

Djuric and Others v Toshali Marketing Pte Ltd
[2000] SGHC 44

Case Number : DC Suit 5473/1997
Decision Date : 18 March 2000
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Ng Hwee Cheng and Chew Min Wei (Rodyk & Davidson) for the appellants; Gwen Teo (Gwen Teo) for the respondents
Parties : Djuric — Toshali Marketing Pte Ltd

*Civil Procedure – Appeals – Staying of proceedings until plaintiffs furnish security for costs
– Whether appeal against stay order can only proceed when the order itself is stayed – O 55B, O 55C, O 56, O 57 Rules of Court*

*Civil Procedure – Appeals – Staying of proceedings until plaintiffs furnished security for costs
– Whether aggrieved party has right of appeal against order – Whether court has right to restrict right to appeal – Nature of aggrieved party's right to appeal*

: The appellants were the plaintiffs in the District Court action on a contract between them and the defendant company. Under the agreement the plaintiffs are to recruit members for the defendant which is in the business of marketing and promoting timeshare and club memberships. The defendant is to pay them on the basis of the membership fees received through their efforts.

The plaintiffs claimed that the defendant failed to fulfill its obligations under the agreement. The defendant denied that and applied for the plaintiffs to provide security for costs in the action because they are foreign nationals ordinarily resident outside of Singapore with no assets in Singapore. On 21 September 1999 a Deputy Registrar ordered that:

a The plaintiffs do within 35 days hereof give further security for the defendants' costs of this action in the sum of S\$20,000 by way of a banker's guarantee on terms acceptable to the defendants or by payment into court of the said S\$20,000.

b Unless such security for costs is furnished, all further proceedings shall be stayed.

The plaintiffs brought an appeal against these orders to a District Judge.

When that appeal was heard on 11 November 1999 the plaintiffs had neither furnished the security nor obtained a stay of the order of 21 September.

Before the District Judge, counsel for the defendant raised a preliminary issue that the appeal should not proceed as it was stayed under the order of court of 21 September. After hearing counsel on that question, the District Judge accepted the argument, and dismissed the appeal without hearing the merits.

Quite naturally, the plaintiffs were unhappy with that decision, and they brought the matter on appeal before me.

Counsel for the plaintiffs raised two points. The first relates to the prevailing practice in our courts. He submitted that there is no requirement that an appeal against a stay order can only proceed when the stay order is itself stayed. He pointed out that for orders staying actions pending arbitration, an appeal against such an order can proceed without a stay of the stay order. He also referred to the analogous position where a writ is struck out for want of jurisdiction. An appeal against the striking out order can proceed without a stay of the order.

The second is a point of law. Counsel referred to a decision of the Supreme Court of South Australia in **Remm Construction (SA) Pty Ltd v Allico Newsteel Pty Ltd & Ors** [1992] 57 SASR 180, apparently the only reported decision on this point he was able to find.

The plaintiff in that action was a `nominal plaintiff` within the meaning of r 101.01 of the Supreme Court Rules 1987. This meant that the plaintiff was impecunious, and was suing for the benefit of other interests, presumably its creditors.

Applications were made for the plaintiff to furnish security. Two orders were made and complied with. A third order was made in the sum of \$1,350,000. The plaintiff appealed against the third order, without furnishing the security or obtaining a stay of the order. Rule 100.03 of the Supreme Court Rules 1987, referring to security for costs, provides that `Where security is ordered the action or other proceeding shall be stayed until the security is furnished, unless the court otherwise orders.`

When the appeal came on for hearing on the first occasion, it was dismissed by the judge who heard it. The plaintiff then applied to the full court to appeal against that dismissal. The defendants argued that it be dismissed as incompetent because of rule 100.03.

The full court rejected that argument. King CJ delivering the court`s judgment explained at p 184:

The order for security for costs is the foundation of the stay imposed by r 100.03. If that order was not correctly made there is no sound foundation for the stay. It would not be reasonable to construe r 100.03 as precluding, unless an excepting order is made, the exercise of the statutory right of appeal against the very order which is the foundation of the stay. I think that reason and justice require that a plaintiff be free to exercise its right of appeal against the order which is the foundation of the stay without first complying with that order. The stay undoubtedly operates from the date of non-compliance with the order and continues while the order remains on foot and is not complied with. I think, however, that the appeal process may properly be regarded as part of the process of the ordering of security which is the foundation of the stay and that it is, therefore, unaffected by the stay.

Counsel for the defendant before me argued that the appeal was stayed because the order of 21 September stayed all further proceedings, and the appeal does not have the effect of staying the order. She referred to the rules in O 55B and O 55C of the Rules of Court regulating appeals from a Registrar to a District Judge in Chambers and from a District Judge in Chambers. Rule 1(5) in both orders are identical, and reads `Except so far as the Court may otherwise direct, an appeal under this Rule shall not operate as a stay of the proceedings in which the appeal is brought. The position is the same for appeals from a Registrar to a judge in chambers (O 56 r 1(4)) and for appeals to the Court of Appeal (O 57 r 15(1)(a)).`

I agree with counsel for the plaintiffs that if the rule is read broadly, an appeal against an order of stay pending arbitration cannot proceed unless the order is complied with or stayed pending appeal.

However, this is not the practice, and should not be the practice because it would be wrong.

When a judge (including a registrar) orders a stay of a matter the aggrieved party may have a right to appeal against the order. The right may be unconditional, or it may require the leave of court. If the right is unqualified, then the judge has no power to impose any condition that interferes with the right. When the right of appeal is subject to leave being obtained, the judge may impose conditions which has to be fulfilled before the appeal can be heard, but even in this situation, the judge must not restrict the right to appeal against the stay order.

The order under appeal will prevent the plaintiffs from taking any steps in the proceedings such as making interlocutory applications or setting the action for hearing unless it is complied with, or it is stayed. For the reason just stated, the order cannot be construed to stay the appeal against itself so as to restrict the right of appeal granted by law.

For the sake of completeness, I should add that while the judge who makes the order cannot restrict the aggrieved party`s right to appeal against it, that does not mean that the appellant has an absolute right to have the appeal heard substantively. When the matter goes before the appellate court, the court in the exercise of its inherent jurisdiction to regulate its own procedure can impose conditions, eg that security or further security be furnished, or that outstanding costs be paid, before the appeal is heard, see [JH Billington Ltd v Billington \[1907\] 2 KB 106](#). If the appeal proceeded no further as a result of the conditions imposed, it can be said that the appellate court has heard the appeal, albeit not on its merits.

I allow the appeal and remit the matter to the District Judge for him to hear the appeal on its merits. The order of costs made by the District Judge is set aside, and \$2,000 is awarded to the appellants as costs of this appeal and the appeal below.

Outcome:

Appeal allowed.