GENET v. SCHUMACHER AND STRAUMANN

Full Court (Purcell, C.J., Sawrey-Cookson, J. and McDonnell, Ag. J.): February 9th, 1923

[1] **Civil Procedure — appeals — time for appeal — leave to appeal — application made when court hears motion not when notice of motion filed:** An application for leave to appeal against a decision of the Supreme Court on the merits of the case is made when the court actually hears the motion and if the hearing is more than three months from the date of the decision, the application will be out of time even if the notice of motion is filed within that period (page 77, line 31 — page 78, line 13).

[2] **Statutes — interpretation — statute to be interpreted as a whole — meaning and effect to be given to every part:** A statute should be construed so that if possible no word, clause or sentence is ineffective or meaningless (page 78, lines 1—9).

[3] **Time — time for application for leave to appeal — application made when motion heard not when notice of motion filed:** See [1] above.

The appellant appealed from a decision of the Supreme Court.

The appellant filed a notice of motion in the Supreme Court within three months of the date of a decision of the court on the merits of the case but the court actually heard the motion after the expiration of the three months.

The court (Purcell, C.J.) granted leave to appeal without giving a decision on an objection by the respondent that the application was out of time. The point was not waived by the respondent who raised it in the Full Court as a preliminary objection, contending that the appeal should be dismissed since the appellant's application for leave to appeal was out of time, an application being made not when the notice of motion is filed but when the motion is actually heard by the court. In the present case this was after the expiration of the three month time limit laid down in r.8 of the Schedule of the Supreme Court Amendment Ordinance, 1912.

The Full Court upheld this objection and dismissed the appeal with costs.

Cases referred to:

(1) *R. v. Bishop of Oxford* (1879), 4 Q.B.D. 245; 40 L.T. 152, *dicta* of Cockburn, C.J. applied.

Legislation construed:

Supreme Court Amendment Ordinance, 1912 (No. 14 of 1912), Schedule, r.8:

"After three months from the date of a decision on the merits, application for leave to appeal shall not be entertained by the Court below."

r.9: "After six months from the date of a decision on the merits, application for leave to appeal shall not be entertained by the Full Court.

Provided that if there shall be no sitting of the Full Court within six months from the date of a decision on the merits, and notice to move the Full Court shall have been given within such period, the motion may be dealt with, and leave to appeal granted at the next sitting of the Full Court whenever the same may be held."

Shorunkeh-Sawyerr for the appellant;
C.E. Wright for the respondents.

McDONNELL, Ag. J.:

In this appeal, Mr. Wright, for the respondents, raised a preliminary objection to the effect that the application made to the lower court for conditional leave was out of time, as although the notice of motion was filed within three months from the date of the decision, the date on which the notice stated the court would be moved and the date on which the court actually was moved, were more than three months after the date of the decision.

It appears from the record that Mr. Wright, on the application for conditional leave on June 16th, 1922, "objected that Mr. Sawyerr was late." The record goes on: "He did not waive the point, but would raise it in the Court of Appeal."

No decision on the point was given by the lower court.

Mr. Sawyerr, at the present hearing, asked that this part of the record of appeal should be expunged as not being included in the record of appeal as specified in r.5 of the Schedule to the Supreme Court Amendment Ordinance, 1912. This the Full Court refused to do, and proceeded to consider Mr. Wright's objection.

In rr. 7, 8 and 9 of the Schedule, the words "application for leave to appeal" are employed, and the proviso to r.9 states that if no sitting of the Full Court occurs within six months of the decision, and a notice to move that court is given within six months, that motion may be dealt with at the next sitting of the court.

The effect of a proviso, according to the ordinary rules of construction, is to qualify something enacted in the preceding part of the enactment, and it is only on the assumption that "application for leave" means something quite different from "notice to move," that this proviso can be given any meaning at all.

If the two things mean the same thing, there is no point in making special provision for times when the Full Court is not sitting, for notice to move it can be filed at any time, and the proviso is then mere surplusage, an interpretation in conflict with the settled canon of construction enunciated in *R.* v. *Bishop of Oxford* (1) *per* Cockburn, C.J. (4 Q.B.D. at 261; 40 L.T. at 157) — "that a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."

It is true that r.5 speaks of "*filing* an application for final leave," but the fact that this is so does not, I hold, affect the only interpretation of r.9, which makes the whole enactment, proviso and all, intelligible.

I asked Mr. Sawyerr, for the appellant, in the course of the argument, to consider r.29 of the Schedule. It seems clear from the record that, although no decision was given in the lower court on the point of law as to time, yet there was no final direction by the Supreme Court that judgment should be entered provisionally, subject to a point of law which it reserved for further argument or consideration in the sense contemplated by r.29.

Finding himself faced with this point in the lower court, the appellant could have abandoned his application for conditional leave there, and, being within time, could have come to the Full Court for special leave. His failure to do that seems to dispose of any argument as to costs.

In my opinion, therefore, the appeal must, on Mr. Wright's preliminary objection, be dismissed, with costs.

PURCELL, C.J. concurred.

SAWREY-COOKSON, J.:

I agree, and desire to add only a few words on the question of costs. At the conclusion of arguments of counsel in this case, the learned Chief Justice intimated that the court were unanimous in the view that Mr. Wright had sustained his preliminary objection to this court, entertaining the appeal, and that the reasons for that conclusion would be given in a judgment to be delivered today with the other judgments reserved. Thereupon, on Mr. Wright asking for his costs, Mr. Sawyerr objected on the ground that, although this court had upheld his (Wright's) preliminary objection, it was still open to him to apply to this court for special

leave to appeal, and that it was, therefore, premature at this stage to give Mr. Wright his costs.

Mr. Sawyerr took more than one point, but mainly omitted, I think, to appreciate the all-important fact that it was, or should have been, perfectly clearly understood by him that Mr. Wright had deliberately before the lower court stated that he did not waive the preliminary objection to be taken as to the power of that court to entertain this appeal, but, on the contrary, intended to take the objection before this court.

That being so, Mr. Sawyerr had the course clearly open to him to abandon his claim to final right to appeal, and to have applied for special leave to appeal.

That course he did not take, so that it is very difficult to understand what valid objection he can have to Mr. Wright being allowed his costs. Mr. Wright's objection, had it been argued before the learned Chief Justice, would presumably (in view of the unanimity of this court) then have been upheld; but it was clearly left for this court to uphold or overrule, and if it should uphold it, so to dispose of the whole matter in Mr. Wright's favour. It is difficult to conceive of a case in which the discretion of the court in such matters should more properly or reasonably be exercised in a successful litigant's favour.

Appeal dismissed.