

39/82

No. 32 of 1981

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT IN MALAYSIA

B E T W E E N :

PL. AR. LETCHUMANAN CHETTIAR
@ AR LAKSHMANAN
@ ANA RUNA LEYNA LAKSHMANAN CHETTIAR
(Plaintiff) Appellant

- and -

10 AR. PL. PALANIAPPA CHETTIAR
(Defendant) Respondent

CASE FOR THE RESPONDENT

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|----|---|--|
| 1. | This is an appeal from an Order dated 1st October 1980 of the Federal Court in Malaysia holden at Kuala Lumpur (Rajah Azlan Shah AG Lord President and Syed Othman and Saleh Abbas F. JJ.) allowing with costs the Respondent's appeal from the decision of Ajaib Singh J. given at Seremban on 22nd August 1979 whereby it was ordered that the Registrar of Titles, Negri Sembilan (hereinafter called "the Registrar") should remove and cancel the Caveat (hereinafter called "the Caveat") | <u>Record</u>
p. 26 l. 1 -
p. 27 l. 19 |
| 20 | Presentation No. 102806 Vol. XXXI Folio 40 registered in the Land Registry on 27th March 1958 vide Order of Court dated 17th March 1958 and that the costs of and incidental to the Appellant's application be taxed and paid out of the proceeds of sale therein mentioned as a first charge thereto. | pp. 22-23
p. 19 -
p. 20 l. 10 |
| | 2. The question for decision is whether or not the Caveat should be removed and cancelled. | p. 11 -
p. 12 l. 11 |

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p. 4 l. 44	3.	The parties are step-brothers and the sons of PL,AR Arunasalam Chettiar (hereinafter called "the Karta") who died on 19th November 1972 and who before his death had been the Karta or manager of the Hindu Joint Family of the PL,AR. Firm (hereinafter called "the PL,AR. Firm") at Port Dickson in Malaysia consisting of the Karta, the Respondent and the Appellant. The Respondent is the Karta's elder son; the Appellant is his younger son by his wife Meenakshi Achi (hereinafter called "Meenakshi"). In 1973 the Appellant commenced Probate Suit No.1 of 1973 (hereinafter called "the probate action") in the High Court at Seremban, which the Respondent contested, seeking probate of the Karta's Will. On 22nd January 1977 the High Court ordered that probate of the said Will be granted to the Appellant except that the Karta's one-third share in the Hindu Joint Family be excluded, and form part of the Karta's estate on intestacy. The Appellant appealed against this decision to the Federal Court in Malaysia, which on 24th September 1977 allowed the appeal, ordering that probate of the said Will be granted to the Appellant "subject to the proviso that before disposing of or distributing any property bequeathed under the Will or the proceeds of such property, there shall be an order to that effect".	10
p. 3 ll. 24-28			
p. 3 ll. 29-39			
p. 3 l. 40 - p. 4 l. 4			20
p. 4 l. 1 - p. 5 l. 10	4.	Amongst the many properties held in the Karta's name at his death was the land held under grant No. 8457, Lot 538, comprising 16a.1r.01p. in area situated in the Town and District of Port Dickson in Malaysia (hereinafter called "Lot 538"). On 25th November 1978 the Appellant took out a summons in chambers in the probate action as executor of the Karta's estate for (inter alia) leave of the Court to sell Lot 538 at a minimum price of \$1.75 per square foot, making a total sale price of \$1,239,213.50, and that after settling revenue liabilities the net proceeds of sale be divided as to two-thirds for the Appellant and as to one third for the Respondent.	30
pp. 1-2			
pp. 3-5 p. 3 ll. 19-33	5.	The Appellant filed an affidavit dated 21st November 1978 in support of this application. He stated therein that if he sold Lot 538, he undertook to pay off the taxes and outgoings in respect of the one-third shares therein of himself, the Karta's estate and the Respondent, and to pay the Respondent's share to him or his solicitors, or otherwise to the Court or the Public Trustee in trust for the Respondent. The reason which the Appellant gave for his application for sale was that his family's landed	40
p. 4 ll. 34-45			

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property in Malaya had been seized and put into the hands of a receiver in late 1964, since when the Karta, until his death, and he himself had had to live on borrowed money.

6. On 5th February 1979 the High Court made an order by consent (hereinafter called "the 1979 Order") in the probate action granting the Appellant leave to sell Lot 538 in the terms of his summons dated 25th November 1978.

p. 5 l. 23 -
p. 6 l. 40
pp. 1-2

10 7. On 30th June 1979 the Appellant took out another summons in chambers in the probate action as executor of the deceased's estate, for an order that the Registrar remove and cancel the Caveat. He filed an affidavit dated 19th June 1979 in support of this application in which he stated that only after the 1979 Order did he discover that Lot 538 was subject to the Caveat. The Respondent had registered it in 1951 and it had been extended by a consent order dated 17th March 1958 (hereinafter called "the 1958 Order") until further order in Civil Suit No. 34 of 1951 (hereinafter called "the 1951 Suit"). The Appellant stated in paragraph 6 of his said affidavit that at the time of the 1979 Order neither he, nor his Counsel, nor the Respondent's Counsel were aware of the existence of the Caveat. On becoming aware of it, the Appellant's solicitors wrote to the Respondent's solicitors a letter dated 19th April 1979 asking them to consent to its withdrawal. The Respondent's solicitors replied by a letter dated 24th April 1979 alleging that the deceased had mismanaged the PL,AR. Firm; that a considerable sum of money was due from the deceased's estate to the Respondent; and that the Respondent would only agree to withdraw the Caveat if the Karta's share of the proceeds of Lot 538 were put in a bank on fixed deposit as security until final accounts were taken in the 1951 Suit, and the amount to which the Respondent was entitled from the Karta's estate was ascertained. Further correspondence did not alter the Respondent's stand in the matter.

p. 6 l. 43 -
p. 7 l. 40
pp. 8-10
p. 9 ll. 7-18
p. 19 -
p. 20 l. 11
p. 9 ll. 19-27
p. 12 l. 30 -
p. 13 l. 13
p. 13 l. 26 -
p. 14 l. 13
p. 10 ll. 7-10
and p. 14 l. 26
- p. 15 l. 41
p. 10 ll. 11-18

40 8. The Appellant also stated in his said affidavit that he objected to the condition that the Karta's share should be placed on deposit, claiming that the Respondent's allegations of mismanagement were unfounded and that "the Privy Council in its decision had held otherwise". He said that the Respondent had already succeeded in his claim against the Karta for a third share of the Hindu Joint Family property, that the accounts ordered by the Privy Council had long been filed, but the Respondent had

p. 10 ll. 19-31

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not taken or challenged them in Court and that the Respondent's present demands were vicious, unreasonable and illogical.

- p.16 l.18 - 9. The Respondent filed an affidavit in reply dated
p.18 l.40 13th July 1979. He stated that the 1979 Order could not
p.16 ll.35-38 in any way affect the Caveat, which had been entered in
p.17 ll.11-18 the following circumstances. On 20th and 21st March
1951 the Respondent lodged caveats on some 35 titles of
land registered in the Karta's name, one of which was
p.17 ll.29-43 Lot 538. On 2nd April 1951 the Respondent began the 10
1951 Suit in the High Court at Seremban against the
Karta, the Appellant and Meenakshi claiming, inter alia,
(a) a declaration that all properties movable or immovable,
held by or in the name of the Karta or Meenakshi belong to
the Hindu Joint Family (b) an account of the amounts due
to the Respondent from the Hindu Joint Family estate or
from the Karta and (c) an inquiry to ascertain what part
of the amounts found due to the Respondent should be paid
from the Hindu Joint Family estate and what part thereof
should be paid by the Karta. 20
- p.11 l.1 - 10. On 17th March 1958 the High Court made the 1958
p.12 l.13 Order by consent of the parties to the 1951 Suit that the
Caveat Presentation No. 102806 Volume XXXI Folio 40
against the various titles specified therein, including
p.11 ll.24-41 Grant No. 8457 for Lot 538, "be withdrawn with the
exception of Grant No. 8457 for Lot 538". It was also
ordered by consent that the Caveat "do remain registered
until further order of the Court against the said Grant No.
p.11 l.41 - 8457 for Lot 538" and that another caveat against various
p.12 l.5 other properties be withdrawn. 30
- p.17 ll.19-20 11. The Respondent, as he stated in his said affidavit
in reply, consented to the removal of caveats on the titles
to the numerous properties set out in the 1958 Order
because Lot 538 was the most valuable of all the properties
whose ownership was in issue and the caveats on the titles
of Lot 538 and four other specified properties were con-
sidered enough security for his claims in the 1951 Suit.
p.17 l.44 - The Respondent went on to state that after the institution
p.18 l.15 of the 1951 Suit the Karta and the Appellant had sold
properties belonging to the PL. AR. Firm to his detri- 40
ment, wrongfully and at an undervalue, causing him loss
for which he should be compensated; that after the
institution of the 1951 Suit the Karta wrongfully spent
considerable sums of money out of the PL. AR. Firm's
assets, thereby causing loss to the Respondent; that the

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- Appellant had borrowed large sums of money from the PL,AR. Firm after 1950 for which he should account to the Respondent; and that the PL,AR. Firm's assets would not be enough to cover the amounts due to the Respondent when accounts were taken. The Respondent said that he was in straitened circumstances and anxious to conclude all proceedings, but that the Appellant had colluded with the Karta in causing the Respondent loss and as the Appellant was not separated from the Hindu Joint Family he was equally liable with the Karta. The Respondent concluded that it would be premature to order the removal of the Caveat before final accounts are taken and in any event the application for its removal could not be made in the probate action.
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12. It should be explained that the Privy Council's decision mentioned by the Appellant arose out of the 1951 Suit and is reported as PL. Arunasalam Chettiar and others v. AR. PL. Palaniappa Chettiar, Privy Council Appeal No. 17 of 1969, at 1974 2 M.L.J. pp.134. The Privy Council, allowing an appeal from the Federal Court of Malaysia reported at 1969 1 M.L.J. pp.55-59, decided that the date from which accounts should be supplied, following the petition of the Hindu Joint Family, was 15th July 1950 and that the case should be remitted to the High Court for further directions as to the accounts.
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13. On 6th August 1979 Ajaib Singh J. heard the Appellant's summons dated 30th June 1979 in Chambers and made an order in the terms of the summons.
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14. On 22nd August 1979 the summons came before the learned Judge in open Court. At the hearing the Respondent's Counsel conceded that the 1979 Order was made by consent but pointed out that the Caveat was entered in the 1951 Suit not the probate action. He referred to and accepted as correct paragraph 6 of the Appellant's affidavit dated 19th June 1979 (mentioned above). He then submitted that Lot 538 was the most valuable piece of land in the deceased's name and if the Caveat were removed the land would be sold; that the Respondent's security for his claim to a share (i.e. as claimed in the 1951 Suit) should be considered; that the issue of the removal of the Caveat should be judged in the context of the 1951 Suit, having regard to the fact that accounts in that case had not yet been taken; and that the Respondent's consent was only to the sale of Lot 538, not to the removal of the Caveat. The Respondent's Counsel submitted in the
- 40
- p. 18 ll. 16-25
- p. 18 ll. 26-30
- p. 20 ll. 18-37
- p. 21
p. 21 ll. 15-18
- p. 21 ll. 19-20
- p. 21 ll. 21-27
- p. 21 ll. 28-30

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alternative that, if Lot 538 were sold, the money realised on sale should be deposited in Court pending what is due to the parties in the 1951 Suit.

p. 21 l. 32
p. 19 l. 1 -
p. 20 l. 11
pp. 22-23

15. Ajaib Singh J. however, confirmed his order of 6th August 1979 that the Registrar should remove and cancel the Caveat. On 27th September 1979 the learned Judge gave the grounds of his judgment and said :-

p. 23 ll. 1-14

"In my view the defendant's refusal to vacate the caveat was not justifiable. He was now placing obstacles to thwart the order to which he had consented on February 5, 1979, Mr. A.D. Rajah for the defendant also submitted that the present application to vacate the caveat should have been made in Civil Suit No. 34 of 1951 and not in the present Originating Summons because the caveat was entered in relation to the litigation commenced in the Civil Suit. With respect, I do not think there is any substance in this contention as the subject matter of the litigation in Civil Suit No. 34 of 1951 also related to the land which was ordered to be sold in the present Originating Summons. In the circumstances therefore I made an order in terms of the Plaintiff's application for the removal of the caveat."

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pp. 24-25

16. On the 19th October 1979 the Respondent lodged a memorandum of appeal from the whole of this decision, setting out the grounds of appeal. After hearing argument the Federal Court on 1st October 1980 allowed the Respondent's appeal with costs. On 30th March 1981 the judgment of the Federal Court was given by Syed Othman, F.J.

p. 26 -
p. 27 l. 9
pp. 28-31

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17. After summarising the circumstances of the Appellant's application for the removal of the Caveat the Federal Court cited the passage of Ajaib Singh J's judgment set out above and said :-

p. 30 ll. 24-38

"From the above it is clear that the only reason for removing the caveat was that the consent given in the Originating Summons should also be taken as consent to remove the caveat without the need to consider the grounds for the caveat having been lodged in the Civil Suit. We are inclined to think that the learned trial Judge should have

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10 considered these grounds by themselves before ordering its removal, as it is not disputed that when the consent was given the parties' minds were not directed to the caveat. Indeed the trial Court itself was unaware of the caveat. The consent given in the circumstances must be treated as being subject to the legal limitations and encumbrances under the title, more so when in applying for the order for sale no mention was made of any limitation and encumbrance."

18. The Federal Court also held that the trial Court should have dealt specifically with the Respondent's offer to agree to the withdrawal of the Caveat if the Karta's one-third share were deposited in a bank until the accounts were taken, having regard to the 1951 Suit which was still pending and that the Privy Council had ordered the taking of accounts. The Federal Court then pointed out that in seeking the order for sale the Appellant did not show how he intended to dispose of the Karta's share or why he objected to depositing it in a bank until the disposal of the 1951 Suit, but in his affidavit only met the Respondent's request with vehement words rather than acceptable reasons. The Federal Court said that in considering the request, enquiry should have been made whether it would have been sufficient to deposit part only of the Karta's share in a bank. Finally, although the Appellant had rendered accounts and the Respondent might have delayed in taking them, the Federal Court said that the Appellant had not shown whether he had tried to expedite the taking of accounts or whether the accounts so far rendered were favourable or adverse to the Respondent. There was no dispute that Lot 538 was the most valuable of the properties involved.

p. 30 ll. 38-45

p. 30 ll. 46-53

p. 31 ll. 1-4

p. 31 ll. 5-16

19. The Federal Court therefore concluded that the trial Court had not considered many factors concerning the Caveat and that from the evidence available the considerations in favour of maintaining it outweighed the considerations so far shown in favour of removing it; they therefore restored it.

p. 31 ll. 19-24

20. The Appellant being dissatisfied with the said judgment of the Federal Court applied for leave to appeal therefrom and by an Order dated 19th May 1981 the said Court granted the Appellant final leave to appeal to His Majesty the Yang di-Pertuan Agong.

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21. The Respondent respectfully submits that this appeal should be dismissed with costs for the following amongst other

R E A S O N S

- (1) BECAUSE by the 1958 Order the Caveat was to remain registered until further order of the Court and no such order has been made in the 1951 Suit.
- (2) BECAUSE any application by the Appellant for the removal of the Caveat should have been made in the 1951 Suit and not the probate action, particularly as the parties in the two proceedings are not the same. 10
- (3) BECAUSE the 1979 Order should be construed having regard to the circumstances in which it was made and, so construed, should only be taken as authorising a sale of Lot 538 subject to the Caveat.
- (4) BECAUSE when the 1979 Order was made the existence of the Caveat had been completely overlooked. 20
- (5) BECAUSE the Respondent's claims in the 1951 Suit and the fact that he had succeeded in his claims for a third share of the Hindu Joint Family property and for accounts show that he had and still has an interest or claim in relation to Lot 538 which it is proper to protect by caveat.
- (6) BECAUSE proceedings are still pending and accounts have still to be taken in the 1951 Suit. 30
- (7) BECAUSE the Respondent agreed in 1958 to withdraw caveats entered by him against other properties, in reliance on the fact that the Caveat would remain on the title of Lot 538, since it was the most valuable property in the Karta's name and, with four other properties, would provide enough security for his claims in the 1951 Suit; and accordingly it would be inequitable to the 40

Respondent if the Caveat were now vacated.

(8) BECAUSE Ajaib Singh J. was wrong in taking the Respondent's consent on 5th February 1979 to an order for sale as consent to, or alternatively sufficient grounds for, the removal of the Caveat, and in not giving weight to the Respondent's evidence and reasons in favour of maintaining the Caveat.

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(9) BECAUSE Ajaib Singh J. was wrong in rejecting the Respondent's submission that an application to vacate the Caveat should have been made in the 1951 Suit and not the probate action.

(10) BECAUSE the judgment of the Federal Court was right.

STEPHEN HUNT

No. 32 of 1981

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

ON APPEAL
FROM THE FEDERAL COURT IN
MALAYSIA

BETWEEN :

CHETTIAR & ORS

- and -

AR. PL. PALANIAPPA CHETTIAR

CASE FOR THE RESPONDENT

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56/52/J4316