Sumitomo Corp Capital Asia Pte Ltd v Salim Anthony and Other Applications
[2004] SGCA 38

Case Number : CA 50/2004 (NM 66/2004, 75/2004), CA 51/2004 (NM 65/2004, 74/2004), CA 53/2004 (NM 67/2004, 69/2004, 73/2004), CA 54/2004 (NM 68/2004, 70/2004, 76/2004)

Decision Date : 03 September 2004

Tribunal/Court : Court of Appeal

Coram : Andrew Ang JC

Counsel Name(s) : Lok Vi Ming, Ajinderpal Singh and Loh Kia Meng (Rodyk and Davidson) for Sumitomo Corporation Capital Asia Pte Ltd; Samuel Chacko (Colin Ng and Partners) for The Sumitomo Trust and Banking Co Ltd; Ang Cheng Hock and Edmund Eng (Allen and Gledhill) for Sakura Merchant Bank (S) Ltd, Mizuho Corporate Bank Ltd, The Norinchukin Bank, Sumitomo Mitsui Banking Corporation, Singapore Branch and Dresdner Bank Aktiengesellschaft; Kabir Singh and Shivani Retnam (Drew and Napier LLC) for Anthony Salim and PT Sulfindo Adiusaha

Parties : Sumitomo Corp Capital Asia Pte Ltd — Salim Anthony

Courts and Jurisdiction – Court of appeal – Single judge Court of Appeal – Applications to adduce further evidence at substantive appeals – Applications by multiple appellants to file single case and core bundle at substantive appeals – Scope of court's power to make incidental direction not involving decision of appeal – Section 36(1) Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed)

3 September 2004

Andrew Ang JC:

1 There were ten Notices of Motion before me (sitting as a single judge Court of Appeal) under s 36(1) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("the Act"), in connection with four appeals to the Court of Appeal – Civil Appeals Nos 50, 51, 53 and 54 of 2004. Six of these Notices of Motion were filed on behalf of the appellants (the defendants in Originating Summonses Nos 1368 and 1566 of 2003). The remaining four Notices of Motion were filed on behalf of the respondents (the plaintiffs in the two originating summonses mentioned above).

2 Each of the six Notices of Motion filed on behalf of the appellants sought orders:

(a) that the appellant be at liberty, upon the hearing of the appeal, to adduce additional evidence by way of certain identified affidavit(s); and

(b) that the appellant be at liberty to file a single case and a single core bundle for the appeals.

Each of the four Notices of Motion filed on behalf of the respondents sought an order that the respondent be at liberty, upon the hearing of the appeal, to adduce additional evidence by way of certain identified affidavit(s).

3 Section 36(1) of the Act provides as follows:

> In any proceeding pending before the Court of Appeal, any direction incidental thereto not involving the decision of the appeal, any interim order to prevent prejudice to the claims of parties pending the appeal, and any order for security for costs and for the dismissal of an appeal for default in furnishing security so ordered, may at any time be made by a Judge.

The provision contemplates three types of directions or orders which a single judge sitting as the Court of Appeal may properly make:

(a) any incidental direction not involving the decision of the appeal;

(b) any interim order to prevent prejudice; and

(c) any order for security for costs of the appeal and the consequential order for dismissal of an appeal for default.

I had no difficulty in granting the appellants' applications for an order that they be at liberty to file a single case and a single core bundle for the appeals as that clearly came within the first limb.

4 Greater difficulty was encountered in regard to the adduction of additional evidence. While it was clear that the second and third limbs were inapplicable, the question was whether an order granting liberty to adduce further evidence fell within the first as being a "direction incidental thereto not involving the decision of the appeal". There appears to be no direct authority on the point. The editors of *Singapore Civil Procedure 2003* (Sweet & Maxwell Asia, 2003 Ed) at para 57/1/3, are of the view that applications to adduce further evidence fall within s 36(1) of the Act. They state:

> 6. Applications — There may be incidental applications in connection with an appeal, most of which are heard by a single Judge of Appeal (see *Bank of India v Rai Bahadur Singh & Anor* [1993] 2 SLR 592). Some of these situations include an application for leave to appeal (under O 57, r 16(2)), an application to obtain further security for costs (see O 23), an application for a stay of execution (under O 57, r 15), *to adduce further evidence (under O 57, r 13(2)),* and for an extension of time (under O 57 r 17). See generally O 57, r 16 and paras 57/16/2 and 57/16/4 below. [emphasis added]

However, they cite no authority in support. Indeed, counsel for the appellants and the respondents have not been able to find any. Nor have they been able to find any reported decision where a single judge sitting as the Court of Appeal decided on an application to adduce fresh evidence. In contrast, the cases discovered all concern applications to adduce further evidence heard by the full Court of Appeal.

5 In *Roberto Building Material Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2003] 2 SLR 353, the full Court of Appeal stated at [23] that they were inclined to take a wider view of the first limb as they regarded it as a facilitative provision to assist the Court of Appeal. A similar view was taken in the case of *Bank of India v Rai Bahadur Singh* [1993] 2 SLR 592 where the Court of Appeal (Judith Prakash JC (as she then was) sitting as a single judge) held at [20] that:

> The intent of legislature [in relation to s 36(1) of the Supreme Court of Judicature Act] was to avoid burdening a three-judge court with interlocutory applications relating to an appeal which could be more expeditiously and less expensively disposed of before a single judge.

It follows that the court should be slow to hold that it lacks jurisdiction to entertain applications lest legislative intention be defeated.

6 I now turn to examine more closely the wording of the first limb. So far as the word "direction" is concerned, I do not think there was any intention on the part of the legislature to use it

in a sense different from "order". As Lord Merriman P opined in *Benson v Benson* [1941] 2 All ER 335 at 341:

> Counsel for the petitioner has directed my attention to the OXFORD ENGLISH DICTIONARY, from which it is quite clear, as I should myself have supposed, that in certain contexts "order" and "direction" are interchangeable terms. A "direction" is said to be "an order to be carried out," and "order," for example, so far as the Supreme Court is concerned, is said to be "a direction other than final judgment," and I should find it very difficult indeed, for the purposes of this Act, to draw any sensible distinction between a direction of the Board of Control that the statutory maximum period should be enlarged and an order to the same effect.

7 The word "incidental" is defined in *The New Shorter Oxford English Dictionary*, vol 1, (Oxford University Press, 1993 Ed) as "something casual or of secondary importance; not directly relevant to …". A direction which disposed of an appeal would therefore not be "incidental".

8 The Court of Appeal in the *Roberto* case (see [5] *supra*) stated at [10] that:

> By qualifying the expression "direction incidental thereto" with the phrase "not involving the decision of the appeal" the legislature must have intended that any direction, so long as it does not involve the disposal of the appeal may be made by the single judge.

I respectfully agree. It is for the full court to decide the appeal. However, I wonder why the legislature found it necessary to add this qualifying phrase when the word "incidental" would already have sufficed. As pointed out earlier, a direction which disposed of an appeal would certainly not be "incidental". In my view, the answer is to be found in the meaning of the word "involving".

9 The word "involve", as defined in *The New Shorter Oxford English Dictionary* (see [7] *supra*), could mean "include as essential; imply, call for, entail". However, the word "involve" is also defined in the same dictionary as synonymous with "affect". Using the word in this latter sense, "not involving the decision of the appeal" becomes "not *affecting* the decision of the appeal". Construed thus, the phrase would not be superfluous and would sit comfortably with the word "incidental". Thus, in order to fall within the first limb, not only must the direction be casual or of secondary importance, but it must also not *affect* the decision of the appeal.

10 As laid down in *Ladd v Marshall* [1954] 3 All ER 745, the second of three conditions to be satisfied for the adduction of fresh evidence is that the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive. If the evidence satisfies this condition, it follows that it would probably affect the decision of the appeal. Accordingly, a direction or order giving liberty to adduce further evidence at the appeal would fail to qualify as an "incidental direction not involving the decision of the appeal".

11 This probably explains why, in practice, the Registry of the Supreme Court normally fixes such applications before the full Court of Appeal. Two other practical considerations occurred to me. First, under s 36(3) of the Act, any order made by a single judge pursuant to s 36(1) may be discharged or varied by the full Court of Appeal. On a matter as critical to the parties as the adduction of fresh evidence, the likelihood of an application being made to the full Court of Appeal for review of the single judge's decision had to be high. In that event, the full Court of Appeal would be re-considering the same question. That would defeat the purpose of having a single judge hear it in the first place.

12 Second, in view of the uncertainty, the parties would still have to prepare their cases in the alternative, one on the basis that the additional evidence was adduced and the other, without the same. A direction by the single judge would not have settled the question (especially in the instant appeals where both sides sought to adduce further evidence). Therefore, no advantage would be obtained by making such an application before a single judge.

13 For the above reasons, I ruled that I had no jurisdiction to hear the applications for the adduction of fresh evidence and directed that they be adjourned to be heard before the full Court of Appeal. At the request of the parties, I also directed that affidavits in reply in respect of each Notice of Motion be filed by the respective respondents by 17 September 2004. Costs were reserved to the Court of Appeal.