Lembaga Kumpulan Wang Simpanan Pekerja v Arulananda K Manickam

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO 12BNCC-29–03 OF 2014
MOHD NAZLAN J
23 FEBRUARY 2017

Civil Procedure — Amendment — Order — Appellant applied to amend order granted by High Court — Whether order can be amended — Whether application on adherence to O 42 r 13 of the Rules of Court 2012 ('the ROC') — Whether slip rule in O 20 r 11 of the ROC applied — Whether amendments could come within ambit of slip rule in O 20 r 11

This was an application to amend the order granted by the High Court in allowing the appeal against the decision of the sessions court which had earlier dismissed the appellant's claim against respondent. In 2011, the appellant instituted a writ of action, among others, against the defendant for outstanding and unpaid employers' contribution, in breach of the Employees Provident Fund Act 1991. This action was dismissed by the sessions court. However, on 26 May 2014, the High Court allowed the appeal by the appellant against the respondent. The claim filed by the appellant at the sessions court was in respect of the period of assessment between December 1997 and November 1998 for the amount of RM42,013 and for the outstanding dividend as well as interest on the said amount. The order dated 24 May 2014 by the High Court ('the order') only allowed the claim for the period between December 1997 and September 1998, totalling RM38,158. The order had no mention of the respondent being liable to pay dividend or interest on the reduced amount. There were no grounds of judgment issued in respect of the order. The appellant applied to amend the order by the proposed inclusion of the words 'beserta dividen dan faedah yang dikenakan ke atas jumlah RM38,158 tersebut' to truly reflect the intention of the decision in allowing the appeal. This application was based on the slip rule found in O 20 r 11 of the Rules of Court 2012 ('the ROC'). The respondent argued that the court was *functus officio* as the order had been perfected and leave to appeal to the Court of Appeal had been denied. The respondent further contended that this application was not in adherence to O 42 r 13 of the ROC. The sole issue for determination was whether the amendments proposed by the appellant could come within the ambit of the slip rule.

Held, dismissing the appellant's application in encl 21 with costs:

(1) There was no basis for the argument that if the judge then had considered the issue, dividend and interest would have been awarded. This would be a matter that the judge must have considered after having evaluated the evidence in the record of appeal. The order crucially mentioned the words 'dibenarkan setakat' in respect of the appeal. This showed a deliberate decision after a careful judicial analysis of the evidence. It could validly be concluded that if the matter had been considered by the judge, the dividend and interest would have been awarded (see paras 23–24).

(2) The court was not satisfied on a balance of probabilities that the appellant had proven its case for the court to invoke the slip rule and effect the proposed amendments. It was unclear whether the High Court judge had intended to impose payment of dividend interests when making the order, given the circumstances. The omission was not in any way accidental or clerical in nature. It was much more substantive and fundamental in nature and therefore, went beyond the jurisdictional scope of the slip rule under O 20 r 11 (see para 29).

[Bahasa Malaysia summary

Ini adalah satu permohonan untuk meminda perintah yang diberikan oleh Mahkamah Tinggi dalam membenarkan rayuan tentang keputusan mahkamah sesyen terdahulu yang telah menolak tuntutan perayu terhadap responden. Pada tahun 2011, perayu telah memulakan tindakan writ, antara lain, terhadap responden untuk jumlah yang belum dijelaskan untuk sumbangan majikan, dalam pelanggaran Akta Kumpulan Wang Simpanan Pekerja 1991. Tindakan ini telah ditolak oleh mahkamah sesyen. Namun begitu, pada 26 Mei 2014, Mahkamah Tinggi telah membenarkan rayuan oleh perayu terhadap responden. Tuntutan yang telah difailkan oleh perayu di mahkamah sesyen adalah berkenaan dengan taksiran jumlah RM42,013 bagi tempoh masa bagi Disember 1997 hingga November 1998 dan untuk bayaran dividen yang tertunggak serta faedah untuk jumlah bayaran tersebut. Perintah bertarikh 24 Mei 2014 yang dikeluarkan oleh Mahkamah Tinggi ('perintah tersebut') hanya membenarkan tuntutan bagi tempoh masa Disember 1997 hingga September 1998, untuk jumlah RM38,158. Perintah tersebut tidak menyatakan bahawa responden bertanggungjawab di sisi undang-undang untuk membayar dividen atau faedah atas jumlah yang dikurangkan. Tiada alasan penghakiman yang dikeluarkan bagi perintah tersebut. Perayu telah memohon untuk meminda perintah tersebut melalui usul bagi memasukkan kenyataan 'beserta dividen dan faedah yang dikenakan ke atas jumlah RM38,158 tersebut' untuk mencerminkan niat keputusan dalam membenarkan rayuan tersebut. Permohonan ini adalah berdasarkan kaedah khilaf yang tertera di dalam A 20 k 11 Kaedah-Kaedah Mahkamah Tinggi 2012 ('KMT'). Perayu menghujahkan bahawa mahkamah telahpun menjadi *functus officio* kerana perintah tersebut telah disempurnakan dan permohonan untuk membuat rayuan kepada Mahkamah Rayuan telah dinafikan.

A Responden selanjutnya menegaskan bahawa permohonan ini tidak mematuhi A 42 k 13 KMT. Isu utama untuk dipertimbangkan adalah sama ada pindaan yang dicadangkan oleh perayu kepada perintah tersebut termasuk dalam skop kaedah khilaf.

B **Diputuskan,** menolak permohonan perayu dalam lampiran 21 dengan kos:

(1) Tiada dasar untuk hujahan bahawa jika hakim telah mempertimbangkan isu tersebut, dividen dan faedah akan diawardkan. Hal ini merupakan perkara yang mesti dipertimbangkan oleh hakim selepas menilai bukti di
C dalam rekod rayuan. Perintah tersebut telah khususnya menyatakan 'dibenarkan setakat' berkenaan dengan rayuan tersebut. Hal ini telah menunjukkan keputusan telah dipertimbangkan selepas analisis kehakiman yang teliti ke atas bukti. Boleh disimpulkan bahawa jika perkara tersebut telah dipertimbangkan oleh hakim, dividen dan faedah
D akan diawardkan (lihat perenggan 23–24).

(2) Mahkamah tidak berpuas hati atas imbangan kebarangkalian bahawa perayu telah membuktikan kesnya untuk mahkamah menggunakan kaedah khilaf dan menguatkuasakan pindaan yang diusulkan. Berdasarkan situasi dalam kes ini, ia adalah tidak jelas sama ada hakim
E Mahkamah Tinggi berniat untuk mengenakan bayaran faedah dividen semasa membuat perintah tersebut. Peninggalan tersebut bukan secara tidak sengaja ataupun besifat pengkeranian. Ia adalah lebih bersifat substantif dan asas, oleh itu, melepasi skop bidang kuasa kaedah khilaf di
F bawah A20 k 11 (lihat perenggan 29).]

Notes

For cases on order, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 719–728.

G

Cases referred to

Affin Bank Bhd v WT Low & Ng Realty Sdn Bhd [2003] MLJU 1; [2003] 2 AMR 417, HC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1
H MLJ 393; [1998] 2 CLJ 75, FC (not folld)

HSBC Bank Malaysia Bhd v Macquarie Technologies (M) Sdn Bhd [2004] 4 MLJ 398, CA (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)

Ling Nam Rubber Works v Leong Bee & Co (No 2) [1968] 1 MLJ 265, FC (refd)

I *Oriental Bank Bhd v Syarikat Zahidi Sdn Bhd* [1998] 7 MLJ 81; [1999] 1 CLJ 810, HC (refd)

Sang Lee Co Sdn Bhd v Subramaniam a/l Mayawan & Ors [2011] 5 MLJ 374, CA (refd)

Sang Lee Co Sdn Bhd & Ors v Munusamy a/l Karuppiah (sole proprietor of MNN

Consultancy Services, a firm) [2010] 5 MLJ 285; [2010] 5 CLJ 229, FC (refd)
Standard Chartered Bank Malaysia Bhd v Benjamin KRK Samy & Anor [2002] 1 CLJ 171, HC (refd)
Tak Ming Co Ltd v Yee Sang Metal Supplies Co [1973] 1 All ER 569; [1973] 1 WLR 300, PC (refd)
Tiong Hung Ming v Kalimantan Hardwood Sdn Bhd [1994] 3 MLJ 656; [1994] 1 CLJ 412, HC (refd)

Legislation referred to

Employees Provident Fund Act 1991
Rules of Court 2012 O 20 r 11, O 42 rr 12, 13

S Krishnan (Azrul Afifi & Azuan) for the plaintiff.
Nabilah Rusli (Lakshmi Gandhi Nathan & Partner) for the respondent.

Mohd Nazlan J:

INTRODUCTION

[1] This is an application by the appellant, documented in encl 21, to amend the order granted by the High Court in allowing the appeal against the decision of the sessions court which had earlier dismissed the appellant's claim against the respondent.

[2] I dismissed the application following conclusion of the hearing on 23 August 2016. This judgment contains the full reasons for my decision.

BACKGROUND

[3] The appellant is the Employees Provident Fund Board. The appellant had, in 2011, instituted a writ action against, among others, the respondent, for outstanding and unpaid employers' contribution, in breach of the Employees Provident Fund Act 1991 ('the EPF Act'). After a full trial, this action was, on 8 February 2012, dismissed by the sessions court. The High Court however, on 26 May 2014 allowed the appeal by the appellant against the respondent.

[4] The claim filed by the appellant at the sessions court was for payment of unpaid EPF contributions in respect of the period of assessment between December 1997–November 1998 for the amount of RM42,013 and for the outstanding dividend as well as interest on the said amount.

[5] The decision of the judge of this High Court NCC1 (who has since been transferred to another division) in allowing the appeal, as contained in the order dated 26 May 2014 ('the order') only allowed the claim for the period between December 1997–September 1998, which totaled a lower amount of RM38,158. There is, in addition however, no mention in the order of the respondent being liable to pay dividend or interest on the reduced amount. No grounds of judgment had been issued in respect of the decision contained in the order.

[6] The appellant takes the view that the order should thus be amended to include the words 'beserta dividen dan faedah yang dikira ke atas jumlah RM38,158 tersebut', in order to truly reflect the intention of the decision in allowing the appeal, and which would also be consistent with the pleadings of the appellant in making the claim. Hence the present application, which was filed on 31 May 2016.

BASIS OF APPLICATION

[7] The application to amend the order by the proposed inclusion of the words 'beserta dividen dan faedah yang dikenakan ke atas jumlah RM38,158 tersebut' is based, by the appellant, on the so-called slip rule found in O 20 r 11 of the Rules of Court 2012.

[8] The resistance by the respondent against the application on the other hand is premised on the principal ground that as the order had been perfected, and leave to appeal to the Court of Appeal subsequently denied on 15 August 2016, the court is now already functus officio. In addition, the respondent contended that this application was also not made in adherence to O 42 r 13 of the Rules of Court 2012, and that the same is thus an abuse of the process of the court.

EVALUATION AND FINDINGS BY THIS COURT

[9] The slip rule is encapsulated in O 20 r 11 of the Rules of Court 2012 ('the RC 2012') which states:

> Clerical mistakes in judgment or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by a notice of application without an appeal.

[10] Therefore, once an order has been made, entered and perfected, the court has no jurisdiction to amend the order unless there has been an accidental slip in drawing up the order, or unless the order as drafted does not correctly state what the Court actually decided and intended (see *Affin Bank Bhd v WT Low & Ng Realty Sdn Bhd* [2003] MLJU 1; [2003] 2 AMR 417). In *Hock Hua*

Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, Chang Min Tat FJ, delivering the judgment of the Federal Court stated:

> 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 of the Rules of the Supreme Court 1957 (O 20 r 11 of the 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* 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. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong v Neotia & Co* [1918] AC 888 and *Jonesco v Beard* [1930] AC 298.

[11] The slip rule can be invoked where the formal judgment does not accord with the oral decision pronounced by the court earlier in time or where matters intended to be included in the judgment were accidentally overlooked.

[12] For proper context, I should at the start make clear that reliance on the application of slip rule by the appellant means that the arguments of the respondent on the significance of the Federal Court decision of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 which sets out circumstances under which a consent order could be varied is not relevant. These circumstances are mutually exclusive to the situations that could attract the application of the slip rule.

[13] Nor is the argument about the court being functus officio relevant either (see the Federal Court decision in *Sang Lee Co Sdn Bhd & Ors v Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm)* [2010] 5 MLJ 285; [2010] 5 CLJ 229 and the High Court case of *Standard Chartered Bank Malaysia Bhd v Benjamin KRK Samy & Anor* [2002] 1 CLJ 171). I should also add that O 42 r 13 providing for any application to set aside or vary an order to be made within one month after receipt of order too is not applicable in a slip rule situation. Nor can the issue of res judicata be raised to defeat an application like presently.

[14] And this is precisely because matters that can be amended or corrected under O 20 r 11 are merely clerical mistakes, and errors arising from accidental slips or omissions. Thus to such extent, the grounds proffered by the respondent to resist this instant application are entirely unmeritorious because they are irrelevant.

[15] Therefore the question for this court is to determine the single issue whether the amendments proposed by the appellant could come within the

ambit of the slip rule. I do not think it is disputed that what was sought to be rectified in the instant application did not arise from a clerical mistake and as a result, it is incumbent upon the appellant to establish that there had been an accidental slip or omission to justify O 20 r 11 to be invoked.

[16] The defect or omission must be an error in expressing the manifest intention of the court at the time the order was drawn up. There is no jurisdiction under the slip rule to amend even a manifestly erroneous order made by the court where the court's attention was drawn to a particular point and it had applied its mind to that issue (see *Ling Nam Rubber Works v Leong Bee & Co (No 2)* [1968] 1 MLJ 265).

[17] The order in the instant case is a decision against the judgment of the sessions court dismissing the claim by the appellant (as the plaintiff) after full trial. The High Court judge, as per the order, allowed the appeal. The issue is whether it is correct, as contended by the appellant, that the non-reference to the payment of divided and interest in the order is an accidental omission under the slip rule. The appellant argued further that under the EPF Act, non-payment of contribution would also carry the obligation to pay dividend and interests. The pleadings of the appellant at the sessions court had also set out the claim for dividend and interests.

[18] The crucial determinant in rectifications grounded on the slip rule has been discussed in a number of authorities. I shall refer only to two. In *Oriental Bank Bhd v Syarikat Zahidi Sdn Bhd* [1998] 7 MLJ 81; [1999] 1 CLJ 810, the High Court held:

> I have to ask myself whether the omission to include a specific date in an application for an order for sale was due to a mistaken appreciation of the evidence or of the law or whether it was due to an accidental slip or omission. In *Armitage v Parsons* [1908] 2 KB 410, the plaintiff signed a judgment in default of appearance by the defendant. However, due to a slip up of his solicitors' clerk, the plaintiff included in the sum in respect of which judgment was signed, costs on too high a scale, so that the judgment was signed for a sum which was too high. The Court of Appeal held, by a majority, that the defendant was not entitled to have the judgment set aside, but that the judgment should be amended under the slip rule. It is important therefore in considering the request to amend or correct the earlier order that the court must give effect to the intention of the court at the time when the earlier order was made. In this case the error arose out of counsel's omission to ask for a specific date although he had prayed for an order that a date be set not less than one month from the date the order for sale was made. This brings to mind the case of *Re Inchcape* [1942] 2 All ER 157 where the court allowed an application to include costs not asked for in the order. The court held that the error arose from an omission of counsel to direct the judge's attention to those costs which would have been included if the learned judge's attention had been so directed. The application was allowed under the slip rule. *There is no doubt that if a judge is addressed on a particular*

issue and having directed his mind to that issue, he decides upon it, there can certainly be no alteration under this slip rule, even if the learned judge had fallen into an obvious error in principle. The omission here is because the judge was not asked for a specific date and the judge did not direct his mind to that issue. Clearly therefore I can and ought to allow the application to amend the order under the slip rule. (Emphasis added.)

[19] The other is the decision in *Tiong Hung Ming v Kalimantan Hardwood Sdn Bhd* [1994] 3 MLJ 656; [1994] 1 CLJ 412 , a case, not unlike presently, involving an omission to grant interest where the High Court applied the Privy Council decision in *Tak Ming Co Ltd v Yee Sang Metal Supplies Co* [1973] 1 All ER 569. In allowing the application under the slip rule, Steve Shim J (as he then was) held that:

Taking the cue from Pickering J. I have to state that in the instant case, my mind was primarily drawn to the lengthy arguments and submissions of Counsel for the parties concerned which had concentrated essentially on matters other than on interest. Not unnaturally therefore my judgment was confined to the issues canvassed before me. *Nevertheless, had the matter of interest been raised by Dr Chew at the time I delivered judgment, I would have granted it.* In the circumstances and having regard to O 42 r 12, I will allow this application and order that the judgment dated 15 May 1993 be amended to include an award of interest on the judgment sum at rate of 8% per annum from date of judgment until it is satisfied. There will be no order as to cost on this application. (Emphasis added.)

[20] In order to deal with the pivotal issue of whether if the judge had considered the issue, the award for dividend and interest would have, as a result, been made, I accept that even though not raised by the appellant, there is no evidence that the learned judge in her decision as documented in the order had actually refused the award for dividends and interests on the judgment sum.

[21] But this alone could not be taken to suggest that if it had been considered the award would have been granted. It was simply not referred to in the order. Nor are the grounds of judgment available, as mentioned earlier. The order itself palpably does not show either way, or whether the matter on dividend and interest was even raised by counsel.

[22] In my view, upon a close examination of the order, and other relevant documents such as the statement of claim of the appellant at the sessions court, it is not clear, given the omission, what the exact intention of the court was in respect of the liability to pay dividend and interest. At any rate, I cannot accept the submission of the respondent's counsel at the hearing before me that the High Court had considered and rejected such payment since that is disputed by the appellant's counsel. I find no basis to the argument that if the judge then had considered the issue, dividend and interest would have been awarded. This

would be a matter that the judge must have considered after having evaluated the evidence in the record of appeal in this particular case. I should add for clarity that it is not necessary for the power to amend under O 20 r 11 be exercisable only by the judge who heard the matter and made the order which is sought to be amended (see the Court of Appeal decision in *Sang Lee Co Sdn Bhd v Subramaniam a/l Mayawan & Ors* [2011] 5 MLJ 374).

[23] However, the order was quite specific in stating the amount to be paid by the respondent. The High Court judge had clearly examined the amount being claimed as pleaded and even reduced slightly the amount of claim to be paid by the respondent and specifying the same to be RM38,158. The statement of claim itself contained detailed items sought to be recovered by the plaintiff. The order also crucially mentions the words 'dibenarkan setakat' in respect of the appeal. This shows a deliberate decision after a careful judicial analysis of the evidence.

[24] Further, even costs of RM2,000 was specified in the order. But, crucially, not the dividend and interest. In addition, it bears repetition that the statement of claim had included extensively drafted prayers for dividend and interests. Thus it is not unlikely that the issue must have been drawn to the attention of the court then. However they are not reflected in the order at all. In my judgment, it cannot validly be concluded that if the matter had been considered by the judge, dividend and interest would definitely have been awarded.

[25] Furthermore, whilst it is not disputed that undue delay is not in itself a ground for refusing to correct a judgment under the slip rule (see *HSBC Bank Malaysia Bhd v Macquarie Technologies (M) Sdn Bhd* [2004] 4 MLJ 398 and *Tak Ming Co Ltd v Yee Sang Metal Supplies Co* [1973] 1 All ER 569; [1973] 1 WLR 300), it is a factor to be considered nevertheless, and more so in the instant case, since the delay was for about two years, given that it was only initiated on 31 May 2016 when the appellant could have made the application at the time of the perfection of the order (dated 26 May 2014) itself. In any event as is standard, the appellant's counsel must have agreed to the language and content of the order prior to the perfection of the same.

[26] In my view, under such circumstances, appropriate and due regard ought also to be had to the rights of the respondent to know at the time of the perfection of the order the extent of his liability to the appellant. The delay in the instant case is nothing but inordinate.

[27] The non-inclusion of the dividend and interest payment in the order is material and could have been the deliberate decision of the High Court in allowing the appeal. Thus, inclusion of the same at this stage would constitute

a major variation of a fundamental nature. It is neither a clerical error and nor could it have been an accidental omission. I would also not characterise the proposed amendment as one which would further the ends of justice. This is quite clear, since the respondent, from not having to pay any dividend and interest based on the order, and having been led to believe that to be the position, is now required by the appellant, after two years, to pay dividend and interests on the amount of RM38,158.

[28] The appellant's argument that there is no prejudice to the respondent since they are bound to pay the same under the EPF Act is not tenable because if that is true then the applicant could just rely on the EPF Act to demand such payment of dividend and interest. The fact is it is not mentioned in the order and the appellant obviously seeks to rely on the order for enforcement. It is material that it should be mentioned in the order. But it is not.

CONCLUSION

[29] In view of the foregoing reasons, I am not satisfied, on a balance of probabilities, that the appellant has proven its case for this court to invoke the slip rule under O 20 r 11 (or pursuant to the inherent jurisdiction of the court for that matter), and effect the proposed amendments. It is not clear that the High Court judge, when making the order, had intended to impose payment of dividend and interests given the circumstances I referred to earlier. The omission, if indeed it was one, was not in any way accidental or clerical in nature. It is much more substantive and fundamental and in my view goes beyond the jurisdictional scope of the slip rule under O 20 r 11.

[30] Accordingly, I dismiss the application in encl 21, with costs.

Appellant's application in encl 21 dismissed with costs.

Reported by Nisha Paran