

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
12 MAR 1960
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12, 1959

IN THE PRIVY COUNCIL

No: 21 of 1957

55586

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA,
THE COURT OF APPEAL AT PENANG.

B E T W E E N

CHEW BOON EE

Appellant

- and -

L. RAMANATHAN CHETTIAR in
his capacity as Adminis-
trator of the Estate of
M. R. S. L. Letchumanan
Chettiar, deceased,

First
Respondent

Pro
forma
Re-
spon-
dents

RAWANG TIN FIELDS LTD.,

Second
Respondent

KUNDANG TIN DREDGING LTD.,

Third
Respondent

RAWANG CONCESSIONS LTD.,

Fourth
Respondent

HARRISONS & CROSFIELD
(MALAYA) LTD.,

Fifth
Respondent

CASE FOR THE APPELLANT

1. This is an appeal from a judgment dated the
2nd day of October, 1956 and an order of the Court p.112
of Appeal of the Federation of Malaya dated the
10th day of November, 1956 whereby judgments of p.131
the High Court at Penang dated 12th day of April, pp.84,86 & 87
1956 declaring the appellant to be the lawful owner
of certain shares and making consequential orders

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and dismissing the first respondent's counterclaim for damages for wrongful conversion of certain other shares, were reversed and judgment entered for the first respondent on the appellant's claim and on the first respondent's counterclaim.

2. The sole issue between the parties was whether the transfer of certain shares took place in 1943 or 1947. The learned trial judge accepted the plaintiff's evidence that he purchased the shares in 1943. The principal question for determination in this appeal is whether the Court of Appeal were right in reversing this finding of fact.

p.81
11.30 to 36

3. At the outbreak of war M.R.S.L. Letchumanan Chettiar, hereinafter known as the deceased, was the owner of the following shares :-

- (i) 200 shares in Rawang Tin Fields Ltd.,
- (ii) 500 shares in Kundang Tin Dredging Ltd.,
- (iii) 300 shares in Rawang Concessions Ltd., and
- (iv) 1,500 shares in Takuapa Valley Tin Dredging.

Ex.PIA, PIC &
PID and D5, D6
& D7
pp.148 to 158

The deceased executed blank transfers of these shares on which no consideration and no date were entered. These transfers together with the share certificates were deposited by the deceased with the Penang Branch of the Indian Overseas Bank as security for his overdraft with that bank. The deceased executed a full power of attorney in favour of one Sithambaram (referred to, also, as Chittambaram and as Chidambaram) Chettiar and left for India some time in 1941. Acting on the deceased's instructions the said attorney purchased a further 200 shares in Rawang Concessions, executed a similar blank transfer and deposited it and the

p.58 1.29

(3)

share certificates with the said bank. The deceased died intestate in India on the 16th day of November 1942.

Ex.FIB
pp.149 & 150
p.59 l.23

4. On the 15th day of June 1943 the said attorney paid off the overdraft and withdrew the said blank transfers and share certificates from the said bank. At some date subsequent to the 15th day of June 1943 the said attorney sold or purported to sell the said shares. On the 14th day of August 1947 the transfers were signed and dated by the appellant as transferee and purchaser and the transfers and certificates (save those for the Takuapa Valley Tin Dredging Company) were sent to the 5th respondents as Registrars of the relevant companies. Registration was refused because of caveats entered by the Indian Overseas Bank. In October 1951 the appellant was informed that the caveats had not been withdrawn. On the 24th day of June 1954 the appellant again applied for registration of these transfers and was informed that the caveats had been lifted but on forwarding the transfers and share certificates registration was refused by the 5th respondents, by a letter dated 2nd day of July 1954 on the ground that these share certificates had been reported lost and replacement scrip had been issued to the administrator of the deceased, the first Respondent. This had been done on the strength of Statutory Declarations by one Vinaitheethan Chettiar, the attorney of the first respondent. Thereafter, after some correspondence, these actions were commenced.

p.71 ll.13 to 18

Ex."AB-A.p.1A/
B/C"
pp.159 & 160
Ex."AB-A.p.6"
p.166

Ex."AB-A.p.11"
p.176

p.177 ll.11 & 12

Ex."AB-A.p.14"
pp.179 & 160

(4)

pp.1 to 6 5. By three writs dated the 20th day of June 1955 the plaintiff claimed that he was the lawful owner of these shares "duly transferred to the plaintiff by M.R.S.L. Letchumanan Chettiar deceased on the 14th day of August 1947" and consequential relief.

p.2, l.19

p.4, l.35

p.6, l.18

pp.4 to 12

6. In three affidavits sworn on the 22nd day of June 1955 for the purpose of obtaining interim injunctions restraining the transfer of these shares the appellant swore "On the 14th day of August 1947 I bought through Messrs. United Traders Ltd., Penang share brokers from one M.R.S.L. Letchumanan Chettiar deceased" those shares.

p.6, ll.34

to 36

p.9, l.39 to

p.10, l.10

p.11, ll.10

to 12

7. In Statements of Claim delivered the 16th day of August, 1955, the appellant stated inter alia that :-

p.13, ll.1 to 19

p.19, ll.6 to 21

p.20, ll.12 to 29

5. At some date during the year 1942 or the year 1943, during the Japanese occupation of Malaya, which the Plaintiff is unable more precisely to specify, the Plaintiff purchased from the said deceased for a consideration of (in Total \$97,300) (Japanese Currency) which the Plaintiff duly paid to the said deceased or his attorney (the said shares).

6. At the time of the aforesaid purchase the appropriate certificates in respect of the said shares were delivered to the Plaintiff together with a blank transfer in proper form duly executed by the said deceased whose signature had been duly witnessed and attested.

7. On the 14th day of August, 1947 the Plaintiff duly executed the said transfer as transferee and his execution thereof was duly witnessed and attested.

And claimed a declaration that he was the lawful owner of the said shares and consequential relief.

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8. By his Defence, the first respondent made no admission as to the facts set out in paragraphs 5 and 6 of the Statements of Claim although admitting that immediately prior to his death the deceased was the registered proprietor of the said shares and further stated that on the said 14th day of August 1947 there was no person living who was then capable of transferring the said shares into the name of the plaintiff. The said respondent also counterclaimed damages for conversion of the 1,500 shares in Takuapa Valley Tin Dredging which had been duly registered in the name of the appellant. p.24, 11.16 to 25
9. It was conceded in the Court of Appeal that if the said shares were purchased in 1943, then, despite the fact that the principal was dead, the power of attorney was still valid and subsisting by virtue of the provisions of Section 3 of the Agents and Trustees (Occupation Period) Ordinance (No: 38 of 1949). If, however, the sale took place in 1947, then the power of attorney had terminated and the appellant could not acquire a good title to these shares. p.25, 11.19 to 33
10. At the trial in which the three actions were by consent heard together, the appellant gave evidence that he had bought the said shares sometime in 1943 through Mr. Oh Eng Leong, a share broker who was an old friend; that he had purchased them from a Chettiar, whom he did not know, for ten times their pre-war price in Japanese currency; that he had paid Mr. Oh Eng Leong the money and a few days later had been handed the scrip and blank transfers; that he had not completed the transfers until the 14th day of August 1947 when he desired p.114, 11.2 to 17
- p.32, 11.8 to 25

(6)

- p.38, l.6 to 17
p.38, l.28
p.36, ll.12 to 17
- to register the transfers because 'it was always done that way'; that the statement in the letters, writs and affidavits that the shares were sold on the 14th day of August 1947, arose out of a mistake by Mr. Goh his solicitor. In cross-examination he was not asked why he was prepared to pay ten times the pre-war price for the shares but he was asked why he was prepared to buy shares in a British company in 1943 to which he answered 'First I had cash. Secondly I thought buying shares in a British company would be much better to buy in Japanese currency which would become valueless.' It was never put to the appellant that the reason for the change of the date of transfer from that in the writ to that in the Statement of Claim was the receipt of the letter of the 5th day of July, 1955, informing him of the date of the death of M.R.S.L. Letchumanan Chettiar.
- pp.40 to 42
11. Mr. Oh Eng Leong gave evidence for the plaintiff that he had negotiated the sale of these shares by Sithambaram the attorney of M.R.S.L. Letchumanan to the appellant sometime in 1942 or 1943; that he paid the price to the attorney and the next day was given the certificates and blank transfers, which he handed over to the appellant; that in 1947 the documents were completed prior to registration.
- p.69, ll.31 to 34
12. The first respondent gave evidence inter alia that although he had seen Sithambaram Chettiar in 1947 he got no statement of accounts from him, and that although the first respondent subsequently discovered that these share certificates and blank transfers had been released to the said attorney

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by the bank he had made no further attempt to find Sithambaram.

13. One M.S. Sundarasan a clerk at the Penang Branch of the Indian Overseas Bank gave evidence and confirmed the contents of a letter which stated that the said share certificates were withdrawn from the said bank on the 15th day of June 1943 by one Mr. Chidambaram Chettiar, the then attorney for Mr. M.R.S.L.Letchumanan Chettiar. He further stated that the shares were deposited to cover the overdraft of the Chettiar and were withdrawn on the paying off of this overdraft. pp.70 & 71

14. On the 12th day of April 1956 the learned judge gave his findings orally as follows :-

"Findings

p.81, ll.20
to 40

At the conclusion of the evidence of the Plaintiff I believed his evidence and the same applies to the evidence of Mr. Oh Eng Leong.

The only evidence contra consists of certain statements in the nature of admissions contained in a letter, an affidavit and in the endorsement of the Writ. I was not aware of this statement in the Writ until my attention was drawn to it by Mr. Huntsman in his address on behalf of the 3rd Defendant.

Notwithstanding these admissions I accept the evidence of the Plaintiff and his witness and hold that the shares in question both in the claim and counterclaim were sold to Plaintiff by Sithambaram Chettiar, the then agent of the deceased through Mr. Oh Eng Leong in 1943 and that the Plaintiff paid for them in Japanese currency.

I hold that the Plaintiff thus became and still is the equitable owner of the shares. He is therefore, in my opinion, entitled to call for a proper transfer of the shares claimed, into his name."

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15. On the 9th day of May 1956 the learned judge gave written grounds of decision as follows :-

pp.88 & 89

"I have little to add to the short oral findings which I gave at the conclusion of the hearing.

The Plaintiff and his witness, Mr. Oh Eng Leong, both gave their evidence in a very straightforward manner, and gave every indication of being honest witnesses. I entirely accepted their evidence. I did this in spite of certain documentary evidence which at first sight appears not to support their story.

In the first place, there is the fact that, although the Plaintiff says that the sale took place in 1942 or 1943, the transfers themselves were not signed by the Plaintiff until 1947, and were so dated. I am unable to accept Mr. Huntsman's argument that the natural and normal thing to do was to sign the transfers upon their receipt. In the circumstances of the Japanese Occupation I consider that it was perfectly natural for the Plaintiff to put away the documents as they were and to complete the transfers when the time came to have them registered. In fact I am unable to see that it would have made any difference to the course of events in this case if the transfers had been signed and dated in early 1943, for the transferor was then already dead; and what went wrong in this case is not that some unauthorised person obtained the blank transfers and filled them in - if that were the case I think the Plaintiff would have been in real difficulty - but that the deceased's son obtained fresh certificates. I think the execution date of 1947 in respect of the sale in 1943 has been amply explained.

I am unable to see how the principles laid down in France v Clark, 26 C.D. 257 and Fox v Martin 64 L.J. Ch. 473 can apply to this case. Mr. Huntsman urged upon me that the Plaintiff took these blank transfers at his peril and that he was put upon enquiry. Vis-a-vis the bank or anyone else to whom the shares might

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have been pledged, I would agree that the Plaintiff took the shares at his peril - but that is not the peril into which he has fallen, and in my opinion the fact that the transfers were at one time in blank did not in this case make the slightest difference to the situation.

The other matter which conflicts with the Plaintiff's evidence consists of the letters, affidavit and Writs of Summons in which it is stated that the sale took place in 1947. I accept the Plaintiff's evidence that this was a mistake - and I think all these admissions are really the same mistake which, once having crept into the correspondence, became perpetuated in all the subsequent documents right up to the Writs themselves. I think the Plaintiff's solicitors must have taken the date of sale from the actual transfers and that the Plaintiff did not notice the mistake until the time came to draw the Statement of Claim. In the result the statements in these documents did not cause me to disbelieve the Plaintiff.

The plea of limitation was dropped as soon as it became clear that the new Ordinance came into force in February 1953.

It appeared to me that once it was established (as in my opinion it was) that these shares were sold to the Plaintiff in 1943 by a person who, it is conceded, was still at that time the properly constituted attorney of the deceased transferor, the Plaintiff became the beneficial owner and the deceased or his estate ceased to have any interest in them, and the third Defendant had no right to apply for or receive new scrip for the shares.

I therefore gave judgment for the Plaintiff on all the claims and on the counterclaim."

16. The first respondent appealed to the Court of Appeal who allowing his appeal in a judgment delivered by Rigby J on the 2nd day of October, 1956, overruled the learned trial judge's

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finding of fact and held as follows :-

p.123, l.25

"The learned trial Judge in his brief judgment has accepted the evidence of the 1st Respondent and his witness that the date of 14th August, 1947, shown in the documents to which I have referred, in so far as that date conflicts with the alleged time of purchase in 1943, was a mistake. If the evidence simply rested upon the conflict of dates as disclosed in these documents I am of the opinion that this Court would have no sufficient ground for interfering with the view taken by the trial Judge on the issue of credibility. But the matter seems to me to go further. The letter of the 5th July, 1955, sent to Oh Eng Leong; the fact that prior to that date neither Oh Eng Leong nor the 1st Respondent knew that the deceased had died in 1942; the fact that Oh Eng Leong made no attempt to answer that letter, but instead handed it over to the 1st Respondent's Solicitor; the fact that thereafter in the Statements of Claim filed six weeks later the date of purchase for the first time was stated as some time in 1942 or 1943. All these facts, to my mind, indicate more than a simple mistake on the part of the 1st Respondent in the alleged date of purchase of the shares. That factor, combined with the total absence of any documentary evidence regarding this alleged transaction in 1943 and the absence of any explanation as to why the 1st Respondent, if his story be true, had paid such a grossly inflated price for the shares - all impel me to the conclusion that the finding of the learned trial Judge that the shares were purchased in 1943 is against the weight of the evidence."

17. Conditional leave to appeal to Her Majesty in Council was granted on the 20th day of February, 1957 and final leave on the 23rd day of July 1957.

18. The appellant respectfully submits that this appeal should be allowed, the judgment and order of the Court of Appeal set aside and the judgment

and order of the High Court restored for the following amongst other

R E A S O N S

- (i) Because the Court of Appeal were wrong in reversing a finding of fact by the trial judge which there was evidence to support and which depended upon the view taken by the trial judge of the credibility of the appellant and Oh Eng Leong.
- (ii) Because the Court of Appeal attached undue importance to the fact that the trial judge did not specifically refer to the letter of 5th day of July, 1955, in either his oral or written findings and because, in view of his findings as to the credibility of the appellant and Oh Eng Leong and in view of the fact that this point was argued before him on the same day as he delivered his oral findings, they should have presumed that the trial judge had this letter fully in mind when he arrived at his decision.
- (iii) Because the Court of Appeal were wrong in holding that the appellant had been guilty of 'a deliberate attempt at deception' when it was never put to the appellant that it was the information contained in the letter of the 5th day of July 1955, which caused him to change his mind as to the date of transfer.
- (iv) Because the Court of Appeal were wrong

(12)

in disbelieving the appellant because of the price he had paid for the shares, (a) when the appellant had never been asked for an explanation as to the price, and (b) by basing their disbelief on a Schedule to a Government ordinance prepared after the occupation for another purpose and not on the evidence before the Court.

- (v) Because the Court of Appeal doubted Oh Eng Leong's evidence as to lack of documentary evidence because he 'endeavoured to explain that fact by saying that the records of his business of share brokers had been totally destroyed in the bombing' whereas Oh Eng Leong at no time suggested that the records of this transaction had been destroyed by bombing.
- (vi) Because the Court of Appeal have ignored the evidence of M.S. Sunderasan which is corroborative of the appellant's case.
- (vii) Because the Court of Appeal wrongly held that the onus of proof was on the appellant.

Dingle Foot Q.C.

Thomas O. Kellock.

T.G. ROCHE

IN THE PRIVY COUNCIL
ON APPEAL FROM THE SUPREME COURT
OF THE FEDERATION OF MALAYA,
THE COURT OF APPEAL AT PENANG

B E T W E E N :

CHEW BOON EE Appellant

- and -

L. RAMANATHAN CHETTIAR in
his capacity as Adminis-
trator of the Estate of
M.R.S.L. Letchumanan
Chettiar, deceased.

1st Respondent

RAWANG TIN FIELDS LTD.

2nd Respondent

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4th Respondent

HARRISONS & CROSFIELD
(MALAYA) LTD.

5th Respondent

*Pro
forma
Re-
spon-
dents*

CASE FOR THE APPELLANT

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Appellant's Solicitors.