

Privy Council Appeal No. 59 of 1926.

Daing Soharah binte Daing Tadaleh and another - - - *Appellants*

v.

Chabak binte Lasaliho and another - - - *Respondents*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT
OF SINGAPORE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL DELIVERED THE 29TH MARCH, 1927.

Present at the Hearing :

VISCOUNT HALDANE.

LORD PHILLIMORE.

LORD DARLING.

[*Delivered by* VISCOUNT HALDANE.]

The appellants are two of the plaintiffs in an action in the Supreme Court of the Straits Settlements (Singapore Settlement) which they brought against the respondents. The first respondent was sued as administratrix of the appellants' nephew, Hadji Mohamed Said, deceased, and the second respondent was sued as the administrator of their niece, Etendir binte Laplamni, deceased. The claim was to set aside an assignment, dated 19th September, 1921, under which the appellants and a deceased sister, who was originally to be their co-plaintiff, had assigned to Hadji Mohamed Said and Etendir binte Laplamni all their interest in leasehold property belonging to them at Singapore, and for an account of all moneys received by Hadji Mohamed Said since the 30th December, 1919, the date on which he had been appointed as the plaintiffs' attorney in regard to the leasehold property in dispute. The only question in this appeal is whether, in the circumstances, and having regard to the alleged fiduciary position of the attorney, the assignment was binding on the plaintiffs. The first respondent as administratrix of Hadji did

not dispute her liability to account for the rents received by him down to the date of the assignment.

The action was tried before the Chief Justice of the Straits Settlements, Sir Walter Shaw, in March, 1925. He decided that there was no undue influence and dismissed the claim. The Court of Appeal in June, 1925, affirmed the dismissal.

It is important to see what the claim was as originally launched. The plaintiffs were old ladies over 70. They lived mainly in Borneo and were alleged to have been acquainted neither with English nor with Malay. The assignment was drawn up in English. The statement of claim charges a fraudulent misrepresentation made by Hadji that the assignment was merely a document enabling him to take over the administration of the property after the deaths of the plaintiffs. There was expressed in the document, as consideration for the grant in it, a covenant to maintain the plaintiffs for the rest of their respective lives. The allegation in the statement of claim was that this consideration was a mere pretence to which effect was never given. The defence denied the alleged fraudulent misrepresentation and the unreality of the consideration expressed.

The Trial Judge held that there was no proof of fraud. The case before him had also been put on the ground of undue influences and he dismissed it in so far as concerned this ground also. The Court of Appeal agreed. The judgment in the first Court does not go into the circumstances in detail, and it is necessary, in order to appreciate their bearing, to restate them. The plaintiffs were three Bugis ladies, two of them married and the third a widow. They lived in Borneo, a long way off, where they had other property, and they also owned the property in question in Singapore. This was looked after for them by their nephew, Hadji Mohamed, who lived in Singapore, and who used to collect the rents and was allowed, temporarily at least, to keep them in his own hands. In 1919 the ladies had given Hadji Mohamed a power of attorney to "adjust all affairs respecting our houses and property . . ." and to receive payments and give receipts. In 1921 the ladies, who were Mohamedans and, as already stated, of advanced ages, decided to make the pilgrimage to Mecca. They landed in Singapore *en route*, and took the opportunity of arranging their affairs. They appear to have consulted a Mr. Bazeley, a solicitor of the firm of Allen and Gledhill at Singapore. He and his assistant, Mr. James, gave evidence very fairly. They prepared the deed and wills to be presently referred to, and acted for all parties, but there is nothing to show how or by whom they came to be employed or who paid their costs. In 1919 they appear to have acted for the ladies in recovering from a previous agent, Hadji Samsudan, the title deeds of the property. That agent appears to have been indebted to the ladies in a large sum for arrears of rent, and this had to be deducted from the value of an interest which he had in the property. Hadji Mohamed appears to have

been appointed in his place, and Allen and Gledhill were in communication with him.

Mr. Bazeley, their partner, prepared the assignment of the 19th September, 1921, and also wills for the two appellants and the husband of one of them. Under the wills of the ladies Hadji Mohamed and his sister, Etendir, were to take the property. The wills were executed on the 26th September, but the assignment was executed seven days previously, on the 19th.

Mr. Bazeley and Mr. James stated that they could not recall precisely what happened, but they had no doubt that they explained to the ladies the character of the assignment. In the books of the firm there is an entry showing that they attended on the 21st September at the house of Hadji Mohamed, where the wills of these two ladies were translated to them and executed. Mr. Bazeley was not versed in the Malay language, but Mr. James was. There is no evidence of any entry in the books about the execution of the assignment on the 19th. The appellant, Daing Tadaleh, asserted that she did not know Malay, but that Hadji Mohamed explained to her that under the documents which she signed the property would be distributed after the deaths of the three sisters. She says that she did not know what the nature of her will was. Her husband, Abdul Siraj, also gave evidence. He said that Hadji Mohamed told them that the document was a will. He is a Bugis and says that he does not know Malay.

It was on the footing of the alleged misrepresentation by Hadji Mohamed that the assignment was only a will, that this action was launched. The Courts below have found concurrently that there was no such misrepresentation. The Chief Justice, in deciding this case at the trial, said :—

“ I do not accept the evidence of the first plaintiff and her husband taken out of Court *de bene esse* as to the alleged fraud perpetrated by Hadji Mohamed on the execution. They are very old and infirm people, and their memories are, obviously, defective as to what took place, and they are probably confusing the execution of the assignment with the execution of the wills of the three plaintiffs, which the defendants' evidence satisfies me took place not on the date when the assignment was executed, but on another day about the same time. I was satisfied that both the husbands of the first two plaintiffs understood Malay—one of them even signed in Malay characters—and that the alleged misinterpretation of the solicitor's description of the effect of the document could not have been successfully carried out.”

The Court of Appeal concurred in this finding, and it has not been challenged in the argument in the present appeal. The fact that the case was put at the trial on this footing has a material bearing on the form of the evidence given. It accounts to a considerable extent for the deficiency in the sort of evidence which would naturally have been tendered for the defendants had the case presented been one simply of the burden on an assignee who stands in a fiduciary position of giving full details of the circumstances under which the assignment to him was made.

It was a case of this second kind that was the only one opened in that appeal. It was, in their Lordships' opinion, open to the appellants to make it, although it had not been distinctly stated in that form in the statement of claim. But the appellants have to bear the responsibility of not having brought forward in the Courts below evidence, for instance, as to the position of the solicitors, which ought to have been before the Judicial Committee when such a case was made. Hadji Mohamed was the agent of the ladies in the management of the property, and he was bound, before taking anything in the nature of a gift from them, to make it clear that they knew exactly what they were doing and acted of their own free will. The relief given by a Court of Equity is a secondary consequence of the principle that a person, standing in a relationship in which authority or influence may be supposed to exist, cannot hold a mere gift without making it clear that the intention to make it was not the result of his influence. The relationship itself does not necessarily preclude the making of the gift; but the burden lies on the donee to show that there was no such influence as to the source of the gift. The Courts have refused to enumerate exhaustively the cases in which the presumption of undue influence will *prima facie* be made. Religious influence is included, and so are many other classes of influence in which the donee may from his position to be presumed to be likely to have exercised special influence over the mind of the donor. But he can discharge the burden incumbent on him by showing that, the relationship notwithstanding, the donor knew completely what he was doing, and acted of his own completely free will. With certain kinds of fiduciary relations, such as that of a solicitor taking a gift from his client, this is, obviously, much more difficult to establish than in others where the duty is less definite. Courts of Equity have therefore exercised a certain freedom in their decisions as to where and how the principle must be applied. This appears to their Lordships to be the outcome of numerous authorities which they have examined.

With these observations their Lordships turn to the character of the assignment itself of the 19th September, 1921. After reciting the title to the property in question of the three ladies, it states that they are desirous of assigning it to Hadji Mohamed and Etendir, and that the premises to be assigned are of the value of \$90,000. It assigns, in consideration of natural love and affection for their relatives, and of the latter having maintained them for some time past, and of their agreeing to maintain them for the future during their respective lives, the premises, as to two undivided thirds for Hadji Mohamed and as to one-third for Etendir, absolutely. There follows a covenant for the maintenance, in the future in the same way as in the past, of the assignors by the assignees. This assignment was in English, and, as already stated, the solicitors, although they cannot recall the circumstances, are certain that it was translated to the assignors.

No proceedings were taken to question the gift for about three years. Under the circumstances, and having regard to the fact that the action, when launched, was launched on a basis that has been disproved, their Lordships think that the Courts below were justified in refusing to set it aside. The relationship of the parties, the desire, naturally to be inferred, of the ladies to make a disposition of their affairs before going away on a long journey to Mecca, and the opportunity afforded by the flying visit to Singapore, where the property was but where they were not resident, all render it probable that the transaction had been considered and represented the deliberately conceived intention of the assignors.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

DAING SOHARAH BINTE DAING TADALEH
AND ANOTHER

v.

CHABAK BINTE LASALIHO AND ANOTHER.

DELIVERED BY VISCOUNT HALDANE.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.
1927.