Privy Council Appeal No. 1 of 1980

Gan Khay Beng and Others – – – – – *Appellants*

v.

Ng Lit Cheng alias Ng Yam Chee and Others – – *Respondents*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND FEBRUARY 1982

Present at the Hearing:

LORD FRASER OF TULLYBELTON
LORD SIMON OF GLAISDALE
LORD RUSSELL OF KILLOWEN
LORD ROSKILL
LORD BRIDGE OF HARWICH

[*Delivered by* LORD RUSSELL OF KILLOWEN]

The testator John David died in 1920. Probate of his will (executed in 1920) was granted to the executor and trustee thereby appointed (his brother Francis Daniel David who died in 1944). At all material times the sole asset of his estate remaining undistributed was a piece of land comprised in Negri Sembilan Grant No. 953 for Lot No. 368 Mukim of Rasah (" the said land "). The testator by his will disposed of his estate as follows:—

(*a*) Francis Daniel David—brother	5/16 share.
(*b*) Benjamin David—brother	4/16
(*c*) Jacob Joseph—godson and nephew	3/16
(*d*) R. Sinnappan	1/32
(*e*) Elizabeth Muttama—sister	1/16
(*f*) Mary Varnagulasinghe	1/16
(*g*) Miss Rasamma—housekeeper	3/32
	Total = 16/16

Jacob Joseph was also known as Joseph Jacob (or Jacob Joseph) David and is hereafter referred to as " J. J. David " or as " the Administrator ".

On 22 September 1970 letters of administration to the estate of the testator were granted to J. J. David out of the Registry of the High Court at Seremban, he being a devisee and also a nephew of the testator.

J. J. David lived in Sri Lanka and no doubt for that reason the grant was expressed to be to J. J. David " by his attorney Dato Athi Nahappan (Power of Attorney No. 380/1965) ".

In connection with that form of grant an elaborate attack was mounted by a lengthy Supplemental Appellants' Case to this Board on the standing of a later attorney appointed by J. J. David after he had revoked the power of attorney granted to Nahappan, as later noted. After some examination of the grounds (not suggested in the courts below) for that attack, their Lordships formed the view that they would not stand up, and Counsel for the appellants withdrew the point.

The assets scheduled to the grant were the said land.

J. J. David on 8 July 1974 revoked the power of attorney to Nahappan, and granted a general power of attorney to E.P.E. Ananda of Seremban (" the Attorney ") dated 5 August 1974.

The said land produced no income, and was subject to outgoings such as quit rent, which appear to have been kept down by a chargee for $3,000 to avoid forced sale. In the circumstances the Administrator understandably wished to realise this remaining asset of the estate so that the estate might be distributed and wound up. In the case of an administrator the said land could not be sold save with the permission of an order of the High Court. With a view to obtaining such an order the Administrator by the Attorney executed a contract on 2 September 1974 to sell the said land to one Ng Lit Cheng (" Ng ") for the sum of $110,000: no provision in that contract calls for particular notice, save that Ng was to be allowed forthwith to enter on the said land to carry out works of development. Provision was made for a deposit of $25,000.

On 26 August 1974 the said land was transmitted to J. J. David as personal representative.

On 11 November 1974 the Administrator applied (through the Attorney) by originating summons for an order that the said land be sold to Ng pursuant to the agreement. This summons was *ex parte*, it being stated that it was not intended to serve it on anyone. The application was supported by an affidavit dated 9 November 1974 affirmed by the Attorney. This stated the beneficial interests constituted by the will: that F. D. David (5/16) was believed to have died intestate leaving a named widow and three named sons (including J. J. David): that B. David (4/16) was believed to have died intestate leaving one son B. G. S. David: that Sinnappan (1/32) was believed to have died intestate but his beneficiaries were not known to the Administrator: that Elizabeth Muttama was believed to have died intestate but her beneficiaries were similarly not known: that Mary Varnagulasinghe (1/16) was believed to have died intestate leaving no issue: that Mary Rasamma (3/32) was believed to have died intestate leaving no issue. It was pointed out that J. J. David (3/16), the applicant, was the only survivor of those named in the will.

To this affidavit were exhibited letters of consent to the proposed sale to Ng. These embodied consents of the widow and three sons of F. D. David (including of course J. J. David)—5/16: of the son of B. David—4/16. The application was thus supported by those between them entitled to 12/16 of the estate: and the affidavit explained why consents could not be obtained from, nor service effected upon, those interested in the remaining 4/16. The affidavit, in addition to exhibiting the consents, exhibited also the power of attorney to Ananda, the letters of administration with will annexed, and the contract of sale to Ng.

On 25 November 1974 the order approving the sale was made and duly perfected. On that basis Ng released to the Administrator the deposit of $25,000 required by the contract, paid off the $3,000 charge on the said land, and expended some $18,000 in and about development of the said land. But transfer of the legal estate did not follow because of the registration of a caveat against the said land by one Gan Khay Beng (" Gan ") in circumstances later mentioned. (Gan and his company Bee Chuan Rubber Factory Sdn. Bhd. participated as one in these proceedings and are compendiously referred to in this judgment as " Gan ").

In circumstances mentioned shortly hereafter the same judge on 8 January 1976 ordered that his order dated 25 November 1974 be set aside. The Federal Court on 7 July 1977 set aside the order of 8 January 1976 and restored the original order of 25 November 1974 approving the contract of sale to Ng. The main appeal to this Board is from that order of the Federal Court.

The events leading to the order of 8 January 1976 (setting aside the order of 25 November 1974) were these.

By Notice of Motion dated 7 February 1975 one Felixia d/o Varnakulasinghe sought to set aside the order of 25 November 1974: this was supported by her affidavit dated 31 January 1975. She asserted, and it is to be accepted for present purposes, that she is the legitimate child (one of five) of A. N. Varnakulasinghe (later in correspondence referred to as A. N. V. Singhe), a son of the devisee Elizabeth Muttama. On that basis, it being asserted that Elizabeth Muttama died intestate leaving three sons her surviving, the beneficial interests of Felixia in the said land would be 1/240th—though she originally stated that she was advised (erroneously) by her solicitor that her beneficial interest was 1/6th. Felixia asserted that the applicant Administrator and the Attorney ought to have been aware of her late father's interest in the said land, and that her father and the Administrator corresponded (between Malaysia and Sri Lanka) as to management and sale of the said land. She exhibited a letter dated 20 November 1967 from the Administrator in Sri Lanka to Dato Nahappan in Kuala Lumpur: this was of course before the grant to the Administrator, after the appointment of Nahappan as attorney of J. J. David, and after the death of the executor F. D. David. The letter referred to A. N. V. Singhe of 5, Kasipillay Road, Kuala Lumpur as cousin of J. J. David: it referred to the said land, said that the cousin had arranged for its sale, and asked Nahappan to act as " our attorney " and effect the necessary sale. On that basis Felixia contended that the Administrator and the Attorney ought to have disclosed her father's interest and made his beneficiaries parties to the application for leave to sell to Ng. It will be recalled that Elizabeth Mutamma was stated in the affidavit in support of the application for leave to sell to Ng as believed to have died intestate but her beneficiaries were not known to the Administrator.

The affidavit of Felixia contended further that it was insufficient merely to state in support of the application for leave to sell to Ng that devisees of the testator had died leaving no issue, or had died intestate, without full details of reasons for the belief, supported by certificates. Their Lordships comment that the High Court judge clearly did not think so when he made his order of 25 November.

Felixia further contended that the application was objectionable because it was not supported by a qualified valuer's valuation. As to this their Lordships make the same comment.

Felixia further drew attention to a suggestion that the Administrator's previous attorney Nahappan had previously contracted to sell the said land to Gan, and stated that she verily believed that at the time of the contract with Ng the said land had a value of $150,000.

At this stage it is necessary to reintroduce Gan, who entered a private caveat against the title to the said land, of which written notice dated 9 November 1974 was sent by the Registrar to the Administrator at the Attorney's address in Malaysia—9 November 1974 being the date of the affirmation of the Attorney's affidavit in support of his originating summons dated 11 November 1974. On 4 March 1975 Gan by writ instituted Civil Suit No. 45 against the Administrator, substantially simultaneously with Felixia's Notice of Motion. Gan in that civil suit sought an order setting aside the order of 25 November 1974, and sought in turn various orders based upon the assertion that he had in his favour a binding and specifically enforceable contract with the Administrator for the sale of the said land to him, the contract being found in a letter dated 15 April 1974 from the then attorney of the Administrator, Nahappan. The Statement of Claim in this suit was delivered on 17 April 1975: the Defence and Counterclaim on 23 April 1975: the Reply and Defence to Counterclaim on 21 May 1975.

The letter dated 15 April 1974 relied upon by Gan (and by Felixia) was in the following terms:

"ATHI NAHAPPAN & CO.
P.O. Box 287, Bangunan Safety, 3rd Floor,
45 Jalan Melayu, Kuala Lumpur 01-03, Malaysia
Telephone: 24436/7 Telegram: ATHICO

AN/3139/67 15th April, 1974

Mr. Gan Khay Beng,
Messrs. Bee Chuan Rubber Factory Sdn. Bhd.,
No. 46 Jalan Tunku Hassan,
Seremban.

Dear Sir,

re: Estate of John David (deceased) Land held under Grant for Land No. 953 for Lot No. 368 in the Mukim of Rasah, District of Seremban.

We are writing this on the instructions of Dato Athi Nahappan, Attorney of the Administrator of the above Estate.

We have instructions to confirm the earlier oral permission given to you by our client that you could at your own cost clear, fill, construct road, drainage, retention walls and connect water and electricity supply through the aforesaid land.

In consideration of the development of the aforesaid land as stated above and of the consequent improved value thereof we further confirm that our client had agreed to give you first preference to purchase the aforesaid land subject to the price of the aforesaid land being valued by a qualified valuer and subject to the approval of the sale in your favour by the Court.

We also confirm that as soon as the issue document of title to the aforesaid land is obtained an agreement for the sale thereof will be made with you subject to the above conditions.

Yours faithfully,

Athi Nahappan & Co."

The Statement of Claim in Civil Suit No. 45 asserted that immediately thereafter Gan entered on the said land and at Gan's considerable expense (unquantified) carried out development thereon: and that the said land was valued on 15 November 1974 "by a 1st Class Licenced Appraiser" at $150,935. It is reasonable to suppose that there was some degree of co-operation between Gan and Felixia who, as stated, had asserted (baldly) that the value was $150,000. It is to be noted that the valuation by the First Class Appraiser was not, their Lordships were informed by Counsel for the appellants, one by a "qualified valuer" as envisaged by the Nahappan letter of 15 April 1974.

To return to the Notice of Motion. At some stage both Ng and Gan were given leave to intervene. On 1 April 1975 the Attorney affirmed an affidavit in Answer to that of Felixia. He said that while neither he nor the Administrator had knowledge of the facts stated by her to constitute her derivative beneficial interest they were prepared to admit them for present purposes, but that Elizabeth Muttama had three sons: that her beneficiaries were not known to either until Felixia surfaced with her Notice of Motion: that her father [A. N. V.] Singhe was known to the Administrator before his death in 1970, but enquiries by the Attorney at his last known address, in 1974 (before the Attorney's affidavit of 9 November 1974) had failed to reveal any trace of the family or their whereabouts: that no attempt had been made to suggest that E. Muttama had left no heirs. The affidavit pointed out that the application was not directed to an order for distribution of the estate. (Their Lordships comment that it did not occur to the learned judge when approving the proposed sale to Ng that there was insufficient evidence of attempts (e.g. by advertisement) to trace all derivative beneficial interests).

In answer to criticisms of insufficient reference on the application to other offers, the Attorney said that Gan had at some date made an offer to him for the said land of $56,000 odd, but he did not think it worth mentioning on the application for approval of a sale for $110,000. That offer would have been received after the Attorney's appointment as such on 5 August 1974. He also said that he had obtained a valuation (exhibited) on 29 August 1974 from a First Class Appraiser at $75,000, and did not mention this since it was so far below the price of $110,000 approved by the known 12/16 of the beneficiaries. He affirmed that neither he nor the Administrator had any knowledge of the alleged contract with Gan.

The Motion came before the judge on 19 May 1975 and 7 June 1975 when the Attorney was cross-examined by Counsel for Felixia. In their Lordships' view nothing additional noteworthy emerged from that, save that the Attorney relied upon the Administrator for information (he produced two letters), and that while not knowing that Gan was interested in the said land he did know of the caveat of which notice was served on him before application for leave to sell to Ng. (The Note of Evidence says "before agreeing to sell": this is obviously a mistake, but it is repeated in the judge's reasons.)

Felixia was examined orally on 29 August 1975. Nothing significant emerged. She did not say where she had been living in November 1974: nor where any of her relations had been: nor that any advertisement would have come to her attention. She said that however small her share in the end she would give it to her mother.

On 20 September 1975 Ng applied for leave to intervene, and this was granted. On 2 October 1975 Gan applied for and was granted leave to intervene, the matter being adjourned to 8 January 1976.

On 2 December 1975 Gan swore an affidavit. He referred to Civil Suit No. 45 and exhibited the pleadings therein. He contended that he (and his company) had a registrable and caveatable equitable interest in the said land because of

(*a*) the letter already mentioned

(*b*) the fact that they had expended a "great" (but unspecified) sum in developing the said land in anticipation of being granted the first preference referred to in that letter.

He contended that the order approving the sale to Ng was bad in law and irregular because his prior interest was not disclosed by the Attorney: because no proper valuation was obtained or put before the Court: because the price of $110,000 "is" far below the market price. He asserted that the Administrator and the Attorney were at all times fully aware of the agreement given by the previous attorney and that a great deal had been spent to improve the said land. He exhibited a valuation dated 15 November 1974 at approximately $151,000 by a First Class Appraiser—not a "qualified valuer". The appraiser said that he acted on oral instructions from Gan: that he was "made to understand that the property is ready for Sub-division for Building Developments": and said "As this property lies within the Town Council Limits there is no need for conversion". He made no comment on the highly irregular shape of the said land.

The Attorney on 2 January 1976 affirmed a further affidavit in which he pointed out that the facts alleged by Gan were all in dispute in the Civil Suit No. 45 and denied any interest of Gan in the said land. Specifically he denied that either he or the Administrator had any knowledge of the alleged contract with Gan. He asserted that such work as was done by Gan on the said land was done before the date of the alleged contract and as trespassers, hoping thereby to benefit their adjoining property. He criticised the valuation produced by Gan as containing an error of law in stating that there is no need for conversion.

The matter came before the judge again on 8 January 1976. Written submissions were put in by Counsel for Felixia and for the Administrator, which are not in the Record. Ng and Gan were also represented. Counsel for Felixia called on subpoena one Periasamy. His firm had taken over some time before the practice of Nahappan's firm. He had a file relating to the estate of the testator. He produced a letter dated 5 January 1968 from J. J. David to Nahappan concerning the said land. The letter refers to the writer's cousin Singhe (presumably A. N. V. Singhe), the son of a devisee Elizabeth Muttama (misspelt) and says that Singhe, with whom he corresponded, had informed him that a Mr. Pereira was prepared to buy the land for $98,000, and asked Nahappan to verify that and get the necessary particulars. Nothing more appears about Pereira or the possibility of his paying $98,000 or any other sum for the said land. The judge did not refer to this.

On 8 January 1976 having considered arguments, briefly noted by the judge, and written submissions, the judge set aside the order dated 25 November 1974, ordered the Attorney (who was not a party) personally to pay the costs of Felixia and Gan, and ordered Ng to pay Felixia's costs from the date of his being made a party.

The judge did not deliver grounds of judgment until 27 October 1976.

The Judge's order gave rise to two appeals to the Federal Court. One (No. 48 of 1976) was by the Attorney against the order insofar as it ordered him to pay costs personally though he was not a party: that appeal was brought by leave of the Federal Court since he was not a party: the Federal Court (Gill C. J., and Ong Hock Sim and Raja

Aslan Shah JJ.) on 7 July 1977 allowed the appeal, set aside the order as to costs below and substituted an order that Felixia and Gan should pay the costs below of the Attorney and Ng and ordered that Felixia and Gan should pay the costs of the appeal of the Attorney and Ng. That order was to some extent tied in with the order of the same date in Appeal No. 19 of 1976. In that appeal Ng appealed against the decision setting aside the order of 25 November 1974 approving the contract of sale to him. The Federal Court allowed the appeal, restored the order of 25 November 1974, and ordered Felixia to pay the costs of Ng and the Administrator below and of the appeal. Gan and Felixia now appeal to His Majesty the Yang di-Pertuan Agong against both those orders, the respondents to the appeal being Ng, the Attorney and the Administrator.

The grounds upon which the judge ordered the order of 25 November 1974 to be set aside may be thus summarized:

(1) The Administrator through the Attorney had failed to bring to the notice of the Court in 1974 all material facts.

(2) The Attorney through the Administrator ought to have known of the letter already quoted from Nahappan's firm to Gan but did not disclose it. At any rate the Administrator knew of that offer but that fact was not disclosed.

(3) No valuation was produced though that of $75,000 existed. It was not a valid reason for its non-production that it was much less than the contract price of $110,000. It was incumbent upon the Attorney to disclose the valuation whether it was more or less than the contract price.

(4) The Attorney was aware of the caveat lodged by Gan by notice thereof given to him dated 9 November 1974. He should have enquired as to the extent of the caveator's interest, and should have disclosed to the Court the existence of the caveat.

(5) The Attorney admitted that he was aware that Gan " was in occupation " of the said land and that he had written to Gan about this.

(6) The offer to the Attorney by Gan to purchase for $56,250 should have been disclosed, for the Court on learning of this offer " some time previously " would most certainly have enquired as to the present value on 25 November 1974. As to this their Lordships in particular observe that the offer by Gan was to the Attorney and therefore not earlier than his appointment in August 1974. Counsel for the appellants found difficulty in supporting this ground.

(7) The Attorney made no real attempts to locate all the beneficiaries to the estate, in particular as to the share of Elizabeth Muttama, though he knew she had three sons.

(8) In all the circumstances the Attorney's application for approval of the contract of sale to Ng " was not made in good faith ".

(9) The Attorney had failed to disclose all the material and relevant particulars as to

(*a*) the value of the said land and

(*b*) the beneficiaries of the estate.

(10) (For good measure) The Attorney had been negligent in carrying out his duties (on the above facts) as attorney—hence the personal order for costs against him.

The judge, rightly in their Lordships' opinion, did not advert to the somewhat obscure " offer " of Mr. Pereira of $98,000 in 1968.

The judgment of the Federal Court in both appeals was delivered by Gill C.J. He dealt first with the main appeal complaining of the setting aside of the order of 25 November 1974.

On point (7) above, Gill C.J. pointed out that the judge in 1974 was not concerned with the distribution of the estate, but only with the propriety, in the interests of all who might be interested, of the proposed sale. He commented that there was no rule of law which required all who might be beneficially interested to be made parties, or even identified. With this their Lordships agree.

He pointed out that Ng had laid out considerable sums on the faith of the November 1974 perfected order and that it was proper to have regard to this, as distinct from a case of expenditure prior to a Court approval of a contract, when a contractor takes his chance of non-approval. With this also their Lordships agree. On this he, rightly in their Lordships' opinion, distinguished the case of *Che Ah and Che Yang Kelsom v. Che Ahmad* [1941] M.L.J. 105.

On point (6) above, Gill C.J. rejected this as irrelevant: and their Lordships agree.

On point (3) above, Gill C.J. rejected the reasoning that the $75,000 valuation should have been disclosed, since it was no less than $35,000 below the contract price. With this their Lordships also agree. Nor do they consider that some process of extrapolation from $56,000 odd through $75,000 could reasonably have led to a conclusion that $110,000, in a short space of time, could have been improved upon.

Their Lordships would add the following comments.

As to point (2) above, the evidence was that the Attorney had no knowledge of the Nahappan-Gan letter already quoted: and there was no evidence that the Administrator knew of it.

As to point (5) above, the evidence of the Attorney's knowledge that Gan " was in occupation " was limited to the situation that Gan was at one time said to be trespassing for his own ends as an adjoining owner.

As to point (7) above, their Lordships reject the suggestion made in argument that the Attorney should have advertised. He made enquiries at the last known address of the only son of E. Muttama with whom the Administrator had been in contact and drew a blank. It did not occur to the judge that the statements of ignorance of the full details of the family trees of the devisees undermined support for the 1974 order, and he sought no details of attempts to locate beneficiaries. It does not appear to their Lordships that the initial satisfaction of the judge, and the later satisfaction of the Federal Court, on this point should be considered erroneous in point of practice.

As to points (8) and (10) above, their Lordships join with the Federal Court in wholly rejecting the suggestions that the Attorney's application in November 1974 " was not made in good faith " or involved negligence in carrying out his duties.

The one point on which their Lordships were inclined to have misgivings was that the Attorney, who had notice of the lodging of a caveat by Gan, perhaps on 9 November 1974 (the date of his Affidavit) and before the Originating Summons on 11 November, and certainly before the order of 25 November, did not mention it to the Court. The notice did not state the grounds upon which the caveat was based. No mention was made of the Nahappan-Gan letter already quoted. Gan had not purported to communicate to the Attorney a claim to be entitled under that letter to buy at $150,000 or any other sum. Indeed Gan made

no claim until 10 December 1974 (after the order was perfected) when he wrote enclosing a cheque for some $15,000 to the firm of the previous attorney Nahappan, the letter mentioning the $150,000 valuation. Faced with the fact that Gan had offered to him very recently a sum of only some $56,000, and wholly ignorant of the Nahappan-Gan letter, the Attorney in their Lordships' opinion may well be excused for assuming that in the context of a firm contract for $110,000 with Ng the caveat need not be brought to the attention of the Court. Moreover it is very far from certain that if it had been, the order of 25 November would not have been made. There is much to be said for throwing doubt on the contractual efficacy of the Nahappan letter, but their Lordships do not wish to prejudge the outcome of Civil Suit No. 45. One thing however can be said: the valuation of $150,000 odd was not such as was envisaged by that letter since it was not by a " qualified valuer ".

Their Lordships accordingly advise His Majesty the Yang di-Pertuan Agong that this appeal must be dismissed with costs.

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