Privy Council Appeal No. 16 of 1981

AR. PL. Palaniappa Chettiar – – – – – *Appellant*

v.

A.R. Lakshmanan Chettiar – – – – – *Respondent*
alias PL.AR.L. Letchumanan Chettiar
alias Ana Runa Leyna Lakshmanan Chettiar

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH JUNE 1983

Present at the Hearing:

LORD FRASER OF TULLYBELTON

LORD KEITH OF KINKEL

LORD ROSKILL

LORD BRIGHTMAN

LORD TEMPLEMAN

[*Delivered by* LORD BRIGHTMAN]

This is an appeal from a decision of the Federal Court of Malaysia given at Kuala Lumpur on 7th October 1978. The Federal Court, as also the High Court at Seremban, declared in effect that a 40 acre rubber estate in the district of Port Dickson, registered in the name of the appellant, was the property of a joint Hindu family and not of the appellant personally.

The Hindu family formerly consisted of the father Arunasalam Chettiar, his second wife Meenakshi, and his sons Palaniappa by his first wife, and Lakshmanan by his second wife. It will be convenient to refer to the father as "the Karta", and to his sons as "the Elder Son" and "the Younger Son".

The Chettiar family were money-lenders. Until about 1923 the Karta was a member of an earlier joint Hindu family which carried on a money-lending business in Kuala Lumpur and Port Dickson under the name "K.M.P.L.". There seems also to have been a family concern carried on at Kandanoor, India, under the name "R.M.P.K.P.".

In 1926, while the previous joint Hindu family assets were in process of division, the Karta started a new money-lending business under the name " PL.AR. " with the aid of funds withdrawn from the K.M.P.L. concern and other moneys.

In 1934 the Karta bought at auction a 40 acre rubber estate. He already held 99 acres, and the addition of a further 40 acres would have brought his holdings up to a level at which the permissible production of rubber would fall to be controlled by an Assessment Committee. In order to conceal the true size of his holdings and thus circumvent the regulations, the Karta in 1935 transferred the 40 acre estate into the name of his Elder Son. The transfer was expressed to be in consideration of $7,000, but it is now common ground that nothing was paid. The 40 acre estate was then registered in the Elder Son's name.

In 1949 a dispute arose between the Karta and his Elder Son as to the ownership of the PL.AR. concern. The Karta claimed that all the assets belonged to him in his own right. The Elder Son claimed that they belonged to a joint Hindu family consisting of the Karta and his wife Meenakshi, and his two sons. In July 1950 the Elder Son instituted proceedings in the Court of the Subordinate Judge at Devakottai, India, claiming among other things that the assets of the PL.AR. concern in Port Dickson were the property of the joint Hindu family in which the Elder Son would be entitled to a one-third share. Their Lordships will refer to this suit (O.S. No. 70 of 1950) as " the Elder Son's Indian Action ".

In October 1950 the Karta wished to sell the 40 acre estate. He sought the co-operation of the Elder Son in order to make title. The Elder Son refused, whereupon in November 1950 the Karta began proceedings in the Seremban High Court against the Elder Son seeking a declaration that the 40 acre estate was held by the Elder Son in trust for the Karta personally. Their Lordships will refer to this suit (Civil Suit No. 62 of 1950) as " the Karta's Action ". In his defence in the Karta's action the Elder Son asserted that prior to the transfer of the 40 acre estate to the Elder Son, the Karta held the same in trust for the joint Hindu family concern known as " R.M.P.K.P.AR." in which the Karta, the Elder Son and the Younger Son were co-parceners. The Elder Son proceeded to claim that he was a purchaser of the 40 acre estate from the Karta for $7,000. It was accepted before their Lordships that R.M.P.K.P.AR. must be treated as a reference to the PL.AR. concern.

In April 1951 the Elder Son brought further proceedings, this time in Seremban, against the Karta, Meenakshi and the Younger Son claiming that the assets of the PL.AR. concern in Port Dickson belonged to the joint Hindu family. Their Lordships will refer to this third action (Civil Suit No. 34 of 1951) as " the Elder Son's Seremban Action ". In that action the parties sensibly agreed to abide by the final decision of the Court in the Elder Son's Indian Action, and accordingly the Elder Son's Seremban Action was stayed by consent.

In July 1956, the High Court (Smith J.) upheld the claim of the Karta in his Action, and declared that the Elder Son held the 40 acre estate in trust for the Karta. The judge rejected the Elder Son's claim that the estate formed part of a joint Hindu family trust. This was not surprising, because the Elder Son absented himself from the trial and no evidence was called on his behalf. There was an appeal to the Federal Court of Appeal (F.M. Civil Appeal No. 34 of 1958) which was dismissed in April 1959. The judgment of the Federal Court is not before their Lordships.

There was then an appeal to Her Majesty in Council, which is reported in [1962] A.C. 295. Judgment was given in January 1962. The Board

expressed the opinion that the appeal should be allowed on the ground that the Karta, according to his own evidence, had transferred the plantation to his Elder Son for a fraudulent purpose, namely, to deceive the public administration. The Karta could not rely on his own fraudulent act in order to recover the estate.

In October 1963, the Elder Son's Indian Action achieved its purpose. The Supreme Court of India declared that the PL.AR. concern at Port Dickson did not belong exclusively to the Karta but belonged to the joint Hindu family. As a consequence of this judgment, the Seremban High Court in July 1964, in the Elder Son's Seremban Action, directed that an account be taken of all movable and immovable property of the joint Hindu family and of the amount due to the Elder Son as one of the co-parceners.

Their Lordships now come to the present action, which was instituted in January 1974. In this action (the 1974 Action) the Younger Son sues the Elder Son claiming a division of the 40 acre estate, or the sale thereof and distribution of the proceeds of sale between himself, the Elder Son and the estate of the Karta (who had in the meantime died). The Younger Son sues as owner of a one-third share in his own right, and as owner of another one-third share as the heir at law of the Karta. The Younger Son pleaded that the 40 acre estate had been bought by the Karta with funds of the joint Hindu family, whereby the land became the property of the family. He also stated in his pleading that the position might nevertheless be binding on the Karta's estate so far as the Karta's one-third share was concerned, but not on the Younger Son in relation to his own one-third share. The Elder Son in his defence asserted that the estate was not family property, that it was the subject matter of a sale by the Karta to himself and that thereafter the estate belonged exclusively to the Elder Son. The Elder Son also pleaded an estoppel, and a time bar, in the following terms:

> " 5. The Privy Council has held by its judgment dated 31.1.1962 that the deceased [Karta] was not entitled to contend that the transfer dated 27.2.1935 was fraudulent or ineffective and [to] get any relief on that basis. The plaintiff is prevented in law from raising the issue once again.
>
> 6. In any event the plaintiff is barred by the law of limitation from claiming a one-third undivided share in the said land."

There were certain procedural features of the trial of the 1974 Action to which their Lordships must refer at the outset. In the first place, on 17th December 1976 an interlocutory order was made by the trial judge. After formal introductory matter, the order made was recorded in the following terms:

> " Civil Suit No. 34 of 1951–Bundle ' A '
> Parties to put in written submissions."

Suit No. 34 of 1951 was the Elder Son's Seremban Action, in which the Elder Son sought to establish the existence of a joint Hindu family trust. It was in this action that the parties had agreed to accept the decision of the Court in the Elder Son's Indian Action, and it was this action which had been stayed on 3rd December 1954 pending conclusion of the Indian Action. Their Lordships understand that " Bundle ' A ' " was intended to be a reference to the pleadings, notes of evidence, memorandum of appeal, judgments and orders in the Karta's Action, and also certain ledgers of the PL.AR. firm which are included in the record of the instant appeal as " Exhibit A ". Their Lordships are uncertain of the significance of the reference in the interlocutory order to " Civil Suit No. 34 of 1951 ", but possibly it was a mistake for " Civil Appeal No. 34 of 1958 " (the appeal in the Karta's Action) in relation to which " Exhibit A " constituted the record.

Secondly, in his judgment in the High Court the trial judge, who as mentioned above had made the interlocutory order, recorded that:

> ". . . . . the parties rested their respective cases on the pleadings and the bundle of agreed documents which in fact is the appeal record in F. M. Civil Appeal No. 34 of 1958 arising from Civil Suit No. 62 of 1950 . . . . . "

which was the Karta's Action.

The written submission on behalf of the Elder Son (though he was the defendant in the suit) preceded that of the Younger Son, and was dated 29th December 1976. This submission defined three issues: whether the 40 acre estate was part of the joint Hindu family property, or was the separate property of the Karta, at the time of the transfer to the Elder Son; if the former, whether the Younger Son was " bound by the judgment in the Privy Council " in the Karta's Action; if not, whether the suit was barred by the Limitation Ordinance 1953. The submission on behalf of the Younger Son was dated 15th January 1977. It is clear from the opening paragraph that it was drafted after receipt of the Elder Son's submission. Indeed their Lordships do not doubt that each side had the opportunity to comment on the submission of the other.

Neither side adhered strictly to the arrangement, if it were in fact made, that the case should be decided exclusively on the " Appeal Record " in the Karta's Action. The Elder Son in his submission relied on another matter of record, namely, the contents of the Karta's Will executed in 1966 which was the subject matter of a Probate action in 1973 in the Seramban High Court. The Younger Son for his part referred extensively to the judgment given by Shah J. on 25th October 1963 in the Elder Son's Indian Action, and to the declaration made that " the PL.AR. firm at Port Dickson and the assets thereof are the estate of the joint Hindu family ". In addition, he referred to the judgment in the Elder Son's Seremban Action. No objection was taken by either side on account of the inclusion of such matters of record as material which should be considered by the judge.

Judgment was delivered on 17th June 1977. The learned judge accepted the three issues as defined in the submission of the Elder Son, but added a fourth issue, namely whether, if the 40 acres were part of the joint Hindu family property, it was competent for the Karta to alienate it.

On this last question of law, the trial judge accepted that the Karta of a joint Hindu family had power to alienate family property for the purpose only of legal necessity or of benefiting the estate and this proposition is not now disputed. In the instant case the alienation was not dictated by necessity or by the interests of the estate, but for the purpose of avoiding the prevailing rubber plantation regulations.

On the main issue, the learned judge concluded as follows:

> " Now to deal with the 40 acres in the present proceedings. After considering the evidence and the submissions made on behalf of the parties I have come to the conclusion that the plaintiff must succeed in this case. In my view there is ample evidence to establish that the 40 acres formed part of the assets of the joint Hindu family firm of PL.AR. and that they were not the separate property of the Karta. When the Karta commenced his money-lending business in the name of PL.AR. on August 22, 1926 he did so with funds withdrawn from the earlier joint family firm of K.M.P.L. which was then in the process of being partitioned and after the division of the movable and immovable properties the Karta brought his share into the PL.AR. firm on January 3, 1927. The ledger which the Karta had produced during the hearing of Civil Suit No. 62 of 1950 was the PL.AR. firm

ledger. In that suit as well as in Civil Suit No. 34 of 1951 the parties had agreed to abide by the decision of the Supreme Court of India in O.S. 70 of 1950 and the Supreme Court had held that the PL.AR. firm in Port Dickson and the assets thereof were the estate of the joint Hindu family consisting of the defendant, the Karta, the plaintiff and Meenakshi. In so far as the 40 acres are concerned the inferences which may be drawn from the facts as found by the Supreme Court conclusively establish that the 40 acres were assets of the joint Hindu family firm of PL.AR. and were not the separate property of the Karta."

In reaching this conclusion the trial judge quoted extensively from the judgment of Shah J. He added:

> " It is quite clear from the findings by the Supreme Court of India that the Karta had throughout regarded the rubber estates as belonging to the joint Hindu family firm of PL.AR., and that the defendant knew about this as he was being kept informed of the dealings of the firm in Port Dickson by the Karta."

The trial judge finally drew attention to the Elder Son's pleadings in the Karta's Action, asserting that the 40 acres were held by the Karta in trust for the joint Hindu family.

On the issue of estoppel, the trial judge pointed out, correctly, that the decision of this Board in the Karta's Action, precluding the Karta from recovering the 40 acre estate, was not binding on the Younger Son who was not a party to those proceedings. Finally, on the issue of limitation, it is sufficient to quote by way of explanation this passage from the judgment of the trial judge:

> " On the issue of limitation I agree with Mr. Atma Singh Gill that this being an action by a beneficiary to recover trust property from a trustee no period of limitation can apply to it by virtue of the provisions of section 22(1)(*b*) of the Limitation Ordinance 1953 which states that ' No period of limitation prescribed by this Ordinance shall apply to an action by a beneficiary under a trust, being an action . . . . to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use '."

The action came before the Federal Court of Appeal at Kuala Lumpur, which gave judgment on 7th October 1978. The Federal Court upheld the trial judge except only as to the one-third share claimed by the Younger Son through the estate of the deceased Karta. If a member of a joint Hindu family wrongfully alienates an asset forming part of the family property, the alienation may be binding as against the transferor's own share of the family assets. In the instant case, the Karta purported to transfer the whole of the 40 acre estate to the Elder Son, who was entitled to retain his own one-third share therein and might or might not be entitled to retain the deceased Karta's one-third share. The trial judge's decision that the Karta or his estate was entitled to a one-third share ought therefore to be set aside. Indeed, their Lordships consider that any other conclusion would be impossible because it would be directly contrary to the judgment of this Board in the Karta's Action, which established decisively that the Karta was not entitled to claim any interest in the land which he had alienated in fraud of the rubber plantation regulations.

The Elder Son, in his appeal to the Board, set out a great number of reasons for reversing the decision of the Federal Court. However, some of these reasons, to which it is not necessary to refer in detail, were new points which had not been argued in the Courts below, and their Lordships declined to allow them to be debated for the first time on appeal to the

Board. In the result the effective grounds of appeal can be summarised as follows:

(1) The trial judge ought not to have taken into consideration the facts found by the judge in the Elder Son's Indian Action.

(2) There was not sufficient evidence that the 40 acre plantation was joint Hindu family property.

(3) The Younger Son was estopped from asserting that the 40 acre estate was trust property.

(4) The Younger Son's claim was barred by the Limitation Act 1953.

In the opinion of their Lordships it is clear beyond argument that, when the trial judge was put in possession of the written submission of each party, he became entitled to rely for the purposes of his judgment on any matter of public record contained in that submission, to the inclusion of which the other party had raised no objection. The submissions were exchanged before being delivered to the trial judge. If a submission referred to a matter of record which the other party asserted he was entitled to exclude from the judge's consideration, the time to take that objection and to seek a ruling upon it was when the submissions were exchanged and not after the judgment had been delivered. If a party considered that a matter of record, such as the findings in the Indian Action, was inadequately or inaccurately set out, the objection should have been taken before the judge was asked to consider the case and adjudicate upon it, and not after he had reached his decision.

The evidence in favour of the existence of a trust of the 40 acre estate is formidable. The Elder Son had constantly asserted and ultimately established that the assets of the PL.AR. firm were trust property. Those assets were all held in the name of the Karta, as was the 40 acre estate until transferred to the Elder Son. The appellant was therefore faced with the problem of explaining why that estate should be treated differently from the other assets held by the Karta. No explanation was forthcoming. Furthermore the Elder Son, in his defence in the Karta's Action, had himself asserted that the estate was trust property, and the trial judge was entitled to assume against the Elder Son that his pleading in the earlier action was a truthful one. The difficulty is to discern any ground upon which the trial judge could have come to a conclusion different from that which he reached.

As regards estoppel, the appellant's Counsel was faced with the fact that the Younger Son was not a party to the Karta's Action, and therefore he could not assert res judicata as against the Younger Son. Counsel tried to fall back on a submission that the Younger Son was in some way affected by the fact that he had in earlier litigation allied himself with the Karta in resisting the Elder Son's claim that all the property held by the Karta was joint family property; and that in those circumstances the Younger Son was now in some way estopped from alleging the existence of such a trust in relation to the 40 acres. This submission, on a brief examination, turned out to be untenable, quite apart from being a new point not raised below, and it was rightly abandoned by Counsel.

The submission that the Younger Son's claim against the Elder Son was time barred, notwithstanding the fiduciary status of the Elder Son, does not feature directly in the decision of the Court of Appeal, and was not pressed by Counsel for the Elder Son in argument before their Lordships.

In the opinion of their Lordships the decision of the Federal Court of Appeal was clearly correct. Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal be dismissed. The costs must be paid by the appellant.

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In the Privy Council

AR. PL. PALANIAPPA CHETTIAR

v.

A.R. LAKSHMANAN CHETTIAR
alias PL.AR.L. LETCHUMANAN CHETTIAR
alias ANA RUNA LEYNA LAKSHMANAN CHETTIAR

DELIVERED BY
LORD BRIGHTMAN

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