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filed in court
50/1964

No. 41 of 1962

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA
IN THE COURT OF APPEAL AT KUALA LUMPUR

F.M. CIVIL APPEAL NO. 10 OF 1962
(K.L. CIVIL SUIT NO.511 OF 1960)

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
23 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N :

78698

THAMBOO RATNAM

Appellant
(Plaintiff)

- and -

10 (1) THAMBOO CUMARASAMY
(2) CUMARASAMY ARIAMANY
d/o KUMARASA

Respondents
(Defendants)

CASE FOR THE APPELLANT

RECORD

1. This is an Appeal from an Order of the Court of Appeal of the Supreme Court of the Federation of Malaya (Mr. Justice Thomson, Chief Justice Mr. Justice Hill J.A. and Mr. Justice Good J.A.) made the 15th May, 1962 dismissing an application made by the Appellant by notice of motion dated the 18th April, 1962 for an Order that the time for filing the Record of Appeal be extended to 14 days from the date of the Order sought.

p.8. No.10

2. The principal question raised by this Appeal is whether the said Court of Appeal in dismissing the said application and thereby as it the said Court of Appeal subsequently held putting an end to the proceedings and debarring the Appellant from pursuing as he wished to do his undoubted right of appeal when the Appellant's only fault was that he was a short while out of time in

p.4. No.4.

complying with the procedural step of filing the Record of Appeal and when the Record of Appeal could still have been filed in such time as would have given the Respondents some eighty days to consider the same before the date fixed for the hearing of the Appeal and when it was not suggested on behalf of the Respondents that by reason of the Appellant's said fault they or either of them had suffered any mischief irreparable or at all and when the granting of the Appellant's said application would not have been prejudicial to the Respondents or either of them in any way which could not have been compensated by a suitable award of costs exercised its discretion on the right grounds or the wrong grounds or at all. 10

3. The circumstances out of which this Appeal arises are as follows.

p.11. lines 8-24. 4. On the 3rd February, 1962 the Honourable Mr. Justice Ong gave judgment for the Respondents in an action brought by the Appellant against them in the Supreme Court of the Federation of Malaya in the High Court at Kuala Lumpur and dismissed the Appellant's claim with costs. In the said action the Appellant claimed a half interest in properties certified in this Appeal as having a value of not less than \$428,000 (that is to say upwards of £50,000) 20 30

5. The Appellant was entitled as of right and without leave to appeal against the said judgment and order to the Court of Appeal of the Supreme Court of the Federation of Malaya and desired and still desires so to do.

Part I of Annexe to this Case. 6. The Rules of the Supreme Court of the Federation of Malaya governing the practise and procedure on an appeal to the Court of Appeal thereof as in force at all times material hereto are set out in the Annexe to this Case. 40

Part I of Annexe to this Case. 7. In accordance with Order 58 Rule 21 on 2nd March, 1962 the Appellant filed four copies of the Notice of Appeal and he paid the stipulated sum of five hundred dollars as security for the costs of the Appeal.

RECORD

p.2. No.2

10 8. By letter dated 15th March, 1962 the Registrar of the Court of Appeal informed the Registrar of the Supreme Court at Kuala Lumpur that the said Appeal was fixed for hearing at the sitting of the Court of Appeal at Kuala Lumpur which was to commence at Kuala Lumpur on Monday 20th August, 1962 at 10 a.m. and drew attention to the fact that the Record of Appeal should be filed at the Registry at Kuala Lumpur on or before 14th April, 1962. A copy of this letter was sent to the Appellant personally and to the Solicitors for the Respondents.

20 9. The documents comprising the Record of Appeal are those stipulated in Order 58 Rule 22. Save for the memorandum of appeal in which the Appellant is required to set forth "concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided", (O. 58 R. 22 (i)) and the copy of the Judge's notes of the hearing (O. 58 R. 22 (4) (b)) the said documents would all be documents which were in any event available to the Respondents.

Part I of Annexe
to this Case.

30 10. The Record of Appeal was not filed on or before 14th April, 1962 which was Easter Sunday but on the 13th April, 1962 the Appellant instructed new Solicitors to act for him and on 18th April, the said Solicitors made an application on his behalf to the Court of Appeal for an extension of time for filing the Record of Appeal. The extension sought was a modest one that is to say 14 days from the date of the Order extending the time. The Court fixed the 15th May, 1962 as the date for hearing of the said application that being the first sitting of the Court of Appeal at Kuala Lumpur after 18th April, 1962. Notwithstanding that further delay over which the Appellant had no control if the Order sought had been made on 15th May, 1962 and the Record of Appeal filed within the extended time there would still have been upwards of 80 days remaining between the

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p.4. No.5

p.4. No.4

RECORD

filing of the Record of Appeal and the earliest date on which the Appeal could be heard which was 20th August, 1962.

Parts I and II
of the Annexe
to this Case.

11. The Court of Appeal had jurisdiction to extend the time for filing the Record of Appeal and to extend the said time even though the application for such extension were made after the expiry of the time allowed. (Order 58 R. 22 (6) and Order 64 R. 7). Order 64 R. 7 is recited in Part II of the Annexe to this Case.

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p.6. No. 7
p.7. Nos. 8 & 9
p.8. lines 1-19
p.4. No. 5
p.5. No. 6

12. On the 15th May, 1962 the said application was heard by the Court of Appeal. The evidence before the Court consisted of an affidavit made by the Appellant on the 18th April, 1962 and an affidavit made by the first Respondent on the 10th May, 1962. In his said affidavit the Appellant who had filed his notice of appeal personally said that he had instructed his present Solicitors on 13th April, 1962 and they had explained to him that it was then too late to file the Record of Appeal in time and that he had not instructed Solicitors earlier nor taken any other action because he had hoped that some compromise might be reached. In his affidavit the first Respondent averred that the Appellant had had ample time to instruct a Solicitor and file the Record of Appeal and stated that the Appellant had not agreed to any compromise nor approached the Respondents with a view to so doing. It was pointed out that the extension sought would not involve any extension of the hearing date (at the next Civil Session commencing 20th August, 1962) and it was not suggested that the Appellant's failure to file the Record of Appeal had prejudiced or that an extension of time for him to do so would prejudice the Respondents or either of them in any way or at all events in any way for which they could not be compensated by a suitable order as to costs.

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p.7. lines 29,30.

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p.8. No.10.

13. On the 15th May 1962 the Court of Appeal dismissed the said application with costs against the Appellant, but the said Court did not then nor has it since given any reasons for so doing.

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p.23. lines 20-26

14. Subsequently the Court of Appeal held that its "order refusing an extension of time for the Applicant (Appellant) to file the

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Record of Appeal put an end to the proceedings and . . . finally disposed of the rights of the parties by barring the unsuccessful Plaintiff (Appellant) from appealing against the order of the High Court".

10 15. It is respectfully submitted that in refusing to the Appellant the extension of time sought or any extension and thus in effect destroying his right of appeal the Court of Appeal must have taken into account wrong considerations or failed to take into account the right considerations or failed to exercise its judicial discretion in that:-

- (a) the principal or only considerations relevant to the exercise of the Court's discretion in this instance were the conduct of the Appellant and the prejudice if any to the Respondents if the extension sought was granted;
- 20 (b) the only conduct of the Appellant to his detriment was his tardiness which led to his failure to comply with the procedural requirements consequent upon his having given Notice of Appeal, he gave an explanation for that tardiness which he was entitled to have believed at that stage, on his behalf his Solicitors took prompt action to rectify the position and asked for a modest time in which to do so and but for circumstances beyond 30 his or their control it could have been rectified very speedily, and in any event if the extension sought or any extension had been granted on the 15th May, 1962 it would not have delayed the hearing of the Appeal for there would still have been ample time left for the Respondents and their advisers to do all that could have been necessary before the 40 20th August, 1962;
- (c) it was not suggested by or on behalf of the Respondents or either of them that they had been prejudiced by the Appellant's tardiness or that if the application were granted they would be prejudiced in the conduct of their defence of the Appeal or in preparing for the same by the first date fixed for its hearing;

- (d) it was plain that the granting of the extension sought or some extension would not be prejudicial to the Respondents or either of them in any respect which could not be adequately compensated by costs;
- (e) where the only fault of a party is tardiness and no mischief has been or will be caused to the other party by acceding to a tardy application the objection of tardiness ought not to be listened to but should be compensated for by a suitable order as to costs; 10
- (f) no Court ought in the exercise of a judicial discretion to make such an order as will defeat the rights of a party altogether as did the refusal to grant any extension of time unless satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by so doing and justice could in this case have been done to the Respondents by a suitable order for costs. 20

16. On those grounds in particular and having regard to the material before the Court of Appeal viewed as a whole it is respectfully submitted that if the Court of Appeal had exercised its judicial discretion and exercised it with regard to the right considerations and only the right considerations it could not have done otherwise than to grant to the Appellant the extension of time which was sought on his behalf or some extension on payment to the Respondents of their costs arising from his tardiness and that its failure so to do constituted an error in law and has resulted in a miscarriage of justice. 30

17. The Appellant respectfully submits that the said Order of the said Court of Appeal made the 15th May, 1962 was erroneous and ought to be reversed for the following, among other, 40

R E A S O N S

- (1) BECAUSE in purporting to exercise its judicial discretion the said Court of Appeal failed to take into account or act upon the right principles and considerations or took into account and

acted upon the wrong principles and considerations or failed in fact to exercise that discretion on the proper grounds or at all.

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- (2) BECAUSE on the facts before it the said Court of Appeal ought to have granted an extension of time for filing the Record of Appeal compensating the Respondents in so far as was requisite by an order for the payment of costs
- (3) BECAUSE the decision of the said Court of Appeal was wrong in law and its Order made on 15th May, 1962 has resulted in a miscarriage of justice in that it has prevented the Appellant from pursuing the right of appeal given to him under the law of the Federation of Malaya and which he desired and desires to pursue.

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IAN PERCIVAL.

ANNEXE TO CASE FOR THE APPELLANT

Rules of the Supreme Court of the Federation of Malaya relating to appeals to the Court of Appeal and the extending of time in force on 15th May, 1962, being extracts from the "Rules of the Supreme Court 1957" as amended at that date.

PART 1

ORDER 58

APPEALS TO THE COURT OF APPEAL

I GENERAL

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Rule 1. *****

1.A (1) Appeals to the Court of Appeal shall be by way of re-hearing and shall be brought by giving notice of appeal.

(2) Security for costs shall be given as hereinafter provided.

(3) A notice of appeal shall substantially be in Form 19.

(4) Any appellant may appeal from the whole or part of a judgment or order and the notice of appeal shall state whether the whole or part only, and what part, of the judgment or order is complained of.

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2. Notice of appeal shall be served on all parties directly affected by the appeal or their solicitors respectively at the time of filing the notice of appeal. It shall not be necessary to serve parties not so affected.

(There is no Rule 3)

4. (1) The Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner.

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(2) Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, shall be admitted on appeal grounds only, and not without leave of the Court of Appeal.

(4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

10 (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties have not appealed from or complained of the decision.

(There is no Rule 5)

II - Notice and Memorandum of Appeal

6. *****

7. *****

20 8. *****

(There are no Rules 8A - 13)

14. *****

15. (1) No appeal shall, except by special leave of the full Court of Appeal, be brought after the expiration of one month -

(a) in the case of an appeal from an order in Chambers, from the date when such order was pronounced or when the appellants first had notice thereof;

30 (b) in the case of an appeal against the refusal of an application, from the date of such refusal;

(c) in all other cases, from the date on which the judgment or order appealed against was pronounced.

(2) The Court of Appeal may at any time, in any case where it thinks fit, order further security for costs to be given, and may order security to be given for the payment of past costs relating to the matters in question in the appeal.

16. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the Court below or the Court of Appeal so orders and no intermediate act or proceedings shall be invalidated except so far as the Court of Appeal may direct.

17. *****

(There is no Rule 18)

19. *****

20. *****

21. (1) Notice of appeal may be given by filing within the time limited for bringing the appeal four copies of the Notice of Appeal in the Registry of the Court at the place where the judgment order or decision complained of was made or given by paying the prescribed fee and by lodging in Court at the same time the sum of five hundred dollars as security for the costs of the appeal. 10

Provided that no deposit by way of security of costs shall be required if the appeal is brought by the Government of the Federation of Malaya or any State Government. 20

(2) A list of civil appeals shall be kept in each Registry of the Supreme Court and a consolidated list thereof shall be kept by the Registrar of the Court of Appeal at Kuala Lumpur.

(3) The Registrar shall on receiving four copies of the notice of appeal and the prescribed fee and on the security required by the sub-rule (1) of this rule being lodged in Court enter the appeal in the list of civil appeals, stating therein the title of the cause or matter, the name of the appellant and his solicitor, if any, and the date of such entry, and shall inform the Registrar of the Court of Appeal at Kuala Lumpur of such entry. 30

(4) The Registrar of the Court of Appeal shall on receipt of information of the entry of the appeal enter the like particulars in the consolidated list of appeals and shall allocate a number to the appeal and shall inform the appellant's solicitor and the Registrar who entered the appeal of the number so allocated which shall thenceforth form part of the title of the appeal.

22. (1) The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points 40

of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively.

(2) The appellant shall not without the leave of the Court of Appeal put forward any other ground of objection, but the Court of Appeal in deciding the appeal shall not be confined to the grounds set forth by the appellant.

(3) The memorandum of appeal shall be substantially in Form 21.

(4) The appellant shall attach to such memorandum copies
10 of the proceedings in the Court below, including:

(a) copies of the documents in the nature of pleadings, so far as is necessary for showing the matter decided and the nature of the appeal;

(b) a copy of the Judge's notes of the hearing of the cause or matter in which the decision appealed against was given;

(c) copies of all affidavits read and of all documents put in evidence in the Court below so far as they are material for the purposes of the appeal, or if such
20 documents are not in the English language, copies of certified translations thereof;

(d) a copy of the judgment, decree or order appealed from;

(e) the certificate, if any, given by the Judge of the grounds of his judgment or order or, if a written judgment was delivered, a copy thereof;

(f) a copy of the notice of appeal.

(5) A draft index of the documents to be included in the record of appeal shall be sent by the Appellant's solicitor to
30 the solicitors for the Respondents who or (if more than one) any of whom may within forty-eight hours object to the inclusion or exclusion of any document. In the event of the parties being unable to agree the matter shall be referred to the Registrar who may require the parties to attend before a Judge. The Registrar as well as the parties shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject matter of the appeal taking special care to avoid the
40 duplication of documents and unnecessary repetition of headings and other merely formal parts of documents. Where in the course of preparation of the record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists on its

being included, the Record, as finally printed or typed shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

(6) The memorandum and copies above referred to which together shall be called the Record of Appeal shall be filed at the place where the appeal was entered within six weeks after the entry of the appeal or within such further time as the Court of Appeal may allow.

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(7) Sufficient copies of the record of appeal for the use of the Judges of the Court of Appeal shall be sent to the Registrar when the record of appeal is filed.

(8) The appellant shall at the time of filing the record serve a copy thereof on each party who has been served with the notice of appeal.

23. *****

24. *****

25. (1) The Court of Appeal may at any time allow amendment of any notice of appeal, or notice of cross-appeal or memorandum of appeal, or other part of the record of appeal on such terms as it thinks fit.

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(2) If the memorandum of appeal is not drawn up in the prescribed manner, the appeal may be dismissed.

(3) If any part of the record of appeal is not filed, or any copy thereof is not supplied, within the prescribed time, and no sufficient ground is shown for the delay, the appeal may be dismissed.

26. (1) If, on any day fixed for the hearing of an appeal, the appellant does not appear in person or by an advocate and solicitor, the appeal may be dismissed.

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(2) If the appellant appears, and any respondent fails to appear, either in person or by an advocate and solicitor, the appeal shall proceed in the absence of such respondent, unless the Court of Appeal for any sufficient reason sees fit to adjourn the hearing thereof.

(3) Where any appeal is dismissed or allowed under the provisions of sub-rule (1) or (2) of this rule the party who was absent may apply to the Court of Appeal for the re-hearing of the appeal and where it is proved that there was sufficient reason for the absence of such party

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the Court of Appeal may order that the appeal be restored for hearing upon such terms as to costs or otherwise as it thinks fit.

(4) The provisions of this rule shall apply mutatis mutandis to the hearing of any cross-appeal.

27. *****

28. *****

29. *****

III - Applications to Court of Appeal

10 30. (1) All applications to the Court of Appeal shall unless otherwise provided be made by motion and shall be heard in open Court.

(2) A notice of motion shall be substantially in Form 22.

(3) Notice of motion shall be served on the parties concerned not less than two days before the return day, unless the Court otherwise orders. Application for leave to give shorter notice may be made by motion ex parte.

20 (4) Affidavits may be filed, read and used in like manner as upon a motion in the High Court.

31. (1) All applications to the Court of Appeal in pending appeals shall contain in the heading the appeal number allocated pursuant to Rule 21 and shall not require any application number.

(2) All applications to the Court of Appeal (otherwise than in pending appeals) shall be allocated a number by the Registrar of the Court of Appeal.

30 (3) All applications shall be made by filing four copies of the notice of motion and of every affidavit intended to be used in support thereof, unless the application is made to a single Judge of the Court of Appeal in which case two copies only need be filed. The said documents shall be filed in the Registry of the Court at the place where the judgment order or decision complained of was given or made. Copies of such application and affidavits shall at the same time be served on all necessary parties. The Registrar at such place and the Registrar of the Court of Appeal shall follow a procedure similar so far as possible to the
40 procedure relating to the entry of appeals. On receipt

from the Registrar of the Court of Appeal of information regarding the number of the application and in cases coming within sub-rule (4) or (5) the place and date of hearing the applicant's solicitor shall immediately inform the Respondents to the application or their solicitors.

(4) At the time of filing any application the appellant's solicitor may file a written statement to the effect that the application is urgent and showing the grounds of such urgency and that Respondents have agreed to the application being heard by the full Court of Appeal at Kuala Lumpur (or at such other place as may be agreed) or if they have not agreed that he has requested them to do so and that they have refused. Whereupon the Registrar if he considers that a prime facie case of urgency has been made out call upon the Respondents to attend and show cause why the application should not be heard in Kuala Lumpur or some other place and shall transmit the applicant's statement and the replies of Respondents to the Registrar of the Court of Appeal who shall, after reference to the Chief Justice, fix the date and place for hearing the application but may require the Applicant to give security for the Respondents' costs of the application.

(5) Applications to a single Judge when the Judge at the place where application is made cannot be a Judge of the Court of Appeal by reason of section 13 (1) of the Courts Ordinance, 1948, or is not available may be fixed for hearing at the nearest convenient place.

32. *****

PART II

ORDER 64

TIME

Rule 7. A Court or a Judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed. Provided that when the time for delivering any pleading or document or filing any affidavit, answer or document, or doing any act is or has been fixed or limited by any of these Rules or by any direction on or under the summons for directions or by an order of the Court or a

Judge the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application unless the Court or a Judge shall otherwise order.

