IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1996] SGCA 45

CA 182/1995, 185/1995

Between

Yogambikai Nagarajah

… *Appellant*

And

Indian Overseas Bank

… *Respondent*

GROUNDS OF DECISION

Banking — Accounts; Civil Procedure — Costs; Trusts — Express trusts — Formalities

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Yogambikai Nagarajah v Indian Overseas Bank

[1996] SGCA 45

CA 182/1995, 185/1995
Chao Hick Tin J; Lai Kew Chai J; Yong Pung How CJ
14 August 1996

1 The two appeals arose from the same facts and the appellant in either appeal was the same person. After hearing arguments from counsel, we dismissed both appeals. We now deliver our reasons.

2 **Factual background**

3 The appellant (known through these proceedings as `Shanti`) had in Suit 1689/91 (hereafter known as the `forgery suit`) claimed the moneys deposited in a fixed deposit account in her name in the Indian Overseas Bank (IOB) who were respondents in both appeals. This account was opened by one Anbudurai Arangannal (hereafter known as `Anbu`), who was the third respondent in the second appeal, on 24 July 1989.

4 The money, the subject matter in both suits, originally belonged to the estate of one ARSAR Valliappan (hereafter known as `Valliappan`). When Valliappan died intestate on 3 July 1986, he was survived by ARV Valliyammai Achi (hereafter known as `Valli`) and Rekha, his widow and infant daughter respectively. His estate, which included property and the money in dispute, was located in Singapore. Valli remained in India but her sister and brother in law

were resident in Singapore. In May 1987, letters of administration of the estate were granted to the brother-in-law and sister of Valli.

5 By the second half of 1988, Valli had become unhappy with the way the estate was administered. She visited Singapore in November 1989 when her `suspicions` were confirmed. Upon her return to Madras, she consulted Rama Arangannal, who was a family friend as well as the head of a wealthy Madras family and a prominent politician, for advice as to whom she should appoint to replace the prevailing administrators. During that meeting, Valli requested Mr Arangannal to ask his son, Anbu, to become an administrator of the estate. Among other things, Anbu was then located in Singapore. Valli then returned to Singapore and on Anbu`s advice, saw a solicitor, Mr V Ramakrishnan, to effect the removal of her sister and brother-in-law as administrators of the estate. On 2 June 1989, Valli obtained an order appointing her and Anbu as administratrix and co-administrator of the estate replacing the previous administrators. On 8 June 1989, Valli appointed Anbu as her attorney in the administration of the estate and subsequently returned to India. On 22 June 1989, they received in their capacity as administrators the sum of $1,232,086.37. The next day, Anbu placed $1m of this sum in IOB on a one-month fixed deposit in the names of Rekha and himself. Upon maturity one month later on 24 July 1989, Anbu placed the money, including the accrued interest of $4,405.82 in a one-month fixed deposit account automatically renewable unless otherwise instructed. This account was in the name of the appellant, Shanti. The nature of Shanti`s interest in this account was the crux of these appeals.

6 Shanti had met Anbu in England in late 1985 or early 1986. Anbu was in England studying accountancy. Shanti was working as a visual display

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operator at the Royal Brompton Hospital and training to be an Indian classical dance teacher. Shanti and Anbu began courting.

7 In late 1987, early 1988, Anbu was instructed by his father to halt his studies in England and leave for Singapore where he was to take over the running of a trading company, AM Abdullah Sahib Trading Pte Ltd, which was owned by his father and was in some financial trouble. Anbu did as instructed and became a director of the company on 24 June 1988. His father injected new capital into the company. In August of that year, Shanti came to Malaysia on vacation with her sister. During this time, Anbu proposed marriage and she accepted.

8 On 2 April 1989, Shanti was accompanied by her father to Madras for the ***Nitchayathartham*** ceremony. This is the customary Hindu engagement ceremony and took place on 3 April 1989. During this time, the date of the wedding was set for 20 August 1989 and other matters ancillary to the wedding like the interchange of gifts and expenses, were also discussed and finalised. After several days, Shanti returned to England while Anbu returned to Singapore.

9 As noted above, the $1m from the estate together with accrued interest was placed in a fixed deposit account at IOB in Shanti`s name on 24 July 1989. In the meantime, Anbu had sent to Shanti in England a card to be filled with her specimen signatures as required by IOB to be filled out by each account holder. There are two columns on this card. Each column contains a corresponding space for signatures. The first column is for specimen signatures of the account holder while the second is for the signatures of someone who can verify the specimen signatures. The card was subsequently returned by Anbu on 2 August 1989 with both columns filled with what were purportedly the signatures of

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Shanti. In the proceedings below, Shanti did not dispute that the signatures in the specimen column were hers. She contended, however, that the signatures in the verification column had been forged. Anbu`s version of the story was that when the card was returned to him on 2 August 1989, both columns had been filled by Shanti. On receipt of the card, Anbu handed it to IOB.

10 Meanwhile, also on 2 August 1989, Shanti accompanied by her father and sister, arrived in Madras from England for the wedding. Anbu returned later from Singapore on 6 August 1989. The wedding took place on 20 August 1989 as planned and thereafter, the married couple stayed on at the Arangannal residence in Madras. During this time, Shanti conceived. The couple left Madras on 16 November 1989 for Singapore.

11 On 23 November 1989, Anbu prepared a handwritten note addressed to IOB with instructions that the money in the fixed deposit account in Shanti`s name be transferred to an account in the name of Valli to be held on the same terms. This note carried a signature purported to be Shanti`s. For convenience, we set out the contents of that note:

> *Yogambikai Nagarajah*
> *Robinson Road*
> *PO Box 19*
> *Singapore 9000*
> *The Chief Manager*
> *Indian Overseas Bank*
> *Cecil Street*
> *Singapore 1646 [sic]*
> *Dear Sir*
> *Re: Fixed Deposit for SGD1,017,032.34*
> *Deal Number 129786*

> *The above deposit matures today. On maturity kindly re-deposit the above sum with accrued interest for a further period of one-month rolled over monthly at the best available rate in the following name till further notice:*
>
> *Mrs ARV Valliyammai Achi*
>
> *Indian Passport C 796513,*
>
> *Robinson Road,*
>
> *PO Box 19, Singapore 9000.*
>
> *Please let us know, when the deposit receipt is ready. Thank you.*
>
> *Yours faithfully*
>
> *Signed: Yogambikai Nagarajah*
>
> *(Yogambikai Nagarajah)*

12 In these proceedings, Shanti challenged the authenticity of the signature on this note. As it happened, IOB upon receiving the note, followed the instructions therein and transferred the money with the accrued interest to an account opened in the name of Valli for that purpose. The sum now totalled $1,021,405.23. Subsequently, it was split into two fixed deposits of roughly equal amounts, one in Singapore dollars, the other in Deutschmarks.

13 On 6 January 1990, Shanti and Anbu returned to Madras to celebrate the Hindu festival `Ponggal`. Two weeks later, on 18 January 1990, Anbu returned to Singapore leaving Shanti with his parents in Madras. Against the wishes of her mother-in-law however, Shanti left Madras for London on 31 January 1990. The reason for this, according to her, was because she was homesick.

14 Between February and March 1990, the fixed deposits of Singapore dollars and Deutschmarks were pledged by Valli as security for overdraft facilities to Anbu.

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15 On 11 June 1990, Shanti gave birth to a son, Aravind. By this time, the marriage had turned sour and has since ended in divorce. On 17 July 1990, IOB received the following letter from Shanti sent on her behalf by Barclays Bank:

> *The Manager*
>
> *Indian Overseas Bank*
>
> *Dear Sir*
>
> *I hold a non-resident account in your Singapore Branch on Robinson Road and it has recently come to my knowledge that I have misplaced all of my documents relating to the account.*

16 My address in Singapore was 27 Lucky Crescent, Singapore 1646, which I have now left to return to the UK.

17 Please find attached copies of the following documents to prove my identity as the account holder, as I do not have any documents with the account number:

> *Copy of British Passport number 647114C.*
>
> *Copy of Singapore Dependent Pass number FIN 1521962U (type DEP).*
>
> *Copy of Birth Certificate number: Y0672086.*
>
> *As I have lost all relevant documents pertaining to the account, I request that all funds in my account are frozen with immediate effect until I advise further. I will also appreciate your sending me fresh details, documents and signing arrangements of the account so that I may, once again, be able to operate it.*

18 I thank you in advance for your co-operation.

> *Yours faithfully*
>
> *Sgd: YOGAMBIKAI NAGARAJAH*
>
> *Flat*
>
> *Neville Street*
>
> *London SW*

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19 On 2 August 1990, Shanti had a telephone conversation with the chief executive of IOB. IOB then wrote directly to her in the following terms:

> *Dear Madam,*
>
> *We refer to your letter of 15 July 1990 sent through Barclays Bank plc, Ickenham Branch, Middx, United Kingdom.*

20 Our records show that you have only maintained one account with us, namely, fixed deposit account.

21 Enclosed herewith is a copy of your instructions dated 23 November 1989 to transfer the amount which was in your name. This was done accordingly.

22 We also refer to your telephonic conversation with our Chief Executive this morning and advise that in view of your instructions dated 23 November 1989, your allegations that our bank should not have transferred the amount and that you were cheated, are misconceived.

23 Kindly let us know if we can be of further service to you.

> *Yours faithfully*
> *Sgd: KS Krishnamurthy*
> *Senior Manager*

24 On 3 August 1990, Shanti replied as follows:

> *Mr KS Krishnamurthy*
> *Senior Manager*
> *Indian Overseas Bank*
> *Cecil Street*
> *IOB Building*
> *Singapore 0104*

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> *Dear Sir*
>
> *I am in receipt of your letter dated 2 August 1990 along with a copy of the letter you have received regarding my account.*

25 I categorically maintain that I have not made any such instructions pertaining to my account and have not authorised any transfers from my account. The letter upon which you have acted regarding the transfer from my account has not been issued by myself nor has it been signed by myself; I have had no knowledge of this letter whatsoever until receipt of the copy from you. As such, the letter in question is a forgery, on which I am seeking necessary legal action.

26 I am most displeased with the negligence on your side and am therefore instructing you to remit the entire sum of SGD1,017,032.34 to my UK account immediately, the details of which are as follows:

> *BARCLAYS BANK plc*
>
> *Ickenham Branch*
>
> *Swakeleys Road*
>
> *Middlesex UB10 BDE*
>
> *SORT CODE: 20-44-00*
>
> *ACCOUNT TITLE: YOGAMBIKAI NAGARAJAH*
>
> *I now await your immediate action, failing which I will be left with no choice but to take the matter up with the International Fraud Squad and other legal bodies.*
>
> *Yours faithfully*
>
> *Sgd: Yogambikai Nagarajah*
>
> *(Yogambikai Nagarajah)*
>
> *6A Neville Street*
>
> *London SW7 3AR*
>
> *Tel: 071-581 0908*
>
> *Fax: 071-603 0654*

27 On 6 August 1990, the bank replied as follows:

> *Dear Madam,*
>
> *We refer to your letter dated 3 August 1990, received by us today.*

28 We strenuously deny the allegation of negligence on our part and are taking a very stern view of your allegation.

29 In order to resolve this matter, we require that you do the following:

> You make a police report and despatch a copy of the report to us immediately, and
>
> you authorise us in the form annexed to this letter to make a police report in Singapore.
>
> Your authorisation is to be witnessed by a notary public.

30 We require your authorisation because of the banking secrecy laws in Singapore.

31 You will appreciate that with the involvement of the police this matter may be resolved expeditiously.

> *Yours faithfully*
>
> *Sgd: KS Krishnamurthy*
>
> *Senior Manager*

32 The trial judge in his judgment highlighted several matters relating to this interchange of letters. Firstly, he pointed out that Shanti`s first letter to IOB sent on her behalf by Barclays Bank contained a lie in that Shanti had never held any of the documents pertaining to the fixed deposit account in her name. The documents had always been held by Anbu and she had no knowledge of the details of the bank account. Secondly, despite her threats to the contrary, the

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trial judge found that Shanti had not reported the matter to the police nor did she authorise the bank to do so.

33 In Shanti`s letter to IOB on 3 August 1990, she claimed that the note (hereafter referred to as the `mandate`) produced by IOB containing her supposed instructions to transfer the money into Valli`s account was a forgery of which she had no notice until it was shown to her. This mandate letter has been reproduced earlier. It was not in dispute in these proceedings that the letter was written by Anbu. As noted previously, what was in dispute was the authenticity of the signature on the mandate.

34 Since Shanti alleged that the mandate had been forged, IOB thought it prudent to withhold the money in the fixed deposits held in Valli`s name. Anbu was then enjoying overdraft facilities with the bank secured by Valli`s fixed deposits. The bank therefore wrote to Anbu on 6 August informing him that no further drawings would be allowed and requested him to pay the overdraft amount then outstanding. Valli then wrote to the bank on 8 August demanding that it pay the money in her account after setting off the amount owed by Anbu.

35 Between 15 August and 21 August, the bank`s solicitors had a series of communications with the UK solicitors instructed by Shanti to handle this matter. On 28 August 1990, Valli`s solicitors gave the bank a deadline after which she would commence proceedings. The bank`s solicitors replied on 31 August 1990 explaining that an `adverse claim` had been made on money in her fixed deposit in relation to which a police report might be made and requesting that they be expressly authorised by her to reveal any information pertaining to her account to the authorities. On 6 September 1990, Valli commenced proceedings against the bank.

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36 **The proceedings**

37 Due to IOB`s action, Valli commenced the trust suit on 6 September 1990. On 20 February 1991, Shanti joined herself as a defendant in that suit. On 10 August 1991, Shanti initiated the forgery suit against IOB. Subsequently, on 10 April 1992, she obtained an order of discharge from the trust suit from the assistant registrar. IOB appealed against this order and was successful before the judge in chambers. Shanti therefore remained a defendant in the trust suit.

38 In the forgery suit, Shanti claimed the sum of $1,021,405.23 from IOB on the basis that the money belonged to her and had been transferred out of her account by forgery and therefore without any authority from her.

39 In the trust suit, Valli claimed, as account holder, the sums in the two fixed deposits in IOB held in her name and the interest accrued thereto less any amount due from Anbu on his overdraft account with the bank. The fixed deposits, it will be remembered, were used to guarantee Anbu`s overdraft facilities with the bank. In the alternative, Valli claimed from Shanti the sum of $1,021,405.23 which was the sum in the latter`s account when that account was closed and the money transferred into Valli`s name. The basis of this claim was that Shanti held the money in her name on trust for Valli and Rekha. It should be noted that this alternative claim was made in the event that the court found for Shanti in the forgery suit and therefore that the mandate had been forged. It was claimed, in the alternative, that even if this were so, Shanti nevertheless held that sum on trust for Valli and Rekha.

40 **The decision below**

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41 In the High Court, the forgery suit proceedings were dominated by expert evidence on the authenticity of the mandate signature. The learned trial judge weighed the opposing opinions of either party`s expert as well as the court expert and held that the mandate signature was genuine. It therefore followed that the bank had transferred the money out of Shanti`s account into Valli`s on the former`s instructions.

42 The learned trial judge found for Valli in the trust suit. He rejected Shanti`s contention that Anbu had given her the $1m from the estate as a marriage settlement. Shanti`s case had been that in May or June in 1989, Anbu and she had a telephone conversation in which he had informed her of his intention of giving her the money. According to her testimony in the forgery suit, she had replied that this `was good to me and for ***my child*** that we are to have if anything did happen to him (Anbu)`. The judge noted that in the trust suit, Shanti changed her testimony as to what she had said in reply so that it read `any child to be born` instead of `my child`. This was to take into account the fact that at the relevant time, she had not conceived yet. This cast doubt on the veracity of her version of what transpired and the learned trial judge thought the variation `significant`.

43 The trial judge also cited the English case of ***Re Gillespie*** (1913) 20 Mans 311 in support of his finding that there had not been a marriage settlement. In that case, Horridge J had held, in the context of an ante-nuptial agreement, that:

> *Agreements of this kind are not to be inferred from casual talk when the parties at the time of the talk are intending to make a binding agreement. They must be made at a time when the parties regard the conversation as contractual.*

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44 The trial judge thought that this requirement had not been made out on the present facts.

45 A third reason for rejecting Shanti`s contention was that there was no evidence that the marriage settlement was discussed at the traditional engagement ceremony or ***Nitchayathartham*** in April 1989.

46 Fourth, the trial judge was influenced by the fact that though the Arangannal family was wealthy, Anbu himself was not. His financial situation did not afford him the resources to make the $1m gift.

47 The learned trial judge also held that even if there had been an agreement to give Shanti the money in consideration for marriage, it was unenforceable because it had not complied with the requirement of writing under s 6A(c) Civil Law Act (Cap 43).

48 It followed from the finding that there had not been a marriage settlement or that the marriage settlement was unenforceable and that Shanti was at best a mere innocent volunteer. However, if Anbu had indeed intended to give Shanti the $1m for whatever reason, he was acting in breach of trust since he was in a fiduciary relationship vis a vis the Valliappan estate. Even if Shanti had no notice of the terms of Anbu`s trust when she first received the money, she had notice when Valli brought her claim. Any money from the estate that Shanti received would still have to be returned to the estate by her. Thus, even assuming the mandate had been a forgery and that Shanti had been given the money by Anbu with the intention that she keep that money, Shanti had to account to Valli for that money since it had been taken from the estate.

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49 However, it is to be noted that the true ratio of the decision of the learned trial judge was not premised on constructive trust liability for knowing receipt but on an express trust. The version of the facts proffered by Valli and Anbu was that when they took over the administration of the estate, both felt it unwise to place the money into bank accounts in their respective names. According to Valli, since her late husband passed away, relatives had been urging her to sell her house in India because it was too large for her and her daughter. She had also been pressurised to pay the dowry and marriage expenses of one sister. Meanwhile, the administrators of her late husband`s estate had sold off certain properties in Singapore which, when resold shortly after, fetched a far larger sum than that paid to the estate. Anbu, on the other hand, had just taken over an ailing business and had given personal guarantees. As such, he felt that his name should not be used. Instead, he suggested that the money be placed in Shanti`s name. The money was therefore placed under Shanti`s name on the understanding that she was holding it on trust for the beneficiaries of Valliappan`s estate.

50 As noted above, the ratio of the learned trial judge`s decision was that there was an express trust created by Shanti for the benefit of Valli and Rekha. This was consonant with the version of the facts given by Valli and Anbu. That the judge so found was implicit in a passage of his judgment. After the discussion on knowing receipt, the judge stated:

51 ***In any case*** , it was my finding in the forgery suit that the letter of 23 November 1989 referred to in that suit as the `mandate` was signed by the second defendant. [Emphasis added.]

52 If the mandate had not been forged, then it followed that Shanti had signed and authorised the transfer of the money to Valli`s account. Why would

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she have done so if she believed herself to be the rightful owner of the money in her account? The only scenario consistent with a finding that Shanti signed the mandate was that she had earlier entered into an agreement to hold the money on behalf of Valli and Rekha.

53 Accordingly, it followed from the trial judge`s findings that there was an express trust and that there had been no breach of trust by Anbu. Shanti`s involvement in the matter was part of a considered plan for the benefit of the beneficiaries in view of the belief on the part of both administrators of the estate that it was unwise to hold the money in accounts in their respective names. Her denial of the terms of that trust as well as her initiation of the forgery suit precipitated the bank`s withholding of the money in Valli`s account. In its wake, Valli brought the trust suit. The trial judge therefore gave judgment for Valli and ordered that the money in her accounts be released to her. He also ordered the bank and Shanti to pay the costs of Valli. Shanti was ordered to indemnify the bank. Shanti also had to bear Anbu`s costs.

54 **The appeal**

55 In these appeals, we were asked to overturn the learned trial judge`s decision in the forgery suit and substitute our finding that the mandate signature had been forged. We were also asked to overturn the trial judge`s order as to costs in the trust suit on the basis that since no order was made against Shanti, the order that she should, in effect, bear all the costs in the proceedings did not follow the normal rule that costs follow the event.

56 It will be appreciated that the finding of whether there was a forgery was a crucial question upon which not only the forgery suit but the trust suit turned. If there had been no forgery, then the logical and inescapable inference would

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be that Shanti held the money in her bank account on express trust for Valli and Rekha.

57 **The forgery suit**

58 The first observation we make in this context is that the burden of proof is on the party alleging the forgery. This raises the question of the standard of proof which the party has to satisfy. At one time, the authorities were unclear and espoused conflicting views as to whether the proper standard was the criminal standard (***New York v Heirs of Phillips Decd*** [1939] 3 All ER 952 (PC)) or the ordinary civil standard (per Sir John Patterson in ***Doe de Devine v Wilson*** (1855) 14 ER 581 at p 592 (PC)). In ***Hornal v Neuberger Products*** [1957] 1 QB 247, the Court of Appeal of England adopted the latter approach but with a significant qualification. The Court of Appeal interpreted the civil standard as one which varied depending on the gravity and seriousness of the allegation. The more serious the allegation, the higher the required standard of proof. In that case, there was a claim based on fraud. The trial judge held that on a balance of probability, a fraudulent misrepresentation had been made. However, he would not have been satisfied if the standard was the criminal standard of beyond reasonable doubt. Nevertheless, he was of the opinion that the correct standard to apply was the civil one. In the course of affirming the trial judge, Hodson LJ at p 263 approved a passage from an earlier case of ***Bater v Bater*** [1951] P 35 where Denning LJ said:

> *... So also in civil cases, the case may be proved by a preponderance of probability but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature;*

> *but still it does require a degree of probability which is commensurate with the occasion.*

59 In ***Nederlandsche Handel-Maatschappij NV v Koh Kim Guan*** [1959] MLJ 173, the plaintiff bank alleged that the defendant presented a cheque of $3,000 and received through the inadvertence of the bank`s employee a sum of $30,000. The defendant denied having received $30,000. In the High Court of Singapore, Rose CJ pointed out that if the defendant in fact retained the $30,000, knowing that he had been overpaid by $27,000, he was guilty of a fraudulent act. Rose CJ dismissed the claim against the defendant and in the course of his judgment, referred to the conflicting Privy Council decisions cited above and to ***Hornal*`** s case. After reviewing the authorities, he had this to say:

> *Whatever the precise formula adopted and whatever the theoretical position may be, it has long been the practice in countries where the English system of law operates for the courts, in civil cases, to require* ***a high standard of proof*** *in cases where fraud is alleged. [Emphasis added.]*

60 In another case in the High Court, ***Eastern Enterprises v Ong Choo Kim*** [1969] 1 MLJ 236; [1969-1971] SLR 206, the plaintiff owners of certain premises sought a possession order against the original tenants. The plaintiffs argued that the defendant was not entitled to protection under the rent control legislation because the latter had used the premises for immoral purpose. This allegation amounted de facto to one of criminal conduct. AV Winslow J applied the standard espoused by the English Court of Appeal in ***Hornal*** `s case, namely, that the more serious the allegation made by one party, the higher the standard of proof it had to satisfy. He held [1969] 1 MLJ 236 at p 242; [1969-1971] SLR 206 at p 216:

> *... for purposes of this action that the plaintiffs must establish their allegation against the defendant on a balance of probability as laid down by* ***Doe d Devine v Wilson*** *subject to the qualification that* ***in tilting the balance against the defendant, they must attain a higher degree of probability***

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> ***than is required in an ordinary case of civil negligence though not the very high standard of the criminal law.****[Emphasis added.]*

61 and further on he said:

> *The crux of the matter in deciding how high the standard of proof should be, short of proof beyond reasonable doubt, the court should act on its own good sense, having regard to the realities of the situation and apply that standard short of certainty which enables it to be reasonably satisfied that a grave allegation in the course of civil proceedings has been substantiated since there is obviously no precise mathematical formula which it can apply.*

62 In ***Sumitomo Bank Ltd v Kartika Ratna Thahir*** [1993] 1 SLR 776, the cases of ***Hornal*** and ***Nederlandsche*** were cited but the following caveat was added:

> *However, it should be noted that it is not the law of evidence that every step in the allegation of fraud has to be proved by calling live and admissible evidence nor is it the law that fraud cannot be inferred in the appropriate case.*

63 Nonetheless, as regards allegations of fraud, forgery or criminal conduct, the standard of proof is to be determined according to the approach in ***Hornal*** `s case. This much is clear from p 776 of that judgment where it was said:

> *This is not to say that inferences of this serious nature should be lightly made. The circumstantial evidence must be so compelling and convincing that* ***bearing in mind the high standard of proof*** *one is nevertheless satisfied that an inference of fraud is justified. [Emphasis added.]*

64 Shanti, the appellant, argued that the trial judge erred in finding that the mandate signature was not forged. We agreed with the authorities above which impose a burden of proof more onerous than the ordinary civil standard where what is alleged is as serious and grave as fraud or forgery. Bearing this `high

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standard of proof` in mind, we had to ask whether, on the facts, the trial judge was unjustified in arriving at his finding.

65 Counsel for Shanti argued that the mandate was forged by suggesting that the surrounding circumstances of this case compelled this conclusion. Firstly, he pointed out that the verification signatures on the specimen signature card had been accepted not to be genuine by expert witnesses of both parties. It was therefore argued that the trial judge failed to make a finding that the verification signatures were forged and that this was a material omission. It was material, so the argument went, because if Shanti did not sign the verification signatures, then on a balance of probability based on her statement that she did not sign the mandate letter, the signature on the mandate was forged. Secondly, it was established at the trial that Anbu was the author of the mandate letter. Thirdly, Anbu derived the benefit from the transfer of funds out of the Shanti`s bank account because the funds were ultimately used, with the consent of Valli, as security for his overdraft facility with IOB. These factors suggested, it was argued, that Anbu had reason to forge the mandate signature and in fact did so.

66 We were not persuaded to overturn the trial judge`s findings. Those findings were supported by the evidence. The following matters bear highlighting.

67 First, as the learned trial judge pointed out, Shanti had lied in her letters to IOB when she said that she had lost all her documents and also that she wanted to operate her account there again. The fact was that she never had control of the account and never operated it nor did she ever have custody of the documents relating to that account. This was consistent with the version of the facts offered by Anbu and Valli that the appellant was merely holding the money on an express trust for the benefit of Valli and Rekha. She never actually

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operated the account, nor did she know the details of it. Anbu controlled the account, Shanti merely lent her name to it. Secondly, there were inconsistencies in her evidence as to the crucial telephone conversation with Anbu in which she made a reference to her `child`, later changed to `children`. Thirdly, she had delayed commencing her action against the bank. Fourthly, she inexplicitly failed to make a police report when she realised that she had just been cheated of approximately $1m. Her explanation was that she was reluctant to get her husband into trouble. However, at the material time, she had already lost all hope of saving the marriage, had a baby to take care of, was surviving on a very minimal income, and according to her testimony, had been the subject of abuse by Anbu. Furthermore, she had complained to the UK immigration authorities alleging that Anbu had married her only to get British residence. Those being the surrounding circumstances, it seemed quite incredible that she would not take the necessary action to protect what she claimed to be rightfully hers.

68 A fifth factor had to do with the expert evidence itself. The evidence of Mr Radley was, as acknowledged by the witness himself, not too convincing as to the forged status of the mandate signature. As to the verification signatures, he thought there was a `high probability` of forgery or that `in all probability` there had been a forgery. However, in relation to the mandate signature, he was only `slightly inclined` to the suggestion that it was a forgery. Counsel for IOB quite forcefully pointed out that Mr Radley`s initial judgment could already be less than objective given that he was told there had been a forgery and asked to see if that could be borne out by his examination. His conclusions as to the mandate signature also seemed to hinge on his conclusion that the verification signatures were forgeries. This suggested that he was not strictly comparing mandate and known signatures. Instead he used the fact that the verification signatures were forged to bolster his conclusions on the mandate signature

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whereas merely comparing mandate and genuine signatures would not have allowed him to come to so confident a conclusion.

69 The appellant`s case therefore depended largely on the forged status of the verification signatures. These forgeries were taken to suggest that there had been a plan to cheat her from the start. Mr Radley offered a theory based on his experience. He said that in certain cases, the forger plants forgeries among specimens of the victim`s signatures so that when the actual forgery is compared to these specimens, it would be more difficult to discern its forged status. However, it was not explained why on 2 August 1989 when the specimen signature card was submitted to the bank and even before Anbu and Shanti got married, Anbu had already devised a dastardly plan to cheat the appellant. Things made even less sense when it was realised that the specimen signature card with the verification signatures was collected for the purpose of opening the fixed deposit account. Why give the money in the first place when you already have it in mind to dishonestly appropriate it later? There was no plausible explanation put forward to answer this fundamental question. Indeed, there was no explanation at all. We were accordingly of the view that whatever the significance of the verification signatures, the trial judge was correct in not placing too much weight on them in coming to a conclusion on the authenticity of the mandate signature.

70 In the end, the only evidence Shanti could rely on was (1) the fact that the mandate letter was written by Anbu, (2) that he ultimately benefited from the transfer of the moneys and (3) the expert evidence of Mr Radley. The fact that the mandate was written by Anbu actually supported, in our view, the inference that Shanti was merely holding the account in name and had no interest in it, all matters relating to the account being handled by Anbu. We have already observed how Mr Radley`s evidence as to the mandate signature was

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weak, his strongest point being the fact that the verification signatures were forged. However, as we pointed out above, the verification signatures did not really assist Shanti in this respect. Therefore, taken at its highest, Mr Radley`s evidence alone could not satisfy Shanti`s heavy burden of proof. That being the case, the fact that the money was ultimately used to guarantee Anbu`s overdraft facility did not preclude, in our opinion, the learned trial judge from coming to a conclusion, on the totality of the evidence, that the mandate signature was not forged.

71 In order to overturn the trial judge`s findings of facts, it must be shown that he was unjustified on the evidence in making the findings. On the facts, we were satisfied that the trial judge was quite justified in coming to his findings. We therefore dismissed CA 182/95.

72 **The trust suit**

73 IOB`s obligations under the banker-customer relationship

74 We deal, firstly, with the appellant`s submissions on the relationship between IOB and Valli as banker and customer. Counsel for the appellant contended that the bank had wrongly refused to honour the fixed deposit accounts in Valli`s name and that it used the forgery allegations as a mere excuse for it to withhold payment. Counsel attempted to segregate the forgery suit from the trust suit and argued that since the two were separate, the allegation of forgery could not provide the bank with justification to withhold payment from Valli.

75 The relationship between the bank and the deposit account holder is premised on the debtor-creditor relationship. It carries with it the obligation on

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the part of the bank to honour the customer`s mandate as regards the payment of money from that account. The bank`s duty to pay on the demand of an account holder however coexists with a duty to take reasonable care in all the circumstances as agent of the account holder. The duty to take reasonable care in the discharge of its obligations under the contract between banker and customer includes withholding payment where there has been fraudulent conduct resulting in wrongful loss by a party. In ***Bank of New South Wales v Goulburn Valley Butter Co Pty Ltd*** [1902] AC 543, Lord Davey at p 550 said: `The law is well settled that in the absence of notice of fraud or irregularity a banker is bound to honour his customer`s cheque.` Of course, where somebody cries `Fraud!`, it is not always the case that the bank must withhold payment. The question in every case, including the present, is whether the bank behaved reasonably in view of all the circumstances and discharged its duty of care.

76 The bank`s duty of care to the customer was examined in some detail in the case of ***Selangor United Rubber Estates Ltd v Cradock (No 3)*** [1968] 2 Lloyd`s Rep 289 the facts of which concerned a take-over scheme. The transaction took place at a meeting attended by the existing directors, the new directors and an officer of the company`s bank. In the course of the meeting, an elaborate plan was executed that involved the transfer of the company`s funds through a middleman to the makers of the takeover bid. The transfer was done by the presentation of a cheque drawn on the company`s bank account to the bank`s representative. The bank`s officer then issued the banker`s draft when presented with that properly signed and indorsed cheque. Unbeknown to the bank`s officer and the bank, the scheme was a breach of the financial assistance rule in company law. The company subsequently went into liquidation and the Official Receiver sought to recover the amount involved from the bank either as constructive trustee or in negligence for breach of its duty of care under the

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customer-banker relationship. In this appeal, we were only concerned with the latter. Ungoed-Thomas J at p 324 said:

> *To my mind, ... a bank has a duty under its contract with its customer to exercise `reasonable care and skill` in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stockbroker into his account of proceeds of sale of his client`s shares) of necessity does not suggest that it is out of the ordinary course of business. If `reasonable care and skill` is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in that exercise of reasonable care and skill again depends on circumstances.* ***Where it is to inquire, the failure to make inquiry is not excused by the conviction that the inquiry would be futile, or that the answer would be false****. [Emphasis added.]*

77 The learned trial judge then held that the bank had failed to discharge its duty of care to the company as customer when it paid out the money from the company`s account in pursuance of the illegal transaction.

78 There has been some criticism of Ungoed-Thomas J`s application of the law to the facts of ***Selangor*** . Ellinger and Lomnicka in ***Modern Banking Law*** (2nd Ed) observe that the bank clerk present could not have possibly known about the illegality nor was his job at the meeting any more than to issue the draft once the cheque was properly made out and presented to him. The learned authors then make the point at p 127 that:

> *[c]ommercial reality militates against any doctrine under which a bank is put on enquiry simply because the total amount standing*

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> *to the credit of the customer`s account with itself is lent to, or deposited with, another financial institution.*

79 In ***Lipkin Gorman v Karpnale Ltd*** [1989] 1 WLR 1340 at p 1356, May LJ thought that Ungoed-Thomas J had placed the standard of care that the ordinary prudent banker would exercise too highly. He said:

> *To a substantial extent the banker`s obligation under such a contract is largely automatic or mechanical. Presented with a cheque drawn in accordance with the terms of that contract, the banker must honour it save in what I would expect to be exceptional circumstances ...*

80 and further down the page, he said

> *... only when the circumstances are such that any reasonable cashier would hesitate to pay a cheque at once and refer it to his or her superior, and when any reasonable superior would hesitate to authorise payment without inquiry, that a cheque should not be paid immediately on presentation and such inquiry made.*

81 Parker LJ, with whom Nicholls LJ agreed, thought that the customer`s action could only succeed when there was a breach of the contract between himself and the bank. His Lordship thought that there were clear situations when the bank was not entitled to ignore evidence showing that the customer was being defrauded. In these situations, what was being breached was the contractual duty of care. He said, at p 1378:

> *I would not, however, accept that a bank could always properly pay if it had reasonable grounds for a belief falling short of probability. The question must be whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious or real possibility, albeit not amounting to a probability, that its customer might be being defrauded ... If it is established, then in my view a reasonable banker would be in breach of duty if he continued to pay cheques without inquiry. He could not simply sit back and ignore the situation. In order so to establish the customer cannot, of course, rely on matters which a meticulous* ***ex post facto*** *examination would have brought to light.*

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82 In ***Lipkin Gorman,*** the English Court of Appeal was concerned with a situation where the bank was alleged to have been negligent in paying out from the account of a firm of solicitors on the mandate of a rogue partner of that firm acting within his authority. On the facts in this appeal, the mandate letter transferring the money from Shanti`s account to Valli`s was analogous to a cheque drawn on a customer`s account. It gave the bank instructions on how to deal with the money in the account. The same principles should apply as to the extent of the bank`s duty of care to the customer in both circumstances. We were in agreement with the English Court of Appeal in that, faced with what appears to be a genuine mandate presented by an agent acting within his authority, the bank`s duty of care did not require it to do anything other than to honour the mandate in the absence of circumstances which put the bank on enquiry. We were also of the opinion that Ungoed-Thomas J`s decision in the ***Selangor*** case states the law correctly, although some doubts remained as to whether the law was applied too stringently in favour of the customer in that case.

83 Therefore, if IOB was put on inquiry as to the possibility of the mandate being forged, what were its obligations under the law? In answering this question, we were guided by Ungoed-Thomas J`s statement quoted above to the effect that where circumstances put a bank on inquiry, it is not enough to ignore them just because the bank is convinced that inquiry would be futile or that there is no risk to the customer. We are not prepared to lay down some rigid rule to govern the indeterminable variations of fact situations that may arise in this context. Parker LJ in ***Lipkin Gorman*** commented:

> *That a bank has a duty of care to its customer when carrying out its mandate is beyond doubt, but so to state advances matters but little, for in each case the question for decision is whether a bank has failed in that duty ... In my view such cases must be approached with caution, for essentially they are no more than*

> *decisions of fact, ie of the application of the law to an endless variety of circumstances.*

84 We were in agreement with Parker LJ and would say that in each fact situation, common sense must prevail. In every case, we must determine the bank`s obligations against the background of day to day commercial activity.

85 The correct test, in our opinion, must be whether the reasonably prudent banker, faced with the same circumstances, would regard the course of action taken on the facts justifiable.

86 Counsel for Shanti contended that IOB should have paid the money in Valli`s account upon her demand. This contention was, in our opinion, unmeritorious given that Shanti was throughout the proceedings arguing that the money in that account had been transferred out of her account fraudulently. Be that as it may, we were of the opinion that the bank was acting properly in withholding the money in Valli`s account. Placing ourselves in the bank`s situation in August-September 1990, we appreciated the quandary it found itself in. Putting aside the alternative argument that Shanti held the money on trust, which in any event was not known to the bank at the material time, the forgery, if there actually was one, would mean that Shanti was still the rightful owner of the money. In those circumstances, the bank must surely have been put on inquiry and was entitled to take what steps it could to prevent the fraud from succeeding. We were therefore of the opinion that the steps taken by the bank were justifiable in law as actions which an ordinary, reasonably prudent banker would undertake faced with similar circumstances. We therefore rejected the contention that the bank should have paid Valli on demand and that its failure to do so had caused the parties here to incur the costs of this law suit in the first place.

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87 `Costs following the event`

88 Counsel for Shanti in the trust suit seemed to concentrate his attention on the award of costs by the learned trial judge. He argued that since no order was made against Shanti, the only order being that the defendant bank release the funds in Valli`s account, the decision was against IOB and not Shanti. As such, under the normal rule that costs follow the event, costs should have been awarded against IOB and not against Shanti, as was ordered by the learned trial judge.

89 While counsel`s statement of the normal rule relating to costs could not be faulted, the crucial enquiry was to establish what the ***event*** was. In our view, these entire proceedings were essentially a contest of ownership over the money between Valli and Shanti. The bank`s involvement was secondary to this primary contest. The order of the court that the bank release the moneys in Valli`s account was made in the light of its decision that the money rightfully belonged to Valli and not Shanti. The court was deciding where ownership of the moneys in dispute lay. That being the case, there was no question of the order of costs not following the normal rule. Clearly it did. However, the correctness of the learned trial judge`s holding as to ownership of the money was also challenged and it is to this question that we now turn.

90 Whether the money was correctly determined to be Valli`s

91 Counsel for the appellant argued that the learned trial judge erred when he held that the money had not been given by Anbu to Shanti as a gift in contemplation of marriage. He criticised the trial judge`s reliance on s 6A Civil Law Act (Cap 43) and the Statute of Frauds saying that the appellant was relying

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on the gift as a defence and not `bringing an action` based on the gift which is the situation contemplated by that provision.

92 Even if there is no requirement of writing under the s 6A Civil Law Act where one is merely invoking the gift as a defence to the action, as opposed to `bringing an action`, we were not disposed to overturning the learned trial judge`s finding that there had been no marriage settlement. His reasons have been noted in our summary of his grounds of decision above. In view of all the facts, we were not persuaded to find that he was unjustified in coming to his conclusion. That being the case, it followed that the appellant, if given the money by way of gift by Anbu, had not provided consideration for it, and was, at best, an innocent volunteer.

93 What would have been the legal position had Shanti been an innocent volunteer? If Anbu`s intention in transferring the money into her account was intended as a gift, then this was a breach of his fiduciary obligations as co-administrator of the late Valliappan`s estate of which Valli and Rekha were the beneficiaries. The money Shanti came into under those circumstances would be money transferred in breach of trust. Under the circumstances, Shanti would potentially be liable for money had and received, or on the basis of an equitable tracing claim or under her liability as a knowing recipient.

94 In each of these claims, Shanti would be entitled to keep the money had she in good faith given value in exchange for it or she could invoke under the defence of change of position as recognised by the House of Lords in ***Lipkin Gorman v Karpnale*** [1991] 2 AC 548 which, in turn, was adopted by this court in ***Seagate Technology Pte Ltd v Goh Han Kim*** [1995] 1 SLR 17. However, she was a mere volunteer in relation to the money. Furthermore, it was hard to

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see how the defence of change of position availed her in view of Lord Goff`s statement in ***Lipkin Gorman,*** at p 579, that the defence applies:

> *... where an innocent defendant`s position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.*

95 Assuming that the money had been transferred in breach of trust, on the facts, a proprietary tracing claim was clearly available. It followed that there was no need for the appellant to have knowledge before Valli was afforded a remedy. This is because lack of knowledge does not preclude a tracing claim from succeeding against a defendant holding property transferred in breach of trust. Knowledge only becomes necessary where the facts do not afford a tracing claim. In that situation, the beneficiaries have to resort to the recipient`s ***in personam*** liability for knowing receipt. In that situation, what is sought is not the recovery of the trust property but to make the knowing recipient make restitution, out of his own funds, to the amount lost by the trust and received by him. However the law recognises that the plaintiff should only have an ***in personam*** claim against the defendant if he had a better right to the property than the defendant. This will not be the case where the defendant is a ***bona fide*** purchaser for value without notice of the breach. It is also the case that no liability attaches where an innocent volunteer is concerned. Where innocent volunteers are concerned, a tracing claim lies but no ***in personam*** liability for knowing receipt: ***Re Diplock*** [1948] Ch 465. The latter liability only arises when the volunteer learns or is put on inquiry that the property was trust property. Such a volunteer will at that point hold the trust property as a constructive trustee and be liable for any loss to the trust while the volunteer is a constructive trustee.

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96 It is important that the fundamental distinction between the proprietary and personal claims be observed. We have thought fit to clarify the position because the learned trial judge`s written judgment may be misconstrued in future cases as blurring this distinction when he said:

> *Thus an innocent volunteer`s liability to return trust property or its proceeds remains so long as he retains possession.* ***This is so even if he had no notice of the trust at the time of receipt but subsequently acquires such notice****. [Emphasis added.]*

97 We were concerned that this passage might be taken to mean that an innocent volunteer still in possession of trust property need not return the property until he acquires such notice. As pointed out above, the innocent volunteer is open to a proprietary tracing claim for the return of the trust property as long as he is in possession whether or not he had notice. The statement of the learned judge quoted above must be confined to persons holding trust properties as constructive trustees.

98 That the learned trial judge did not mean to say that there must be notice before the rightful owner has a remedy is clear from his citation of the passage from ***Hanbury and Martin`s Modern Equity*** (14 Ed) at pp 304-305 where the law is correctly stated in the following terms:

> *A basic principle of property law is that any person who received trust property, not being a purchaser for value without notice, takes subject to the trust. This is so whether he took with actual or constructive notice. So long as he retains the property he is bound to return it, and the proprietary remedy of tracing is available in respect of the property or its identifiable proceeds.* ***However, this is different from the question whether the recipient should be under a personal liability as constructive trustee****. The distinction is important if he no longer has the property. If he is a constructive trustee, his liability remains. If he is not a constructive trustee, his liability is confined to the return of the property or its proceeds while still in his possession. It will be appreciated that not every transferee who fails to prove that he was a bona fide purchaser of the legal*

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> *estate without notice is subjected to the additional liability of a constructive trustee.* ***An `innocent volunteer` for example who took without notice that the property was trust property transferred in breach of trust cannot take free of the trust, but will probably not incur the liability of a constructive trustee****. [Emphasis added.]*

99 Proceeding on the premise that Shanti was an innocent volunteer, the correct position at law would be that she was liable to return the moneys that belonged to Valli and Rekha on a proprietary tracing claim regardless of knowledge. She would furthermore have incurred ***personal*** liability to make good to Valli and Rekha any loss to the trust once she knew that the money had been transferred in breach of trust.

100 Be that as it may, the finding that Shanti had signed the mandate letter ***in pursuance of an express trust*** was fatal to her claims of ownership over the money in dispute. This finding rejected any contention that the money was a gift to Shanti or that she had given good consideration in the form of marriage. This made any resort to constructive trust or tracing remedies unnecessary. Since there was no reason to overturn the learned trial judge on that matter, it followed that the appeal in the trust suit failed.

101 **Conclusion**

102 Looking at the totality of the facts in this case, we were of the opinion that the appeals should be dismissed. It was our view that the crux of the dispute was the question of ownership of the money. The learned trial judge was correct in holding that Shanti had signed the mandate signature. Shanti therefore failed in her claim in the forgery suit. She had transferred the money back to Valli in keeping with the arrangement earlier entered into with Valli and Anbu. Shanti was therefore holding the money as an express trustee. This meant that her defence that she was an innocent volunteer or that it was a settlement in

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consideration of marriage in the trust suit failed since she never had, nor was she intended to have, beneficial title to the money. The order of the learned trial judge in the trust suit that Shanti bear the costs of all the other parties in the trust and indemnify Anbu as the third party was unassailable. The contest was one between Valli and Shanti. Shanti having lost, she had to bear the costs of the other party. As to the costs of the Bank, it was clear that it had legitimate cause to withhold the money in Valli`s account given Shanti`s allegations of forgery. As to Anbu, things might or might not have been different had he been in breach of trust. However, since we upheld the finding that Shanti held the money on an express trust for Valli and Rekha, it followed that he had not been in breach of trust and the issue did not arise. The only wrongdoer, if we may use that term, was the appellant who having agreed to hold the money for Valli when requested to by Valli and Anbu, sought to keep that money as her own and deny the terms of that trust. We were therefore in entire agreement with the learned trial judge`s order of costs.

103 Accordingly, we dismissed the appeal and further ordered that the money paid into court as security for costs be paid to the respondents in the proportion of their taxed costs.

104 ***Appeal dismissed.***

Chao Hick Tin J
Lai Kew Chai J
Yong Pung How CJ

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Lawrence Quahe (Harry Elias & Partners) for the appellant in CA 182/95
KS Chung (Harry Elias & Partners) for the appellant in CA 189/95
B Vijayan Peter (Ramdas & Wong) for the respondent in CA 182/95
Shriniwas Rai (Hin Rai & Tan) for the first respondent, Michele Rasanayagam (Ramdas & Wong) for the second respondent and Karuppan Chettiar (Karuppan Chettiar & Husain) for the third respondent in CA 189/95
