Privy Council Appeal No. 13 *of* 1961

P. N. CT. Ganapathy Chettiar – – – – – – *Appellant*

v.

PR. SP. Periakaruppan Chettiar and another – – – *Respondents*

FROM

THE SUPREME COURT OF THE FEDERATION OF MALAYA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH FEBRUARY 1962

Present at the Hearing:

LORD RADCLIFFE.

LORD HODSON.

LORD DEVLIN.

[*Delivered by* LORD RADCLIFFE]

This consolidated appeal asks for the reversal of two judgments of the Supreme Court of the Federation of Malaya in the Court of Appeal at Kuala Lumpur. The first of those judgments was given on the 6th October, 1960 and reversed an order made by Adams, J. in the High Court at Kuala Lumpur: the second was given on the 12th December, 1960 and dismissed a motion by the appellant to have the Court's judgment of the 6th October reviewed and varied.

The merits of the appeal can be determined upon a consideration of the first judgment. No separate reasons were given for the second and it can be taken that, if the first was justified, so was the second: if the first is upset, so should be the second.

The order of the High Court which has been reversed by the Court of Appeal is an order made on the 25th April, 1960 purporting to give to the appellant as administrator of the estate of one P. N. ST. Sithambaram Chettiar deceased (hereinafter referred to as " the intestate ") liberty to sell and transfer an undivided 19/24ths share of certain lands in Selangor to certain named purchasers at the price of $900/- an acre. The whole appeal turns upon the validity of that order. The appellant seeks to uphold it; but it is not possible for their Lordships to do justice to the issues that divide the parties and to offer any reliable advice upon the conflicting arguments that have been advanced to the Courts below and before them without first trying to establish more precisely than has yet been done the real nature of the proceedings which were started in the High Court and in the course of which was made the order that is now in controversy.

The intestate was at the time of his death a partner in a money-lending firm, styled N.P.R. carried on at Kajang in the territory of the Federation. The 19/24ths share of the lands in Selangor was partnership property but was registered in his sole name. It is common ground that he held the land in trust for the members of the partnership which comprised beside himself the first respondent and three other partners who were resident in India.

It was never established in the proceedings whether this partnership became dissolved by his death, so that the partnership assets had to be realised in a winding-up. It seems that the partnership business continued to be carried on after his death, but this is not conclusive. Prima facie the partnership would have been dissolved under section 206(g) or (j) of the Contracts Act: but there might have been partnership articles which provided otherwise. If it had terminated in this way, the Court could, under section 218,

have wound up its business and directed realisation of its assets, payment of its debts and distribution of the ultimate surplus. That would however have depended on the institution of appropriate proceedings to start the winding-up by the Court and there is nothing in evidence to suggest that anything of this kind had been done.

The appellant obtained registration of his own name as proprietor of the land. This appears to be a permissible proceeding under that part of the Land Code (c.138. F.M.S.) that regulates transmissions, where the deceased proprietor is a sole trustee: but it is, of course, plain from section 158 and section 165 of that Code that by so doing he did not render the land in any sense assets of the intestate's estate and it continued " to be subject to all trusts to which it was subject at the time of the death of the deceased ". He could only deal with the land therefore in execution of the trust of which the partners were the beneficiaries or, if they all agreed, as they might direct. This is the first point to which insufficient attention seems to have been paid when the proceedings that followed began to take shape.

According to the appellant a proposal that the land should be sold came to him in the first instance from the first respondent and one Sockalingam Chettiar who was managing the business of the partnership, whether or not in the course of winding it up. This proposal was made in September/October, 1959. He says that the three Indian partners had sent a letter agreeing to a sale at any price above $850 an acre provided that the first respondent consented, and that on or about the 20th October that respondent did give him his oral consent. Armed with what he regarded as the approval of all the partners who had interests except for the share represented by the intestate's estate, he accordingly entered into a conditional Contract of Sale with the intended purchasers, dated 31st March, 1960, under which he undertook to sell the land to them at the price of $900 an acre, subject to the approval of the Supreme Court being obtained. By clause 2 of that contract he was to apply to the Court forthwith for that approval.

At this point the second respondent came on the scene. He is a brother of the appellant, both of them being sons of the intestate and so interested in his estate. So far as appears they are between them the only two persons so interested. On the 12th April, 1960 this respondent wrote to the Senior Assistant Registrar of the Supreme Court at Kuala Lumpur, stating that he was a beneficiary entitled to share in the estate, that he understood that the administrator was trying to sell " some of the properties " of the estate without telling him and asking that the administrator should be directed to effect service on him of any such application to sell lands of the intestate including any trust lands held for the partnership firm. On the 21st April the Registrar wrote back informing the second respondent that a summons had been taken out for the purpose of getting approval of a sale of the 19/24ths share in question and saying that, while he had no power to direct service as requested, the second respondent's letter would be placed before the Judge dealing with the summons.

The summons referred to was an *ex parte* originating summons which had been taken out by the appellant on the 20th April. There seems to be no doubt that it was issued as in the estate of the intestate since the appellant's supporting affidavit is so entitled and refers to the original administration petition; and the relief that it asked for was an order that the appellant should be at liberty to sell and transfer the 19/24ths share of the land which was the partnership property to the contract purchasers at the price of $900/- an acre, and that the costs of the application should be paid out of the proceeds of sale or the partnership funds.

In their Lordships' opinion there was a basic misconception in the application so launched. The land itself, the 19/24ths share, did not form part of the intestate's estate and could not be the subject of administration proceedings initiated by originating summons under Order 55 of the Supreme Court Rules. On the other hand the Court had no jurisdiction over the affairs or assets of the partnership unless, which was not the case, it had accepted responsibility for a winding-up of the partnership itself under

section 218 of the Contracts Act or, possibly, a summons had been issued for the administration of the trusts affecting the partnership land. Failing this the Court had no jurisdiction to make an order binding any of the partners to a sale of a portion of the partnership assets at one price or another nor could it make an order charging the partnership funds with the costs of the proceedings in the estate.

The origin of the misconception seems to have lain in the interpretation placed by the appellant on section 60(4) of the Probate and Administration Ordinance No. 35 of 1959. The material part of this subsection enacts that an administrator may not, without the previous permission of the Court, mortgage, charge or transfer by sale any immovable property for the time being vested in him. This restriction was regarded as extending to land vested in the administrator not as assets of the estate but as trust property which he had taken over from the deceased and held therefore on extraneous trusts. Their Lordships do not think that this can be the proper construction of section 60(4). The subsection is part of a composite section which regulates the powers of personal representatives to deal with the estate that comes to them for the purposes of administration and it must be read in that context. Thus section 60(1) opens by saying " In dealing with the property of the deceased his personal representative shall comply with the provisions of this section ". It would be a very unnatural reading of these words to regard as property of the deceased land which was merely vested in him as trustee for other persons: yet the whole section is seen to be confined to regulations about the " property of the deceased ". Subsection (2) makes the point even plainer, for it prescribes that " a personal representative may charge, mortgage or otherwise dispose of all or any property vested in him as he may think proper . . . subject to any provisions of this section ". It would be impossible to suppose that in this subsection the Legislature is contemplating conferring on a personal representative power to mortgage or sell as he thinks fit trust property which is vested in him extraneously to the estate, regardless of the restrictions or powers contained in the trust instrument itself or the wishes of his beneficiaries. Subsection (4) then must be understood as being no more than a qualification of the powers previously conferred by the earlier subsection, and if they do not extend to trust property nor does it. Their Lordships conclude therefore that section 60(4) of the Probate and Administration Ordinance had no application to the case and that accordingly that subsection did not either require the appellant to get the Court's permission to a sale of the trust property held for the partnership or give the Court any jurisdiction to sanction or approve such a sale, apart from any jurisdiction that it might otherwise possess in the administration of estates or trusts.

The originating summons came before the learned Judge, Adams, J., on the 25th April, 1960, five days after it had been issued. It was supported by a short affidavit of the appellant to the effect that he had obtained the consent of all the surviving partners to the proposed sale, but the summons had been served on none of them nor on the second respondent. The latter however succeeded in reaching the Court and being at any rate present at the hearing. His letter to the Assistant Registrar was read by the Judge. There seems to be no doubt from the evidence that was given at a later stage that what the Judge said to him was that as he, the Judge, was dealing with a sale of partnership property and not with the affairs of the estate the second respondent had no right to be served with the summons under Order 55 rule 5(a) as a person whose rights or interests were sought to be affected and that the Judge could do nothing to help him at that stage. As will appear later their Lordships think that in saying this the learned Judge misconceived the position.

The first respondent had comparatively less success. He did not succeed in entering the Court room. A copy of the summons and affidavit in support had evidently reached him from the appellant's solicitors on the morning of the 25th April, the day the summons was heard. He left Kajang at once for Kuala Lumpur in order, he says, to oppose the making of the order applied for, but he was told by a member of the Court staff who was supervising the

Judge's Chamber list that he could not appear on the hearing of the application because he was not a party to it. This matter was unknown to the Judge who was proceeding with his list and involves no reflection on him, but it was certainly a material matter for him to consider when the respondents' later motion for review of his order came before him, since the whole basis upon which he, even if mistakenly, was proceeding was that he was acting with the consent of all the surviving partners in approving the sale. Yet here, excluded from the hearing in his Court room, was one of them who had come to say that he had never given his consent to the sale of $900/- an acre and who was able a few days later to bring forward another purchaser willing to pay $1,000/- an acre. Incidentally, it was upon the approval of this partner that the consent of all the others depended.

The order sought for was then made on the 25th April, the Judge directing that the costs of the application should be paid out of the proceeds of sale or from the funds of the partnership. Since the whole of this appeal turns in the end upon the question whether that order can stand having regard to the fact that it was made in the absence of any respondents and that of the two persons who wished to appear and be heard one was refused access and the other a hearing, it is convenient at this stage to consider what justification there could have been for thus proceeding in their absence.

The learned Judge had before him an originating summons taken out under Order 55 of the Rules of the Supreme Court. In that context it must have been either for the execution of some trust or the administration of an estate or for some particular relief incidental to such execution or administration. Since it was taken out by the administrator and was entitled " in the estate " of the deceased it was evidently asking for relief or directions in the course of the administration. Viewed in this way the summons ought certainly to have been served on the second respondent under R.S.C. Order 55 rule 5(a), for he was a beneficiary whose interests stood to be affected by the price at which the partnership property was sold, the estate being entitled to a share of the partnership assets or the resulting sum available on winding-up. He was not, of course, entitled to any right in the partnership property itself, but that is not the point that is relevant for the purposes of considering who is a proper respondent under rule 5(a).

The Judge however did not treat himself as making an order in the administration of the intestate's estate. He made his view of the matter quite clear when he said in his judgment on the motion for review (28th June, 1960) " 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 " the second respondent " 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 O.55.r.5(a)".

The jurisdiction which he seems to have supposed himself to have been exercising was that of sanctioning a sale of partnership assets with the consent of all the surviving partners. It may have been for that reason that he did not take the usual precaution of requiring an independent or expert valuation of the property sold. But the difficulties about following out any consistent argument on that view of the matter are two-fold. First, it is impossible to see from what source the Court derived its authority so to act on the originating summons before it. Secondly, if the order was to have any effect *vis-à-vis* the surviving partners who were not in any way involved in the administration of the intestate's estate, they should have been served as respondents to the summons and given an opportunity to record their views. It was all very well for the appellant to state in his affidavit that all the surviving partners consented: but there was no affidavit from them confirming that and, when it came to the point, the first respondent was outside the door seeking to record his objection to the sale and later in his affidavit on the motion to review denied that he had ever given any consent at all to the proposed sale. No one has ever been in a position to resolve

this direct conflict of fact in the two affidavits. It is plain therefore that even if the Judge's order could somehow be treated as made in the affairs of the partnership or in execution of the trusts affecting the partnership land it would be gravely defective as not having been served on any of the beneficiaries and as having been made at a time when a beneficiary entitled to be present and to object was, however innocently, being excluded from the Court. Such an order would be indefensible.

In their Lordships' view, however, the summons must necessarily be treated as made in the matter of the estate in which it was issued and in which alone accordingly the Judge had jurisdiction. So regarded the question for him was not precisely that of sanctioning the sale of the land, since that was not assets of the estate, but was that of approving the proposal of the appellant to give the estate's consent to the other partners to the partnership land being realised at $900/- an acre. There would be no relevant difference in the kind of evidence that a Judge would require in order to be satisfied on the latter issue, but framed in this way it illustrates how necessary it was that the second respondent should be properly served with the summons and given a full opportunity of taking part in the proceedings, if necessary with professional assistance. For, if the surviving partners were really all agreed that there should be a sale at $900/- an acre, as the appellant represented, the only remaining question was whether the intestate's estate, as entitled to the deceased's share, should come in with that agreement: and that was a point in which the second respondent was as much interested as the appellant himself.

The conclusion therefore is this. However these confused proceedings are looked at the order approving the sale was made in the absence of persons who should have been respondents. The second respondent was entitled to be served in proper form under Order 55, rule 5(a), and the requirements of this rule were neglected to his prejudice. But all rule requirements must be read in the light of the words of Order 70 " non-compliance with any of these rules shall not render any proceedings void unless the Court or Judge shall so direct ". A breach of the rules affecting service of parties does not automatically render void an order made in the proceedings in which it occurs and it is necessary for the Court subsequently passing upon it to consider the circumstances and consequences to which it relates. These may vary widely. At the one end of the range is a case such as *Craig* v. *Kanssen* [1943] 1 K.B. 256 to which reference is made in the Court of Appeal's judgment, where in effect what had happened was that a defendant found himself the subject of an order for the payment of money without having been given any prior opportunity even of knowing that proceedings to this end were being taken against him. Such a defect of procedure, if uncorrected, is an affront to natural justice. At the other end are many occurrences in which some defect in requirements of service is in substance made good by the action or consent of the party prima facie entitled to object. (See *Marsh* v. *Marsh* [1945] A.C. 271). No doubt there are many gradations between these two extremes. The question here is to which end of the range the present case belongs: in other words, what action should Adams, J. have taken when on the motion for review which came before him on the 20th June, 1960 he was asked to set aside or vary his previous order. The Court of Appeal thought that he ought to have set it aside on the ground that, in the absence of the second respondent, it was a mere nullity.

Their Lordships agree with the conclusion that the order cannot stand and with the reasoning that led Thomson, C.J., who delivered the Court of Appeal's judgment, to hold that the second respondent was a person whose rights or interests were sought to be affected. It is desirable however, owing to the peculiar circumstances of this case, to add a little in expansion of the view that the order was a nullity. The peculiar circumstance here is that the second respondent not only knew of the intended proceedings but also managed to be present in Chambers when the order complained of was made. He addressed the Judge to the extent of saying that he was a beneficiary of the intestate's estate and that, as such, he wanted some order made to restrain the appellant from receiving the estate's share of the

partnership assets without reference to him. If the Judge had then treated him as a person entitled to take part in the proceedings, asked him whether he wished for the usual time after service of notice in order to review his position, whether he wanted to consider the question of professional representation etc. and directed any consequential adjournment, the original defect arising from the breach of the rules would no doubt have been cured. Incidentally, the giving of time would probably also have enabled the Judge to be informed of the better offer which was later produced by the first respondent. But this was not at all what happened. The Judge evidently treated the second respondent as a person having no right to be before him and made his order without further delay on the ground that the second respondent had no interest in it. An order so made is equivalent to a refusal to allow an interested party access to the Court: and, if it is made without his acquiescence and in a mistaken belief as to his legal position, it should in their Lordships' view be " set aside . . . wholly . . . as irregular " under the authority of Order 70.

There remains the question of dealing with the costs of these most unfortunate proceedings. The various orders that have been made with regard to costs can be summarised as follows.

(1) The costs of the original application for the approval of the sale were ordered to be paid out of the proceeds of sale or the funds of the partnership. This order (25th April, 1960) was set aside by the Court of Appeal *in toto* and those costs are not provided for.

(2) The appellant's costs of the motion to review in the High Court were ordered to be paid by the two respondents (20th June, 1960). No part of this order has been formally interfered with by the Court of Appeal, although it was strictly the only one of the two orders that was the subject of the appeal to them. Since their decision necessarily meant that the Judge ought to have set aside his earlier order, it cannot be right to leave the respondents under liability to pay to the appellant his costs of the motion to review.

(3) The Court of Appeal (6th October, 1960) ordered the appellant to pay the respondents' costs of the appeal personally. The effect of that order is to deny the appellant any right to get those costs out of the intestate's estate.

(4) The Court of Appeal similarly ordered (12th December, 1960) that the appellant should pay the respondents' costs of his unsuccessful motion to them to review their previous judgment.

Their Lordships have felt very great difficulty in reviewing these orders of the Court of Appeal that the appellant should be personally liable for costs, since the Court have not recorded their grounds for holding that the proviso to Order 65(1) does not enable the appellant to claim his costs out of the estate. Prima facie, an executor or administrator who appears on an appeal for the purpose of supporting a judgment which has been made in his favour by the lower Court does not act unreasonably and there must therefore be some presumption to be displaced before the Court deprives him of his costs if he is unsuccessful. The prudent course is for an executor, administrator or trustee to furnish himself with legal advice before taking part in legal proceedings and to lay that before the Court in chambers and ask for its directions before committing himself further. If he does not do that, he may find himself incurring a liability for costs to a successful opponent without any certainty that he will be allowed later to indemnify himself out of his estate. But it is a strong measure to deprive him of any right to indemnity where he has merely defended his existing judgment and in the absence of any detailed knowledge of what has governed his actions, such as can be obtained on a summons in chambers directed to his obtaining relief. In the circumstances their Lordships think that the wiser course in this case is to remove the special direction from the Court of Appeal's orders that the appellant is to pay the respondents' costs " personally " and to leave him at liberty, if he is so advised, to apply in the course of his administration to be allowed all or any part of those costs and his own as proper expenses of the administration. Nothing that their Lordships have

said here is to be taken as encouraging the granting of such an application which might in the end amount to no more than compelling the second respondent who has been successful to share the costs with his defeated antagonist.

For the reasons that have been given their Lordships will report to the Head of the Federation of Malaya their opinion that this appeal should be dismissed and the orders of the Court of Appeal made on the 6th October and 12th December, 1960 respectively be affirmed, subject to the minor alterations that (a) the order of 6th October should be amended by adding to it that the order of Adams, J. dated 20th June, 1960 should be set aside and the appellant directed to pay to the respondents their taxed costs of the motion upon which that order was made, and (b) there should be eliminated from both the orders of 6th October and 12th December, 1960 the word " personally " where the appellant is directed to pay the respondents' costs, and (c) there should be added to those orders a provision that the appellant is to be at liberty, if so advised, to apply to the High Court in the administration of the intestate's estate for an order allowing him all or any part of the costs incurred in these proceedings out of that estate.

The appellant should pay the costs of this appeal, and should have a similar liberty.

(84789) Wt. 8109/53 100 3/62 Hw.

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