

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

- 1. GAN KHAY BENG
- 2. BEE CHUAN RUBBER FACTORY SDN. BHD.
- 3. FELIXIA d/o Varnakulasinghe Appellants

- and -

- 1. NG LIT CHENG alias NG YAM CHEE
- 2. E.P.E. ANANDA
- 3. JOSEPH JACOB DAVID also known as
JACOB JOSEPH as Administrator with
Will annexed of the Estate of John
David deceased Respondents

10

CASE FOR THE ^{FIRST} ~~RESPONDENTS~~

1. This is an Appeal against two Judgments and Orders of the Federal Court of Malaysia dated the 7th day of July, 1977 allowing Federal Courts Civil Appeals numbers 19 and 48 of 1976 against the Order of the High Court in Malaya at Seremban dated 8th January, 1976 and restoring the Order of the High Court in Malaya at Seremban dated 25th day of November, 1974. The original Order of the High Court of Malaya at Seremban (Ajaib Singh J.) ordered that ^{pursuant to} an agreement dated 2nd September, 1974 entered into by the Third-named Respondent (the original Applicant) and the First-named Respondent, ~~whereby~~ certain lands in the Mukim of Rasah registered in the Third-named Respondent's name as personal representative be sold to the First-named Respondent at a price of \$110,000 in accordance with the provisions of that agreement and that there be no Order as to costs. In compliance with the Order, the 1st Appellant through Solicitors released the deposit of \$25,000.00

20

30

P. 6 & 7 of Supplementary Record

to the personal representative and expended a further sum of approximately \$18,300.00 on the said land. By the Order of the High Court in Malaya at Seremban dated 8th January, 1976 (Ajaib Singh J.) the said Order of 25th November, 1974 was set aside and the Second-named Respondent was ordered to pay personally the costs of the Appellants herein. The Federal Court of Malaysia (Gill, C.J. and Ong Hock Sim and Raja Azlan Shah F. JJ.) by Orders dated 7th July, 1977 allowed Appeals by the Respondents herein against the said Orders of Ajaib Singh J. dated 8th January, 1976; in Federal Court Civil Appeal Number 19 of 1976 the Federal Court ordered that the Order of 8th January, 1976 be set aside and that the Order of sale dated the 25th day of November, 1975 be restored and in Federal Court Civil Appeal Number 48 of 1976 the said Order for costs made by Ajaib Singh J. against the Second-named Respondent herein was set aside with costs.

Pp. 65 & 80 10

P. 124

Pp. 128 - 129 20

2. That the principal question falling for consideration in this Appeal is whether or not a person with a small interest in the estate of a deceased person is entitled to have set aside an agreement bona fide entered into by a personal representative for the sale of land included in the estate and if so upon what terms.

3. On 15th October, 1973 Letters of Administration with Will Annexed were issued to the Third-named Respondent of the Estate of John David who died on 29th June, 1920 having made and executed his last will on 13th April, 1920. The sole asset of the estate was the land that forms the subject of the instant Appeal. The powers of the Third-named Respondent to deal with the said land were governed by Sections 346 and 347 of the National Land Code (Act 56 of 1965) which provide for the registration of personal representatives and the effects of such registration and the Probate and Administration Act, 1959 (revised - 1972) which, by Section 60, deals with the powers of a personal representative to dispose of property. Under Subsection 4 of that Section an Administrator may not without the previous permission of the Court transfer by sale immovable property vested in him.

30 40

4. By an Ex-parte Originating Summons dated 11th November, 1974 approval of the sale that is the

pp. 1-2

subject of the instant Appeal was sought. This Application was made under Order 55 Rule 3(1) (f) of the Rules of the Supreme Court; this provided that an Administrator could seek the approval of the Court of any sale, purchase, compromise, or other transaction. In support of the said Application an Affidavit sworn by the Second-named Respondent (who held a power of attorney granted by the Third-named Respondent, who at all material times resided in the Republic of Sri Lanka) was filed. In the said Affidavit the Second-named Respondent dealt with the reasons for sale and the beneficial interests in the said estate. He exhibited consents to the proposed sale showing that persons entitled to 12/16ths of the beneficial interests in the said estate were content with the proposed sale. The said Summons came on for hearing having not been served on any person before Ajaib Singh J. on 25th November, 1974, when he made the Order sought. Subsequent to the said Order approving the sale dated the 25th day of November, 1974 the 1st Respondent in compliance therewith and the Agreement of Sale dated 2nd day of September, 1974 firstly paid to the Third Respondent by way of deposit the sum of \$25,000.00, secondly obtained a discharge of a Charge of \$3,000 on the Land and thirdly expended the sum of approximately \$18,300.00 on the said Land. A transfer could not be registered in view of a Caveat lodged by the 1st Appellant on the 9th day of October, 1974.

Pp. 3 - 5

Pp. 15 - 18

Pp. 19 - 20
Pp. 7 - 8 of
Supplementary
Record

P. 57 Ll. 46-54
P. 41 Ll. 9-15
Pp. 46 - 47

5. By Notice of Motion dated 7th February, 1975 the Third-named Appellant sought an Order that the said sale be set aside. In support of the said Notice of Motion the Third-named Respondent filed an Affidavit sworn on 31st January, 1975. The effect of this Affidavit and a full history of the subsequent proceedings is fully set out in the Grounds of Judgment of Ajaib Singh J. dated 27th October, 1976 given in support of the Order made by him on 8th January, 1976 whereby the Learned Judge Ordered that his earlier Order of 25th November, 1974 be set aside. Because the history of the proceedings below is fully set out in the said Judgment at pages 90 - 98 the Respondents do not propose in their case herein to summarise the proceedings herein before delivery of Judgment by the Learned Trial Judge. (It is also convenient to observe that in the Judgment of the Federal Court the history of the proceedings is also set out at pages 109 - 115).

Pp. 20 - 21

6. The Third-named Appellant's motion came on for hearing before Ajaib Singh J. on 19th May, 7th June, 29th August, 1975 and 8th January, 1976, on the last day the Learned Judge ordered, it is respectfully submitted erroneously, that the Order dated the 25th November, 1974 be set aside and that the costs of and incidental to that Application be taxed and paid personally by the Second-named Respondent herein and it was further ordered that the First-named Respondent do pay the costs of the proceedings from the date of his having been made a party to the same to the Third-named Appellant. 10

P. 66 &
P. 80

7. In his Grounds of Judgment delivered (as observed hereinbefore) some ten months after he made the said Order the Learned Judge, after reciting the facts of the case reached various conclusions. It is to be observed that the said conclusions do not depend upon the credibility of the witnesses or upon judicial discretion but upon assertions of law, which are it is respectfully submitted, erroneous. It is therefore respectfully submitted that the Learned Judge's conclusions were amenable to review on Appeal without it being incumbent upon the Respondents herein to show that there has been any error of principle or failure to take due advantage of seeing and hearing the witnesses. 20

8. The Learned Trial Judge held that the failure by the Second-named Respondent herein to disclose the offer of \$56,250 for the said land was in breach of his duty towards the Court. In so finding the Learned Trial Judge, it is respectfully submitted, fell into error and the Respondents adopt the reasoning of Gill C.J. delivering the Judgment of the Federal Court at page 119. 30

Pp. 98 - 99

9. The Learned Trial Judge also, it is respectfully submitted, fell into error in holding 40

P. 99
11.29 - 38

"With regard to the beneficiaries also I came to the conclusion that the attorney made no real attempts to locate all the beneficiaries to the estate and particularly in the case of Elizabeth Muttama he failed to disclose, that there were other beneficiaries of Elizabeth Muttama although on his own admission he said, that he knew, that she had three sons."

The Respondents submit that the approach of the Federal Court (at page 118) that the question of ascertaining the whereabouts of the beneficiaries would only arise when the time came for the estate to be distributed was correct.

10. The Learned Trial Judge then concluded that because of the circumstances of the case and the reasons given in the previous two paragraphs he found that the Original Application was not made in good faith and ought to be set aside. It is respectfully submitted that this conclusion cannot be supported from the material available before the Court and that the Federal Court was correct on Appeal in setting the same aside. P. 99 - 100

11. Prior to the delivery of the Grounds for Judgment by the Learned Trial Judge the Second-named Respondent obtained Leave to Appeal from the Federal Court (Gill, Ag. L.P., Ali, Ag. CJ. Malaya, and Wan Suleiman, F.J.) against the Order that he should be ordered to pay the costs of the proceedings personally by Order dated 5th April, 1976. Thereafter the Second-named Respondents served Notice of Appeal dated 15th April, 1976. A memorandum of Appeal was served on his behalf dated 16th November, 1976. P. 19
P. 88
P. 101 - 105

12. In the meantime an Appeal against the substantive order made by Ajaib Singh J. had been initiated by the First-named Respondent by Notice of Appeal dated 3rd February, 1976 and a Memorandum of Appeal was served on his behalf dated 18th December, 1976. Pp. 80 - 81
Pp. 106 - 107

13. The Appeal against the substantive order to the Federal Court came on for hearing before Gill C.J., Ong Hock Sim and Raja Azlan Shah F. JJ. as Federal Court Civil Appeal Number 19 of 1976. The Judgment of the Court was delivered by Gill C.J. on 7th July, 1977. After reciting the facts giving rise to the Appeal the Learned Judge went on to deal with the conclusions of the Learned Trial Judge. These were set out in full and the Court concluded that even without considering the grounds on which the Appeal had been brought it was in complete disagreement with the reasoning of the Trial Judge. Pp. 109 - 116
Pp. 116 - 117
P. 117
ll. 44 - 48

14. Gill C.J. dealt first with the alleged default of the Second-named Respondent in attempting to locate in full the beneficiaries of the estate and held (as mentioned above) that the sale of an asset was an entirely different question

Pp. 118
ll. 30 - 40

P. 118
ll. 45 - 52

P. 119

to the distribution of the assets of the estate. He further held, it is submitted correctly, that there was no obligation in any event to serve all beneficiaries.

15. Gill C.J. went on to hold that the offer of \$56,250 was irrelevant and that the Trial Judge was wrong in holding that the Application was not made in good faith. It is submitted that Gill C.J. was right in so holding.

16. Gill C.J. went on to consider the position of the First-named Respondent herein and held, it is submitted correctly, that 10

P. 120
ll. 21 - 27

"I am also inclined to agree with the contention on behalf of the Appellant that upon the approval by the Court of the sale agreement the Appellant's rights in the land crystallised and that the administrator thereafter held the land in trust for him."

17. Gill C.J. was also, it is respectfully submitted, correct in holding that the later offer by the First and Second named Appellants for the land was irrelevant. 20

P. 121
ll. 15 - 35

18. The Learned Chief Justice went on to consider the effect of non-service of the original Application upon the Third-named Appellant. It is respectfully submitted that if there was any obligation to serve her (which is denied) the observations of the Learned Chief Justice are correct to the effect that breach of them does not necessarily vitiate the Order, but, it is respectfully submitted, that this point does not fall for consideration in the instant Appeal. In any event, it is respectfully submitted that because the Court had jurisdiction to make the Order approving the sale, that Order was at most voidable. It is respectfully submitted that if the same was voidable it ceased to be so when the 1st Respondent as a bona fide third party relied and acted on it. It is also to be observed that 30

P. 118, 1.51
P. 119, 1.5

Gill C.J. held that the interest of the 3rd Appellant would be very small and that it would be unjust to set aside the order in the circumstances of the instant case. 40

19. The Federal Court then ordered that the Order of sale dated 25th November, 1974 be restored and that the subsequent Order of Ajaib Singh J. be set aside.

P. 124

10 20. Federal Court Civil Appeal Number 48 of 1976 dealt with the Order for costs made personally against the Second-named Respondent herein. Judgment was delivered in that Appeal immediately after that in the Appeal Number 19 and it is respectfully submitted that the said Judgment is correct and, even if the Appeal against the Order made in Appeal Number 19 should succeed that the Order allowing this Appeal should not be interfered with as there is no material, it is respectfully submitted, upon which the Second-named Respondent's conduct as Attorney can be held to be defective.

Pp. 125 - 129

20 21. That when the said Appeals came on for hearing before the Federal Court of Malaysia certain documents had erroneously been omitted from the record before the Court and a Notice of Motion was issued to add the same thereto. No formal Order was made upon this motion but the documents were admitted into evidence by the Federal Court. Those documents relate to the prejudice which would have been suffered if the Federal Court had not allowed the Appeal by the First-named Respondent herein. The said documents form the supplementary record.

30 22. That by Order of the Federal Court (Raja Azlan Shah, Wan Suleiman, and Syed Othman, F.JJ.) final Leave to Appeal to H.M. The Yang dipertuan Agung was granted on the 13th November, 1978 against the Orders made herein by the Federal Court.

Pp. 137 - 138

40 23. That the Respondents respectfully submit that the jurisdiction of the Court in approving a sale by an Administrator is a supervisory one; it is to be exercised so as to prevent any sales that are not apparently to the benefit of the estate being approved. Because a personal representative (other than an administrator) may sell without approval of the Court land vested in him under the National Land Code approval by the Court of proposed sales should only be withheld if, in the Court's view, there is some overriding consideration that makes the proposed transaction inappropriate. It is respectfully submitted that in only exceptional cases should approval, once given, to a proposed sale be set aside. Such exceptional circumstances are, in the Respondents respectful submission, effectively limited to cases of fraud.

24. The Respondents respectfully submit that the Appeal herein should be dismissed with costs for the following among other

R E A S O N S

- (1) BECAUSE the Learned Trial Judge was wrong
- (2) BECAUSE the Judges of the Federal Court were right
- (3) BECAUSE approval of a sale of land by an administrator should only be set aside in exceptional circumstances and in the instant case there are no such exceptional circumstances.
- (4) BECAUSE in the instant case the first Respondent as a bona fide purchaser for value had acquired proprietary rights, under the Order approving the sale, issued by a Court of competent jurisdiction.

10

NIGEL MURRAY

No. 1 of 1980

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

1. GAN KHAY BENG
 2. BEE CHUAN RUBBER FACTORY SDN. BHD.
 3. FELIXIA d/o Varnakulasinghe
- Appellants

- and -

1. NG LIT CHENG alias NG YAM CHEE
 2. E.P.E. ANANDA
 3. JOSEPH JACOB DAVID also known as
JACOB JOSEPH as Administrator with
Will annexed of the Estate of
John David deceased
- Respondents

CASE FOR THE RESPONDENTS

SMILES & CO.,
15 Bedford Row,
London WCLR 4EF

Ref: P/CC/6