Tan Chwee Chye and Others v P V RM Kulandayan Chettiar
[2005] SGHC 203

Case Number : OS 619/2002, SIC 2341/2005

Decision Date : 26 October 2005

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Chew Kei-Jin and Lavinia Rajah (Tan Rajah and Cheah) for the plaintiffs; Lai Swee Fung (Unilegal LLC) for the applicant

Parties : Tan Chwee Chye; Tan Sin Eng; Ng Chek Seng — P V RM Kulandayan Chettiar

Civil Procedure – Judgments and orders – Whether default order obtained in proceedings commenced against deceased person valid – Whether court having jurisdiction to order personal representative of deceased person's estate to be made party to proceedings after default order made

Land – Adverse possession – Claim for adverse possession by one co-owner against another co-owner – Applicable principles

26 October 2005 *Judgment reserved.*

Belinda Ang Saw Ean J:

1 This application raises a question of whether a claim for adverse possession can be established by one co-owner against another co-owner. The other issues are of a procedural nature. They concern the validity of a default order obtained in proceedings commenced against a deceased person. It is necessary to examine the procedure adopted in Originating Summons No 619 of 2002 which led to obtaining the default order.

2 The plaintiffs, Tan Chwee Chye, Tan Sin Eng and Ng Chek Seng, are the trustees of the Singapore Chinese Weekly Entertainment Club ("the Club"). The Club was established in 1891 and, for the most part of its existence, has operated from its clubhouse at 76 Club Street, Singapore. The clubhouse is built on land comprising Lot 85-1 (new format Lot 99794P) TS 3 and Lot 85-2 (new format Lot 99793V) TS 3. The Club, through various trustees, has owned Lot 85-1 since 1898.

3 By an Order of Court dated 10 July 2002 ("the default order"), the plaintiffs obtained by default of appearance a declaration that they had become entitled to possession of the land comprising Lot 85-2 forming part of 76 Club Street by virtue of having been in adverse possession of the land by themselves and their predecessors in title for a period in excess of 12 years. Until then, the trustees of the Club and the defendant, P V RM Kulandayan Chettiar, had been shown in the Registry of Deeds as tenants-in-common in equal shares of Lot 85-2.

4 The applicant, K L Ramanathan ("Ramanathan"), seeks permission to intervene in the proceedings with a view to setting aside the default order. The defendant died on 7 January 1985 in Ipoh, Malaysia. The applicant is the defendant's son and sole executor of his will. The High Court in Malaya at Malacca granted probate to the applicant on 2 April 1985 and the same was re-sealed on 27 May 1987 in Singapore.

5 The plaintiffs' position is that the application is without merits and ought to be dismissed. Service of the Originating Summons by way of advertisement in the *New Straits Times* was effected

pursuant to an order for substituted service properly obtained, and the facts and law necessary to prove a claim for adverse possession were before the court granting leave to enter the default order. The plaintiffs were at all material times unaware of the defendant's death.

Background facts

6 I begin with the history of the ownership of Lot 85-2. I shall for convenience refer to Lot 85-2 as "the land". By an Indenture of Assignment dated 3 January 1901, Cheang Jin Hean assigned the land to Tan Quee Lan and Mayna Ahna Ravena Mana Perianar Chitty (son of Raman Chitty) as tenants-in-common in equal shares. Tan Quee Lan then sold his half-share of the land to the then trustees of the Club in October 1901. The Club appeared to have at some stage mortgaged its half-share of the land. On 29 April 1980, there was a reassignment by the Oversea-Chinese Banking Corporation Limited of the one-half share in the land to the then trustees of the Club. As for the other half-share, there were through the years various assignments of that interest to different individuals. The defendant became the legal co-owner of the land by virtue of an Indenture of Assignment dated 23 August 1957 from one V V R N V R N Nagappa Chettiar (son of Veerappa Chettiar).

7 On 24 October 2000, the Singapore Land Registry ("SLR") wrote to the plaintiffs and the defendant at 76 Club Street as registered co-owners of the land under the Registration of Deeds Act (Cap 269, 1989 Rev Ed). In that notice of conversion, the plaintiffs and the defendant were notified of the conversion of ownership of the land under the Registration of Deeds Act to the Torrens system under the Land Titles Act (Cap 157, 1994 Rev Ed). On 28 March 2001, SLR sent a conversion notice similar to the one despatched in October 2000 to the defendant at 8 Jalan Maharani, Muar, Johor. It is the applicant's case that he did not receive this conversion notice. On 5 April 2001, SLR informed the plaintiffs' firm of solicitors, M/s Tan Rajah & Cheah, that SLR had had no response from the defendant on the conversion notice sent to both addresses. In that same letter, SLR sought the assistance of the plaintiffs as co-owners for the information requested from the defendant.

8 Tan Rajah & Cheah wrote on 30 July 2001 to a previous solicitor of the defendant, M/s Donaldson & Burkinshaw, for information regarding the defendant. The latter were unable to assist as the files of this particular client had been destroyed in 1984. Mr H M Dyne, who was the partner in charge, had nothing useful to add.

9 The plaintiffs on 28 August 2001 lodged a caveat in the Registry of Deeds claiming an interest as adverse possessors of the one undivided equal half-share in the land registered in favour of the defendant. On 8 May 2002, the plaintiffs filed this Originating Summons. Ng Chek Seng in his supporting affidavit of 3 May 2002 stated that neither he nor any of the other trustees were aware of any contact at any time between the defendant and the Club apart from some brief correspondence with a lawyer then acting for the defendant. Presumably, Ng Chek Seng was referring to Donaldson & Burkinshaw's letter dated 15 September 1969 to the Club's lawyer, M/s Philip Hoalim & Co. Interestingly, Donaldson & Burkinshaw in that letter took the trouble to trace the defendant's root of title to demonstrate his entitlement to a half-share in the land.

10 On 31 May 2002, pursuant to an Order of Court dated 14 May 2002 for substituted service of the Originating Summons out of jurisdiction, an advertisement was inserted in the *New Straits Times*. The advertisement giving notice of the Originating Summons appeared in the *New Straits Times* on 31 May 2002.

11 Since no appearance was entered on behalf of the defendant within the time limited to do so, the plaintiffs applied for and obtained a default order in terms of the Originating Summons on 10 July

2002. On 12 May 2005, Ramanathan filed the subject application.

Procedural point

12 Counsel for the applicant, Mr Lai Swee Fung, contends that the default order and the Order of Court for substituted service on the defendant must be set aside for non-compliance with the Rules of Court (Cap 322, R 5, 1997 Rev Ed). The Originating Summons was not properly brought as the proceedings were issued against a deceased person. The Order for substituted service of the proceedings was equally bad for the same reason.

13 At the hearing, Mr Lai pressed the point that it was incumbent on the plaintiffs under O 15 r 6A(4)(*a*) of the Rules of Court to obtain an order making the personal representative of the defendant a party to the proceedings as probate had been granted. The order and Originating Summons must also be served on the personal representative. In response, Mr Chew Kei-Jin for the plaintiffs argued that it was not necessary to do all that as judgment in default had already been obtained.

14 Order 15 r 6A provides:

> (1) Where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the deceased.
>
> (2) …
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> (3) An action purporting to have been commenced against a person shall be treated, if he was dead at its commencement, as having been commenced against his estate in accordance with paragraph (1), whether or not a grant of probate or administration was made before its commencement.
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> (4) In any such action as is referred to in paragraph (1) or (3) —
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> > (*a*) the plaintiff shall, during the period of validity for service of the writ or originating summons, apply to the Court for an order appointing a person to represent the deceased's estate for the purpose of the proceedings or, if a grant of probate or administration has been made for an order that the personal representative of the deceased be made a party to the proceedings, and in either case for an order that the proceedings be carried on against the person appointed or, as the case may be, against the personal representative, as if he had been substituted for the estate;
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> > (*b*) the Court may, at any stage of the proceedings and on such terms as it thinks just and either on its own motion or on application, make any such order as is mentioned in sub-paragraph (*a*) and allow such amendments (if any) to be made and make such other order as the Court thinks necessary in order to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon.
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> ….
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> (7) Where an order is made under paragraph (4), Rules 7 (4) and 8 (3) and (4) shall apply as if the order had been made under Rule 7 on the application of the plaintiff.

15 It seems to me that even though the default order was made with the leave of the court, it does not detract from the fact that it was a judgment in default of appearance and an *ex parte* order. An application can be made to set it aside. Another situation in which an order may be set aside is where the person obtaining the order has not complied with the requirements of the Rules of Court and the order has thus been irregularly obtained: see *Ong Cher Keong v Goh Chin Soon Ricky* [2001] 2 SLR 94 at [44].

16 At the setting-aside hearing, the undisputed fact is that the defendant died as long ago as 1985. Order 15 r 6A(3) recognises any proceedings commenced against a person who has died as being duly commenced against the estate of the deceased. However, and this is important, in order to continue with the proceedings, O 15 r 6A(4)(*a*) requires the personal representative (in this case the applicant) to be made a party to the proceedings and for an order that the proceedings continue against the personal representative. Order 15 r 6A(7) read with O 15 r 7(4) requires the order made under r 6A(4)(*a*) or r 6A(4)(*b*) to be noted in the cause book and the order served on the personal representative together with the originating summons. Order 15 r 8(3) deals with the entry of appearance by the person to be made a defendant. Order 15 r 8(4) provides that the person added as a party or to be made a party becomes a party after service of the order or, if service of the order on him is not required, after the order has been noted in the cause book.

17 A distinction is drawn in r 6A(3) and r 6A(4) between commencing a writ action or originating summons and continuing with it after it has commenced. The originating summons in the latter case cannot continue as there will be no defendant having legal personality and capable of identification. The estate of a deceased person has no legal persona and, if a grant of probate has been made (as was the case here), the action must continue against the person who is the personal representative of the deceased. In these circumstances, it is not enough that the action was properly commenced. There has to be an effective party against whom the dispute can be determined. The estate of a deceased person is not such an effective party. Consequently, the default order itself in the present case could not stand for the same reason. There was no legal persona in existence against whom a default order could be entered. I would not regard this as a case of non-compliance with the Rules of Court and an irregularity under O 2 r 1(1). The default order was fundamentally defective and thus a nullity. See *In re Amirteymour, decd* [1979] 1 WLR 63 at 66 and 67. I therefore order that the default order be set aside *ex debito justitiae*.

18 The fact that the Originating Summons was issued and default order entered against the defendant in ignorance of the defendant's death is not a valid reason for not setting aside the default order. The application envisaged in O 15 r 6A(4)(*a*) has to be made during the period of validity of the originating summons. However, the court has a discretion to make the same orders as in r 6A(4)(*a*) at any stage of the proceedings, under r 6A(4)(*b*). Rule 6A(4)(*b*) is in plain and unfettered terms and the power is expressly exercisable at any time. Therefore, the court has jurisdiction to make an order for the personal representative to be made a party to the proceedings under r 6A(4)(*b*) after there is a default order.

19 Arunachalam s/o RM KP Venkatachalam of M/s Sault & Co, the applicant's solicitors in Malaysia, said in his affidavits that the applicant was only aware of the default order when land title searches were carried out in Singapore. He said that he was given instructions to wind up all the affairs of the estate, and in so doing, he caused searches to be made in respect of the subject property in the Registry of Land Titles and/or the Registry of Deeds. He was later informed by the Singapore solicitors who carried out the searches on 17 March 2005 of the caveat and the default order. Having regard to the defective default order and the merits of the defence discussed below, they far outweigh any impact of the delay in filing this application almost three years after the default order was obtained.

Adverse possession point

20 The plaintiffs submit that to establish adverse possession, it is necessary to establish: (a) actual possession; and (b) an intention to possess. The latter requirement itself has two elements: (a) subjective, requiring the trespasser to establish he intended to possess; and (b) objective, requiring the establishment of possession that would be apparent to the paper owner if he visited the site: see *The Inglewood Investment Co Ltd v Baker* [2003] 2 P & CR 23. On the facts, the plaintiffs submit that these elements have been satisfied. The argument is that immediately before 1 March 1994, the plaintiffs had been in possession of the land for a period of 12 years. Their rights as adverse possessors were preserved by s 177(3) of the Land Titles Act. On 28 August 2001, a caveat to protect the plaintiffs' interest to the one-half share of Lot 85-2 was lodged and registered against part of Lot 85-2 in the Registry of Deeds. The grounds of claim as stated in the caveat were as follows:

> BY VIRTUE OF the Caveator being in continuous and uninterrupted possession of the land above described for a period exceeding twelve years prior to 1st March 1994 and by virtue of the provisions of Section 9 of the Limitation Act and Section 177(3) of the Land Titles Act.

21 The plaintiffs, to prove their claim in adverse possession, relied on these facts. The Club was established in 1891. The clubhouse is situated in an area of land made up of the two plots. The plaintiffs, together with their predecessors in title and therefore the Club, have been in possession of Lot 85-1 and Lot 85-2 for a period well in excess of 20 years. The Club used Lot 85-2 without any reference to the defendant. No rent of any sort was paid to the defendant for as long as anyone could remember. The defendant had no access to Lot 85-2 for well in excess of 20 years.

22 As stated, this application raises an issue as to whether one co-owner (the plaintiffs) can acquire title by possession from the other co-owner (the defendant), a situation which is very different on the facts from the various local authorities on adverse possession tendered by both sides. In those decided cases, the disputed land was entirely owned by one paper owner and the trespasser's possession was single and exclusive. Therefore, if the trespasser was in possession, the paper owner could not be.

23 The rights of co-owners of property are to equal occupation of the land. Evidence of single and exclusive possession by itself is not enough to constitute dispossession where co-owners are concerned. The possession to the exclusion of the other co-owner can be read as referable to the rights which the claimant already has as co-owner. The question is whether the claimant ever had the necessary intention to possess the property so as to dispossess the other co-owner. The fact that each co-owner is necessarily entitled to the use and occupation of the whole land is a factor to be borne in mind.

24 A co-owner can commit a legal wrong against another co-owner by excluding the latter from exercising the right to occupation. As between co-owners, there has to be ouster before the possession of the claimant can be treated as adverse. An ouster is an act of a co-owner which constitutes a trespass of another co-owner's rights in the land. The burden is on the plaintiffs to establish ouster.

25 Besides occupation of the land by the co-owner, what are the other circumstances of the case in deciding whether there has indeed been an ouster? Acts which are open to more than one interpretation will not suffice. The plaintiffs pointed out that they paid no rent to the defendant for occupying the land. This fact does not assist them. Under s 73A of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed), a co-owner has to account for receipt of rent from a third party.

At common law, a co-owner who is so excluded can sue for ejectment and for mesne profits: *Goodtitle v Tombs* (1770) 3 Wils K B 118; 95 ER 965. Furthermore, the fact that the plaintiffs have not been in contact with the defendant is not the same as saying that the plaintiffs have denied access to their co-owner who sought access and that such denial amounted to an ouster. Again, the clubhouse, which was built that way (*ie*, on Lot 85-1 and with the car park and driveway on part of Lot 85-2), remained the same from the time the defendant bought the half-share of the land. If anything, an inference may be drawn that implied permission was in fact given for the Club to use and occupy the land. A reasonable person would have appreciated that the use was with the permission of the co-owner. Again, the fact that many years had passed without there being any contact or communication between the co-owners did not mean that the implied permission ceased to exist. The defendant's implied consent to the Club's occupation continued and the Club was not in adverse possession and could not acquire title by adverse possession.

26 Mr Chew asked the court to presume ouster of possession against the defendant from the long undisturbed and quiet possession: see *Doe ex dim Fishar v Prosser* (1774) 1 Cowp 217; 98 ER 1052. He submits that the Club has had the use and exclusive possession of the whole of Lot 85-2 in excess of 12 years which is sufficient to constitute an ouster of the defendant, the paper co-owner, so as to adversely possess the latter's half share. I am not, however, prepared to presume an ouster. Wherever the limits on ouster or deemed ouster lie, there must be conduct sufficient for the court to infer a denial of the claimant's title.

27 It is evident that the plaintiffs' intention to dispossess the defendant was formed after their inquiries into the whereabouts of the defendant drew a blank. If they had indeed ousted the defendant well before 1 March 1994 as claimed, they would have informed SLR after receipt of the October 2000 conversion notice that they had adversely possessed the undivided half-share. There would have been no need for SLR to write to the defendant at the Muar address or for the plaintiffs' lawyers to make inquiries as to the whereabouts of the defendant. The plaintiffs' conduct was undoubtedly incompatible with an ouster. There is also evidence that in December 1988 when the Land Office in Singapore wrote to the co-owners of the land, nothing was said about the Club having adversely possessed the defendant's share in the land.

28 It was suggested that the defendant had abandoned his half-share of the land. In considering the whole of the evidentiary material including what the defendant was doing or not doing during the relevant period, I would say that the defendant did not abandon his half-share of the land. To illustrate, on 7 December 1988, the Commissioner of Lands, Land Office Singapore addressed a letter to the defendant and the Club seeking permission to allow the Public Works Department to carry out works on the land, *ie* soil investigation, and to reinstate the site on completion of the works. Sault & Co, on 15 December 1988 replied on behalf of the defendant's estate. Furthermore, quit rent payable annually in respect of the defendant's share of the land was regularly paid by the defendant until his death and was thereafter paid by his estate or the applicant until quit rent was abolished. The last payment of quit rent to the Land Office was on 25 January 1989.

29 On a closer reading, the half-share of the land in Club Street was mentioned in the defendant's will. For almost 18 years after the Grant of Probate was re-sealed in Singapore, Ramanathan did nothing in respect of the interest in Lot 85-2. This inactivity is actually irrelevant. The sufficiency of the possession which is alleged to be adverse depends on the intention of the claimant and not that of the paper owner.

30 When all these matters are put together, the Club's possession was not adverse to begin with. It begs the question of when and how that possession allegedly turned adverse, if at all. I am in agreement with Mr Lai that the adverse possession for the requisite period has not been made out. I

need not deal with other arguments raised, given my decision.

31 For all these reasons, the Order of Court dated 10 July 2002 is set aside with costs to the applicant. I will hear counsel as to the precise terms of the order to be made.