

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 24 of 1977

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

IN THE MATTER of the ADVOCATES AND SOLICITORS ORDINANCE
1947

- and -

IN THE MATTER of CHOE KUAN HIM, gentleman, one of the
Advocates and Solicitors of the High Court

B E T W E E N :

10 T. DAMODARAN S/O P.V. RAMAN (Applicant) Appellant
- and -
CHOE KUAN HIM (Respondent) Respondent

CASE FOR THE RESPONDENT

Record

1. This is an appeal from the Judgment of the Federal Court of Malaysia (Suffian L.P. and Wan Suleiman F.J.; Ali F.J. dissenting) dated the 20th August 1976, dismissing an appeal by the Appellant against the Judgment of Syed Agil Barakbah J. on 14th July 1975 ordering the Respondent to pay into Court as deposit the sum of \$182,000/- together with interest thereon at the rate of 12% per annum from 16th April 1974 to the date of payment. The Federal Court allowed the cross-appeal of the Respondent and ordered that interest be paid at the rate of 6% per annum from the 14th July 1975 to the date of payment. p.22
p.16
- 20 2. The facts are as follows:
- 30 On the 2nd August 1973 the Appellant sold some lands to one Andawan ("the purchaser"). By clause 3 of the contract the lands sold were "to be free of all incumbrances whatsoever". On the 21st August, 1973, one Vesudevan ("the claimant") entered a private caveat against the lands and on 19th December 1973 issued a Writ, also in the High Court p.39

Record

p.54

at Alor Star ("the trust action"), claiming that the Appellant held a one half undivided share in the lands as trustee for him. The Appellant succeeded in removing the caveat. The claimant again caveated the lands. The Appellant again caused the caveat to be removed and obtained an injunction restraining the said claimant from lodging further caveats.

3. On the 20th December 1973 the claimant obtained from the High Court in the trust action an *ex parte* order that a right in the disputed lands was in question and that the order remain in force as a *lis pendens* for 12 months or until determination of the trust action. On the 22nd December 1973 the *lis pendens* order was registered by the land office. On the 9th February 1974 the Appellant applied to the High Court to set aside the order but the application was dismissed on the 27th April. The Appellant appealed to the Federal Court which on the 12th July 1975 affirmed the order of the High Court.

10

p.42

4. The purchaser had on the 6th March 1974 assigned his rights under the contract to Syarikat Alor Merah Sendirian Berhad ("the sub-purchasers"). The Respondent acted for both the Appellant and the sub-purchasers.

20

5. On the 6th March 1974, the same day that the sub-sale took place, the Respondent gave an undertaking to the Appellant in the following terms:-

p.44

"This is to confirm that the sum of Ringgit Three hundred and thirty two thousand seven hundred and ninety two (\$332,892/-) being the balance of the purchase price of the above-said lands has been deposited with us and that the said sum will be released to you upon the transfer of the said lands being duly registered in the name of the Purchasers Messrs. Syarikat Alor Merah Sdn. Bhd. or their nominee, nominees or assigns."

30

6. The transfer was registered in the name of the sub-purchasers' nominees on the 16th April 1974. The Respondent paid \$150,000/- to the chargee of the land and on the 23rd April sent a cheque for the balance of \$182,000/- to the Appellant, payment of which he subsequently stopped on the ground that a *lis pendens* registered against the lands was an incumbrance on the lands.

40

7. Before the High Court, the Respondent argued that his undertaking read together with the contract and the assignment to the sub-purchasers amounted to its being given by mistake in too wide terms and should not be enforced. The Respondent also submitted that the trust action was still pending. The Respondent had also deposed that he had sent the cheque to the Appellant on the Appellant's assurance that the lis pendens order would be discharged and the title perfected.
- 10 8. The High Court (Syed Agil Barakbah J) rejected the Respondents' reasons. He found as a fact that the Respondent knew that the lis pendens was registered and had not been removed when he gave the Appellant his cheque. The Respondent's reasons for stopping payment of the cheque as he had himself admitted was on client's instructions. The learned Judge held that the Respondent should have embodied the assurances in the undertaking. The learned Judge also rejected the submission that The Federal Court had yet to decide the validity of the registration of a lis pendens order in the State of Kedah, and that the decision would affect the undertaking. The learned Judge held that in view of the trust action and steps being taken by the Plaintiff in that action to add the sub-purchasers as a co-defendant he should order the Respondent instead to deposit the money in Court.
- 20
9. Against this order the Appellant appealed to the Federal Court of Malaysia. In his Judgment, Suffian L.P., after stating that the law and practice relating to solicitors' undertakings in Malaya is the same as that in England and after remarking that the registration of the lis pendens order was the first time this had been done in a Malay State, held that in the peculiar circumstances of the case the Respondent should be allowed to release the money into Court. Suffian L.P., also held that if the claimant succeeded in the trust action the sub-purchasers would not have obtained the unincumbered title as promised. Suffian L.P., went on to say that while the Respondent could have worded his undertaking to provide for removal of the lis pendens order, it did not matter in the peculiar circumstances of the case. The Appellant should not be allowed to take advantage of the Respondent's mistake. Wan Suleiman F.J., concurred.
- 30
- 40
10. Ali F.J., dissented. He held that nothing that was said by the Respondent could have any relevance to the issue before the Court, which was concerned only with his misconduct and his liability to carry out the undertaking. Whatever the legal effect of a lis pendens order, the question could only arise in proceedings by the purchasers to

p.13

p.14

p.15

p.15

p.26

p.25

p.27

pp.27-28

p.33

Record

p.33

recover the purchase moneys from the Appellant. As neither the purchasers nor claimant were before the Court, Ali F.J., said he failed to see why the learned Judge should be concerned about their interests. In his opinion the Appellant had not done anything to deprive him of his right to be paid.

11. The statutory provisions relevant to this appeal are as follows:-

Section 322 National Land Code:-

10

Private Caveats

- (1) A caveat under this section shall be known as a "private caveat" and
- (a) may be entered by the Registrar on the register document of title to any land at the instance of any of the persons or bodies specified in section 323 ;
- (b) shall have the effect specified in sub-section (2) or (3) according as it is expressed to bind the land itself or merely a particular interest therein ;
- (2) The effect of any private caveat expressed to bind the land itself shall, subject to sub-sections (4) and (5), be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of :-
- (a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto ;
- (b) any claim to the benefit of any tenancy exempt from registration granted by the said proprietor ; and
- (c) any lien-holder's caveat in respect thereof.
- (3) The effect of any private caveat expressed to bind a particular interest only shall, subject to sub-sections (4) and (5), be to prohibit the registration, endorsement or entry on the register document of title of :-

20

30

40

Record

- (a) any instrument of dealing directly affecting that interest (including any certificate of sale relating thereto); and
- (b) where that interest is a lease or sub-lease:
- (i) any claim to the benefit of any tenancy exempt from registration granted directly thereout, and
- 10 (ii) any lien-holder's caveat in respect thereof.

(4) A private caveat shall not prohibit the registration, endorsement or entry of any instrument, claim or lien-holder's caveat where the instrument was presented, or the application for endorsement or entry received, prior to the time from which the private caveat takes effect.

(5) A private caveat shall not prohibit the registration or endorsement of any instrument or claim where :-

- 20 (a) the instrument was presented or the application for endorsement made by the person or body at whose instance the caveat was entered; or
- (b) the said instrument or application was accompanied by the consent in writing of that person or body to its registration or, as the case may be, to the making of the endorsement.

30 (6) Where the registration of any instrument, or the endorsement or entry of any claim or lien-holder's caveat is prohibited by any private caveat, the Registrar shall reject the instrument or, as the case may be, application for endorsement or entry.

(7) On rejecting any instrument or application for endorsement pursuant to this section, the Registrar shall take the like steps as if he had rejected it pursuant to section 298 or, as the case may be, 317.

Section 323 of the National Land Code :-

(1) The persons and bodies at whose instance a private caveat may be entered are :-

Record

- (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest ;
- (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest ; and
- (c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b). 10

(2) Any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B, specifying therein the nature of the claim on which his application is based, and whether the caveat is to be expressed to bind the land itself or a particular interest only.

(3) Any application under this section shall be accompanied by the prescribed fee and, so far as it sets out the claim giving rise thereto, be verified by a statutory declaration by the applicant or his advocate and solicitor. 20

Paragraph 6 of the First Schedule to the Courts of Judicature Act (Act 91)

Additional Powers of the High Courts

Power to provide for the interim preservation of property the subject-matter of any cause or matter by sale or by injunction or the appointment of a receiver or the registration of a caveat or a lis pendens or in any other manner whatsoever. 30

Section 417 of the National Land Code :-

(1) The Court or a Judge may by order direct the Registrar or any Collector to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Collector to comply with the order forthwith. 40

(2) Where, pursuant to any order made by virtue of this section, the Registrar or any Collector :-

- (a) cancels any instrument relating to land or any memorial or other entry on any such instrument, or
- (b) makes any other amendment of, or addition to, any such instrument,

10 he shall note thereon the reason for the cancellation, amendment or addition, and the date thereof, and shall authenticate the same by his signature and seal.

(3) Where the Registrar or Collector takes action under this section in respect of any land or any share or interest therein, he shall cause notice of his action to be served upon any person or body having a claim protected by caveat affecting the land, share or interest.

12. The Respondent submits that the Federal Court was right in holding that there were peculiar circumstances which should be taken into account. The registration of the claimant's order of lis pendens created legal history. While the former Straits Settlements had provided by the Rules of the Supreme Court for the registration of lis pendens orders the Malay States had no equivalent legislation. The National Land Code which came into force on the 1st January 1966 did not introduce registration of lis pendens orders as such, but by section 417 merely provided generally for registration of Court orders. It was only after the Federal Court decision in Vesudevan's case (1975) 2M.L.J. 231) that all doubts about the propriety of registering lis pendens have been cleared.

20

30

13. The Respondent submits that the judgement of the Federal Court (Appellate Division) was right and should be affirmed with costs for the following, amongst other ;

R E A S O N S

- (1) BECAUSE the successful registration of a lis pendens order in a Malay State was a peculiar circumstance rightly taken into account by the Federal Court.
 - (2) BECAUSE the Federal Court's powers of supervision over advocates and solicitors was rightly exercised.
- 40

Record

- (3) BECAUSE the Judgment of the Federal Court (Appellant Division) was correct.

A. JAYADEVA

IN THE JUDICIAL COMMITTEE No. 24 of 1977
OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

IN THE MATTER of the ADVOCATES AND
SOLICITORS ORDINANCE 1947

- and -

IN THE MATTER of CHOE KUAN HIM,
gentleman, one of the Advocates and
Solicitors of the High Court

B E T W E E N :

T. DAMODARAN S/O P.V. RAMAN
(Applicant)

Appellant

- and -

CHOE KUAN HIM (Respondent)

Respondent

CASE FOR THE RESPONDENT

PHILIP CONWAY THOMAS & CO.,
61 Catherine Place,
London, SW1E 6HB

Solicitors for the Respondent