YAP KIM HIN & ANOR

v.

CHUA BOON HOCK & ORS AND ANOTHER APPEAL

Federal Court, Putrajaya
Tengku Maimun Tuan Mat CJ, Abang Iskandar Abang Hashim PCA, Hasnah Mohammed Hashim FCJ
[Civil Appeal Nos: 02(i)-51-09-2023 (W) & 02(i)-52-09-2023 (W)]
6 January 2025

Civil Procedure: *Judgment and orders — Court of Appeal — Order of Court of Appeal pertaining to joinder of parties — Whether joinder application flawed — Whether High Court could disregard Court of Appeal's order — Whether Court of Appeal functus officio and acted in excess of its jurisdiction when it granted a consequential order despite its previous order*

These were the appeals by the appellants against the decision of the Court of Appeal ("COA") in dismissing the appellants' appeal against the decision of the High Court, and against part of the decision of the COA in dismissing the Notice of Motion ("encl 19"). The COA in Appeal 1556 had, *inter alia*, ordered that the respondents add Soo Teck Lee ("STL") and Lim Siew Kien ("LSK") as parties in the High Court's proceedings within 14 days from 25 August 2021, ie on or before 8 September 2021, failing which, the respondents' suit at the High Court would "stand as struck off' ("COA Order"). In compliance with the COA Order, the respondents filed a Joinder Application dated 2 September 2021. The High Court Judge ("Judge") struck out the Joinder Application in accordance with the COA Order as there was a failure to add STL and LSK within the stipulated time. However, the Judge made a Consequential Order ("High Court Consequential Order") and directed that pending further directions from the COA in Appeal 1556, the respondents be granted the liberty to refile another joinder application to join STL and LSK as parties in the High Court Suit. Aggrieved, the appellants appealed to the COA against the High Court Consequential Order vide Appeal 682 and filed encl 19 in Appeal 1556 at the COA to enforce the COA Order. The COA dismissed the appeal as well as encl 19 and granted a Consequential Order ("COA Consequential Order"), which was the subject matter of the present appeals. The appellants argued that the Judge departed from the terms of the COA Order and hence, erred in making the High Court Consequential Order. The respondents had not appealed against the High Court Order striking out their Joinder Application. The main issue for determination herein was whether, in the first place, a High Court could disregard a COA Order and whether the COA was *functus officio* and acted in excess of its jurisdiction when it granted the COA Consequential Order despite its previous order in Appeal 1556.

Held (allowing the appellants' appeals):

(1) In the present appeals, the respondents filed the Joinder Application on 2 September 2021 without a proper affidavit in support, as it was neither affirmed nor attested before the Commissioner for Oaths on the said date. Hence, the respondents had breached the mandatory requirements under the existing law to formally attest to the said Affidavit. In other words, there was no valid and legal attesting instrument filed in support thereof. The failure to attest to the affidavit in support was fatal to the Joinder Application, which was neither curable nor remediable under O 1A of the Rules of Court 2012 as the respondents had intentionally disregarded the mandatory rules. The COA in Appeal 682 failed to take into consideration that the Judge departed from the COA Order in Appeal 1556 by granting the High Court Consequential Order and that the Joinder Application was flawed due to the absence of a valid affidavit in support. No reasons were given by the Judge as to why the COA Order of Appeal 1556 was not adhered to. If clarification were required, then the Judge should have directed the parties to seek clarification at the COA before making any decision and/or granting any order. The sanctity of a Court Order must be respected and observed at all times until it was validly set aside. Therefore, the COA was plainly wrong in varying the COA Order in Appeal 1556. The COA in Appeal 682 should have taken cognisance of the COA Order in Appeal 1556 and should not make any order inconsistent and/or contrary to it and, more importantly, there was no application for leave to appeal filed against the COA Order in Appeal 1556. (paras 17-20)

Case(s) referred to:

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 MLRA 687 (refd)

Syed Omar Syed Mohamed v. Perbadanan Nasional Berhad [2013] 1 MLRA 181 (refd)

Legislation referred to:

Rules of Court 2012, O 1A

Rules of the Court of Appeal 1994, rr 1A, 93

Counsel:

For the appellants: Justin Voon (Caroline Lim with him); M/s Justin Voon Chooi & Wing

For the respondents: Lim Kien Huat (Bryan Ching Tze Yeo with him); M/s Lee & Lim

[For the Court of Appeal judgment, please refer to *Yap Kim Hin & Anor v. Chua Boon Hock & Ors And Another Appeal* [2024] 2 MLRA 45]

JUDGMENT

Hasnah Mohammed Hashim FCJ:

[1] These are the appeals by the Appellants against the decision of the Court of Appeal (COA) which dismissed the appeal by the Appellants against the decision of the High Court made on 28 March 2022 and against part of the decision of the COA in dismissing Notice of Motion dated 6 April 2022 [Encl 19]. We heard oral submissions by all learned counsel representing the respective parties and at the end of those submissions, we allowed the appeals. These are our reasons as to why we had so decided.

[2] On 23 August 2023, leave to appeal was granted to the Appellants on the following Questions of Law (QOL):

(i) Whether the Court of Appeal in Civil Appeal: W-02(IM)(NCvC)-1556-10/2020 has, on 25 August 2021, which had ordered consequentially that "Perintah Mahkamah Tinggi bertarikh 7 Oktober 2020 dipinda ('varied') di mana pihak Responden-Responden/Plaintif-Plaintif adalah dikehendaki untuk menambah Soo Teck Lee (No. K/P: 680107-10-6035) dan Lim Siew Kien (No. K/P: 650930-10-6050), sama ada sebagai plaintif-plaintif ataupun defendan-defendan, dalam prosiding Mahkamah Tinggi ini dalam tempoh 14 hari dari tarikh Perintah ini, dan jika Responden-Responden/Plaintif-Plaintif gagal berbuat demikian, tindakan Responden-Responden/Plaintif-Plaintif di Mahkamah Tinggi akan dibatalkan ('shall stand as struck off'') ("the said COA Order") become *functus officio* after granting the said COA Order and is, therefore, not entitled and/or does not have the jurisdiction to give the said COA Consequential Order.

(ii) Whether the High Court can give an order that "Notis Permohonan bertarikh 2 September 2021 (Lampiran 75) adalah dibatalkan tanpa perintah terhadap kos dan dengan kebebasan untuk memfail semula tertakluk kepada arahan yang diperolehi oleh Plaintif-Plaintif daripada Mahkamah Rayuan dalam Rayuan Sivil No.: W-02(IM)(NCvC)-1556-10/2020 berkenaan garis masa yang diberikan oleh Mahkamah Rayuan untuk memfailkan permohonan untuk menambah Soo Teck Lee (No. K/P: 680107-10-6035) dan Lim Siew Kien (No. K/P: 650930-10-6050) sebagai pihak-pihak dalam prosiding Mahkamah Tinggi ini, iaitu dalam tempoh 14 hari dari tarikh Perintah Mahkamah Rayuan bertarikh 25 Ogos 2021" ("the said HC Consequential Order") when it is contrary and/or inconsistent with the said COA Order.

(iii) Whether any "liberty to file afresh" ("kebebasan untuk memfail semula") granted by the High Court to the Respondents is contrary to the said COA Order.

(iv) Whether the Respondents (who did not file any appeal and/or notice of motion) can benefit from the Motion (encl 19) filed by the Appellants in the Court Appeal below and obtain a consequential order, i.e., the said COA Consequential Order from the Court of Appeal.

[3] The facts in these appeals are straightforward and not complicated. They are mainly undisputed. However, having said that, it is necessary to set out the material facts to appreciate the issues argued in these appeals. The COA in Civil Appeal No. W-02(IM)(NCvC)-1556-10/2020 (Appeal 1556) had *inter-alia* ordered that the Respondents shall add Soo Teck Lee (STL) and Lim Siew Kien (LSK) as parties in the High Court's proceedings within 14 days from 25 August 2021, i.e., on or before 8 September 2021, failing which, the Respondents' suit at the High Court shall "stand as struck off" (the 1st COA Order).

[4] In compliance with the 1st COA Order, the Respondents filed a Joinder Application dated 2 September 2021 (Encl 75 in the High Court) together with an Affidavit in Support purportedly affirmed by one Chua Yok Sin, i.e., the 2nd Respondent, before a Commissioner for Oaths, YM Tengku Fariddudin bin Tengku Sulaiman (CO) on 2 September 2021. However, the CO had, through his solicitors' letter dated 11 September 2021, stated that all the affidavits, including the Impugned Affidavit in Support by Chua Yok Sin were never signed and/or attested by either Chua Boon Hock or Chua Yok Sin before the said CO and that the CO never signed and/or placed his chop on the said affidavits, including *inter-alia* the impugned Affidavit in Support.

[5] Before the High Court Judge, the Appellants raised a preliminary objection in that the Respondents had filed, used and/or relied upon various impugned affidavits which were not affirmed before a Commissioner for Oaths and, therefore, are not valid affidavits throughout the various Court proceedings for this case. In this regard, therefore, learned counsel for the Appellants had argued that the Impugned Affidavit in Support by Chua Yok Sin cannot be accepted and/or ought to be disregarded by the Court. Consequentially, the result would be that the said Joinder Application was filed without a valid affidavit in support and must fall *in limine*.

[6] The learned High Court Judge, on 28 March 2022, struck out the Joinder Application in accordance with the 1st COA Order as there was a failure to add STL and LSK within 14 days from 25 August 2021. However, the learned High Court Judge made the said HC Consequential Order and directed that pending further directions from the COA in Appeal 1556, the Respondents be granted the liberty to refile another joinder application to join STL and LSK as parties in the High Court Suit.

[7] Aggrieved with the decision of the High Court, the Appellants appealed to the COA against the High Court Consequential Order vide Court of Appeal No. W-02(IM)(NCvC)-682-04/2022 (Appeal 682) as well as filing a Notice of Motion [Encl 19] in Appeal 1556 at the COA to enforce the 1st COA Order.

[8] The COA dismissed the appeal as well as the Motion in Encl 19 relating to Appeal 1556 with costs of RM5,000.00 and granted the said COA Consequential Order, which is the subject matter of the appeals before us.

[9] Learned counsel for the Appellants argued that the learned High Court Judge departed from the terms of the said COA Order and, hence, erred in making the said HC Consequential Order. The Respondents had not appealed against the said High Court Order which struck out their said Joinder Application.

[10] The main issue for determination before us is rather straightforward, namely, whether in the first place a High Court can disregard a COA Order and whether the COA is *functus officio* and acted in excess of its jurisdiction when it granted the Consequential Order despite its previous order in Appeal 1556. Such an act would tantamount to revisiting or reopening the matter that has been perfected and finalised.

[11] Learned counsel for the Appellants submitted that the COA failed to appreciate the fact that the learned High Court Judge ought to have enforced the said COA Order and not make any further consequential order that would have the effect of contradicting it. It is also the submission of learned counsel for the Appellants that the COA in Appeal 682 involving the same issues failed to appreciate that the High Court Judge did not comply with the explicit COA Order in Appeal 1556 and by doing so, the High Court Judge had erred in principle by further granting the Consequential Order. Instead of applying and/or invoking the 1st COA Order in Appeal 1556, the High Court referred the matter to the COA for clarification.

[12] The COA in Appeal 682 failed to appreciate that the 1st COA Order is similar to a strict pre-emptory order and/or unless order in that if the said 1st COA Order in Appeal 1556 is not complied with by the Respondents within 14 days as ordered, the whole action at the High Court shall stand as struck off immediately and/or without any extension of time. By rejecting the Appellants' appeal against part of the High Court's decision, namely the said HC Consequential Order given on 28 March 2022, the COA departed from the relevant terms in the said COA Order in Appeal 1556.

[13] Learned counsel for the Appellants further argued that the COA erred in exercising its purported discretionary power under rr 1A and/or 93 of the Rules of the Court of Appeal 1994 (RCA 1994) to extend the 14 days period for compliance of the said COA Order in Appeal 1556. Furthermore, no leave to appeal had been filed against the said COA Order in Appeal 1556 to the Federal Court. There is also no application for an extension of time filed by the Respondents to comply with the said COA Order in Appeal 1556. Therefore, the said COA Order in Appeal 1556 remains valid and enforceable.

Analysis And Decision

[14] It was submitted that the said COA Consequential Order, in essence, has the effect of granting an extension of time to the Respondents through the "backdoor," thereby enabling the Respondents who had deliberately failed to comply with the said COA Order in Appeal 1556. As highlighted, there was no formal application for an extension of time being made by the Respondents when the Appellants raised the issue of breach or non-compliance of the said COA Order in Appeal 1556. The "liberty to file afresh" granted by the High Court was also against the said COA Order in Appeal 1556, as the order by the COA clearly stipulates that the failure by the Respondents to comply will result in the High Court Suit being struck off.

[15] It is trite law that once an order and/or judgment has been perfected, the Court ought not to reopen or alter its effect unless it falls under the slip rule. Chang Min Tat FJ explained in *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 MLRA 687, that:

> Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in O 28 r 11 Rules of the Supreme Court 1957 (O 20 r 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: *Re St Nazaire Co* [1879] 12 Ch D 88, *Kelsey v. Doune* [1912] 2 KB 482; *Hession v. Jones* [1914] 2 KB 421, unless it is a judgment by default or made in the absence of a party at the trial or hearing.

[16] In the Federal Court case of *Syed Omar Syed Mohamed v. Perbadanan Nasional Berhad* [2013] 1 MLRA 181, at p 191, the apex court explained the implications of failing to appeal against the decision of a judge:

> [20] We also find that the plaintiff did not appeal against the decision of the learned judge striking out the first suit. The failure to appeal meant that the plaintiff accepted the correctness of the decision to dismiss its suit.

[17] In the appeal before us, the Respondents filed the Joinder Application on 2 September 2021. However, the Joinder Application was not supported by a proper Affidavit in Support (Encl 76 at the High Court) as it was not affirmed nor was it attested before the CO on 2 September 2021. Hence, the Respondents breached the mandatory requirements under the existing law to formally attest to the said Affidavit. In other words, there was no valid and legal attesting instrument filed in support thereof.

[18] The failure to attest to the Affidavit in Support is fatal to the Joinder Application. That failure is neither curable nor remediable under O 1A of the Rules of Court 2012 as the Respondents intentionally disregarded the mandatory rules. The COA in Appeal 682 failed to take into consideration that the High Court Judge departed from the said COA Order in Appeal 1556 by granting the Consequential Order and that the joinder application was flawed

due to the absence of a valid affidavit in support. No reasons were given by the High Court Judge as to why the COA order of Appeal 1556 was not adhered to. If at all clarification is required then Her Ladyship should have directed the parties to seek clarification at the COA before making any decision and/or granting any order.

[19] We agreed with the arguments advanced by learned counsel for the Appellants that the sanctity of a Court Order must be respected and observed at all times until it is validly set aside.

[20] With respect, the COA was plainly wrong in varying the COA Order in Appeal 1556. The COA in Appeal 682 must take cognizance of the COA Order in Appeal 1556 and not make any order inconsistent and/or contrary to it and more importantly, there was no application for leave to appeal filed against that COA Order in Appeal 1556.

[21] We, however, find no necessity to answer the QOL posed, and hereby decline to answer the same in the circumstances before us.

[22] Based on the aforementioned reasons and in the light of the above settled principles we found merits in the issues raised by the Appellants. Having carefully considered the submissions of all parties and for all the reasons aforesaid we allowed the appeals and restored the 1st COA Order in Appeal 1556. Since no proper application was made by the Respondents at the High Court as ordered by the COA in Appeal 1556, the Respondents' suit at the High Court is struck off. We allowed the appeals with global costs of RM60,000.00 for both appeals to the Appellants subject to allocatur fee. We set aside the decisions of the Court of Appeal and the High Court.