

No. 20 of 1978

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT
KUALA LUMPUR (APPELLATE JURISDICTION)

B E T W E E N :

SAMINATHAN s/o VANATHAN Appellant

- and -

PAPPA d/o THOPPAN Respondent

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CASE FOR THE APPELLANT

1. This is an appeal from a Judgment and Order of the Federal Court of Malaysia holden at Kuala Lumpur (Suffian L.P., Ali Hassan F.J., Wan Suleiman F.J.) dated the 3rd day of September 1975 allowing an appeal by the Respondent herein from a Judgment of the High Court in Malaya at Kuala Lumpur (Mohd Azmi J.) dated 14th October 1974 and the order of the said High Court for:-

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(i) a declaration that the Appellant's principal, Palaniandy, has been and still is the proprietor and registered owner of the land held under E.M.R. 5806 in the Mukim of Tanjong Karang, in the District of Kuala Selangor, formerly known as Approved Application Nos. 814/50 and 79/57;

pp.78-79

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(ii) a declaration that the irrevocable power of attorney dated July 9th, 1962 and registered in the High Court at Kuala Lumpur under Registration No. 739/62 be declared null and void as far as it affects the lands mentioned in (i);

(iii) an injunction restraining the Respondent or her agents or servants or any person or persons claiming by or through her from interfering with the rights of the

Appellant over the said lands in his capacity as attorney for Palaniandy;

(iv) an order that the assignment or memorandum of transfer or other application drawn and/or executed by the Respondent in respect of the said lands be set aside;

(v) a consequential order that the appropriate authority do expunge the name of the Respondent from the records of the relevant land office;

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(vi) costs of the Counterclaim.

The order included that all monies (if any) paid into Court under Order of Court dated October 30th, 1972 be paid out to the Appellant.

2. The Appellant's Petition was presented in pursuance of an order of the Federal Court, granting the Appellant Final Leave to appeal to His Majesty The Yang di-Pertuan Agong which was granted to the Appellant by the Order of the Federal Court dated 12th July 1976 and it was further ordered that the execution of the said judgment of the Federal Court hereof be stayed until the appeal is heard and disposed of.

pp.108-109

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3. The facts briefly are as follows:-

(i) This is a dispute in respect of ownership of land relating to two lots which were originally held under approved applications Nos. 814/50 (Lot No. 10600) and 79/57 (Lot No. 5406). The approved applicant being one Palaniandy s/o Murugan. Sometime during 1957 Palaniandy the owner of the two lots of land before leaving for India appointed the Appellant as his attorney and duly executed a general power of attorney in his favour. The general power in favour of the Appellant executed on May 11th, 1957 was duly registered in the High Court Malaya Registration No. 500/57.

pp.126-130

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(ii) On 9th July 1962 the Appellant duly executed an irrevocable power of attorney in favour of the Respondent duly authorising her to convey land to herself. The Power of Attorney was also registered in the High

pp.131-135

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Court, Malaya Registration No. 739/62. The E.M.R. 5806 in the Mukim of Tanjong Karang grant of title in respect of the two lots referred to above from the State Authority was issued to Palaniandy on 15th July 1965 with an express condition that the land was not to be transferred without the written consent of the Ruler in Council.

- 10 (iii) The Appellant and the Respondent made separate applications for the transfer to land to the Ruler in Council and on 9th July 1970 the Respondent was duly registered as the owner of the land in dispute and she is now shown in the records as the registered owner. The Respondent initially in her original Statement of Claim dated 4th day of August 1971 claimed that she was and is at all material times the registered proprietor and beneficial owner of the lands held under E.M.R. No. 5089 Bendang Lot No. 10600 and Kampong Lot No. 5406 in the Mukim of Tanjong Karang in the District of Kuala Selangor. p.139 p.143 pp.171-172
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- 30 (iv) In his Defence dated 23rd August, 1971 the Appellant claimed that he has been in cultivation of the said land for over twenty-five years and was still cultivating the portion known as Lot No. 5406 save and except in or about 1962 or 1963 due to illness he allowed the Respondent or her representative to cultivate the portion of the land known as Lot No. 10600 in consideration of payment of rent to be agreed from time to time. The Appellant claimed that the rent was in arrears and he allowed the Respondent time to settle failing which he was to obtain re-possession of the said portion. These initial proceedings commenced at the Magistrates Courts were later transferred on 30th October 1972 to the High Court because of proceedings commenced by the Respondent in the High Court Malaya. The pleadings were amended and re-amended before the actual hearing commenced. pp.173-174 pp.175-176
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- 50 (v) The Appellant alleged fraud in that without his knowledge the Respondent applied for and obtained permission from the appropriate authority and on 9th July 1970 fraudulently transferred the said lands into her own name by virtue of the two powers of attorney.

PARTICULARS OF FRAUD

p.8 line 30

(a) The Respondent applied for the transfer of the land without the knowledge of the Appellant.

(b) The Respondent misrepresented to the Collector of Land Revenue that the Appellant was in India and desired the transfer of the approved application to the Respondent.

(vi) It was further submitted that the Appellant cannot delegate a power under the power of attorney No. 500/57 in which there are no provisions either express or otherwise to grant a third person to transfer the said lands.

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(vii) The hearing of the action took place between 14th June 1973 and 24th November 1973 and the Learned Trial Judge having heard oral evidence for five days from three witnesses for the Appellant's case and seven witnesses for the Respondent reserved judgment.

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(viii) The reserved judgment was delivered on 14th October 1974. The Learned Judge considered the evidence and held that fraud had been proved and his judgment inter alia reads:-

p.71 line 52

"Having regard to the evidence as a whole, I find fraud and misrepresentation on the part of the Plaintiff having been proved beyond reasonable doubt".

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With regard to the power of attorney the Trial Judge held:-

p.73 line 8

"In short, the Defendant cannot delegate a power which is outside the power of attorney No. 500/57. From the contents of this power, I find no provision either express or otherwise for any authority on the part of the Defendant to grant to a third person to transfer the said lands, and as such the power purported to be given to the Plaintiff in respect of the said lands is null and void"

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(ix) The Respondent appealed to the Federal Court of Malaysia. The appeal was heard on 15th and 16th April 1975 on the printed evidence and judgment was reserved. The only reserved judgment was given by Lord President Tun Suffian. He referred to the facts outlined above and the issues involved and disagreed with the trial Judge on a finding of fact.

pp.85-93

10 Ali Hassan and Wan Suleiman, F.J.J.
 concur.

20 The Learned Lord President allowed the appeal with costs in both Court on the basis that the only evidence on fraud came from the Collector. On the other hand the Learned Trial Judge said that he found fraud and misrepresentation on the part of the Respondent have been proved beyond reasonable doubt having regard to the evidence as a whole including the contents of a statutory declaration stating that the Appellant was in India has been admitted by the Respondent in cross-examination as being not true.

p.33 line 38

4. The issues which arise in this appeal are as follows:-

30 (i) Whether the Appellant had proved fraud beyond reasonable doubt to be entitled to the exception of Section 340 of the National Land Code No. 56 of 1965 to defeat the Respondent's claim to the title.

(ii) Whether the allowing of the Respondent's appeal by the Federal Court on the question of fact on fraud reached by the trial judge after he had heard considerable evidence fall within the principles on which an appellate court should act in reviewing the decision of a Judge in the first instance as stated by Lord Thankerton in Watt or Thomas v. Thomas (1947) A.C. 487 which reads:-

40 "(1) Where a question of fact has been tried by a judge without a jury, and there is no question of mis-direction of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed

evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

(2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. 10

(3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court." 20

(iii) Whether the irrevocable power of attorney granted by the Appellant is null and void because the contents of his original power No. 500/57 has no provisions express or implied to delegate a third person a power to transfer the said land by a greater power which does not exist.

5. The following statutory provisions are relevant to the case of the Appellant:-

(A) The National Land Code Act 56 of 1965. 30

Power of State Authority to vary conditions, etc. on application of proprietor	124.(1) The proprietor of any alienated land may apply to the State Authority under this section for - (c) the amendment of any express condition or restriction in interest endorsed on, or referred to in, the document of title thereto, or the imposition of any new express condition:	40
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Provided that the State Authority shall not entertain any such application unless it is satisfied with respect to every person or body having a

registered interest in the land, or in occupation of any part thereof under any tenancy exempt from registration, either that he has consented thereto or that his consent ought in the circumstances of the case to be dispensed with.

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(4) The State Authority may approve any application under paragraph (c) of sub-section (1) either in the terms in which it was submitted or, with the consent of the applicant and any other persons or bodies whose consent thereto was required under the proviso to that sub-section, subject to such modifications as it may think fit, and shall, in either case, direct as appropriate -

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(a) the amendment of any condition or restriction in the interest endorsed on the document of title to the land, or

.....
.....

(5) Any direction given by the State Authority under this section may be made conditional upon all or any of the following matters -

(a) the payment of a further premium;

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Documents to accompany instruments executed under power of attorney 64 of 1949

309. (1) Where any instrument presented for registration under this Part has been executed on behalf of any person or body under a power of attorney, it shall be accompanied by -

(a) an office copy thereof within the meaning of section 10 of the Powers of Attorney Ordinance, 1949, or, in the case of a power to which sub-section (4) of section 4 of that Ordinance applies, the original thereof; and

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(b) subject to sub-section (2), a copy thereof for retention by the Registrar.

(2) Where a copy of any power of attorney has once been delivered to the Registrar pursuant to paragraph (b) of sub-section (1), and filed by him in accordance with section 310, it shall not be necessary to send a further copy under that paragraph with any instrument subsequently executed under the same power.

(3) The references in sub-section (2) to paragraph (b) of sub-section (1), and section 310, shall be construed as including references to the corresponding provisions of any previous land law. 10 10

Enquiries etc., by Registrar

311. In determining the fitness for registration of any instrument to which section 309 applies, the Registrar -

(a) may, without prejudice to the generality of his powers under section 302, require from the attorney or his principal a statutory declaration, or other evidence upon oath or affirmation, that the power of attorney was, at the material time, still in force; but 20 20

(b) shall not, in the exercise of those powers, require proof of the due execution of any power of attorney where the document delivered to him pursuant to paragraph (a) of sub-section (1) of the said section 309 was an office copy thereof. 30 30

Regis- tration to confer in- defeasible title or interest except in certain cir- cumstances.

340. (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible. 40 40

(2) The title or interest of any such person or body shall not be indefeasible -

- (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
- (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
- (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) -

- (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
- (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent -

- (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
- (b) the determination of any title or interest by operation of law.

(B) Laws of Malaysia Act 67 - Civil Law Act
1956 (Revised - 1972).

Application of U.K. common law rules of equity and certain statutes. 3. (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall -

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956;

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6. In his Judgment, the Learned Trial Judge who heard evidence from two groups of witnesses reached a finding on fraud which reads:-

"It is not seriously in dispute that the decision in favour of the Plaintiff was made on the strength of both powers of attorney after it has been ascertained from the Kuala Lumpur High Court Registry that they were still effective, and also on the strength of the Plaintiff's statutory declaration to the effect that both Palaniandy and the Defendant were still living and that they were in India at the material time. On the evidence, it is my finding that the Defendant has established fraud and misrepresentation on the part of the Plaintiff as envisaged by section 340(2) (a) of the National Land Code. That part of the statutory declaration which declared that the Defendant was still living and was in India is obviously untrue and fraudulent."

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p.69 lines
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It is submitted that the above approach by the Learned Trial Judge is correct and is in accordance with the Judgment of Lord Diplock in the case of Damodaran v. Choe Kuan Him (P.C.) (1979) 3 W.L.R. 383 at 387-388 which deals with the statutory provision of the Malaysian Torrens System.

The Learned Trial Judge further correctly held that an attorney cannot give to a third person a greater power and relied on Bryant, Pavis and Bryant Limited v. La Banque Du Peuple (1893) A.C. 170 LordMacnaghten at page 177:

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".... that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication."

p.72 line 44

10 7. The Learned Lord President of the Federal Court did not agree with the Trial Judge's finding of fact on fraud as his judgment and it reads:-

"As regards the Plaintiff's alleged fraud in misrepresenting to the Ruler in Council that the Defendant was in India when he was in fact in Malaya and that Palaniandy and the Defendant were no longer interested in the land, as already stated the burden is on the Defendant to prove the Plaintiff's alleged fraud beyond reasonable doubt. Has he done so? The only evidence of fraud came from the Collector who appeared in the witness box and who also handed over to the Court the relevant file from his office. But with due respect I do not think that that was enough

p.102 line 48

20 I would therefore respectfully disagree with the Learned Judge that the Defendant has satisfied the Court beyond reasonable doubt that the Plaintiff has been guilty of fraud."

p.103 line 34

30 It is submitted that the Learned Lord President was wrong in his conclusion that the Appellant had the power to execute an irrevocable power of attorney. The additional clause No. 24 regarding transfer should operate only upon the Appellant's death. The Learned Lord President cannot be supported because the evidence relating to that Clause reads:-

"But para. 24 was particularly explained to them. I explained to them in Tamil, the effect of the Clause. I told them under Clause 24 provided the Ruler in Council gave permission to transfer the land the Plaintiff by herself would have the legal power of transfer the land to herself. The Defendant did not object. This is of course subject to his death".

p.60 line 24-32

8. The Appellant respectfully submits that the

judgment of the Federal Court of Malaysia was wrong and should be reversed. A series of consistent decisions of the Privy Council and the House of Lords have well established that where the decision of a trial judge on a question of fact has depended on his estimation of witnesses who have given evidence before him, an appellate court will only interfere with that decision on certain limited grounds. In the present case no such grounds were present, and the Federal Court did not suggest that the decision of the trial judge was being reversed on any such ground. Since it is submitted that there was sufficient evidence to support the conclusions of the trial judge, and since he did not misdirect himself in law in arriving at those conclusions, they should not have been disturbed. In particular, it is submitted that the trial judge correctly directed himself as to the burden of proof on fraud. It is further submitted that in any event the learned trial judge did reach the correct conclusion, on the facts in evidence before him that the fraud and misrepresentation on the part of the Respondent have been proved beyond reasonable doubt.

9. The Appellant further submits that the Federal Court did not follow the accepted principle on which the Appellate Court should act in reviewing finding of fact and erred without any evidence to support in holding:-

(i) "... it being quite well known that even if all documents were in order the Ruler in Council could still refuse his consent to an application of this kind, decisions on which being made on grounds of public policy, not on considerations of law", without having regard to the statutory provisions of Section 124(1) of the National Land Code No. 56 of 1965 which inter alia reads:-

"That the State Authority shall not entertain any such application unless it is satisfied with respect to every person or body having a registered interest in the land, or in occupation of any part thereof under any tenancy exempt from registration, either that he has consented thereto or that his consent ought in the circumstances of the case to be dispensed with."

p.103 lines
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(ii) That the Collector under his letter dated 2nd February 1970 was interested in finding out whether or not the two powers of attorney were still valid whereas the relevant portion of the letter addressed to the Respondent reads:-

"You are also required to make a statutory declaration that Palaniandy a/k Muvugan and Saminathan a/k Vanthan are still alive at present and also state their place of residence."

p.148 lines
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10. The Appellant therefore respectfully submits that this appeal should be allowed with costs, that the decision of the Federal Court should be set aside, and that the judgment of Mohd. Azmi J. should be restored, for the following, among other

R E A S O N S

- (1) BECAUSE there were no grounds on which the original judgment should have been reversed.
- (2) BECAUSE the Federal Court wrongly considered that it was entitled without restraint to reconsider all the issues of fact decided by the trial judge.
- (3) BECAUSE the Federal Court acted contrary to well established principles of law in reversing the trial judge upon questions of fact.
- (4) BECAUSE the Federal Court failed to apply the proper tests in considering whether to reverse findings of fact made by the trial judge.
- (5) BECAUSE the trial judge correctly held that the power of attorney duly executed by the Appellant was null and void.
- (6) BECAUSE the trial judge correctly held that fraud had been proved beyond reasonable doubt.
- (7) BECAUSE of the other reasons in the judgment of Mohd. Azmi J.

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K.S. NATHAN

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