DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANG KUASA RAYUAN)
PERMOHONAN SIVIL NO. 08( )-395-09/2011 (W)

ANTARA

DATO' ABU HASAN BIN SARIF ... **PEMOHON**

DAN

DATO' DR. ABD. ISA BIN ISMAIL ... **RESPONDEN**

(Dalam Mahkamah Rayuan Malaysia
(Bidang Kuasa Rayuan)
Rayuan Sivil No. W-02-2654-2009

Antara

Dato' Abu Hasan Bin Sarif ... Perayu

Dan

Dato' Dr. Abd. Isa Bin Ismail ... Responden

Coram: Zulkefli bin Ahmad Makinudin, CJM
Hashim bin Hj. Yusoff, FCJ
Ahmad bin Hj. Maarop, FCJ

JUDGMENT OF THE COURT

Introduction

1. This is an application by the applicant filed by way of Notice of Motion to this Court pursuant to rule 137 of the Rules of the Federal Court 1995 ["RFC"] for an order that the Order of the Court of Appeal dated 2.11.2011 which ordered a stay of its own decision given on 18.8.2011 be discharged and/or set aside. We heard and allowed the application on 14.11.2011. We now give the reasons for our decision.

Background Facts

2. The relevant background facts leading to this application by the applicant may be summarized as follows:

(1) On 17.8.2009, the respondent as the speaker of the Legislative Assembly of the State of Kedah ["the speaker"] informed the Election Commission of Malaysia ["EC"] that the Kota Siputeh (N3) seat in the State of Kedah had purportedly become vacant due to the applicant's non-attendance as a State Assemblyman at the State Assembly on purportedly two consecutive meetings of the State Assembly, namely on 19.4.2009 and 9.8.2009.

(2) On 1.9.2009, the EC decided that the Kota Siputeh (N3) seat had not become vacant.

(3) On 1.10.2009, the respondent filed an application for judicial review to, *inter alia*, seek a declaration that the applicant was no longer the State Assemblyman for Kota Siputeh (N3) and that the applicant's seat was vacant, as well as a certiorari to quash the EC's decision set out in its letter dated 1.9.2009.

(4) On 16.11.2009, the High Court granted the declarations and the order for certioarari sought by the respondent.

(5) Resulting from the High Court's decision, the applicant was no longer the State Assemblyman of Kota Siputeh and his seat was declared vacant.

(6) The applicant then filed an appeal to the Court of Appeal against the decision of the High Court dated 16.11.2009.

(7) The EC also filed a separate appeal to the Court of Appeal against the decision of the High Court dated 16.11.2009.

(8) On 18.8.2011, the Court of Appeal allowed the applicant's appeal and set aside the High Court's decision dated 16.11.2009.

(9) The consequence of the Court of Appeal's decision on 18.8.2011 was, in essence, that the decision of the EC regarding non-vacancy was upheld, and in effect, the applicant was restored as the State Assemblyman of Kota Siputeh (N3) constituency.

(10) The respondent filed an application for leave to appeal to the Federal Court against the decision of the Court of Appeal dated 18.8.2011. The respondent also applied to the Court of Appeal for a stay of the Court of Appeal's decision dated 18.8.2011 pending the disposal of the application of leave to appeal to the Federal Court.

(11) On 2.11.2011 the Court of Appeal comprising the coram of a different member panel from the member panel that allowed the application's appeal on 18.8.2011 granted the respondent's application for a stay of the Court of Appeal's decision dated 18.8.2011

Preliminary Objection

3. At the outset of the hearing of the applicant's application before us learned Counsel for the respondent raised a preliminary objection as to the jurisdiction of this court to hear the application under rule 137 of the RFC. Rule 137 of the RFC provides as follows:

> "137. Inherent powers of the Court
> *For the removal of doubts, it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent an injustice or to prevent an abuse of the process of the Court.*"

4. It is the contention of the respondent that the applicant's application is an abuse of the Court's process and that the applicant ought to have first filed an application for leave to appeal to the Federal Court pursuant to section 96 of the Courts of Judicature Act 1964 ["CJA"]. Section 96 of the CJA provides as follows:

> "*Subject to... any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall be from the Court of Appeal to the Federal Court with the leave of the Federal Court....*
>
> *(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdictional [involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or]*
>
> *(b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.*"

5. Having heard the submissions made by learned Counsel for both the applicant and respondent, we are of the view this Court has the inherent powers under rule 137 of the RFC to hear the applicant's application. Based on the factual circumstances of the applicant's case we find that there is a clear case of injustice being committed

against the applicant as a result of the order of the Court of Appeal in granting a stay of its own decision of 18.8.2011 which allowed the applicant's appeal against the decision of the High Court dated 16.11.2009. On the inherent powers of the Court we would refer to the case of **Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1** wherein **Zaki Tun Azmi PCA** (as he then was) in delivering the judgment of the Federal Court elaborated on the meaning of "*inherent powers*" and "*inherent jurisdiction*" as follows:

> "*[36] What then is the meaning of inherent jurisdiction? According to the Concise Oxford Dictionary, 'inherent' means 'existing in something esp. as a permanent or characteristic attribute'. In the context of law, that inherent jurisdiction is deemed to be part of the court's power to do all things reasonably necessary to ensure fair administration of justice within its jurisdiction subject to valid existing laws including the Constitution. In other words, that inherent power is found within the very nature of a court of law, unlike power conferred by statute.*
>
> *[17] The* ***Halsbury's Laws of England, 4th Edition in volume 37*** *at para 12 refers to "inherent jurisdiction" as follows:*
>
> *In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary*

whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them."

6. Still on the inherent powers of the Court useful reference may be made to the Federal Court's case of **Megat Najmuddin Dato' Seri (Dr.) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645** whereby **Steve Shim CJSS**, in his judgment had stated:

"*Inherent Powers of the Federal Court*
Where there is a clear case of injustice being committed, the Federal Court, as an apex court in the land, cannot stand idly by and do nothing . It cannot and should not shirk from its responsibility of preventing injustice in appropriate cases. It must deal with it. In this regard, the Federal Court has been conferred with inherent powers under rule 137 Federal Court Rules 1995."

7. As regards the jurisdiction of this Court to hear the applicant's application, it is trite law that the Federal Court has the inherent power to review any order or decision given not only by the Federal Court itself, but also extends to that of the Court of Appeal. In support of this proposition we would refer to the case of **Tan Sri Eric Chia Eng Hock v. PP [2007] 1 CLJ** 565 wherein **Augustine Paul, FCJ** *inter alia* at page 592 had this to say:

> "*The result of the context and wide range of r. 137 is that the words 'the court' in part (c) must be construed as 'any court' and not as provided in Rule 2 of the Rules of the Federal Court. Such a departure from the meaning given to a particular word in the definition clause of a statutory provision is permissible if the context in which the word is used warrants it as explained by this court in* ***Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177.*** *Thus the Federal Court may review decisions made by the Court of Appeal in the exercise of its inherent powers.*" [**Emphasis Added**]

8. It is our considered view that this Court as the apex Court is equipped with a power to uphold the fair administration of justice and to prevent injustice and/or abuse of the process of the court. With this inherent power it can therefore maintain its character as a court of justice as is highlighted in the earlier cited case authorities. For this reason we would dismiss the respondent's preliminary objection.

Decision

9. On the merits of the applicant's application we are of the view that as a result of the Court of Appeal's order on 2.11.2011 in allowing a stay of its own decision dated 18.8.2011, the applicant has suffered grave prejudice and injustice as the applicant had been deprived of his successful litigation and his right to be restored as the

Assemblyman for the Kota Siputeh seat (N3) in the State Assembly of Kedah.

10. It is to be noted the applicant was democratically elected by the constituents of Kota Siputeh (N3) during the general election in March 2008 with a majority of 495. The applicant has a constitutional duty to carry out his duties and functions and responsibilities as an Assemblyman. The applicant's tenure as an Assemblyman is of a finite duration, lasting only until the next general election. If the stay granted by the Court of Appeal on 2.11.2011 is allowed to persist until the disposal of the respondent's application for leave to appeal and/or at the stage of the appeal, there is a real possibility that by then, the applicant's tenure as Assemblyman would have come to an end. In such a case, the applicant would have been permanently deprived of his rights as Assemblyman. More importantly, the applicant's constituency would have been deprived of a representation in the Kedah State Legislative Assembly. It is the democratic right of the people of Kota Siputeh to be represented by an Assemblyman and the Order of the Court of Appeal dated 2.11.2011 deprives them of such a right.

11. We noted that the applicant was unable to attend the Assembly from 16.11.2009 until 18.8.2011, that is for a period of 21 months. We are of the view such a prolonged deprivation of rights, especially in light of the applicant's successful appeal in 18.8.2011, is of a grave injustice to the applicant and cannot in any manner whatsoever be compensated by damages or costs. The applicant's appeal had been

heard in full and disposed of by the Court of Appeal on merits and his rights and interest have crystallized. On the other hand, the respondent herein merely has a contingent interest which may or may not come to fruition, depending on the outcome of his leave application and/or the appeal. In the circumstances, we are of the view that this Court should prevent an injustice and exercise its discretion in the applicant's favour to allow the applicant to enjoy his fruits of success and not allow his constitutional rights to be extinguished merely because the respondent wishes to pursue further litigation.

12. Further, even if the applicant is allowed to attend and participate in the proceedings in the State Assembly and subsequently the respondent is successful in his leave application and thereafter his appeal to the Federal Court, the applicant's participation and attendance would not render the proceedings in the State Assembly null and void. Therefore, even if the stay granted by the Court of Appeal on 2.11.2011 is set aside, the respondent's appeal would not be rendered nugatory.

13. We are therefore of the considered view that the Court of Appeal in granting the stay application of the respondent had misdirected itself on the factual circumstances of the case. The Court of Appeal was clearly in error when it made a finding that there were special circumstances to grant the stay application whereas for the reasons we had hereinbefore highlighted there are in fact no special circumstances shown.

14. We are also of the view that the Court of Appeal erred in law in granting the stay application of the respondent in relation to its own decision after having allowed the appeal of the applicant against the decision of the High Court. At the High Court the respondent had applied for a declaratory relief to declare that the applicant was no longer the State Assemblyman for Kota Siputeh (N3) Constituency and for a declaration that the seat be declared vacant. It is an established principle of law that a stay application cannot be granted in regard to a declaratory relief. On this point we would cite the case of **Takako Sakao v. Ng Pek Yuen & Anor. [2010] 1 CLJ 429** wherein **Gopal Sri Ram FCJ** in delivering the Judgment of the Federal Court had this to say:

> "*... The weakness of the remedy of declaration lies in the want of its enforceability. In* ***Prakash Chand v. Grewal & Anor. [1975] CRI LJ 679****, the court held as follows:*
> *'A declaratory decree cannot be executed as it only declares the rights of the decree-holder qua the judgment-debtor and does not in terms, direct the judgment-debtor to do or to refrain from doing any particular act or things. Since there is no command issued to the judgment-debtor to obey, the civil process cannot be issued for the compliance of that mandate or command.'*
> *In other words, there can be no committal or other execution process issued to enforce a declaration. Since*

a declaration cannot be enforced, no question of staying it may arise." **[Emphasis Added]**

Conclusion

15. For the reasons abovestated we allow the applicant's application with no order as to costs. The order of the Court of Appeal dated 2.11.2011 which ordered a stay of its own decision on 18.8.2011 is hereby discharged and/or set aside.

t.t.
(ZULKEFLI BIN AHMAD MAKINUDIN)
Chief Judge of Malaya

Dated: 12th Januari 2012.

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Watching Brief for the Government of State of Kedah
Ruzaimah Bt. Mohd Ridzuan
(Penasihat Undang-Undang Negeri Kedah)

SALINAN DIAKUI SAH

Setiausaha kepada
Y.A.A. Tan Sri Dato' Zulkefli bin Ahmad Makinudin
Hakim Besar Malaya
Mahkamah Persekutuan Malaysia
Putrajaya
12/1/2012