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TAN POH LEE v. TAN BOON THIEN

FEDERAL COURT, PUTRAJAYA
NALLINI PATHMANATHAN FCJ
VERNON ONG LAM KIAT FCJ
ZALEHA YUSOF FCJ
B [CIVIL APPEAL NO: W-02(i)-45-09-2020(W)]
18 FEBRUARY 2021

Abstract – *It is clear, upon a true construction of O. 52 r. 2B of the Rules of Court 2012, that: (i) prior notice to show cause need not be given to a proposed contemnor before the filing of an ex parte leave application under O. 52 r. 3; and (ii) the notice to show cause referred to in O. 52 r. 2B means the documents referred to in O. 52 r. 4(3).*

C

D ***CIVIL PROCEDURE:*** *Proceedings – Contempt proceedings – Leave application – Failure to comply with conditional stay order – Court of Appeal set aside motion to commence committal proceedings – Construction of O. 52 r. 2B of Rules of Court 2012 – Whether prior notice to show cause to be given to proposed contemnor before filing of ex parte leave application under O. 52 r. 3 – Whether notice to show cause referred to in O. 52 r. 2B meant documents referred to in O. 52 r. 4(3)*

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The Court of Appeal had set aside the appellant's motion, to commence committal proceedings against the respondent, following the latter's failure to comply with a conditional stay order. The Court of Appeal held that (i) the appellant failed to issue a notice to show cause mandatorily required
F under O. 52 r. 2B of the Rules of Court 2012 ('ROC'); (ii) the Rules Committee had enacted r. 2B with the express purpose of the proposed contemnor being given an opportunity of answering to the notice before any application for leave for contempt was made; (iii) the leave application could only be made after the issuance of the notice and the appropriate time had lapsed and where the proposed contemnor had given no reply or no
G satisfactory reply; and (iv) as contempt attracted penal sanctions, any ambiguity had to be resolved in favour of the alleged contemnor. Hence, the present appeal. The questions of law that arose for consideration were whether on a true construction of O. 52 r. 2B of the ROC, (i) prior notice to show cause is to be given to a proposed contemnor before the filing of an
H *ex parte* leave application under O. 52 r. 3 of the ROC; and (ii) the notice to show cause referred to in O. 52 r. 2B means the documents referred to in O. 52 r. 4(3) of the ROC.

Held (allowing appeal; setting aside order of Court of Appeal with costs)
Per Nallini Pathmanathan FCJ delivering the judgment of the court:

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(1) The notice to show cause referred to in O. 52 r. 2B of the ROC refers to the documents stated in O. 52 r. 4(3) of the ROC, particularly the notice of application itself. If O. 52 r. 2B is construed otherwise, it

would require a litigant seeking to enforce a court order, which ought to be complied with expeditiously, if not forthwith, to send a pre-notice as a mandatory requirement, before being able to even initiate committal proceedings, notwithstanding that both the litigant and the alleged contemnor are fully aware of the order of the court. (paras 11 & 12)

(2) Any such commencement of contempt proceedings would require further compliance with O. 52 r. 4(3) of the ROC, which means that the documents specified there would have to be served personally a second time. That too, for an order of court, to which the alleged contemnor was fully privy or ought to have notice of. The time expended would be far too long. There would be a surplusage in the need for a pre-notice followed by further personal service in relation to the documents under O. 52 r. 4(3). After all, it is the failure to comply with the order of the court that is the primary subject matter of consideration. (paras 13 & 14)

(3) While contempt proceedings may well entail criminal consequences, and great care must be taken in contempt proceedings, bearing in mind the possible consequences to the liberty of a person, such consideration must be balanced against the equally important requirement that court orders must be complied with strictly. Moreover, the ROC ensures that the potential contemnor is fully safeguarded. This takes the form of O. 52 rr. 3 and 4 of the ROC. As such, there is no basis on which to construe O. 52 r. 2B as imposing a further mandatory requirement for a pre-notice prior to even initiating contempt proceedings against a contemnor who has been party to and, therefore, is fully conversant with an order of court made against him or involving him. Such a construction would defeat the need for prompt and full compliance with orders of court which carry the force of the law. (paras 15 & 16)

(4) The first question was answered in the negative while the second question was answered in the affirmative. (para 18)

Bahasa Melayu *Headnotes*

Mahkamah Rayuan telah mengetepikan usul perayu, untuk memulakan prosiding pengkomitan terhadap responden, susulan kegagalan responden mematuhi satu perintah penggantungan bersyarat. Mahkamah Rayuan memutuskan (i) perayu gagal mengeluarkan notis tunjuk sebab yang dikehendaki secara wajib bawah A. 52 k. 2B Kaedah-kaedah Mahkamah 2012 ('KKM'); (ii) Jawatankuasa Kaedah-kaedah menggubal k. 2B dengan tujuan nyata agar orang yang dikatakan menghina diberi peluang menjawab notis sebelum apa-apa permohonan kebenaran penghinaan dibuat; (iii) permohonan kebenaran hanya boleh dibuat selepas pengeluaran notis dan waktu sesuai telah tamat dan orang yang dikatakan menghina tidak memberi balasan atau balasan memuaskan; dan (iv) oleh kerana penghinaan membangkitkan hukuman jenayah, apa-apa kesamaran harus diselesaikan

berpihak pada orang yang dikatakan menghina. Maka timbul rayuan ini. Soalan-soalan yang berbangkit untuk diputuskan adalah sama ada, berdasarkan tafsiran sebenar A. 52 k. 2B KKM, (i) notis tunjuk sebab harus diberi pada orang yang dikatakan menghina terlebih dahulu sebelum pemfailan permohonan kebenaran *ex parte* dibuat bawah A. 52 k. 3 KKM; dan (ii) notis tunjuk sebab yang dirujuk dalam A. 52 k. 2B bermaksud dokumen-dokumen yang dirujuk dalam A. 52 k. 4(3) KKM.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Rayuan dengan kos)

Oleh Nallini Pathmanathan HMP menyampaikan penghakiman mahkamah:

(1) Notis tunjuk sebab yang dirujuk dalam A. 52 k. 2B KKM merujuk pada dokumen-dokumen yang dinyatakan dalam A. 52 k. 4(3) KKM, khususnya notis permohonan itu sendiri. Jika A. 52 k. 2B ditafsir sebaliknya, ini mengkehendaki pelitigasi yang ingin melaksanakan perintah mahkamah, yang harus dipatuhi dengan cepat, bahkan serta merta, untuk memberi pra-notis sebagai syarat wajib, sebelum boleh memulakan prosiding pengkomitan, tanpa mengira kedua-dua pelitigasi dan orang yang dikatakan menghina sedar sepenuhnya akan perintah mahkamah.

(2) Apa-apa pemulaan prosiding penghinaan akan mengkehendaki pematuhan lanjut A. 52 k. 4(3) KKM, yang bermaksud dokumen-dokumen yang dinyatakan dalamnya perlu diserahkan secara kediri buat kali kedua. Ini juga, untuk satu perintah mahkamah, yang orang yang dikatakan menghina tahu sepenuhnya atau sepatutnya tahu. Masa yang digunakan teramat panjang. Akan ada lebihan dalam keperluan pra-notis diikuti dengan serahan kediri lanjut berkaitan dokumen-dokumen bawah A. 52 k. 4(3). Apatah lagi kegagalan mematuhi perintah mahkamah yang menjadi hal perkara utama pertimbangan.

(3) Walaupun prosiding penghinaan melibatkan akibat jenayah, dan prosiding penghinaan harus dijalankan dengan hati-hati, mengambil perhatian akibat yang mungkin pada kebebasan seseorang, pertimbangan sedemikian mesti diimbangi dengan syarat yang sama penting iaitu perintah-perintah mahkamah mesti dipatuhi secara ketat. Tambahan lagi, KKM memastikan orang dikatakan menghina dilindungi. Ini adalah dalam bentuk A. 52 kk. 3 dan 4 KKM. Oleh itu, tiada asas untuk mentafsir A. 52 k. 2B sebagai mengenakan syarat wajib lanjut agar pra-notis sebelum memulakan prosiding pengkomitan terhadap penghina yang mengambil bahagian dan, oleh itu, tahu sepenuhnya akan perintah mahkamah yang dibuat terhadapnya atau melibatkannya. Tafsiran sedemikian akan menggagalkan keperluan pematuhan pantas dan penuh perintah-perintah mahkamah yang membawa kuasa undang-undang.

(4) Soalan pertama dijawab secara negatif manakala soalan kedua dijawab secara afirmatif.

Case(s) referred to:

Tang Hak Ju v. Pengarah Tanah Dan Galian Pulau Pinang & Ors [2017] 2 CLJ 345 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 52 rr. 2A, 2B, 3, 4(3)

For the appellant - Michael Chow & Sunita Sankey; M/s Liza Khan & Shankey
For the respondent - Vijaya Segaran, Aaron Mathews & Darmain Segaran; M/s Aaron Mathews

[Editor's note: For the Court of Appeal judgment, please see Tan Boon Thien & Anor v. Tan Poh Lee & Ors [2020] 3 CLJ 28 (overruled).]

Reported by Najib Tamby

JUDGMENT

Nallini Pathmanathan FCJ:

Introduction

[1] Two questions of law arose for consideration before us in this appeal:

(i) whether on a true construction of O. 52 r. 2B of the Rules of Court 2012, prior notice to show cause is to be given to a proposed contemnor before the filing of an *ex parte* leave application under O. 52 r. 3 of the Rules of Court 2012; and

(ii) whether on a true construction of O. 52 r. 2B of the Rules of Court 2012, the notice to show cause referred to in O. 52 r. 2B, means the documents referred to in O. 52 r. 4(3) of the Rules of Court 2012.

Background

[2] On 30 September 2019 the Court of Appeal set aside the motion to commence committal proceedings brought by the appellant against the respondent, for failure of the respondent to comply with a conditional stay order dated 21 February 2019. The condition imposed for the stay was that the *status quo* of the assets relating to a pending probate action were to be preserved. There was an alleged contravention of that condition by the respondent.

The Decision Of The Court Of Appeal

[3] The sole ground on which the Court of Appeal set aside the leave previously granted, was that the appellant failed to issue a notice to show cause seemingly mandatory required under the Court of Appeal's construction of O. 52 r. 2B of the Rules of Court 2012. The rationale as

A gleaned from the written grounds is that r. 2B requires mandatory compliance, and failure to do so would result in all subsequent proceedings being rendered invalid.

[4] The Court of Appeal went on to add that the Rules Committee had enacted r. 2B with the express purpose of the proposed contemnor being B given an opportunity of answering to the notice before any application for leave for contempt is made. The leave application, it was held, could only be made after issuance of the notice and the appropriate time had lapsed, and where the proposed contemnor had given no reply or no satisfactory reply. The further basis for this construction was stated to be that as contempt C attracted penal sanctions, any ambiguity had to be resolved in favour of the alleged contemnor.

Our Decision

[5] It appeared to us that the primary consideration was to ascertain the D philosophy or rationale behind O. 52 r. 2B? As submitted by the appellant, it cannot be construed *in vacuo*. It has to be considered in juxtaposition and contextually with O. 52 r. 2A. The latter deals with contempt in the face of the court. The contemnor is aware of precisely what it is he has done, and in respect of which he is asked to show cause etc, because a *prima facie* finding E has been made. There is therefore no requirement for a formal notice to be issued by the court.

[6] But not so in a matter where there has been a failure to comply with an order of court. Such a contravention is likely to happen months or even years after the order of court. The alleged contemnor is not before the court.

F **[7]** In such an instance, there is a requirement that the contemnor is appraised of the precise nature of the wrongdoing he is accused of. This is in keeping with one of the twin pillars of natural justice, namely *audi alteram partem*, or simply that the person accused of a wrong must know precisely the charge made against him. Order 52 r. 2B is an encapsulation of that G principle, so as to ensure that the contemnor is aware of the charge made against him. However, this is not equivalent to a stricture that the alleged contemnor has to be given several notices regarding the alleged contravention.

[8] That does not mean either, that O. 52 r. 2B encapsulates a strict set H of procedures that has to be followed meaninglessly, such that several notices are issued sequentially. The law does not believe in surplusage.

[9] The notice referred to in O. 52 r. 2B is to be issued at the behest of the court, and not the parties. Private parties do not issue notices to show cause to each other. It is what the court does. It is after all, the order of court I which has been breached. And it is therefore the court that ensures compliance and redresses any contravention. And that is therefore what O. 52 r. 2B is concerned with – ensuring compliance and redressing non-compliance.

[10] It then follows that such a notice can only come into being after the initiation of contempt proceedings by making the requisite application to court. And that is why the notice in O. 52 r. 2B ties in with the documents referred to in O. 52 r. 4(3).

[11] In this context, we respectfully concur with the decision of Lim Chong Fong J in *Tang Hak Ju v. Pengarah Tanah Dan Galian Pulau Pinang & Ors* [2017] 2 CLJ 345 that the notice to show cause referred to in O. 52 r. 2B refers to the documents stated in O. 52 r. 4(3), particularly the notice of application itself.

[12] If O. 52 r. 2B is construed otherwise, it would require a litigant seeking to enforce a court order (which ought to be complied with expeditiously, if not forthwith) to send a pre-notice as a mandatory requirement, before being able to even initiate committal proceedings, notwithstanding that both the litigant and the alleged contemnor are fully aware of the order of court.

[13] Any such commencement of contempt proceedings in turn, would require further compliance with O. 52 r. 4(3), which means that the documents specified there would have to be served personally a second time. And that too for an order of court, to which the alleged contemnor was fully privy, or ought to have notice of.

[14] The time expended would be far too long. There would, moreover, be surplusage in the need for a pre-notice followed by further personal service in relation to the documents under O. 52 r. 4(3). After all, it is the failure to comply with the order of court that is the primary subject matter of consideration.

[15] We concur with the appellant's submissions that while contempt proceedings may well entail criminal consequences, and that great care must be taken in contempt proceedings, bearing in mind the possible consequences to the liberty of a person, such consideration must be balanced against the equally important requirement that court orders must be complied with strictly.

[16] Moreover, the Rules of Court 2012 ensures that the potential contemnor is fully safeguarded. This takes the form of O. 52 rr. 3 and 4. As such, there is no basis on which to construe O. 52 r. 2B as imposing a further mandatory requirement for a pre-notice prior to even initiating contempt proceedings against a contemnor who has been party to, and therefore is fully conversant with an order of court made against him or involving him. Such a construction would defeat the need for prompt and full compliance with orders of court which carry the force of the law.

A **[17]** We therefore conclude that the Court of Appeal erred in focusing solely on the word "shall" without adequately considering the rationale and purpose of the entirety of O. 52.

Answers To The Questions Of Law

B **[18]** We answer the first question in the negative and the second question in the affirmative. We therefore allow the appeal and set aside the order of the Court of Appeal with costs of RM50,000 to the appellant subject to allocator.

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