Court of Appeal

Guyana

Civil Appeal No. 35 of 1976

Hoyte
and
Liberation Press Ltd and Post Papers Ltd.

November 4, 1977

Crane, J.A.; Luckhoo, J.A.; Massiah, J.A.

Practice and procedure - Appeal — Extension of time

Appearances:

Sir Lionel Luckhoo, S.C. for the appellant.

B. O. Adams, S.C for the respondents Kumar and Richmond.

M.G. Fitzpatrick for the respondents M.A. A. McDoom, Gangadin and Yamin.

Ashton Chase for the respondents Moen McDoom and Shaw.

D. Jagan for the respondent Doodnauth Singh.

Crane, J.A.

On the substantive appeal coming on for hearing, learned counsel for the eight respondents named herein, all took in turn the preliminary point that this appeal is out of time. Their submissions were, briefly as follows: At the conclusion of the decision of the Full Court on June 30, 1976 leave was sought of the Chief Justice and obtained from him to appeal further to the Guyana Court of Appeal. The matter being one in which an order was made by the Full Court from an order of a judge of the High Court made in chambers and from which appeal lies only by leave [see Court of Appeal Act, Cap. 3: 01 s.6(2)(a)(i) and (4)], it was incumbent on the appellant after being granted leave to appeal to make his application within 14 days from June 30, 1976. This being so, the last day for filing an application was July 14th, i.e., within 14 days from June 30, the grant of such leave. [See O. 11, r.2(2).] But the appellant having filed his application on July 17 is clearly three days too late, and must abide by the consequences.

Counsel for the appellant in reply confessed that the point raised had taken him completely by surprise, although he did learn as he was entering the Courtyard that morning that a preliminary point would be taken against him. He however submitted that the Court should refuse to entertain the objection since the appellant had not been given three clear days' notice of it as, is required by O. 11, r.7(1). We were unable to agree, however, for no other reason than that our attention had been alerted to the fundamental question of jurisdiction and we could not lightly brush it aside. We considered it would be more appropriate, in the circumstances, to give an adjournment at the cost of the respondents if one were requested.

Counsel then formally applied under O. 1, r.8 for leave to enlarge the time for appealing as prescribed by the Rules of Court. Whereupon it was pointed out by opposing counsel that such an application must be made by notice of motion as required by O. 11, r.3(5) of the Court of Appeal Rules. At that stage counsel for the appellant requested an adjournment to consider his position and the matter was adjourned to September 30.

On the resumption on September 30, counsel for the appellant surprisingly took the stand that his appeal was within time, i.e., that the period within which he should have filed his notice of appeal was six weeks and not

fourteen days and sought to found his arguments on both main and alternative contentions. By copious references to decided cases he endeavoured to show that neither the judgment of the trial Court nor the decision of the Full Court was interlocutory. That the decision of the Full Court was final and not interlocutory posited the contention that the appellant would have had a period of six weeks and not fourteen days within which to file and serve his notice of grounds of appeal and that his appeal was amply in time. So from the beginning it appeared counsel was prepared to stand or fall by that contention because, at that time, he had not yet filed notice of motion to enlarge the time for appealing. He however did so on October 1, during the time when arguments were being received on the point that the appeal was filed within time.

It became evident, however, that a red herring was being drawn across the trail, for it was immaterial whether the trial judge's or the order of the Full Court was final or interlocutory, because what the Full Court was called upon to adjudicate was “an order of a judge of the High Court made in chambers.” Leave to appeal was therefore necessary from either the Full Court or the Court of Appeal; and when granted, the relevant rule of Court directed that “the appellant shall file a notice of appeal as provided by r.1 of this Order within fourteen days from the grant of leave ….” [O. 11, r.2(2).]

Faced with the force of the above argument and the decisions of Bonzon v. Altricham, [1903] 1 K.B. 547, Solomon v. Warner, [1891] 1 Q.B. 754, Seecharran v. Kuntie, [1946] L.R.B.G, 287, Singh v. Williams, [1938] L.R.B.G, Evelyn v. Williams, (1962) 4. W.I.R. 265, Ahmad Bacchus v. Rasulan Bacchus, C/A No. 42, /1976 (a decision on the identical point we are now considering given in this Court some three weeks ago) and Moses v. Kumar (1969) 14 W.I.R. 328, counsel for the appellant sought a further adjournment with a view to assisting the Court by exploring and investigating s.6(2)(d) of the Court of Appeal Acts, Cap. 3:01. Rather, on his next appearance on October 5, counsel announced he was abandoning his stand that his appeal was within time and asked leave of the Court to argue his motion for an extension of time within which to appeal, which I have already indicated was filed on October 1. Counsel for the respondents thereupon insisted that the appeal be struck out and dismissed that an order of Court be made to that effect and complained he had not sufficient time within which to file an affidavit in reply to the motion. Leave was then granted the respondents to file affidavits in reply to the affidavit in support of the motion with consequential orders and the matter adjourned to October 12, on which day a change of counsel for the appellant was noted.

On the resumption counsel now appearing for the appellant sought leave to tender as part of the proceedings a supplementary affidavit in support of the motion for an enlargement of time to which objection was taken. Objection was also taken to the Court's jurisdiction to entertain the motion in view of the order of dismissal of the appeal on October 5, at which time the motion for an enlargement of time was already filed in Court. Counsel then submitted the appeal was dead and could not be revived.

Speaking for myself, I think there is much force in the contention of counsel for the respondents that it is not possible to entertain this motion for an extension of time because of lack of jurisdiction to hear and determine it, particularly in view of the Order of Court of October 5, dismissing the appeal. In order to appreciate the merit in this contention, let us suppose, for the sake of argument, we were now to embark upon the hearing of the motion and after some strange process of reasoning were to decide to grant the appellant an extension of time for appealing. In that event the legality of such a course could not possibly be justified unless the order of dismissal of October 5, were revoked. That order would certainly be in our ways because there cannot at the same time be two orders of Court in relation to one and the same matter. Furthermore, it is not possible to contend that a subsequent grant of an extension of time automatically revokes or renders nugatory a previous order of dismissal of an appeal in relation to the same matter. Without being unduly critical, I think it would have been better had learned counsel conceded being out of time and straightaway applied for the grant of an extension of time, for although only three weeks ago a similar application was unsuccessful in the case of Ahmad Bacchus v. Rasulan Bacchus, concerning lands at Larimakabra, East Bank, Essequibo, the ingenuity of counsel might well conceive circumstances permitting such an application to be successfully made during the pendency of an appeal provided it shows exceptional circumstances. There is nothing in our Rules of Court against making an application for an extension of time within which to appeal whilst an appeal is pending. But having in the first place taken the stand that an appeal is within time, it seems that failure so to prove must render an order of dismissal the inevitable and only consequence. This means to say that once the question whether an appeal is within or without the time-limit has been fought out and lost, an order of Court dismissing the appeal on that issue cannot be avoided. However, where an appellant concedes he is out of time, but only seeks the grant of an order extending the time for appealing, the Court cannot be required to make a specific order that the appeal was out of time because there was no issue on that matter.

The Court must either make a finding or obtain an admission from which it satisfies itself that the appellant is out of time before it can properly go on to consider the granting of an extension of time.

Speaking only obiter on this point, I must not be understood to say that such an application would have been successfully made, because, coming as late as it did — more than 15 months after leave to appeal was granted by the Chief Justice on June 30, 1976 and only after solicitor's error in reading Rules of Court had caused preliminary objection to be made by counsel for the respondents, that alone could hardly be considered such an exceptional circumstance as would warrant an extension of time. Coming to think of it, solicitor's error in reading Rules of Court is the only excuse that is disclosed in the supplementary affidavit now sought to be tendered. I do not say a solicitor's error can never in any circumstances amount to an exceptional circumstance; every case must be looked at in the light of its own circumstances. However, in my way of thinking, that error alone can hardly be referred to as an “exceptional circumstance” when more than 15 months have elapsed and solicitor only became aware of it on the morning of the trials when it was drawn to her attention by counsel for the respondents. What is quite clear is she would never have known of it had it not been brought to her attention, but that alone cannot be urged as an exceptional circumstance.

The preliminary objections are therefore sustained for the following reasons: (i) the appellant having taken the stand that his appeal was within time must abide by the Order of Court of October 5, which reflects the Court's finding on that stand; (ii) the supplementary affidavit in support of the motion is rejected, not because it fails to disclose good and substantial reasons for the applications but because the Court has no jurisdiction to consider it in view of the Order of Court dismissing the appeal on October 5, 1977. There will be the usual order for costs.

V.E. Crane

Justice of Appeal

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LUCKHOO J.A.: I concur with the order proposed.

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MASSIAH J.A.: I concur.

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