4/1962

Appeal No.13 of 1961

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL
FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA
IN THE COURT OF APPEAL AT KUALA LUMPUR

IN THE ESTATE OF P.N.ST.SITHAMBARAM CHETTIAR alias PR.A. Sithambaram Chettiar alias Sithambaram Chettiar alias P.N. ST.Sithamparam Chettiar son of Nallakaruppan Chettiar deceased.

B E T W E E N

P.N.CT. GANAPATHY CHETTIAR — Appellant

- and -

PR.SP. PERIAKARUPPAN CHETTIAR and P.N.ST. NALLAKARUPPAN CHETTIAR — Respondents

CASE FOR THE RESPONDENTS

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1. This is a consolidated Appeal from Orders dated the 6th October 1960 and the 12th December 1960, of the Court of Appeal at Kuala Lumpur of the Supreme Court of the Federation of Malaya pursuant to leave granted by the said Court on 17th April 1960. — pp.44 and 53-4; pp.58-59

2. The Order dated 6th October 1960 allowed with costs against the Appellant personally the Respondents' appeal from an Order of the High Court at Kuala Lumpur dated 20th June 1960 which dismissed with costs the Respondents' application for an Order of the High Court at Kuala Lumpur dated 25th April 1960 to be either set aside or varied. — p.25; p.12

3. The Order dated 12th December 1960 dismissed with costs against the Appellant personally the Appellant's motion for a review and variation of the Judgment delivered by the Court of Appeal on the 6th October 1960.

4. The primary question for decision on this Appeal insofar as it relates to the Order dated 6th October 1960 is whether, as the Respondents contend

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and the Court of Appeal have held, the Order of the High Court at Kuala Lumpur dated 25th April 1960 should be set aside as a nullity on the ground that neither the Respondents nor any person having a parity of interest with them had been made parties to the proceedings in which the Order was made.

5. The primary question for decision on this Appeal insofar as it relates to the Order dated 12th December 1960 is whether (as the Respondents contend it was) the Court of Appeal was correct in either law or in fact in refusing to review its previous Judgment in the light of what the Appellant claimed appeared "to be an error that.....crept into the consideration of the matter by the Court of Appeal".

p.45 lines 11-13

6. The Appellant is the Administrator of the Estate of P.N.ST. Sithambaram Chettiar alias PR.A Sithambaram Chettiar alias Sithambaram Chettiar alias P.N.ST. Sithamparam Chettiar (hereinafter called "the deceased") who died intestate on 8th March 1954. Letters of Administration were granted to the Appellant on 30th April 1957.

pp.1-2

7. At the time of his death the deceased was a partner in a moneylending firm known as N.P.R.of which the other partners were P.N.P.Nallakaruppan Chettiar, P.N.P. Vairavan Chettiar, S.P. Krishnappa Chettiar and the first named Respondent.

p.7 lines 21-26

8. At the time of his death the deceased was the registered proprietor of undivided 19/24 Shares in each of two pieces of land held under Selangor Grants Nos.5558 and 6468 for Lots Nos.990 and 1308 in the Mukim of Cheras in the district of Ulu Langat and which contained a total area of 153 acres, 3 roods,20 poles. The two undivided 19/24 Shares in the two pieces of land were the property of the firm known as N.P.R.

p.7 lines 29-37

p.13 lines 16-17

9. The Appellant at some date subsequent to obtaining the Letters of Administration applied to and became the registered proprietor of the undivided 19/24 Shares in each of the two pieces of land. He was so registered "as representative" in accordance with Section 155 of the Land Code.

p.37 lines 23-25

10. The second named Respondent is a son of the deceased, and is beneficially entitled to a share

p.16 lines 17-23

in the deceased's estate. Record

11. By a letter dated 7th October 1959 P.N.P. Nallakaruppan Chettiar, P.N.P. Vairavan Chettiar and S.P. Krishnappa Chettiar consented, subject to his obtaining the approval of the first named Respondent, to the Appellant selling the undivided 19/24 Shares in each of the two pieces of land at any price in excess of $850 an acre. On the 31st March 1960 the Appellant entered into an Agreement to sell the undivided 19/24 Shares in each of the two pieces of land subject to the approval of the Court at a price of $900 an acre. p.62 lines 33-40; p.8 lines 19-25; pp.69-71

12. On the 20th April 1960 an ex parte Originating Summons was taken out on behalf of the Appellant in the High Court at Kuala Lumpur for an Order that the Appellant as Administrator of the Estate of the deceased be at liberty to sell the undivided 19/24 Shares in each of the two pieces of land in accordance with the Agreement into which he had entered on 31st March. The Summons stated that the application would be supported by an affidavit affirmed by the Appellant on 14th April 1960. It was stated (inter alia) in the said affidavit that the first named Respondent had on or about the 20th October 1959 orally consented to a sale at a price in excess of $850 an acre. A copy of the Summons and a copy of the affidavit in support were sent to the first named Respondent but did not reach him until 25th April 1960. p.9; p.8 lines 16-18; p.14 lines 21-27

13. The second named Respondent had on the 12th April 1960 written to the Senior Assistant Registrar of the Supreme Court at Kuala Lumpur requesting that the Appellant be directed to serve the second named Respondent with any application made by the Appellant for leave to sell (inter alia) the undivided 19/24 Shares in each of the two pieces of land. On the 21st April 1960 the Senior Assistant Registrar replied to the second named Respondent stating that the Originating Summons referred to in paragraph 12 of this Case had been taken out and that the Senior Assistant Registrar had no power to direct that the second named Respondent should be served therewith. p.6; pp.9-10

14. On April 25th, 1960 the Summons came on for hearing before Adams J. The second named Respondent was present in Court, but the first named Respondent who had proceeded to the Court building immediately upon receipt of the copy Originating Summons and p.11 lines 8 and 16

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p.14 lines 27-34 copy affidavit in support was advised by a member of the Court staff that he could not be present at the hearing of the Summons because he was not a party to it. After reading the Appellant's affidavit and hearing Counsel for the Appellant, Adams J. made an Order in the terms sought.

p.12

15. On 23rd May 1960 a Notice of Motion was taken out on behalf of the Respondents for an Order that the Order made by Adams J. should be set aside or alternatively that it should be varied to provide for liberty to the Appellant to sell the undivided 19/24 Shares in each of the two pieces of land at a price of not less than $1000 an acre. The Notice of Motion stated that the application would be supported by affidavits affirmed by the Respondents on 12th May 1960. In his affidavit the first named Respondent (inter alia) denied that he had at any time given his consent to the sale of the undivided 19/24 Shares in the two pieces of land at a price of $900 an acre; and stated that he had since 25th April 1960 obtained a purchaser who was willing to purchase at a price of $1000 an acre and that $900 an acre was not the best possible price. In his affidavit the second named Respondent stated (inter alia) that he had never been consulted by the Appellant concerning a sale of the undivided 19/24 Shares in each of the two pieces of land. On the 18th June, 1960 the Appellant filed an affidavit in reply to the first Respondent's affidavit.

p.18

p.14 lines 11-15

p.14 lines 41- p.15 line 2

p.16 lines 28-31

pp.19-22

16. On 20th June 1960 the Motion came on for hearing before Adams J. The contentions of the Respondents so far as presently material were and still are:

(i) That the Appellant's application was made in pursuance of Section 60(4) of the Probate and Administration Ordinance which provides:

"An administrator may not, without the previous permission of the Court -

(a) mortgage, charge or transfer by sale, gift exchange or otherwise any immovable property situate in any State other than the States of Penang and Malacca and for the time being vested in him".

(ii) That the application was an application

within the scope of Order 55 rule 3 which provides (so far as relevant): Record

"The.....administrators of a deceased person or any of them.....may take out, as of course, an originating Summons....for such relief of the nature or kind following as may by the Summons be specified and as the circumstances of the case may require, (that is to say) the determination, without an administration of the estate...of any of the following questions or matters:-

(f) the approval of any sale....."

(iii) That the Originating Summons embodying the Appellant's application should have been served in accordance with Order 55 rule 5 which provides (so far as relevant):

"The person to be served with the Summons under the last two preceeding rules in the first instances shall be the following; (that is to say):

A. Where the Summons is taken out by an..... administrator.....

(a) for the determination of any question, under sub-sections (a), (e), (f) or (g) of rule 3, the persons, or one of the persons, whose rights or interests are sought to be affected".

(iv) That the surviving partners in the firm known as N.P.R. and the beneficiaries in the deceased's estate were persons whose rights or interests were sought to be affected by the proposed sale.

(v) That by reason of the failure to serve any of the persons referred to in the preceeding sub-paragraph the Order of 25th April 1960 should be set aside as a nullity or should be set aside as irregular in order that a better price could be obtained for the undivided 19/24 Shares in each of the two pieces of land.

17. Adams J. dismissed the Respondents' application with costs. The material portions of the Grounds of Judgment are as follows:

"The second ground was that none of the partners for whom the land was held in trust nor PN.ST. p.28 line 47-

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p.29 line 27

Nallakaruppan Chettiar who is a beneficiary in the estate of the deceased were served under provisions of order 55 r.5(a) with copies of the proceedings.

Mr. Peddie argued that this was a fatal defect and therefore that the order must be set aside. He cited in support of this In the Estate of Haji Fatimah binti Haji Abdul Samat, VI.F.M.S.L.R. 154. But in the present case Mr.Ramani pointed out that it must be appreciated that what was being dealt with here was partnership property and that, although the beneficiaries to the deceased's estate, that is to say, the administrator and his brother the said PN.ST.Nallakaruppan Chettiar would eventually benefit indirectly from the sale when the assets of the partnership come to be distributed among the surviving partners and the administrator of the deceased partner, what the administrator was seeking to do was to sell a piece of partnership property to enable the partnership to be wound up for the benefit of the surviving partners for whom and for himself the deceased held the land in trust. On this ground I do not think that PN.ST. Nallakaruppan Chettiar has any immediate right or interest in this property at all, and any right he has is contingent on the result of the winding up of the partnership. I do not think that he should have been served with a copy of the originating summons under 0.55 r.5(a).

On my reading of Order 55 r.3 and r.5 I am of the opinion that although all the partners including PR.SP. Periakaruppan Chettiar were well aware of what was going on and that although I am satisfied that PR.SP.Periakaruppan Chettiar had already given his consent verbally to the sale of the property to the purchasers at $900 an acre pursuant to the instructions contained in the letter dated 7th October, 1959 (Exhibit "A" to Encl.1), technically he should have been served under 0.55 r.5(a) with the summons.

The question therefore arose whether or not I should set the order of the 25th April aside or vary it as Mr. Peddie asked me. Mr.Peddie cited the case of Che Ah and Che Yang Kelsom vs. Che Ahmad reported in (1941) 10 M.L.J. 126. Mr. Peddie pointed out there had been no independent valuation in this case and that

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when the purchaser made the contract he well knew that it was subject to the approval of the Court. However the facts in Che Ah's case are very different from the present one. It may be noted that in that case before the application was heard two of the beneficiaries brought to the notice of the Court that they had received an offer of $14,000 as against the sum of $12,777.50 for which the approval was asked. In this case, although the only partner in this country and the agent of the firm were well aware of the proposed sale, no steps at any time were taken to notify the administrator's solicitors that the price was too low. It is obvious that at the time that the contract was made and at the time the order was made the price was a fair one, the price of rubber being what it was at that time. As Terrell, J.A. said in Che Ah's case:

> "In all these cases the duty of the Court is to protect the rights of the parties who have an interest in the property to be sold, and it is a matter for the discretion of the Judge whether the sale should be by public auction or whether the Court is satisfied that, in a private sale, the highest price can be obtained. Where in an application under the Federated Malay States procedure all the beneficiaries are sui juris and have consented the Court will be entitled to assume that the price offered is the best obtainable".

and I do not think that this is a proper case in which to interfere with the order of the 25th of April. The Indian partners agreed to a sale at a figure of over $850. The partners in the Federation are sui juris and were fully aware, through their solicitors of what was happening and took no steps to protest. The contract was already entered into at a time when the price of rubber was lower than it was at the time of the subsequent offer. I was satisfied that the original offer was a fair one made by someone willing and able to complete. By the provisions of 0.70 the order made on the 25th April is not void, and taking all the circumstances of this case into consideration a fair bargain was struck and I do not think that the duty of the Court to protect the interests of the beneficiaries extends to setting aside an order which will have the effect of setting aside a perfectly fair

p.31 line 20

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contract because now owing to an enhanced price of rubber the value of the estate has risen."

18. The Respondents appealed against the decision of Adams J. to the Court of Appeal, and the Appeal came on for hearing on 5th October 1960 before Thomson, C.J., Hill, J.A., and Ong, J. On the 6th October 1960 the Court of Appeal unanimously allowed the Appeal with costs against the Appellant personally and set aside the Order of 25th April 1960 as a nullity. The material passages in the Judgment of Thomson, C.J. (with whom Hill, J.A. and Ong, J. agreed) are as follows:

p.41 line 44- p.42 line 19

"Rightly or wrongly the administrator had acted under section 155 of the Land Code and in consequence the land had become vested in him as administrator.

In my opinion it follows that any application to the Court for approval of a sale was an application within the scope of Order 55 rule 3(f) as being an application by an administrator for approval of a sale. It has been argued that by virtue of Order 72 rule 2 the application should have been treated as having been made under section 472 of the now repealed Civil Procedure Code (F.M.S. Cap.7). But to my mind that argument is without substance. Order 55 rule 3 contains nothing new, it merely re-enacts the provisions of section 467 of the old Code and section 472 of the Code only had application where section 467 did not apply.

It would then seem to follow that the question of service was governed by the provisions of Order 55 rule 5.A(a).

p.42 line 31-

The question then arises whether in all the circumstances of the present case P.N.ST. Nallakaruppan was a person whose "rights or interests" were "sought to be affected".

In my view he was. It is true that the beneficiary of the estate of a deceased person has no "interest" in any specific piece of property which is vested in the administrator in the sense that he has no real interest in any such piece of property. (See Lord Sudeley v. The Attorney-General (1897) A.C.11) But I do not think the word in the rule can

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be interpreted in the strictly technical sense of a real interest. To my mind the word is used in a less technical sense, in the sense that he should have a pecuniary and patrimonial interest in that he will in due course become entitled to a share in the ultimate net product of the estate, in what is left after the assets have been realised and the liabilities discharged. On any other interpretation it would never be necessary to serve any beneficiary for no beneficiary in an intestacy could have any other sort of right. p.43 line 46

After all any step taken by the administrator by way of administering the estate will affect the ultimate amount of each beneficiary's ultimate share, particularly where that step consists in selling any property it cannot but affect that result. In the present case the former partners of the deceased had no doubt an interest that was much greater in value than that of the beneficiary. Nevertheless the price for which the land was sold was something which would affect the amount which ultimately came to him and thus the question of sale was something that did affect his interests within the meaning of the rule. Perhaps in view of the reference that has been made to the cases of Re King (1907) 1 Ch. 72 and Sethuramaswamy 1950 M.L.J. 300. I should add that there was nothing contingent about that interest. No doubt the value of what was to come to him was subject to all sorts of chances and contingencies but the fact that something was to come was not subject to any contingency.

In the circumstances I am of the opinion that Adams, J., should have followed the decision of this Court in the case of Haji Fatimah binti Haji Abdul Samat 6 F.M.S.L.R. 154 and set his original order aside. As I said ten years ago in the case of Sethuramaswamy (Supra) the report of Fatimah's case is not very satisfactory. Nevertheless the effect of that decision has been known to the profession and followed by Judges for thirty years and it would be a great misfortune if anything were done now to weaken its force. At this stage any question as to its being wrongly decided will have to be taken elsewhere.

I would then allow the appeal and in the light

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of the case of Craig v. Kanseen (1943) 1 A.E.R. 108 I think the proper course would be simply to say that the Order of 25th April, 1960, is a nullity and to set it aside. As regards costs I consider these should be borne by the administrator personally."

The Learned Chief Justice did not find it necessary to express any opinion upon whether or not the first named Respondent should have been served.

pp.46-47

19. On the 12th December 1960 the Appellant's Counsel moved the Court of Appeal pursuant to a Notice of Motion filed on the 10th October, 1960 for an Order that the Judgment delivered on 6th October 1960 be reviewed and varied on the grounds and for the reasons stated in an affidavit affirmed by the Appellant's Counsel on the 10th October 1960. The affidavit stated

p.45 lines 10-14

that what appeared to be an error had crept into the consideration of the matter by the Court of Appeal; that the second named Respondent had been present in Court on 25th April 1960 and that he (the second named Respondent) had been informed by Adams J. that at that stage he (Adams J.) was dealing with the sale of partnership property

p.45 lines 15-30

and that as and when the share belonging to the estate is ascertained he could apply to the Court for any necessary reliefs.

20. On the 12th December 1960 the Court of Appeal dismissed the application with costs against the Appellant personally.

21. The Respondents respectfully submit that the Court of Appeal was correct in dismissing the application in that the Affidavit affirmed by the Appellant's Counsel contained no matter which either in point of law or in point of fact warranted or justified a review or variation of the decision.

22. The Respondents respectfully submit that the Court of Appeal was correct in ordering that the costs of the Appeal and of the Application of December 12th, 1960, should be paid by the Appellant personally rather than that the costs should come out of the deceased's estate or of the partnership assets as was suggested on

p.46 lines 9-16

behalf of the Appellant in relation to the application of December 12th, 1960.

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The Appellant's opposition to the Appeal and his attempt to obtain a review of the Court of Appeal's judgment were contrary to his duty to the estate and could not have benefited the surviving partners in the firm known as N.P.R. in that the success of the Appeal would enable the two pieces of land to be sold at a price in excess of that which the Appellant had obtained. Moreover an award of costs out of the estate would have penalised the beneficiaries (including the second-named Respondent) whose interests the Appellant had ignored in taking ex parte proceedings.

23. The Respondents humbly submit that this Appeal should be dismissed with costs for the following among other

R E A S O N S

1. Because the application embodied in the Originating Summons taken out on the 20th April, 1960 was an application under Order 55 rule 3(f) and both the first and second named Respondents should have been served therewith.

2. Because the failure to serve the first and second named Respondents either made the proceedings before Adams J. on April 25, 1960 a nullity or alternatively made them irregular in which event they ought in the circumstances to be set aside.

3. Because the Orders of the Court of Appeal which are appealed from are right.

MICHAEL MANN