. The defendant took the matter to the full Court of Appeal where Lord Woolf MR laid down, *inter alia*, the following guidelines (at 840–841):

> (a) The court will only refuse leave if satisfied that the applicant has "no realistic prospect of succeeding on the appeal". This test is not to be treated differently from "no arguable case".
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> (b) However, the court can grant leave even if the court is not satisfied that the appeal has any prospect of success, *eg*, the issue may be one which the court considers should, in the public interest, be examined, or, more specifically, the court takes the view that the case raises an issue where the law requires clarification.
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> (c) Where leave is granted by a single Lord Justice, the opposing party should only apply to set the leave aside if that party can show not only that the appeal has no realistic prospect of success but that there is no other good reason for granting leave.

13 These guidelines were subsequently re-stated and amplified in the Practice Direction for the Court of Appeal (Civil Division) reported at [1999] 1 WLR 1027.

14 It would be seen that guideline (b) in *Smith v Cosworth* (see [12] above) is broadly similar to the second and third guidelines enumerated by this court in *Lee Kuan Yew v Tang Liang Hong* (see [11] above). However, there is a significant difference between guideline (a) in *Smith v Cosworth* and guideline (1) in *Lee Kuan Yew v Tang Liang Hong*. While under the *Smith v Cosworth* guideline (a), all that needs to be established for leave to be granted is really just an arguable case, that is not the position under this court's guideline in *Lee Kuan Yew v Tang Liang Hong*, which requires a much higher threshold to be met before leave may be granted, namely, the establishment of a *prima facie* case of error. Lord Woolf explained why guideline (a) was expressed in those terms (at 840):

> This test is not meant to be any different from that which is sometimes used, which is that the

applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.

15 We note that while the guidelines in *Smith v Cosworth* were laid down on 26 February 1997, they were only published in the fourth quarter of 1997. *Lee Kuan Yew v Tang Liang Hong* was heard and decided on 22 July 1997, with the written grounds being delivered on 22 August 1997. It does not appear that *Smith v Cosworth* was cited to this court in *Lee Kuan Yew v Tang Liang Hong*.

16 In *Singapore Civil Procedure* (Sweet & Maxwell Asia, 2003 Ed) ("the White Book") the authors stated at para 57/16/13:

> The general test which the court applies in deciding whether or not to grant leave to appeal is this: leave will normally be granted unless the grounds of appeal have no realistic prospects of success (*Smith v Cosworth Casting Processes Ltd (Practice Note)* [1997] 1 W.L.R. 1538; [1997] 4 All E.R. 840, CA). The Court of Appeal may also grant leave to appeal where the applicant is able to demonstrate a *prima facie* case of error (see (1907), 123 L.T. Jo. 202; see also *Lee Kuan Yew v. Tang Liang Hong* [1997] 3 S.L.R. 489, CA where Yong Pung How C.J. granted an application for leave to appeal against an order for costs on the basis that the High Court exercised its discretion wrongly and therefore there had been a *prima facie* case of error (at paras 31-38)), if the question is one of general principle, decided for the first time (*Ex p. Gilchrist, Re Armstrong* (1886) 17 Q.B.D. 521, *per* Lord Esher M.R. at 528) or a question of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage.

17 The wife relied, in particular, on the first sentence of the above passage of the White Book to suggest that that was also the applicable law in Singapore governing the granting of leave to appeal to the Court of Appeal. The authors do not appear to have considered whether the two tests of "no realistic prospect of success" and "*prima facie* case of error" are consistent or reconcilable. For the reasons given above, it is clear to us that these two tests are quite different. As Lord Woolf MR had clarified in *Smith v Cosworth*, the "no realistic prospect of success" test was intended to be no different from that of "no arguable case". Thus it would be wrong, or at least confusing, to cite the two tests side by side as if to suggest that both tests are applicable. If the applicable test is that of "no realistic prospect of success", the test of "*prima facie* case of error" will be quite redundant.

18 Counsel for the wife had not really submitted any reason why this court should not follow the test of *prima facie* case of error and should, instead, adopt the test of no realistic prospect of success. Although in the later High Court case of *Pandian Marimuthu v Guan Leong Construction Pte Ltd* [2001] 3 SLR 400, G P Selvam J had referred to the test enunciated in *Smith v Cosworth*, the judge had stated the test in a somewhat different form, namely (at [11]), "whether the appeal is likely to succeed and whether, if leave is not granted, there is a likelihood of substantial injustice". It seems to us that this is more akin to the test of *prima facie* case of error rather than to the arguable case test.

19 Further, other later High Court cases had consistently applied the guidelines laid down in *Lee Kuan Yew v Tang Liang Hong*, *eg*, *Abdul Rahman bin Shariff v Abdul Salim bin Syed* [1999] 4 SLR 716; *Lam Seng Hang Co Pte Ltd v The Insurance Corporation of Singapore Ltd* [2001] 2 SLR 179; *Goh Kim Heong v AT & J Co Pte Ltd* [2001] 4 SLR 262 and *Essar Steel Ltd v Bayerische Landesbank* [2004] 3 SLR 25.

20 In *Abdul Rahman bin Shariff v Abdul Salim bin Syed*, Tay Yong Kwang JC (as he then was) clarified at [30] that the test of *prima facie* case of error would not be satisfied by the assertion that the judge had reached the wrong conclusion on the evidence. Leave should not be granted when there were mere questions of fact to be considered. He said that it must be a *prima facie* case of error of law that had a bearing on the decision of the trial court. In our opinion, this is a useful amplification of the first guideline set in *Lee Kuan Yew v Tang Liang Hong*.

21 If we were to adopt the test of "realistic prospect of success" propounded in *Smith v Cosworth*, it would be a rather low threshold to meet. As we have indicated before, that test is really an "arguable case" test which would not be a difficult one to satisfy. This would effectively mean that many cases would have to be permitted to go further to the Court of Appeal, thus clogging up the Court of Appeal.

22 An examination of s 34 of the SCJA would show that, as a general rule, it is intended that there should only be one tier of appeal as a matter of right. A litigant in a case commenced in the Subordinate Courts would have a right of appeal to the High Court. Any further appeal to the Court of Appeal would require the leave of court.

23 When matrimonial matters were first transferred to be heard in the district court in 1996, an anomaly appeared. This was because it was not possible to quantify, in monetary terms, a divorce or custody matter. Thus, before the enactment of s 28A of the SCJA, a decision of the district court in a divorce proceeding could be taken up all the way to the Court of Appeal, as it would not be caught by the restriction imposed in s 34(2)(*a*) which prescribes that no appeal may be brought to the Court of Appeal except with leave where the subject matter at the trial is of a value of $250,000 or less. The object of enacting s 28A was to correct this anomaly. The Deputy Prime Minister ("DPM") and Minister for Law, Prof S Jayakumar, in moving the second reading of the Supreme Court of Judicature (Amendment) Bill (No 35 of 2004) on 21 September 2004, which sought to amend the SCJA, including the addition of the new s 28A, said (*Singapore Parliamentary Debates, Official Report* (21 September 2004) vol 78 at cols 682 to 683):

> These amendments were proposed by the Supreme Court to address an anomaly. With respect to civil proceedings (other than family law matters), which are heard in the Subordinate Courts, a party has, subject to certain statutory conditions, the right to appeal to the High Court. Leave is needed for a further appeal to the Court of Appeal. However, in family law cases, parties currently have the right to appeal from the Subordinate Courts to the High Court and then make a further appeal to the Court of Appeal, without having to seek leave. This is an anomaly which needs correction.
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> In the interests of finality, there should be only one tier of appeal as a matter of right for family cases, with a second appeal only with the leave of court. The general position in Singapore for civil cases, other than family cases, is only one tier of appeal as a matter of right. This is because having an automatic second tier of appeal delays a final decision on the matter and increases costs for litigants.

24 Having regard to what was clearly legislative intent, we did not think this court should adopt the more liberal regime for granting leave to appeal expounded in *Smith v Cosworth*. In England it would appear that the object of the leave mechanism was to filter out appeals "which had no hope of success": see *Alliance & Leicester Plc v Paul Robinson & Co* [2000] CP Rep 3 *per* Auld LJ. To grant leave liberally would have subverted what our Parliament had intended, *ie*, that, as a rule, there should only be one tier of appeal. Indeed, the DPM had also in the same statement referred to the three guidelines laid down in *Lee Kuan Yew v Tang Liang Hong* for the granting of leave to appeal to

the Court of Appeal. In this regard, it should be noted that the DPM had emphasised in the same speech in Parliament that the Court of Appeal's resources would be better utilised in dealing with questions of law. Accordingly, we could not adopt the English yardstick for use in Singapore.

Question of law of importance

25 While the wife had in the main relied upon guideline (a) in *Smith v Cosworth* to apply for leave to appeal to the Court of Appeal, she had also submitted that the proposed appeal raised a question of general principle and of importance on which further argument and a decision of a higher tribunal would be to the public advantage, a line of argument falling within guidelines (2) and (3) of *Lee Kuan Yew v Tang Liang Hong*. The wife further submitted that the case involved an interplay of three important legal principles which the court would take into consideration in determining custody, namely, maintaining status quo; preservation of mother-child bond; and that siblings should be brought up together. She said that the applicability and weight to be given to each of the three principles was a matter of general importance.

26 It is clear to us that the paramount consideration in every case where custody is in issue is the welfare of the child. That is the immutable principle. The term "welfare" should be taken in its widest sense and we do not think it is possible or desirable to define it. In *Tan Siew Kee v Chua Ah Boey* [1987] SLR 549, Chan Sek Keong JC (as he then was), in reference to the term "welfare", said (at 551, [12]):

> It means the general well-being of the child and all aspects of his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well-being. A loving parent with a stable home is conducive to the attainment of such well-being. It is not to be measured in monetary terms.

27 What would be in the interests of the child must necessarily depend on all the circumstances of the case. The court, where appropriate, will have regard to the factors the wife had mentioned, *ie*, maintaining status quo, preservation of mother-child bond and that siblings should not be separated. Other factors will include the home environment and care arrangements made for the child, the conduct of the parties and the wishes of the child. We must reiterate that this enumeration is not meant to be exhaustive. The court will have to carry out a balancing exercise to determine, as between the two parents, to whom custody should be given in the best interests of the child. A factor which may be determinant in one case may not necessarily be so in another. So the weight to be given to each factor may vary from case to case. No precise formulation is possible. This is not a scientific exercise but one of judgment.

28 Accordingly, we were also not satisfied that the wife had shown that she had met guidelines (2) or (3) set out in *Lee Kuan Yew v Tang Liang Hong* for leave to appeal to be granted.