

G.M.F.G.2.

6, 1954

Appeal No. 26 of 1952.

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.
24 FEB 1955
INSTITUTE OF ADVANCED
LEGAL STUDIES

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF
MALAYA (COURT OF APPEAL AT KUALA LUMPUR).

BETWEEN

37739

- 1. KESARMAL S/O LETCHMAN DAS
- 2. LAKHMI DAS CHHABRA S/O GENDAMAL - - Appellants,

AND

- 10 N.K.V. VALLIAPPA CHETTIAR S/O NAGAPPA
CHETTIAR - - - - - Respondent.

CASE FOR THE RESPONDENT.

1. This is an appeal from a judgment and order of the Court of Appeal of the Supreme Court of the Federation of Malaya given at Kuala Lumpur on the 16th April, 1952, whereby the said Court dismissed the Appellants' appeal from a judgment of Taylor, J. in the High Court of Kuala Lumpur dated the 22nd May, 1951.

RECORD.

20 2. The Respondent, who was the Plaintiff in these proceedings claimed to have a conveyance of land, which had been entered into during the period of Japanese occupation, set aside on the ground that it was procured by coercion or duress within the meaning of Section 27 of the Titles to Land (Occupation Period) Ordinance, 1949. The text of the said Section is annexed hereto. Both Courts below have held that duress was established and that the Respondent was therefore entitled to have the conveyance set aside. The issue in this appeal is whether they were right in so holding.

3. The Respondent is a money-lender who has lived in Klang for about forty years and who, as the trial Judge found, is a man of substance and good repute. The Appellants are Northern Indian drapers, each having his own separate business, but they were partners in various dealings in land. These proceedings arise from certain transactions

p. 55, l. 5.

RECORD. between the Respondent and one Tengku Musa Edin, who is commonly known as Tengku Klana, and is hereinafter referred to as "the Klana." The personal history of the Klana sufficiently appears from the following passage from the judgment of the learned trial Judge:—

p. 55, l. 11.

"He is the eldest son of Sultan Suleiman of Selangor and was for some years recognised as the Raja Muda or heir-apparent to the throne of Selangor but his marked lack of interest in State affairs, his addiction to pleasure and, more especially, his chronic indebtedness, which frequently involved him in embarrassing transactions, finally compelled the venerable Sultan Suleiman to agree to depose him; this was about the end of 1935; soon afterwards his younger brother, the third son of the Sultan, was installed as Raja Muda. This affair aroused considerable public feeling among the Malays of Selangor, many of whom sympathised with the Klana and regarded his supersession as an unnecessary departure from the usual order of succession. Sultan Suleiman died in 1937 and the new Raja Muda succeeded, but when the Japanese occupied the country early in 1942 they deposed him and installed the Klana as Sultan. This, of course, was a bid by the Japanese for the political support of the local Malays. When the country was liberated, the position was again reversed, the third son being restored as Sultan."

p. 1, l. 15. 4. The lands in question are and were at all material times held under Certificates of Titles Nos. 11285 and 11299 for Lots Nos. 86 and 97 Section 15 in the town and district of Klang in the State of Selangor. Prior to the 11th March, 1941, the registered proprietor thereof was the Klana. On or about that date, however, the Klana entered into an agreement with the Respondent whereby he agreed that as security for moneys advanced and to be advanced by the Respondent the said lands should be transferred and conveyed to the Respondent subject to an option in favour of the Klana to repurchase the same within a period of five years. Four further such agreements were entered into, the last being on the 7th October, 1941, when the total indebtedness stood at \$68,000, the option now being available for four years. On the 5th November, 1941, in consideration of a further advance by the Respondent of \$5,000, the Klana cancelled the option.

p. 136.

p. 116, l. 21.

p. 114. 5. Early in 1942 the Japanese authorities installed the Klana as Sultan of Selangor. On the 9th July, 1943, the Klana served on the Respondent a written notice stating that he intended exercising his option to repurchase the lands and directing the Respondent to transfer the same to the Appellants for a consideration of \$105,000. Out of the purchase price he authorised the Respondent to take a sum of \$75,300 and required him to pay to himself (the Klana) the balance. On the same day the Respondent entered into the agreement with the Appellants which is the subject matter of these proceedings. By such agreement

p. 114.

he purported to agree that, in consideration of the sum of \$5,000 which was to form part of the purchase price, he would sell the land together with the buildings erected thereon for the sum of \$105,000. The purchase was to be completed on the 20th July, 1943, or earlier. A Memorandum of Transfer was duly entered into on the 20th July, 1943.

RECORD.

p. 124.

6. By a Statement of Plaint dated the 18th April, 1950, the Respondent instituted

THE PRESENT SUIT

p. 2, l. 11.

10 alleging that he had been constrained to enter into the agreement of the 9th July, 1943 as a result of coercion or duress. The Statement of Plaint included the following particulars:—

p. 2, l. 18.

“ (i) The Defendants sometime about the end of June, 2603 (1943) called on the Plaintiff at his house, No. 41, Sultan Street, Klang, in the company of one Supramaniam Chettiar a well-known friend and intermediary of the previous proprietor and required Plaintiff to sell the said lands to them; when the Plaintiff declined to do so they warned the Plaintiff that the said lands were the property of the previous proprietor, who as the Sultan had unlimited power to compel obedience to his demands.

20 “ (ii) On the 9th day of July, 2603 (1943), the Plaintiff was sent to the residence of the previous proprietor where he found there were already present the Defendants, the said Supramaniam Chettiar, one Chanan Din another well-known intermediary of the previous proprietor and some Japanese Officers; the Plaintiff was there threatened by the previous proprietor that he must sell and one of the Japanese Officers interfered to warn the Plaintiff of the dire consequence of disobeying the Ruler of the State.

30 “ (iii) On the instructions of the said previous proprietor the Defendants thereupon produced the agreement already prepared and kept ready for the Plaintiff’s signature which the Plaintiff signed in fear and trembling.”

7. By their Amended Statement of Defence the Appellants denied that there was any coercion or duress as alleged by the Respondent and pleaded that the agreement of the 9th July, 1943, was produced by the Respondent himself and was interpreted to them in the Respondent’s shop by the Respondent.

p. 5, l. 13.

40 8. At the trial the Respondent deposed (*inter alia*) that at about the end of June, 1943, one Maniam Chettiar, who was a kind of attorney or manager for the Klana, came to the Respondent’s house with the two Appellants to speak to him about selling the Rex Cinema which stood on the said lands. The Respondent refused to sell. The first Appellant then said “ How can you say you won’t sell? He is the Sultan and can

p. 17, l. 3.

RECORD. do anything he likes." On the 9th July he was summoned to the Astana Bank, Klang, where he found the Klana facing him with two Japanese officers. Maniam and both Appellants were on or near the verandah. The Klana came towards him and said the two Punjabis had bought the cinema and he should sign the agreement. He further said that the Respondent was not to wait and that he must sign. The two Japanese officers then came up one by one and the first said that the Respondent must act according to the orders of the Sultan. After that the Respondent did not hesitate but signed the document without even reading it.

p. 17, l. 16.

A furniture dealer named Chanan Din deposed that he had witnessed two of the transfers from the Klana to the Respondent, including the document for \$68,000. He then described an occasion when he was sent by the Klana to summon the Respondent and in fact took him to the Astana Bank where he was present at the interview between the Respondent, the Klana and the Japanese officers. His evidence included the following passage :—

p. 9, l. 28.

p. 10.

p. 10, l. 18.

"Tengku Klana got up and came to us—Maniam and Defendants were then sitting some distance away. The Japs remained sitting at the table. Tengku Klana said to the Chetty "You accept your money—my property is now being sold". He said two persons from K. L. were buying it. Kesarmal and Lakhmi Das—still at a distance. Plaintiff said he did not wish to sell it then. Tengku Klana said "It is my order to sell". Tengku Klana spoke in a harsh way—the two Japs said it would be better to listen to the wishes of the Sultan—they both spoke at the same time—in Malay—I have lived in this country since 1933. The Japs had got up from the table then—I went downstairs—I waited outside under a tree—I saw Plaintiff leave—he appeared in distress—waved to me and left. Later, I came to know the cinema was sold to Defendants."

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p. 11, l. 30.

Raja Wahid Bin Raja Haji Osman deposed that he had been working in the Klana's office at the material time as controller of the household. He remembered sending Chanan Din to fetch the Respondent. Before that Maniam and his two friends had gone up to the Klana. One of the friends was the second Appellant and he thought the first Appellant had also been there. Two Japanese came.

p. 30, l. 20.

9. Both the Appellants gave evidence that the agreement of 9th July had been entered into at the suggestion of the Respondent and signed at the Respondent's shop. In cross-examination it was put to the first Appellant that the said agreement of the 9th July, 1943 and the notice from the Klana to the Appellant bearing the same date were the same paper and the same type.

p. 41, l. 44.

The Klana deposed that the agreement of 9th July, 1943, was brought to him by Maniam and the Appellant together. There were Japanese present in the Astana. He remembered one Japanese officer who was

present at the conversation, but took, no part in it. As regards the receipt for \$5,000 dated 5th November, 1941, he stated that he believed the previous agreement would be cancelled in order that the fresh one would be drawn up and that subsequently a typed document conferring upon him the option of repurchase would be drawn up for his signature. RECORD.
p. 39, l. 23.

10. The Appellants also produced a document (Exhibit D.6) purporting to be a letter from the Respondent to the Klana dated the 13th April, 1943, in which the Respondent wrote as follows:— p. 116, l. 21.

10 “ The above land were bought by me for the sum of Dollars Sixty-eight thousands only (\$68,000.00).

 “ The said land can be bought back by you within 4 years, for that there is an agreement between us.

 “ The assessment and quitrent of the said land to be paid by you: ”

The first Appellant deposed that Maniam produced this document at the alleged interview in the Respondent's shop and that it was explained to them by the Respondent. The Respondent in cross-examination admitted having signed such a document, but deposed that it was written in October, 1941, and that the date which appeared thereon had been written in since. The document was handed to the Acting Chief Chemist of the Federation of Malaya who, in his report dated 22nd January, 1951 found no sign that the date had been altered. The letter was typed on the back of a letter head belonging to one Yahayabhoy, a young man who had an agency business in Klang. p. 29, l. 30.
p. 18.
p. 126.

11. The learned trial Judge held that all the circumstantial evidence was in favour of the letter D6 being genuine and correctly dated but that the internal evidence was mainly the other way. In particular he pointed out that the Respondent had really bought the land for a paper total of about \$73,000 and not the \$68,000 mentioned in the letter. He was of opinion that for some purpose of their own the Klana and his agents wished to pay the rates for the second half of 1942, that as the legal title was in the Respondent's name the officials might not accept payment from another party without written authority, and that the letter was probably procured, as it was almost certainly used, for that purpose. Finally he came to the conclusion that this letter was, in the true sense, irrelevant. He did not believe that it was used in any way at the material time. p. 65, l. 1.
p. 65, l. 38.
p. 66, l. 31.

The learned Judge then proceeded to compare the agreement of 9th July, 1943 (P.4) with the Klana's letter of the same date (P.5) and a typed letter dated 7th July, 1943, whereby the Klana agreed to pay Maniam a commission of 2% on the sale of the Rex Theatre. The learned Judge pointed out that the three documents were on similar paper and that the type face was the same, and that clearly all three were typed on a machine of the same make, which was different from p. 66, l. 44.

RECORD. either of the two machines used by the Respondent on other occasions.
 He then proceeded to compare the three documents and came to
 p. 67, l. 34. the conclusion that they were all typed by the same person, by
 Maniam's direction. The learned Judge then arrived at the following
 conclusion:—

“ The broad and general effect of the oral testimony was in
 favour of the Plaintiff; subsequent analysis confirmed this
 impression and the documentary evidence finally convinced me
 that the Plaintiff's version is substantially true. He signed the
 agreement because the Japanese official said, “ You had better 10
 obey.” Such words, spoken by a person in authority, import a
 threat; the Plaintiff had already been detained temporarily for
 enquiry by the Japanese on one occasion and in the circumstances
 a reasonable man of firm character might well fear, as the Plaintiff
 feared, that on another occasion he would not be freed so easily.
 Whether the Jap meant his threat seriously, or could have
 carried it out, is immaterial; the question is how the Plaintiff's
 mind was affected.

“ The point was taken that there was no suggestion of duress
 at the time of completion when the actual transfer was signed; 20
 it is true that there was no fresh overt duress but the Plaintiff's
 position was worse than ever. He could be sued on the agreement,
 but he could not sue the Sultan. It was suggested that the fact
 that he did not complain to Mr. Bok is inconsistent with the
 truth of his evidence, but how could Bok have relieved his fears?
 Would he have said: “ Let them arrest you; If they do so,
 send me word and I will quickly procure your release ” ? There
 would have been no means of sending word and there was no
 habeas corpus. A man who was born in a free atmosphere and
 has never breathed any other can hardly imagine life under a 30
 totalitarian regime. He may be told, but he does not realise.
 Words cannot convey the feel of the jungle to an Esquimau.
 This failure to understand is one of the greatest dangers of our
 time. The safeguards of liberty are attained only after centuries
 of struggle—but they can be lost overnight.

pp. 67-8. “ The truth is that the effect of the threat continued; the
 Plaintiff was in exactly the same danger in the solicitor's office as
 he had been in at the Astana; if he had refused to sign the
 transfer the Sultan might have influenced the Japanese to act
 against him.” 40

The learned Judge further held that it had been proved by Raja Wahid
 that one of the Appellants was present at the Astana at the material time
 and the Respondent had been corroborated on so many points that he
 p. 68, l. 39. felt bound to accept his statement that the second Punjabi was the other

Defendant. On the evidence as a whole he found that the Appellants knew of the duress. In any event Maniam must have heard what passed and though he was primarily the Klana's agent he was acting as a broker and the Appellants paid his commission. He was their agent also, and the learned Judge thought this was enough to saddle them with notice of the duress. RECORD.
p. 69, l. 40.

The learned Judge therefore gave judgment for the Respondent, set aside the transfer with costs, and ordered an enquiry to ascertain the amounts to be paid and offset. p. 73, l. 15.

10 12. By a notice of appeal dated the 20th June, 1951, the Appellants appealed to the Court of Appeal at Kuala Lumpur. The judgment of the Court of Appeal (Murray-Aynsley, C.J., Charles Abbott, J. and H. W. Wilson, J.) was delivered by Murray-Aynsley, C.J., who held as follows:— pp. 77-82.

(a) In view of the evidence of the Plaintiff and of the former owner it was impossible to interfere with the finding that the transaction of November, 1941, took place and that the document of 5th November, 1941, was genuine. p. 104, l. 12.

20 (b) The question as to whether the Respondent had been induced to enter into the agreement of 9th July, 1943, by duress was a pure question of fact on which the learned Judge, after hearing all the evidence, decided in favour of the Plaintiff. He did not think it possible to disturb the findings of fact as to what took place or to disturb the finding that what took place amounted to duress within the meaning of the Ordinance in question. It seemed impossible also to disturb the finding that the Appellants at the time of the transfer had knowledge of the duress. From the wording of the Ordinance this would appear in any case to be immaterial. p. 104, l. 22.

30 (c) In the absence of any knowledge as to the circumstances in which the document D.6 came to be written and of its subsequent history, it was impossible to say that the learned Judge was wrong when he treated the letter as irrelevant. p. 105, l. 3.

(d) In the circumstances, he thought it impossible to set aside the judgment appealed against.

The Court of Appeal therefore dismissed the appeal with costs. An order was made accordingly. p. 106.

40 13. Conditional leave to appeal to Her Majesty-in-Council was granted on the 16th April, 1952, and final leave on the 14th July, 1952. p. 107.
p. 109.

RECORD. 14. The Respondent humbly submits that this appeal should be dismissed with costs and the judgments and orders of the Courts below upheld for the following amongst other,

REASONS:—

1. Because both Courts below have found as fact that the transfer in question took place under duress and that the Appellants at the time of the transfer had knowledge of the duress.
2. Because the Court of Appeal were right in holding that the findings of the trial Judge on these questions of fact ought not to be disturbed. 10
3. Because the Court of Appeal were right in holding that on the true construction of the Titles to Land (Occupation Period) Ordinance, 1949, it was immaterial whether the Appellants at the time of the transfer had knowledge of the duress.
4. Because both Courts below were right in holding that the document bearing the date April 13th, 1943, was irrelevant.
5. Because the judgments and orders of the Courts below were right.

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ANNEXURE.

RECORD.

FEDERATION OF MALAYA.

No. 39 of 1949.

TITLES TO LAND (OCCUPATION PERIOD).

27. (1) Notwithstanding the provisions of sub-section (1) of Section 42 of the Land Code or the corresponding provisions in the Land Enactment of any Malay State, the title of a proprietor, chargee or lessee and any assignment by any recorded occupant of his rights by way of expectation of registration of title to the land comprised in an approved application
 10 which may have been effected during the occupation period under the authority of Land Rule 12 (i) of the Rules made under the Land Code or the corresponding provision in any law in any Malay State, under any instrument executed during the occupation period shall not be indefeasible if the execution of such instrument was procured by coercion or duress:

Provided that nothing in this sub-section shall affect the title of a subsequent proprietor, chargee, lessee or assignee who has taken *bona fide* and for valuable consideration from such first named proprietor, chargee, lessee or assignee or from any person claiming *bona fide* through
 20 or under him.

(2) Notwithstanding anything to the contrary contained in any written law, the Courts to exercise jurisdiction in any suit, action or other proceeding (in this section referred to as a "suit") brought to set aside an instrument or the registration of an instrument executed or effected during the occupation period on the ground of coercion or duress shall be—

- (a) if the value of the land concerned exceeds three thousand dollars in Malayan currency at the date when the suit is commenced, the High Court;
- 30 (b) if the value of the land concerned does not exceed three thousand dollars in Malayan currency at such date, the Sessions Court having jurisdiction in the District in which the land is situate.

(3) Upon application being made in that behalf, a Collector shall, within two months of the receipt by him of such application, deliver to the applicant, by registered post or otherwise, a certificate certifying that the value of the land concerned does not exceed three thousand dollars in Malayan currency, or that it does exceed three thousand dollars in such currency as the case may be, and any such certificate shall be accepted by the Court as conclusive evidence of the
 40 value of the land for the purposes of this section in any action commenced within four months from the date of the certificate. An application for

RECORD. a certificate shall be made in the form, and accompanied by the fee, prescribed.

(4) No action to which sub-section (2) of this Section applies shall be filed in any Court unless at the time of the filing of such action a certificate obtained under the provisions of sub-section (3) of this Section is deposited with the Registrar of the Court.

(5) Duress, for the purposes of any action brought to set aside an instrument or the registration of an instrument executed or effected during the occupation period on the ground of duress, includes—

(a) any force or injury applied or caused, or threat of force or 10 injury offered, by an official of, or person on behalf of, the Occupying Power; and

(b) a threat (other than one ordinarily and lawfully made in the exercise of a legal right or remedy) made by a party to the transaction to inform an official of the Occupying Power of the refusal of the person concerned to execute an instrument or effect a registration,

which caused the person concerned to execute an instrument or effect a registration.

In the Privy Council.

ON APPEAL

*FROM THE SUPREME COURT OF THE
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