Jumabhoy Asad v Aw Cheok Huat Mick and Others
[2003] SGCA 32

Case Number : CA 1/2003

Decision Date : 31 July 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J

Counsel Name(s) : Mdm Loh Wai Mooi, Ms Rowena Chew (Bih Li & Lee) for the Appellant; Chan Kia Pheng (Khattar Wong & Partners) for the Respondents

Parties : Jumabhoy Asad — Aw Cheok Huat Mick; Bruce Johnson Christopher; The Liquidators of Lion City Holdings Pte Ltd (in Liquidation)

Courts and Jurisdiction – Court of appeal – Whether Court of Appeal has jurisdiction to hear appeal where order appealed against is interlocutory and appellant did not apply to judge for further arguments – Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) s 34(1)(c)

Civil Procedure – Judgments and orders – Test for determining whether an order is an interlocutory order or a final order

Delivered by Chao Hick Tin JA

1 This is an appeal against a decision of Tay Yong Kwang JC (as he then was) refusing to set aside an *ex parte* order made by Rajendran J on the application of the liquidators of a company, Lion City Holdings Pte Ltd ("the company"), Messrs Mick Aw ("Aw") and Christopher Johnson ("Johnson"), to have the appellant, a former director of the company, examined by the court on matters "concerning the promotion, formation, trade dealings, affairs or property of the company" and if necessary for the examination, to "produce all books, correspondence and documents in his custody, power or control."

2 At the commencement of the hearing of the appeal before us, a preliminary issue, touching on the vital question as to whether the appeal is properly before this Court, was raised by the respondent. This judgment will address this preliminary issue.

The facts

3 The appellant ("Jumabhoy") was a director of the company from February 1994 to September 1996 and became the managing director in 1996. On 24 March 2000, the company was wound up pursuant to an order of court. Aw and Johnson were appointed the liquidators. On 23 January 2002, pursuant to s 285 of the Companies Act, the liquidators applied by way of an *ex parte* summons-in-chambers ("summons") for an order that Jumabhoy attend court for examination relating to the affairs of the company as aforesaid. After two adjournments, the summons was eventually heard on 23 April 2002, and the order for examination of Jumabhoy was granted. However, in the meantime on 18 April 2002, the liquidators filed a protective writ against Jumabhoy, as well as against his father and a brother. Due to an oversight, at the hearing of the summons, the liquidators failed to inform Rajendran J that the protective writ had been issued.

4 Some six months later, on 23 October 2002, Jumabhoy filed an application by way of summons-in-chambers to set aside or vary the order of Rajendran J. On 3 December 2002, this application was refused by Tay JC and it is against this decision that the present appeal is being brought.

Interlocutory or final

5 The preliminary issue arises because of s 34(1)(c) of the Supreme Court of Judicature Act which

provides that-

> (1) No appeal shall be brought to the Court of Appeal in any of the following cases:-
>
> (c) subject to any other provision in this section, where a Judge makes an interlocutory order in chambers unless the Judge has certified, on application within 7 days after the making of the order by any party for further argument in court, that he requires no further argument;"

6 By this provision, it is clear that there can be no appeal against an interlocutory order made by a judge in chambers unless the aggrieved party shall, within 7 days thereof, make an application to the judge to hear further arguments and the judge has certified that he requires no further argument.

7 In the instant case, it is a fact that the summons came before Tay JC in chambers. There was no application made by Jumabhoy to the judge to hear further arguments. So there can be no appeal unless the order of Tay JC is a final order. Thus the question that remains to be answered is whether the order of 3 December 2002 is an interlocutory order or a final order falling outside the ambit of s 34(1)(c) of the SCJA. If it is the former, Jumabhoy would be precluded from filing any appeal.

8 The question whether an order is interlocutory or final was the subject of several decisions here. In *Rank Xerox (Singapore) Pte Ltd v Ultra Marketing Pte Ltd* [1992] 1 SLR 73, this Court, after reviewing the authorities, adopted the test propounded in *Bozson v Altrincham Urban District Council* [1903] 1 KB 547 to be the correct test:-

> "Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then … it ought to be treated as a final order; but if it does not, it is then … an interlocutory order."

In *Rank Xerox* the plaintiffs sought to set aside an order giving the defendants conditional leave to defend. Applying the *Bozson* test, the Court held that as the order did not finally determine the rights of the parties, it was interlocutory in nature.

9 It is of interest to note that in *Rank Xerox*, the plaintiffs argued that the order giving conditional leave to defend was nevertheless a final order as the defendant could only defend if the condition was satisfied. The Court rejected the argument and reasoned as follows (at p 76):-

> "In our judgment the phrase 'the rights of the parties' contained in the *Bozson* test refers to the substantive rights in dispute in the particular action in which the application for summary judgment is made. When conditional leave to defend the action is given, then so long as the defendant complies with the condition, he has the right to a full trial on the merits, at which later time the substantive rights of the parties will be determined. All that the order for conditional leave decides is the condition subject to which the dispute on the substantive rights is allowed to proceed to trial. It does not decide any part of the substantive rights themselves."

10 We are conscious that in England, the test adopted would appear to be the "application" approach: see *Salaman v Warner* [1891] 1 QB 734, which was applied in *White v Brunton* [1984] 1QB 571 and this latter case in turn declared that the *Bozson's* test was no longer good law.

11 That is the English position. We would further add that in England the difficulties inherent in determining whether an order was interlocutory or final led to the enactment of Order 59 r 1 A in 1988 which sets out specific lists of final and interlocutory orders. A general test is also provided in that rule in respect of orders which do not fall within those specified in the lists.

12 But in so far as the position in Singapore is concerned, the *Bozson* test adopted in *Rank Xerox* was subsequently followed in several cases, e.g., *L v L* [1997] 1 SLR 222; *Ling Kee Ling v Leow Leng Siong* [1996] 2 SLR 438 and *Aberdeen Asset Management Asia Ltd v Fraser & Neave Ltd* [2001] 4 SLR 441. Indeed, very much earlier, in the case of *Tee Than Song Construction Co Ltd v Kwong Kum Sun Glass Merchant* [1967] 2 MLJ 205, the Federal Court in Singapore held that the *Bozson* test was the correct one to apply. Neither counsel has requested us to depart from this line of authorities.

13 However, applying the *Bozson* test, counsel for Jumabhoy argued that Tay JC, in refusing to set aside the order of Rajendran J and in allowing the appellant to be examined by the court, made a final order. Counsel recognised that under the English rules, this order could not be a final order. But as the Singapore Rules of Court do not have the equivalent provisions and the lists, the English position should not be followed, relying on *L v L* and *Tee Tham Song v Kwong Kum Sun.*

14 We accept the submission that this Court should apply the *Bozson* test to determine if the order of Tay JC is an interlocutory or a final order and not adopt indiscriminately the provision in the English O 59 r 1A(6)(ee) which classifies "an order made in the course of or by way of regulation of a liquidation and any other order ancillary to or consequential on a winding up order" as an interlocutory order.

15 Obviously, in determining, in accordance with the *Bozson* test, whether an order is interlocutory or final, it is necessary to examine the nature and effect of the order. The order of 18 April 2002 was made pursuant to an application by the liquidators in the course of their duties in winding up the company. The order did not determine the substantive rights of any party. It only required Jumabhoy, who was first a director, and later the managing director, of the company, to appear before the court to be examined as to his knowledge of the affairs of the company and to produce the relevant documents if they were in his possession. It is an order to assist the liquidators in discharging their functions of establishing the true state of affairs of the company. Such an order is clearly of a procedural nature and is similar in effect to a subpoena in other civil proceedings. We are unable to see how it could be said that this order affects substantive rights.

16 We turn next to the appellant's application to have the 18 April 2002 order set aside. Clearly, in refusing the application, Tay JC was effectively affirming the order. Such an affirmation does not alter the nature of the order of 18 April 2002.

17 Counsel for the appellant contended that the refusal order was "an order which finally disposed of the rights of parties under s 285(2) of the Companies Act, i.e., it conferred upon the respondents the right to examine the appellant in court and refused the appellant the right not to attend what is an oppressive examination." In this connection, counsel relied upon the views of the first instance judge in *Thomson Plaza Pte Ltd v The Liquidators of Yaohan Department Store Pte Ltd* [2001] 3 SLR 248 who expressed the view that his decision to dismiss an application, made in a winding up proceeding, against the rejection of a proof of debt by a liquidator was a final order. However, this Court in that case declined to make a ruling on that point as it was wholly unnecessary to do so. But there can be no doubt that there is a clear difference in nature between the order there, of rejecting a proof of debt, and the order in the present case, of requiring the appellant to appear before the court to be examined as to the affairs of the company on account of his being previously an officer of the company.

18 Reliance was also placed on the case of *Pac Asian Services Pte Ltd v European Asian Bank AG* [1987] SLR 1 which related to the appointment of provisional liquidators and where the appeal was heard before a quorum of three judges. With respect, this reliance is misplaced for three reasons.

First, in that case the issue of whether the order appointing the provisional liquidators was an interlocutory or final order did not arise. Second, the fact that the appeal was heard before a quorum of three judges did not necessarily suggest that the order in question was a final order. Third, and more importantly, at the time, there was no provision, like the present s 30(2) of the SCJA, which was enacted in 1993, allowing the Court of Appeal to sit in relation to certain cases with a quorum of two judges.

19 The order of Tay JC simply meant that the examination of the appellant by the court was to proceed. No substantive rights of the parties had been determined.

Judgment

20 Accordingly, it is our opinion that the order of 3 December 2002 is an interlocutory order. As Jumabhoy had not requested Tay JC to hear further arguments, no appeal may be brought against that order. This is a question of jurisdiction and is not a matter which could be waived by the parties. That requirement is a condition precedent which had to be fulfilled before any appeal may be brought against that decision: see *Rank Xerox* at p 76 (where the required leave was not obtained before the appeal was filed).

21 In the result, no appeal could be filed against the order of 3 December 2002. We direct that the present appeal be struck out. Parties are requested to make their submission on costs within seven days hereof.

Supplementary Judgments on Costs

1 In our judgment dated 31 July 2003, in ruling on a preliminary jurisdictional point, we held that the appeal was not properly brought and should be struck out because the decision appealed against was an interlocutory order and, pursuant to s 34(1)(c) of the Supreme Court of Judicature Act (SCJA), no appeal could be brought against that order unless an application was made within seven days to the judge to hear further arguments and he certified that he required no further argument. As the appellant had not made such an application, no appeal could be brought against it. In the judgment, we invited solicitors to make their submissions on costs before we rule on it.

2 Under O 59 r 3(2) of the Rules of Court the general rule is that costs should follow the event unless it appears to the court that in the circumstances of the case some other order should be made. In *Soon Peng Yam & Chan Ah Kow v Maimoon bte Ahmad* [1996] 2 SLR 609, this court further clarified (at p 619) that in exercising this discretionary power "the overriding concern of the court must be to exercise discretion to achieve the fairest allocation of costs."

3 In the present case, the costs issue can be looked at in two segments. The first relates to the jurisdictional point and the second, the substantive appeal. As far as the jurisdictional point is concerned, there can be no doubt that costs on that question should go to the respondents and we so order.

4 As for the costs thrown away on account of the appeal being struck out, counsel for the appellant made the point that the respondents should have, very early in the day, filed a motion to strike out the appeal. She submitted that their omission had resulted in unnecessary time and costs being expended. She also argued that it was not unreasonable for the appellant to have thought that the order in question was a final order and thus did not fall within s 34(1)(c).

5 It seems clear to us that under s 34(1)(c) the responsibility rests on the party who wishes to appeal against the order made to apply for further arguments. It is true that the respondents could have applied earlier to have the appeal struck out. They did not do so presumably because the point did not occur to them then. But as it was the duty of the appellant to comply with s 34(1)(c), we do not think it is right for him to shift the blame over to the respondents, who did not bring the appeal process about.

6 However, counsel for the appellant has indicated to us that she has been instructed to proceed afresh, though out of time, in order to comply with s 34(1)(c). If the appeal is allowed to be brought, albeit out of time, then the costs incurred on the substantive appeal would not have been thrown away, apart from disbursements. In the light of this, we make the following order: if the appellant is subsequently allowed to file a fresh appeal against the decision of 3 December 2002, we order that the respondents should only be entitled to the disbursement component of the costs of the appeal which had been struck out. However, if no appeal is allowed to be brought, then the respondents shall be entitled to costs thrown away.