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DATO' MENTERI OTHMAN BAGINDA & ANOR.

v.

DATO' OMBI SYED ALWI SYED IDRUS

FEDERAL COURT, KUALA LUMPUR

SUFFIAN LP

b

RAJA AZLAN SHAH CJ (MALAYA)

SALLEH ABAS FJ

IBRAHIM MANAN FJ

HASHIM YEOP SANI J

[CIVIL APPEAL NO. 104 OF 1980]

26 SEPTEMBER 1980

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CONSTITUTIONAL LAW: *Action against appointment of Undang, Jelebu Negri Sembilan - Application to strike out - Immunity of appointment - Art. 181, Federal Constitution - Jurisdiction of Court.*

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The dispute concerned the succession to the 14th Undang of the luak of Jelebu, Negri Sembilan. On 20 November 1979 on the death of the 14th Undang, the 1st appellant became acting Undang. On 4 February 1980, he proclaimed the appointment of the 2nd appellant as the new Undang, though the respondent had not included the name of the 2nd appellant amongst the names of three possible candidates he had submitted to the 1st appellant. The respondent filed a suit in the Seremban High Court against the two appellants for a declaration that the purported appointment of the 2nd appellant was invalid as being contrary to the adat, custom and constitution of the luak of Jelebu, whereupon the appellants applied for an order that the respondent's statement of claim be struck out on the ground that the Court had no jurisdiction and in the case of the 2nd appellant, on the further ground under the constitution that he, as Ruling Chief, enjoyed legal immunity in his personal capacity.

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Held:

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[1] It was doubtful that art. 181 of the Federal Constitution gave the 2nd appellant legal immunity at all. Furthermore, even if it were to be assumed that an Undang of Jelebu enjoyed legal immunity in his personal capacity, this was so if and only if there was no dispute as to the validity of his election.

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[2] The Court had jurisdiction to adjudicate on the dispute regarding the election of the 2nd appellant as the Undang of Jelebu. Art. 71 of the Federal Constitution does not oust the jurisdiction of the Courts to adjudicate on the complaint of a tribal chief of the luak of Jelebu that a new Undang of Jelebu has been elected contrary to the custom of the luak. While it is open to the Federal or State Constitution to oust the jurisdiction of the Court, it must do so in clear language, and there were no provisions in the Constitution, Federal or State, that clearly ousted the jurisdiction of the Courts over a disputed election of an Undang.

[Appeal dismissed with costs.]

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Legislation referred to:

Federal Constitution, arts. 63(1), (2), 68(4), 71(1), (2), 135(2) 160(2), 180, 181(1), (2)

Constitution of the State of Negeri Sembilan, Chapter 6

*For the appellants - N. Ramachandran (Arifin Jaka & Joseph Chia with him); M/s. Arifin & Partners
For the respondent - A. Razak bin Ahmad; M/s. Ong Ban Chai & Razak*

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JUDGMENT

Suffian LP (dissenting):

This dispute concerns the succession to the 14th Undang (Ruling Chief) of the luak (territory) of Jelevu in the State of Negri Sembilan, and the answers to the issues that arise in this appeal turn on the construction of certain provisions in the Federal Constitution and in the State Constitution.

Preliminary

On 20 November 1979, when the 14th Undang died, it was necessary that his successor be, in the words of Clause (1) of art. XIV of the State Constitution, a person "lawfully elected in accordance with the custom of [his luak]". Until then, in accordance with the adat (custom) and constitution of the luak, Dato' Menteri Othman bin Baginda ("the first defendant") became acting Undang. He was bound by the adat of the luak to instruct Dato' Ombi Syed Alwi bin Syed Idrus ("the plaintiff") one of the Dato' Lembaga (Tribal Chiefs) of the luak to investigate and nominate candidates, from amongst whom a suitable person would be elected as successor to the deceased Undang.

On 4 December the Dato' Menteri received a nomination from Kecik bin Kiman, Dato' Raja Diraja or Buapak from Waris Sarin, nominating Musa bin Wahab, P.J.K. ("the second defendant") as a candidate. On receipt of the nomination the first defendant directed the plaintiff to investigate into Encik Musa's background and qualifications and included his name in the list of candidates.

On 14 December, the first defendant received a letter from the plaintiff giving the names of three possible candidates: namely Syed Zin bin Syed Hussein, Syed Sulong bin Syed Chik and Nordin bin Ahmad. It will be observed that the second defendant's name was not on the list. The first defendant claimed that it was his duty under the law, custom and constitution of the luak to see that the nomination of the second defendant be given due consideration, and that the plaintiff had failed in his duty as Dato' Ombi by not considering the second defendant's eligibility as a candidate under the rules of pesaka (succession). So the plaintiff as acting Undang called a special meeting of the Tribal Chiefs of the luak on 24 December to discuss the matter. On 31 December another special meeting of the Tribal Chiefs was held attended by eight of them.

The first defendant alleged "that there was no single candidate acceptable to the eight tribal chiefs", whereupon it was his duty under the adat, custom and constitution of the luak to choose the new Undang. So he personally investigated into the background and qualifications of all the three candidates submitted by the plaintiff and into those of the second defendant, and he concluded that none of the three candidates were eligible and that only the 2nd defendant was a fit and proper person to be appointed the new Undang, that there was no reason why he should not be appointed and that in failing to take into account his eligibility the plaintiff had failed to carry out his duty as Dato' Ombi. Subsequently, on 4 February, 1980, he (the first defendant) proclaimed the appointment of the second defendant as the new Undang of the luak of Jelevu in accordance with the adat, custom and constitution of the luak.

Seventeen days later the plaintiff filed a suit in the Seremban High Court against the two defendants, alleging that the second defendant was not a candidate for the Undangship, was not qualified for it under the adat, custom and constitution of the luak, that his

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a appointment was not approved by the plaintiff and six other Tribal Chiefs of the luak, whom he named; and by reason of all this the plaintiff asked the Court to declare that the purported appointment by the first defendant of the second defendant as the new Undang was invalid as being contrary to the adat, custom and constitution of the luak of Jelebu.

b In their defence the two defendants maintain that the appointment was valid according to the adat, custom and constitution of the luak. Secondly, they contend that the Court has no jurisdiction to entertain the action. Thirdly, the second defendant for his part alone contends that as the lawfully elected Undang he is immune from being sued in his personal capacity.

c On 24 March the two defendants applied by summons in chambers for an order that the plaintiff's statement of claim be struck out on the ground that the Court had no jurisdiction because the dispute involved a question of adat and custom of Malays in the luak and, in the case of the second defendant, on the further ground that under the constitution he as Ruling Chief enjoyed legal immunity in his personal capacity.

d These contentions were hotly contested. In the event, the learned Judge (Abdul Hamid, FJ, sitting in the High Court) dismissed the application, holding that the Court had jurisdiction to entertain the action and that the second defendant did not enjoy legal immunity.

e The defendants have appealed to this Court. Before proceeding any further, it should be stressed that as this matter has not gone to trial yet, the facts given above have been taken from the pleadings and affidavits filed in connection with the summons in chambers, and may not be "firm". Secondly, while clause (1) of art. XIV of the State Constitution speaks of Undang of Jelebu being elected, the above narration of the facts speaks of his being "chosen" and "appointed", the very words which were used in the affidavit. But it would appear that at this stage there is no significance in the deviation from the word used in that clause. Thirdly, the Court is not concerned at this stage with the merits of the plaintiff's claim, i.e. with the validity or otherwise of the election of the second defendant.

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Issues

There are two issues in this appeal. First, does the Court have jurisdiction to determine this dispute? The defendants contend that, contrary to the ruling of the learned Judge, the Court does not.

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Legal Immunity

Secondly, does the second defendant enjoy legal immunity from being sued in his personal capacity? He contends that, contrary to the ruling of the learned Judge, he does. As regards this, article 181 of the Federal Constitution provides:

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181. (1) Subject to the provisions of this Constitution, the sovereignty, prerogatives, powers and jurisdiction of the Rulers and the prerogatives, powers and jurisdiction of the Ruling Chiefs of Negri Sembilan within their respective territories as hitherto had and enjoyed shall remain unaffected.

(2) No proceedings whatsoever shall be brought in any Court against the Ruler of a State in his personal capacity.

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and art. 160(2) of the same Constitution provides:

In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say:

“Ruler” -

(a) in relation to Negri Sembilan means the Yang di-Pertuan Besar **acting** on behalf of himself and the Ruling Chiefs in accordance with the Constitution of that State; ...

It appears doubtful that art. 181 gives the second defendant legal immunity at all. I say so because such immunity is usually an attribute of sovereignty, and while Clause (1) of the art. speaks of the sovereignty of a Ruler it speaks only of the prerogatives, powers and privileges, not sovereignty, of a Ruling Chief. And the definition of Ruler in Clause (2) of art. 160 appears to refer only to functions and does not touch on the question of whether or not a Ruling Chief is sovereign.

In the past, treaties between the State and the British were co-signed by the Ruling Chiefs. The Federation of Malaya Agreement, 1957, signed by Their Royal Highnesses the Rulers and the British, one of the instruments granting us independence, was also co-signed by the Ruling Chiefs. It is therefore also arguable that a Ruling Chief does enjoy legal immunity to the extent set out in art. 180, being “sovereign”.

Be that as it may, I am of the opinion that even assuming, without deciding, that an Undang of Jelebu enjoys legal immunity in his personal capacity, this is so if and only if there is no dispute as to the validity of his election; and that if the very validity of his election is disputed, then until the Court is satisfied as to its validity, the purported holder of the office is subject to the process of the Court. Otherwise, every pretender or usurper will enjoy legal immunity. For this reason, I am of the opinion that the second defendant cannot at this stage avail himself of the protection of art. 181(2) of the Federal Constitution.

Jurisdiction

I now turn to the first issue in this appeal. It transpires that before this action was filed this dispute was brought to the attention of His Royal Highness the Yang di-Pertuan Besar, i.e. the Ruler of the State, and on 7 February, 1980, a meeting of the Dewan Ke’adilan dan Undang, the Council of the Yang di-Pertuan Besar and the Ruling Chiefs, (“the Council”) was held to discuss the matter. This body, established by Art. XVI, XVII and other Art. of Chapter 6 of the Negri Sembilan Constitution, consists of His Royal Highness, the Ruling Chiefs, the Tengku Besar of Tampin and other high dignitaries, and its function (Art. XVI) is “to advise on questions relating to Malay custom in any part of the State or on other matters which may be referred to it by His Royal Highness or any of the Ruling Chiefs ...”. When the Council deliberates on state or national policy the Menteri Besar shall be invited to attend (Art. XVII); and the Council may invite to any of its meetings any person if it considers that his presence is desirable (Art. XXIV). This meeting of 7 February had only one item on the agenda, to discuss the election of the new Undang, and was attended by the following high officials on invitation: the Menteri Besar, the State Secretary, the Legal Adviser and the Mufti-which shows the importance attached to the matter under discussion. According to its minutes (Exh. DM 7), His Royal Highness, the President of the Council, reported that he and the Secretary of the Council had each received a letter signed by seven Tribal Chiefs of the luak of Jelebu expressing dissatisfaction with the election of the second defendant as Undang of Jelebu, and His Royal Highness invited the Menteri Besar to report on the dispute, which he did. Then the members of the Council discussed the matter among

a themselves behind closed doors in the absence of non-members for about an hour. When the non-members had been invited to re-enter, His Royal Highness announced the decision of the Council, formally recorded in the minutes as follows:

b The Council of the Yang di-Pertuan Besar and the Ruling Chiefs, Negri Sembilan which sits this day gives its blessing to the election of Dato' Musa bin Abdul Wahab (the second defendant) to hold the hereditary office of the Undang of Jelebu Territory, the new Undang, with the title of Dato' Mendika Menteri Akhirulzaman.

The last paragraph of the minutes concludes:

Thereafter His Royal Highness commanded the Secretary to the Council to make a press statement announcing the decision of the Council of the Yang di-Pertuan Besar and the Ruling Chiefs.

c Reference was made in the lower Court and before us to art. 71 of the Federal Constitution, and it was contended that in the light of that Art., the decision of the Council is decisive of this dispute and removed it from the jurisdiction of the Courts. That Article provides that any dispute as to the title to the succession as a Ruling Chief in Negeri Sembilan shall be determined **solely** by such authorities and in such manner as may be provided by the Constitution of that State, and reads as follows:

d 71. (1) The Federation shall guarantee the right of a Ruler of a State to succeed and to hold, enjoy and exercise the constitutional rights and privileges of Ruler of that State in accordance with the Constitution of that State, but **any dispute as to the title to the succession as Ruler of any State shall be determined solely by such authorities and in such manner as may be provided by the Constitution of that State.**

e (2) Clause (1) shall, with the necessary modifications apply in relation to a Ruling Chief of Negri Sembilan as it applies to the Ruler of a State.

f The learned Judge held that the Court has jurisdiction to adjudicate on this dispute because the election must be held in accordance with the custom of Jelebu, the Council's function relating to Malay custom is merely advisory (the Council does not decide), there is no evidence so far from the minutes showing what was the custom that it took into account when "blessing" the new appointment, and that blessing it is not the same as approving or confirming it, which in any event it has no power to do.

g The learned Judge also held that the second limb of clause (1) of art. 71 of the Federal Constitution, meaning the words underlined, does not appear to be applicable to a Ruling Chief. With respect I do not agree. In my judgment, the effect of this art. 71 is that the Negri Sembilan Constitution may provide that a dispute as to the title to the succession as a Ruling Chief in Negri Sembilan may be determined solely by such authorities and in such manner as may be provided by it, and if that is done, the Court's jurisdiction is ousted.

h It was submitted before us that the State Constitution has provided that such a dispute should be determined solely by the Council established by art. XVI of that Constitution, thus ousting the Court's jurisdiction. True the Council's function is expressed to be advisory, but it was submitted that it is an august body, consisting of the highest dignitaries in the State who are repositories of Malay adat and with easy access to experts on adat, and that if a disputed election such as this which should have been held in accordance with adat had been referred to it, it would not have blessed it if it found that it had contravened adat, and that if it blessed it, it must have found that it did conform to adat; that it was far-fetched to imagine that the constitution-makers of the State intended that thereafter the Court

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should have jurisdiction to reopen the subject and question its validity. And mention was made of the fact that the State Assembly had on 13th February formally “noted” the election of the 15th Undang and that he has been in receipt of his civil list allowances since the election. *a*

I am of the opinion that while it is of course open to the Federal or State Constitution to oust the jurisdiction of the Court, it must do so in clear language. *b*

Suppose a vote on something is taken in the House of Representatives; the validity of the proceeding cannot be questioned in the Court, because art. 63(1) of the Federal Constitution so provides. Suppose Mr. Speaker certifies that the steps which require to be taken before a money bill may be presented to the Yang di-Pertuan Agong for his assent over the objection of the Senate, have been taken; the validity of the certificate may not be questioned in the Court, because art. 68(4) so provides. Or suppose a member says in the House something that is defamatory; he may not be sued in Court, because art. 63(2) expressly provides that he shall not be liable for any proceedings in any Court in respect of anything said by him in the House. In all these instances, there are provisions clearly ousting the jurisdiction of the Courts. *c*

In my respectful judgment, there is nothing as clear as the above provisions in the Constitution, Federal or State, ousting the Court’s jurisdiction over a disputed election of an Undang, and I therefore agree with the learned Judge that the Court does have jurisdiction to adjudicate on this election - in the same way as the Court has jurisdiction to determine the validity of the dismissal by the Public Service Commission of a public servant, when it is challenged. *d*

As a public servant may not be dismissed without being first given a reasonable opportunity of being heard (art. 135(2)), and the Court has jurisdiction to entertain and adjudicate on his complaint that he has been so dismissed, there being no provision in the constitution to oust the jurisdiction of the Court, so in my judgment the Court has jurisdiction to entertain and adjudicate on the complaint of a tribal chief of the luak of Jelebu that a new Undang of Jelebu has been elected contrary to the custom of the luak, there being no provision in the Federal or State Constitution ousting the jurisdiction of the Court. To determine whether or not the complaint is justified, the Court has first to ascertain what is the custom in Jelebu, and then apply it to the facts, and there is no question of the Court interfering with or disregarding it. Whether or not the Undang has been validly elected is of course a delicate question, and a political question which is best solved by political means; but if the constitution and law require, as I think they do, that the matter be resolved by the Court, then until the constitution has been suitably amended, the Court has no alternative but to embark on the task as best as it can, though that will have the unfortunate effect of throwing the Court into the political arena. So that Courts are not turned into a political forum, I would rather that State Constitutions be amended by the appropriate authorities, so that future disputes regarding succession are kept out of our way and decided by persons or bodies better equipped to do so. *e*

Until then, I would with respect have dismissed this appeal with costs. *f*

Also found at [1984] 1 CLJ 28

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