The "Melati" (No 2)
[2004] SGCA 16

Case Number : CA 134/2003, NM 16/2004, 21/2004

Decision Date : 15 April 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ

Counsel Name(s) : Lim Tean and Probin Dass (Rajah and Tann) for appellant; Kenneth Lie and Chow Sy Hann (Joseph Tan Jude Benny) for respondent

Parties : The "Melati" (No 2)

Civil Procedure – Appeals – Leave – Judge in chambers allowing extension of time to file Statement of Claim and allowing Statement of Claim filed out of time to stand – Whether appellant required to obtain leave of court to appeal to Court of Appeal – Section 34(2)(d) Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed)

15 April 2004

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

1 Two motions were before this court in relation to Civil Appeal No 134 of 2003. The first was by the respondent cargo owners seeking to strike out the appeal on the ground that the appellant shipowners had failed to obtain leave of court, as required under s 34(2)(d) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA"), before filing the notice of appeal against the decision of Belinda Ang Saw Ean J (reported at [2003] 4 SLR 575). The arguments before us centred on the true nature of the orders made by Ang J against which the appellants sought to appeal. The second motion was an application by the appellants seeking the leave of this court, in the event that we should hold, pursuant to the first motion, that leave of the judge was required before an appeal could be filed.

2 At the conclusion of the hearing of the first motion, we ruled that the notice of appeal had been properly filed as no leave of the judge was required. This rendered the second motion redundant and the appellants duly withdrew it. We now give our reasons for the ruling.

The background

3 On 24 December 2000 the vessel *Melati* suffered a casualty in the course of its voyage from Buatan, Indonesia, to Huangpu and Shanghai, China. On 5 March 2002, the cargo owners, who suffered losses as a result of the casualty, took out a writ *in rem* against the shipowners. The *in rem* writ was served on 12 March 2002. Appearance was duly entered on 20 March 2002. Thereafter, the cargo owners took no further steps until 18 March 2003 when they filed and served a statement of claim out of time on the shipowners' solicitors.

4 Under O 18 r 1 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) ("ROC"), the statement of claim to a writ must be served on the defendant within 14 days of the defendant entering appearance unless the court allows otherwise. Under O 21 r 2(6) of the ROC, if no party has, within a period of one year, taken any step or proceeding in the action, the action is deemed to have been discontinued.

5 On the basis of these two rules, the shipowners objected to the service of the statement of claim effected on them on 18 March 2003, as not only was the statement of claim filed and served

out of time, the action was also deemed discontinued under O 21 r 2(6). Subsequently, exchanges took place between the solicitors of the parties as to whether the filing and service of the summons in chambers was proper and whether the action had been automatically discontinued. As no agreement could be reached, the cargo owners made an application by summons in chambers for the following reliefs:

2. The time for filing of the statement of claim in the action be extended;

3. A declaration that the statement of claim filed and served on the defendants on 18 March 2003 was regular and made in accordance with the Rules of Court;

4. Further and alternatively, the plaintiffs be at liberty to reinstate the action herein.

6 On 24 April 2003, the assistant registrar dismissed the cargo owners' application and also ordered that the statement of claim filed on 18 March 2003 be "struck out". He felt that such a long extension of time to enable the statement of claim to be filed and served would "quite fatally disrupt case management". He also refused to reinstate the action as the cargo owners did not prosecute it with due despatch.

7 The cargo owners appealed to the judge in chambers who, on 21 October 2003, allowed the appeal. She extended the time for the filing of the statement of claim and retrospectively validated the service of the statement of claim effected on 18 March 2003. She ordered that time ran from the date of her order for the shipowners to file their defence.

8 On 27 October 2003, as required under s 34(1)(c) of the SCJA, the shipowners requested for a certification from the judge that she would require no further arguments on the matter. The judge duly so certified on 4 November 2003. On 20 November 2003, a notice of appeal was filed by the shipowners.

9 Thereafter the parties proceeded in the normal way to discuss about the necessary documents to be included in the Record of Appeal. On 9 February 2004, the shipowners filed and served on the cargo owners the Appellant's Case, the Record of Appeal, the Core Bundle and the Bundle of Authorities. It was only eight days later, on 17 February 2004, that the cargo owners wrote to the shipowners alleging for the first time that as the latter had failed to obtain leave of court before filing their notice of appeal, there was, in fact, no appeal. The cargo owners contended that the failure to obtain such leave was fatal to the appeal. They said that without leave, there could be no appeal. Thus the notice of appeal should properly be withdrawn. This was the backdrop to the two motions before us.

Nature of the orders

10 The fundamental question, which would be determinative of the first motion, related to the true nature of the orders made by the judge. Did they amount to an order "refusing to strike out an action or a pleading or a part of a pleading" within the meaning of s 34(2)(d) of the SCJA?

11 To answer that question, it would be expedient to bear in mind the reliefs sought by the cargo owners in their summons in chambers: see [5] above. Quite clearly, they wanted an extension of time to file and serve their statement of claim out of time. Further, and in the alternative, if due to inaction on their part for such a long period the case should fall within the ambit of O 21 r 2(6), they beseeched this court, in exercise of its discretionary power under O 21 r 2(8), to reinstate the action.

12 When the application came before the assistant registrar, no arguments pertaining to the merits of the claim were made. The arguments centred squarely on the two main points, namely, whether the court should exercise its discretion to extend time to enable the cargo owners to file and serve the statement of claim out of time and whether, if automatic discontinuance had set in, to reinstate the action. It is true that the assistant registrar, in refusing the reliefs prayed for, also ordered that the statement of claim already filed be struck out. But it was clear that by so ordering, the assistant registrar did not mean to suggest that the statement of claim was struck out as having no merits or being an abuse of process. He meant to say that the statement of claim should not have been filed and it should not, therefore, remain on the record, or, in his words, he saw no point in leaving the statement of claim "floating around". Instead of saying that it was struck out, he could very well have said that the statement of claim be removed from the record.

13 Thus, when the matter came on appeal to the judge in chambers, who, in such circumstances, exercised a confirmatory jurisdiction (see *Herbs and Spices Trading Post Pte Ltd v Deo Silver (Pte) Ltd* [1990] SLR 1234 and *Lassiter Ann Masters v To Keng Lam* [2004] SGCA 10), she reheard the arguments of the parties in relation to the application made in the summons in chambers. Like the assistant registrar, she did not hear any arguments on the merits of the claim. But, unlike the assistant registrar, the judge came to the conclusion that although the statement of claim was filed and served out of time on 18 March 2003, this failure constituted only an irregularity. In any event, this filing and serving of the statement of claim was a step taken in the action and in view of this, O 21 r 2(6) had not been activated as 20 March 2002 to 18 March 2003 was just short of one year. The judge then proceeded to consider the reasons advanced by the cargo owners as to why the statement of claim was not filed within the prescribed time. This was what she said in relation to the explanation offered (at [12] and [13]):

> Mr Robinson explained that it was not unusual for parties to agree to solve the salvage claim before the main cargo claim. A protective writ was issued since the defendants [the shipowners] refused their request to extend suit time. The salvage claim took some time to resolve. The salvors had problems getting up their claim. …. Eventually, the arbitration in London involving the bills of lading in this action was settled amongst the defendants as shipowners, salvors and the plaintiffs as cargo interests on 17 February 2003. …
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> The delay was the result of a decision to await the outcome of the salvors' arbitration, as the plaintiffs had wanted to quantify the indemnity sought by them in the present action. The decision to wait may not have been justified as the cargo claim in Singapore could still proceed without quantification of the claim for salvage indemnity. Right or wrong, that was the course adopted and the decision could not in the circumstances be viewed as a manifest intention not to advance the cargo claim or that the plaintiffs were sleeping on the case.

14 As the judge did not think that to regularise the statement of claim filed by extending time would cause any real prejudice to the shipowners, she accordingly granted the extension asked for. She felt that not to grant an extension of time here would be "a drastic and disproportionate response in the circumstances of the particular breach and would give the [shipowners] an unjustified tactical advantage and windfall" (at [18]). She also ordered that the statement of claim was to "stand as served on 18 March 2003".

15 In other words, what the judge below decided was that she would exercise her discretion in granting an extension of time for the cargo owners to file their statement of claim out of time, and, by virtue of this extension, the irregularity in the filing and serving of the statement of claim was put right.

16 However, the way in which the cargo owners perceived the orders of the judge was this. They said that the judge, by granting the extension of time to regularise the filing and service of the pleading, was in effect refusing to strike out the statement of claim. Therefore, the judge having refused to so strike out the statement of claim, had made a decision falling squarely within s 34(2)(d) of the SCJA. It was not necessary that there must be a formal application to specifically strike out the statement of claim. The whole object of s 34(2), which had other limbs too, of requiring leave of court, was to sieve out non-serious and unmeritorious appeals.

17 It was not in dispute that if leave was required and not obtained, then the notice of appeal would not be valid. This court had previously in *Rank Xerox (Singapore) Pte Ltd v Ultra Marketing Pte Ltd* [1992] 1 SLR 73 at 76, [10] ruled that a failure to obtain leave is a matter that goes to jurisdiction and is not something that can be waived by the parties.

Was there really a decision not to strike out?

18 Could it be said that the judge, in exercising her discretion to extend time to enable the cargo owners to file their statement of claim out of time and to allow the statement of claim already filed on 18 March 2003 to stand, had refused to strike out a statement of claim? The cargo owners urged this court to view the matter bearing in mind the orders made by the assistant registrar. In our opinion, this would be wrong. The orders made by the assistant registrar should have no bearing at all since they had been set aside by the judge in the exercise of her confirmatory jurisdiction. What was the nature or effect of the orders made by the judge should be apparent from the orders themselves. But, if the orders were at all unclear, reference should then be made to the prayers in the application concerned.

19 When so viewed, the nature of the orders made by the judge was quite clear. First, the judge extended the time within which the statement of claim should be filed by the cargo owners. Second, and in consequence of the first order, the judge allowed the statement of claim already filed on 18 March 2003 to remain. Of course, the judge could have declared that the statement of claim filed and served on 18 March 2003 was of no effect and directed that a fresh statement of claim be filed and served forthwith or within a reasonable time thereafter. If the judge had taken this course, there could be no argument whatsoever that it would not be a case of the judge refusing to strike out a statement of claim. Instead, being practical, the judge treated the earlier statement of claim as having been properly filed and served. We could not see why the adoption of this sensible approach should change the nature of the orders.

20 Therefore, we do not see how it could truly be asserted that the judge refused to strike out the statement of claim. It is true that s 34(2)(d) of the SCJA does not elaborate on what would constitute or amount to a refusal to strike out a statement of claim. But this is addressed in O 18 r 19(1) of the ROC which provides that:

> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
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> (a) it discloses no reasonable cause of action or defence, as the case may be;
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> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

21 From this rule, it would be seen that the process of striking out is meant to be a simple and quick way of enabling a defendant to have a wholly unmeritorious claim be disposed of instead of having to waste time through a trial. Such a summary relief could be based on any of the grounds listed. It is trite law that the court will only make such an order in very clear cases because it would effectively deny the plaintiff or claimant his day in court. And if the judge should refuse the relief, it makes absolute sense that there should be no automatic right of appeal, as otherwise, a process which is intended to be short and simple will turn out to be long-drawn. Instead of a case coming up to the Court of Appeal once after trial, it could come up twice, rendering negative the very purpose of a quick solution. This is really the policy behind s 34(2)(d) of the SCJA and O 18 r 19 of the ROC.

22 In the present case, Ang J was not dealing with any arguments that the statement of claim should be struck out because it disclosed no reasonable cause of action or that it amounted to an abuse of process or the like.

23 In the result, we held that the orders of Ang J were not orders refusing to strike out a statement of claim. They were really interlocutory orders which would come under s 34(1)(c) of the SCJA where an appeal could only be brought if the judge certifies, on an application made within seven days, that he or she requires no further arguments. In the present case, this condition was complied with by the shipowners. Accordingly, the appeal was properly brought.