

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1996] SGHC 124

OS 1082/1995

Between

Sum Keong Realty Pte Ltd

... Plaintiff

And

Syed Jafaralsadeg Alhadad

... Defendant

GROUND OF DECISION

Land — Caveats — Wrongful lodgment; Land — Registration of title

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Sum Keong Realty Pte Ltd v Syed Jafaralsadeg Alhadad and Others

[1996] SGHC 124

OS 1082/1995
Chao Hick Tin J
20 June 1996

1 **CHAO HICK TIN J**

2 Cur Adv Vult

3 This is an application by the plaintiffs to remove a caveat lodged by the defendants against the property known as lot 124-1 TS16 (the property), upon which houses Nos 41 and 43 Dickson Road stood.

4

The plaintiffs are the registered proprietors of the property for the unexpired portion of a leasehold term of 999 years commencing from 1 August 1859 as shown on the certificate of title, volume 369, folio 16. A qualified title in respect of the leasehold interest of the property was first issued to Creative Realty Pte Ltd on 29 June 1991. Thereafter, there were two other transfers before the plaintiffs became the owners thereof by purchase in 1994. The transfer to the plaintiffs was registered on 9 November 1994.

5

The caveat of the defendants was lodged against the property on 8 December 1994 and registered on 13 December 1994. The defendants are the present trustees of the trusts of the Will dated 4 May 1894 of Syed Ahmad bin Abdulrahman bin Ahmat Aljunied (the testator). The basis of the defendants' claim that the leasehold interest in the property belongs to the trust and thus vests in them is that it was bought over by the testator as evidenced by the Order of the Supreme Court of the Colony of Singapore dated 28 October 1895 in Petition Suit 304 of 1895 (the 1895 Order). The relevant portion of the 1895 Order reads:

*... And it is ordered that all those leasehold lots of vacant land, viz 115 lots situate at Syed Allowee Road, 74 lots situate at Serangoon Road and **53 lots situate at Dickson Road** and all those freehold lots of vacant land, viz 21 lots situate in the district of Claymore, 2 lots situate at Sunghie Road and Lot No 23 situate at Syed Allie Road and those two houses bearing Municipal numbers 38 and 39 in Market Street and the two shares which belonged to Syed Abdulrahman bin Allie Al Junied and Syed Aboobakar bin Urmar Al Junied in the house and premises No 44 High Street bought over by the said testator now subject to the trusts of the said Will vest in the said Syed Mohamed bin Abdulrahman bin Ahmad Al Junied for the estate herein now vested in the said Syed Abdulrahman bin Allie bin Urmar Al Junied.` (Emphasis added.)*

6

The said Order was registered at the Land Registry in Vol LXXXV No 196 on 12 November 1895.

7

The position of the plaintiffs is that what, if at all, belongs to the trusts is only

the freehold reversion of the property and not the leasehold term which the plaintiffs have purchased.

8 ***Issues***

9

Besides the issue on the merits of the defendants' claim to title, two other points were raised by counsel for the plaintiffs: (i) the question of the indefeasibility of the title of the plaintiffs on the ground that the caution stated on the qualified title has lapsed; (ii) that even if the defendants had a legitimate claim to title of the leasehold term in the property, the title has been extinguished on account of limitation.

10

I must at this juncture observe that the question of limitation was not raised in any of the affidavits filed in support of this OS. Neither did the defendants touch on this in their affidavit. Thus I will say no more on this point.

11 ***Defendants' claim to title***

12

The defendants' claim to title rests wholly on the 1895 Order. Before I turn to consider the scope of that Order it is essential to determine what title the testator possessed in relation to the property before his death. It is common ground that the testator derived his title from an Indenture of Conveyance dated 18 January

1892 from one Syed Allowee bin Ally Al Junied. In that Indenture, it was stated in the preamble that:

... the vendor is seized or absolutely entitled of the hereditaments ... in fee simple subject to the fifty-three leases for nine hundred and ninety years ... and has agreed with the purchaser for the absolute sale to him of the same ...

13

The relevant operative part of the Indenture reads:

... the vendor as beneficial owner hereby conveys into the purchaser all those several pieces of land ... and also all and singular the messuages or dwelling houses or other erections which have been created and are now standing on the said four pieces of land together with the full benefit of the rents now in arrears and henceforth to become due and the covenants services and other the benefits and advantages reserved by and contained in the said fifty-three indenture of leases ...

*To hold the hereditaments and premises **subject to the said fifty-three indentures Lease** and the terms thereby granted unto the purchasers ... And the vendor doth hereby covenant with the purchaser that notwithstanding anything by the vendor done or knowingly suffered he the vendor now hath power to grant all the said premises to the purchaser free from encumbrances **except the said leases** and that all the said premises may be quietly entered into held and enjoyed by the purchaser without any interruption ... **except persons claiming under the said leases** (Emphasis added.)*

14

From the said Indenture it is clear that what the testator had purchased was the freehold reversion. When it is traced further backwards I noted that the vendor (Syed Allowee bin Allie Al Junied) had acquired a similar title from one Sophia Perreau pursuant to an Indenture of 15 January 1881. Sophia Perreau acquired her title to the same pursuant to the Will of one Elizabeth Campbell. Elizabeth

Campbell obtained four pieces of land from the East India Company and had during her lifetime `caused the said four pieces of land to be sub-divided into fifty three several allotments which were afterwards leased and devised to several persons at the rent and subject to the covenants and conditions on the said respective leases`. Therefore what Sophia Perreau inherited was the freehold reversion of the 53 lots and the rents and covenants of the leases.

15

In so far as the plaintiffs` title to the leasehold interest in the property is concerned, it can be properly traced back to the time when Elizabeth Campbell created the 53 leases. The property in this action relates to two of those leases. This is set out in paras 8 to 14 of the affidavit of Soh Onn Cheng Margaret Jane filed herein on behalf of the plaintiffs.

16

There is, therefore, nothing to suggest that at the time of his death the testator held anything other than the freehold reversion to the property.

17

I come now to the 1895 Order. I ought to mention that in OS No 330/1995 which involved a similar sort of a case as the present, where another set of properties of the same testator was involved, I had the occasion to consider the same Order. There too the defendants relied upon the Order and also upon s 43(2)(d) of the Evidence Act to argue that the 1895 Order was conclusive proof of the defendants` title to the property. I held there that the orders (the 1895

Order was one of them) were in respect of the appointment of new trustees and the vesting of trust properties in the new trustees. I held that they were not orders made by the court in the exercise of probate, matrimonial, admiralty or bankruptcy proceedings and thus s 43(2)(d) did not apply and that the orders only bound the parties. In that case too, there was no evidence that the leasehold interest in those properties ever belonged to the testator (the same testator as the present).

18

I have taken this opportunity to review the position under s 43(2)(d) and I still do not think the 1895 Order was an order in the exercise of the probate jurisdiction of the court. The essence of probate jurisdiction is to determine the genuineness or validity of a Will and not on any other matter. This is clear from the following passages in ***Sarkar on Evidence*** (14th Ed) at pp 736-737:

The probate granted by a competent court is conclusive of the validity and contents of such will and the appointment of executor, until it is revoked, and no evidence can be admitted to impeach it, except in proceedings in the Probate Division, for its revocation.

...

*A finding not essential to the judgment in a probate action does not operate as a finding **in rem**;*

...

*A decree of the court of probate granting probate and declaring the domicile of the testator, is not, as judgment **in rem**, conclusive as to domicile, unless the declaration was essential to the grant.*

...

In an application for probate the only question for determination is whether the will is genuine or not and it is not the province of

the court to determine any question of title, with reference to the property covered by the will.

19

The 1895 Order was both an order appointing a new trustee as well as an order vesting in the new trustee the properties of the trust. To properly appreciate the scope of that Order, it is necessary to closely examine that same part of the Order already quoted above:

*... And it is ordered that all those leasehold lots of vacant land, viz 115 lots situate at Syed Allowee Road, 74 lots situate at Serangoon Road and 53 lots situate at Dickson Road and all those freehold lots of vacant land, viz 21 lots situate in the district of Claymore, 2 lots situate at Sunghie Road and Lot No 23 situate at Syed Allie Road and those two houses bearing Municipal numbers 38 and 39 in Market Street and the two shares which belonged to Syed Abdulrahman bin Allie Al Junied and Syed Aboobakar bin Urmar Al Junied in the house and premises No 44 High Street **bought over** by the said testator now subject to the trusts of the said Will vest in the said Syed Mohamed bin Abdulrahman bin Ahmad Al Junied for the estate herein now vested in the said Syed Abdulrahman bin Allie bin Urmar Al Junied. (Emphasis added.)*

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As I see it, four categories of properties were covered by the Order (i) the leasehold lots of vacant land, (ii) the freehold lots of vacant land, (iii) 38 and 39 Market Street, and (iv) the two shares which belonged to Syed Abdulrahman bin Allie Al Junied and Syed Aboobakar bin Urmar Al Junied in the house and premises No 44 High Street bought over by the testator. Looking at the way the Order was drawn and viewing the matter in context, I cannot accept the defendants' contention that the words 'bought over' also qualified the properties under (i), (ii) and (iii). A plain reading would not permit such a construction. Furthermore, why was there any need to refer to 'bought over' in respect of the

properties in (i), (ii) and (iii) when they were already owned by the testator? Another pertinent point of difference is that in respect of the first three categories of properties, no mention was made of the previous owners as was done in respect of the (iv) category. I accept the explanation and submission of counsel for the plaintiffs that `probably in respect of the said two shares in No 44 High Street there was no assurance as yet made in favour of the testator but the testator had already contracted to buy the shares over` and that was why it was described in that way. This construction is consistent with that part of the Will of the testator where this asset was referred to as `the two shares which belonged to Syed Abdulrahman bin Allie Al Junied and Syed Aboobakar bin Omar Al Junied in the house and premises No 44 High Street bought over by me in trust for the children of my said trustee`.

21

I turn next to the question of the construction of the words `... all those leasehold lots of vacant land viz ... 53 lots situate at Dickson Road` in the Order. I think it is significant that these are the exact words found in the Will of the testator. The Order in effect did no more than reproduce those properties as described by the testator in his Will. In my opinion, more likely than not, the reference to `all those leasehold lots of vacant land` was just a loose and perhaps a brief expression to refer to those freehold lands which were subject to the 999 year leasehold term. Assuming for a moment that the defendants` submission is correct, that indeed the leasehold interest in the property had been `bought over` by the testator, then why only was the leasehold interest put on trust? What about the freehold reversion? Who was to get that? Was there a lacuna? Be that as it may, and more importantly, there is no evidence whatsoever of such `buying over` by the testator. The simple truth is that at the time the testator

made his Will he did not own the leasehold interest in the property in question and neither did he acquire title thereto at any time prior to his death. All that he possessed to pass over to his executor and trustee was the freehold reversion. Thus, the expression 'leasehold lots of vacant land' was probably just a convenient label, though perhaps not a wholly appropriate one, adopted by the testator and perpetuated in the 1895 Order.

22

I should add that registration under the Registration of Deeds Act (Cap 269, 1989 Ed) does not confer title. It only affects priority. Title has still to be proved. See s 14 of the Act and the previous equivalent provision.

23

Finally, there is the argument that the 1895 Order is a conveyance - here the defendants relied upon s 53 of the Trustees Act (Cap 337). I do not think this argument advances the defendants' case. Firstly, a person cannot convey what he does not possess. Secondly, as stated before, while this may be an order of court, it does not bind persons who are clearly non-parties.

24 ***Indefeasibility***

25

I now turn to consider briefly the second contention advanced by the plaintiffs: that they have acquired an indefeasible title to the property because the caution

on the qualified title has lapsed. Reliance was placed by the plaintiffs on s 25(1), (2), (4) and (5) of the Land Titles Act, which read:

25(1) Upon the creation of a qualified folio, the Registrar shall enter thereon a caution warning persons dealing with the registered proprietor therein named that the land comprised therein is held subject to any interest which affected it at the date of the creation of that folio, and so long as the caution remains on that folio that land shall be so held.

(2) In favour of any purchaser of an entire estate or interest in any land comprised in a qualified folio who is registered as the proprietor in the qualified folio, a caution entered on the qualified folio whether before or after 1st March 1994 lapses, in respect of that estate or interest, on the expiration of 5 years from the date of the last conveyance which was cancelled by the Registrar upon the creation of the qualified folio. (4) When a caution lapses pursuant to subsection (2), the lapsed caution shall constitute a defunct entry and the Registrar shall, after the lodging of an application in the approved form made by the proprietor of the land cause an entry to be made in respect of the lapsing of the caution. (5) Upon the lapsing of a caution pursuant to subsection (2), the folio shall cease to be qualified and the land comprised therein shall thenceforth be held subject only to such interests as are registered or notified on the folio and to such interests as are otherwise excepted by section 46.

26

By s 46(1), subject to certain exceptions, which have no relevance to our case here, any person `who becomes the proprietor of registered land, whether or not he dealt with a proprietor, and notwithstanding any lack of good faith on the part of the person through whom he claims, shall hold that land free from all encumbrances ... except such as may be registered ...` Subsection (3) provides that `nothing in this section shall confer on a proprietor claiming otherwise than as a purchaser any better title than was held by his immediate predecessor.` There is uncontroverted evidence before me that the plaintiffs are a purchaser for valuable consideration. The reliance by the defendants on an earlier caveat,

filed by a related company of the plaintiffs, to argue that the plaintiffs are not a purchaser, is wholly without any substance. The instrument of transfer clearly stated that the plaintiffs paid for the transfer. Thus sub-s (3) can have no application.

27

In the light of s 25(2) it seems to me clear that a caution stated on a qualified title lapses on the expiry of five years from the date of the last conveyance (in this instance 2 October 1989) which was cancelled by the Registrar upon the creation of the qualified folio. The fact that no entry has yet been made in respect of the lapsing of the caution is immaterial. This is what subsection (4) says. The caution has become a defunct entry. The making of an entry regarding its lapsing is purely administrative. The Registrar has no discretion in the matter. The plaintiffs have, therefore, by virtue of s 46 acquired an indefeasible title before the caveat of the defendants was lodged.

28

In this regard the defendants' counsel has made a rather ingenious argument, that as the plaintiffs were only registered as a proprietor on 9 November 1994, after the five-year period has elapsed, the plaintiffs are not entitled to invoke s 25(2) and (5) and that the plaintiffs must now apply under s 26 to have the caution cancelled. In my opinion this argument is wholly without merit. Section 25(2) is clear: there is nothing in it to suggest that it can only be applied in favour of the particular person who is the registered proprietor on the date of the expiry of the five-year period and not to the successor of that person. I think this argument leads to an absurd consequence in the context of a case such as

the present: it would mean that the caution would lapse on 2 October 1994 but would re-appear as against a purchaser who becomes a registered proprietor after 2 October 1994. Such a consequence has only to be stated to be rejected. I know of no principle of law which would permit such a construction. An application under s 26 to cancel a caution is an entirely different matter. It has nothing to do with the five-year period. It can be invoked by a registered proprietor at any time.

29

The commentary in *The Singapore Torrens System* by Baalman (1961) at p 36, which is relied upon by counsel for the defendants, is no longer applicable in view of the amendments made to s 25 of the Act.

30 ***Judgment***

31

Accordingly, I hold that the plaintiffs have shown that they are the owners of the leasehold interest in the property and that what the defendants have is the freehold reversion. I also hold that the plaintiffs' title has become indefeasible.

32

In the result I order that Caveat No CV/98507D lodged by the defendants on 13 December 1994 against the property known as lot 124-1 TS16 be removed and I direct the Registrar of Titles to so remove the said caveat from certificate of title volume 369 folio 16. The defendants shall also pay the plaintiffs such

losses which the plaintiffs may have suffered on account of the defendants wrongfully lodging the said caveat and refusing to withdraw the same. The compensation payable, if any, shall be assessed by the Registrar, if not agreed. The defendants shall bear the costs of this OS.

Chao Hick Tin J

Gan Hian Chye (Allen & Gledhill) for the plaintiffs
Peter Pang and Ronald Choo (Peter Pang & Co) for the defendants
