12, 1959

No. 21 of 1957.

In the Privy Council.

ON APPEAL

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

BETWEEN

CHEW BOON Ee . . . . . *Appellant*

AND

10 L. RAMANTHAN CHETTIAR in his capacity as administrator of the Estate of M. R. S. L. LETCHUMANAN CHETTIAR, deceased . . . . . *First Respondent.*

RAWANG TIN FIELDS LIMITED . } *Pro Forma Respondents* — *Second Respondent.*

KUNDANG TIN DREDGING LIMITED — *Third Respondent.*

RAWANG CONCESSIONS, LIMITED . — *Fourth Respondent.*

20 and

HARRISONS AND CROSFIELD (MALAYA) LIMITED . . . — *Fifth Respondent.*

Case for the First Respondent.

RECORD.

1. This is an appeal from a judgment of the Supreme Court of the Federation of Malaya (Sir Charles Mathew, Chief Justice, Federation of Malaya, John Whyatt Esquire, Chief Justice, Singapore, and Mr. Justice Rigby) given on the 10th November, 1956. By this judgment the Supreme Court set aside a judgment of Mr. Justice Spencer-Wilkinson, sitting as a
30 judge of first instance of the High Court of Penang, given on the 12th April, 1956, in favour of the Appellant as Plaintiff in three actions, and ordered that judgment be entered in favour of the First Respondent.

2. On the 20th February, 1957, the Supreme Court ordered that the second, third, fourth and fifth Respondents should be discharged from

RECORD.

appearing on this appeal, and on the 10th March, 1958, ordered that the title of this appeal should describe these Respondents as pro forma Respondents.

3. The judgment of Mr. Justice Spencer-Wilkinson dispose of three actions, Nos. 140, 141 and 142 of 1955. The nature of the claims in these actions as stated in the Statements of Claim can be summarised thus :—

ACTION No. 140

Plaintiff (Appellant)	Chew Boon Ee.
First Defendants (Second Respondent)	Rawang Concessions Limited.
Second Defendants (Fifth Respondent)	Harrisons and Crosfield (Malaya) Limited.
Third Defendant (First Respondent)	L. Ramanathan Chettiar, sued as administrator of the Estate of M. R. S .L. Letchumanan Chettiar, deceased.

In this action the Appellant claimed to be entitled to be registered as the owner of 200 shares in Rawang Concessions Limited. The basis of this claim was stated in the Statement of Claim in these terms :—

> " 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 $6,300/- (Japanese currency) which the Plaintiff duly paid to the deceased or his attorney 200 shares in the first Defendants numbered 223724 to 223923 inclusive."

The First Respondent by his Defence denied these allegations. By way of Counter-claim he alleged that on the 14th August, 1947, the Appellant had wrongfully taken possession of 1,500 shares in Takuapa Valley Tin Dredging, and he claimed their return. By his Defence to Counter-claim the Appellant alleged that at the same time as he had bought from the deceased the shares in Rawang Tin Fields Limited, he had also bought the shares in Takuapa Valley Tin Dredging for $79,500 (Japanese currency).

ACTION No. 141.

Plaintiff (Appellant)	Chew Boon Ee
First Defendants (Third Respondent)	Kundang Tin Dredging Limited
Second Defendants (Fifth Respondent)	Harrisons and Crosfield (Malaya) Limited
Third Defendant (First Respondent)	L. Ramanathan Chettiar, sued as the administrator of the Estate of M. R. S. L. Letchumanan Chettiar, deceased.

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In this action the Appellant claimed to be entitled to the registered as the owner of 500 shares in Kundang Tin Dredging Limited. He claimed that he had bought these shares from the deceased " at some date during the year 1942 or the year 1943 " which he was " unable more precisely to specify," and that he had paid for them " to the deceased or his attorney " $45,500 (Japanese currency). The First Respondent by his Defence denied this allegation.

ACTION No. 142.

Plaintiff (Appellant)	Chew Boon Ee
First Defendants (Fourth Respondent)	Rawang Concessions Limited
Second Defendants (Fifth Respondent)	Harrisons and Crosfield (Malaya) Limited
Third Defendant (First Respondent)	L. Ramanathan Chettiar, sued as administrator of the Estate of M. R. S. L. Letchumanan Chettiar, deceased.

In this action the Appellant claimed to be entitled to be registered as the owner of 500 shares in Rawang Concessions Limited. He claimed in his Statement of Claim that he had bought these shares from the deceased " at some date during the year 1942 or the year 1943 " which he was unable " more precisely to specify," and that he had paid for them " to the deceased or his attorney " $45,500 (Japanese currency).

4. From the summary in paragraph 3 of this Case it appears that the Plaintiff claimed to have bought four lots of shares at an unspecified date in 1942 or 1943 for a total consideration of $176,800 (Japanese currency) paid to the deceased Letchumanan Chettiar (hereinafter referred to as the deceased) or to his attorney.

5. At the trial of the action the Appellant testified that he had bought the shares in 1943 through one Oh Eng Leong a director of United Traders Limited, a firm of sharebrokers, from one Chidambaran Chettiar, the holder of a power of attorney to act on behalf of the deceased who had left Malaya in 1941 before the Japanese invasion and had returned to India. It was common ground that the deceased had died in India in 1942 after the Japanese occupation of Malaya. If in fact the purchase had been made in 1943, the death of the deceased in 1942 would not have prevented the Appellant from acquiring a good title to the shares from Chidambaran by reason of the provisions of the Agents and Trustees (Occupation Period) Ordinance (No. 38 of 1949) which had the effect of continuing an agent's authority, notwithstanding his principal's death, while absent from Malaya, at any time between the date when the occupation period began and the 5th September, 1945. The Respondent denied that any sale had taken place in 1943 or at any time during the occupation period and contended that the purported sale had not taken place until the 14th August, 1947. In these circumstances the important

p. 31, l. 35.
p. 32, l. 25.

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pp. 113–4.

question was whether the sale had taken place in 1943 or in 1947. This appears from the following passage from the Judgment of Rigby, J., on the hearing of the appeal :—

> " The sole and crucial question in dispute at the trial was whether the shares were purchased in 1943 or in 1947. If they were purchased in 1943 then despite the fact that the principal was then dead, it is conceded by Mr. Hume, on behalf of the Appellant (the First Respondent in the present appeal) that 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, on the other hand, the sale took place in 1947, the only relevant enactment then in force was the Conveyance and Law of Property Ordinance. The Power of Attorney given by the deceased to Chidambaran Chettiar had been terminated by the death of the deceased. It followed, therefore, that if the sale took place in 1947 Chidambaran Chettiar would have had no authority to pass, or the first Respondent (the present Appellant) to acquire, a good title to all those shares."

6. At the trial of the actions and at the hearing of the appeal the following facts or matters were common ground :—

(A) Before the Japanese invasion of Malaya (December, 1941), the deceased carried on business as a moneylender in Penang.

(B) At that time the deceased was the owner of—

(i) 200 shares in Rawang Tin Fields Limited.

(ii) 500 shares in Kundang Tin Dredging Limited.

(iii) 300 shares in Rawang Concessions Limited.

(iv) 1,500 shares in Takuapa Valley Tin Dredging.

(C) The deceased had deposited these shares, together with signed transfers in blank, with the Penang Branch of the Indian Overseas Bank Limited as security for his overdraft.

(D) At some date in 1941, before the Japanese invasion, the deceased left Malaya and returned to India.

(E) Before leaving Malaya the deceased executed a full power of attorney in favour of Chidambaran Chettiar.

(F) After the deceased had left Malaya, Chidambaran, acting on the deceased's instructions, bought in the name of the deceased a further 200 shares in Rawang Concessions Limited, and deposited these shares with the Indian Overseas Bank Limited, together with a signed transfer in blank, as security for the deceased's overdraft.

(G) On the 16th November, 1942, the deceased died in India.

p. 222.

(H) On the 15th June, 1943, Chidambaran withdrew from the Indian Overseas Bank Limited the deceased's shares which had been deposited with them.

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(I) In August, 1947, Sithambaram was still in Penang. p. 43, l. 1.

(J) On or about the 14th August, 1947, United Traders Limited sent to Harrisons and Crosfield (Malaya) Limited, the registrars of Rawang Tin Fields Limited, Kundang Tin Dredging Limited and Rawang Concessions Limited, four transfers for registration in the Appellant's name :— pp. 159–160.

(i) A transfer signed by the deceased, dated the 14th August, 1947, purporting to transfer to the Appellant for the sum of $3,000 300 shares in Rawang Concessions Limited. p. 148.

(ii) A transfer signed by Chidambaran as attorney for the deceased, dated the 14th August, 1947, purporting to transfer to the Appellant for the sum of $2,000, 200 shares in Rawang Concessions Limited. p. 149.

(iii) A transfer signed by the deceased, dated the 14th August, 1947, purporting to transfer to the Appellant for the sum of $600, 200 shares in Rawang Tin Fields Limited. p. 150.

(iv) A transfer signed by the deceased, dated the 14th August, 1947, purporting to transfer to the Appellant for the sum of $2,000, 500 shares in Kundang Tin Dredging Limited. p. 151.

(K) On the 20th August, 1947, Harrisons and Crosfield (Malaya) Limited wrote to United Traders Limited, informing them that they were unable to register these transfers as caveats had been lodged. These caveats had been lodged on the 14th May, 1947, by the Indian Overseas Bank Limited, which claimed to be entitled to a lien on the shares as security for a debt of the deceased. pp. 159–160. pp. 144–148.

(L) On the 15th September, 1950, Letters of Administration of the deceased's estate in the Federation of Malaya were granted to the First Respondent. pp. 160–1.

(M) On the 24th April, 1953, the First Respondent's solicitors wrote to Harrisons and Crosfield (Malaya) Ltd. in connection with an application on behalf of the First Respondent to have issued to him fresh share certificates in respect of the shares in Rawang Concessions Limited, Rawang Tin Fields Limited and Kundang Tin Fields Limited registered in the name of the deceased on the ground that the share certificates originally issued in respect of these shares were lost. Fresh certificates were issued to the First Respondent pursuant to this application. p. 167, l. 20. p. 179, ll. 20–30.

(N) On the 24th June, 1954, the Appellant's solicitor, Mr. Goh, wrote to Harrisons and Crosfield (Malaya) Limited, inquiring whether the caveat referred to in (K) above had yet been lifted and whether the shares could now be registered in the Appellant's name. On the 30th June, 1954, the Appellant's solicitor sent to Harrisons and Crosfield (Malaya) Limited the original share certificates issued in respect of the shares registered in the deceased's name. p. 176. p. 178, l. 11.

RECORD.

p. 179.

(O) On the 2nd July, 1954, Harrisons and Crosfield (Malaya) Limited wrote to the Appellant's solicitor informing him, as stated in (M) above, that certificates had been issued to the First Respondent after advertisements of loss duly published in the *Straits Times* and *Malay Mail* on the 16th May, 1953, that they could not register the transfer of these shares to the Appellant, and that the original share certificates were deemed to have been cancelled.

7. The following matters are relevant in connection with the Appellant's evidence that he had bought the shares in 1943 :—

(A) On the 13th July, 1954, the Appellant's solicitor wrote to the First Respondent's solicitors in connection with the shares. The letter contained the following statement :—

p. 187, l. 17.

" All the above shares were purchased by my client through the share brokers The United Traders Penang, and were sent on the 14th August, 1947, to Messrs. Harrison and Crosfield (Malaya) Ltd. for registration of the transfers . . ."

p. 193, l. 27.

(B) On the 29th September, 1954, the First Respondent's solicitors wrote to the Appellant's solicitor inquiring what sum the Appellant would require to hand over the cancelled certificates.

p. 194, l. 24.

On the 14th October, 1954, the Appellant's solicitor replied stating that the Appellant would require $17,394 " together with all dividends paid since 14th August, 1947."

p. 198, l. 10.

(C) On the 18th January, 1955, the Appellant's solicitor wrote to the solicitors then acting for Harrisons and Crosfield (Malaya) Ltd. The letter contained the following request :—

p. 198, l. 30.

" I shall be obliged if you will supply me with a statement of the dividends paid since 14th August, 1947."

pp. 200–201.

(D) On the 17th March, 1955, the Appellant's solicitor wrote to the First Respondent as follows :—

" I am instructed by Mr. Chew Boon Ee (the Appellant) to inform you that the above shares were sold to my client by M. R. S. L. Letchuman Chettiar in his life time on or about 14th August, 1947.

" This is to demand that you shall transfer back the shares to my client and also pay to my client all the dividends received by you since 14th August, 1947 . . ."

p. 201, l. 20.

(E) On the 4th April, 1955, the First Respondent's solicitors wrote to the Appellant's solicitor as follows :—

" Before we are able to carry out our instructions, we particularly wish to know the exact date that your client Mr. Chew Boon Ee purchased the shares in question. We should be most grateful if you would kindly let us have this information at your earliest convenience."

The Appellant's solicitor's reply to this letter did not answer this question, and the First Respondent's solicitors wrote to him on the 31st May, 1955, stating that the First Respondent would not transfer the shares in question or account to the Appellant for the dividends paid on these shares since the 14th August, 1947. p. 203. p. 204.

(F) On the 20th June, 1955, the Appellant issued three writs commencing the three actions Nos. 140, 141 and 142 referred to in Paragraph 3 above. The material parts of each of the three writs were in these terms :—

No. 140.

" The Plaintiff's claim is as owner of 200 shares . . . in the First Defendant Company, which said shares were duly transferred to the Plaintiff by M. R. S. L. Letchumanan Chettiar, deceased, on the 14th day of August, 1947 . . ." p. 2, l. 14.

No. 141.

" The Plaintiff's claim is as owner of 500 shares . . . in the First Defendant Company, which said shares were duly transferred to the Plaintiff by M. R. S. L. Letchumanan Chettiar, deceased, on the 14th day of August, 1947 . . ." p. 4, l. 29.

No. 142.

" The Plaintiff's claim is as owner of 500 shares . . . in the First Defendant Company, which said shares were duly transferred to the Plaintiff by M. R. S. L. Letchumanan Chettiar, deceased, on the 14th day of August, 1947 . . ." p. 6, l. 12.

(G) On the 22nd June, 1955, the Appellant personally affirmed three affidavits in support of applications for interim injunctions in the three actions. The affidavits contained the following statements :—

No. 140.

" 2. 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, 200 shares . . . p. 6, l. 34.

" 4. On the date aforesaid similarly through the United Traders Ltd., I purchased 500 shares in Kundang Tin Dredging Limited and 500 shares in Rawang Concessions Limited from the said deceased . . ."

No. 141.

" 2. On the 14th day of August, 1947, I bought through Messrs. United Traders Limited, Penang share brokers from one M. R. S. L. Letchumanan Chettiar, deceased 500 shares . . . p. 9, l. 38.

" 4. On the date aforesaid similarly through the United Traders Ltd., I purchased 500 shares in Rawang Concessions Ltd. and 200 shares in Rawang Tin Fields Limited from the said deceased . . ."

RECORD.

No. 142

p. 11, l. 10.

" 2. 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, 500 shares . . .

" 4. On the date aforesaid similarly through the United Traders Ltd., I purchased 500 shares in Kundang Tin Dredging Limited and 200 shares in Rawang Tin Fields Limited from the said deceased . . ."

p. 220–221.

(H) On the 5th July, 1955, the First Respondent's solicitors wrote to United Traders Limited, the Company through whose representative Oh Eng Leong, the Appellant claimed to have bought the shares in question from the deceased's attorney. The letter was marked for the attention of Mr. Oh Eng Leong. The following passages are cited from the letter :—

" Prior to his death in India intestate in 1942 our client was the registered proprietor and beneficial owner of 200 shares in Rawang Tin Fields Limited, 500 shares in Rawang Concessions Limited, 500 shares in Kundang Tin Dredging Limited and 1,500 shares in Takuapa Valley Tin Dredging (No Liability).

" It appears that on or about the 14th August, 1947, after the death of the deceased but before the Grant of Letters of Administration in respect of his estate had been extracted, there was a purported sale of all these shares to a Mr. Chew Boon Ee of No. 37 Aboo Sittee Lane, Penang . . .

" In order that the position may be clarified we shall be most grateful if Mr. Oh Eng Leong would kindly write and inform us when and how this transaction took place, and in particular : (*a*) the date that Mr. Oh Eng Leong received instructions to sell the shares in question . . ."

No reply was received to this letter. At the trial of the action Oh Eng Leong was called by the Appellant as a witness to support his case that the purported sale had taken place in 1943. He was described by the Appellant as a close friend, with whom he had been

p. 44, l. 20.

educated, and whom he had known for a very long time. He admitted in evidence that when he had received this letter he had shown it to the Appellant's solicitor. There is no evidence that the Appellant learned the date of the death of the deceased in 1942 otherwise than by means of this letter.

(I) On the 16th August, 1955, the Appellant filed his Statement of Claim in each of the three actions. As stated in paragraph 3 above, he alleged that the sales of the shares had been made to him " at some date during the year 1942 or the year 1943." Hitherto he had uniformly alleged, and had affirmed in his affidavits, that the sales had been made on the 14th August, 1947.

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8. At the trial of the action the Appellant testified that the sales had been made in 1943. He said that he had agreed to pay for the shares in Japanese currency amounts equal to ten times the amounts which he was asked to pay in Malayan currency. In cross-examination he admitted that he had only recently heard that the deceased had died in 1942. He said that he had purchased the shares through Oh Eng Leong but had obtained no receipts for the payments which on his evidence had totalled some 176,000 Japanese dollars. Asked to explain why the transfer of the 500 shares in Kundang Tin Dredging Limited stated that the consideration was $2,000 dollars, whereas according to his evidence the price paid had been $45,000 dollars Japanese currency, he said that the figure of $2,000 was a nominal sum. He said that the references to the 14th August, 1947, in his solicitor's letters, was a mistake made by his solicitor. He stated that he remembered swearing the affidavits stating that he had bought the shares in August, 1947, but that this was a mistake, and that he had read the affidavits through very hurriedly.

p. 32, l. 18.
p. 33, l. 33.
p. 34, l. 40.
p. 35, l. 18.
p. 38, l. 28.
p. 39, l. 3.

9. (A) The Schedule to the Debtor and Creditor (Occupation Period) Ordinance (No. 42 of 1948) shows that between June, 1943, and December, 1943, the value of $100 Malayan currency had increased in terms of Japanese currency from $224 to $385. If the Appellant had paid in 1943 the sums which he claimed to have paid in Japanese currency, he had paid three times the proper amount for the shares.

p. 122, l. 12.

(B) The Appellant did not call his solicitor to support his evidence that the statements about the date of the purchases in the solicitor's letters and in the draft affidavits had been mistakenly made by the Appellant's solicitor.

(C) The Appellant did not call as a witness Chidambaran Chettiar, the deceased's attorney.

10. The Appellant did call Oh Eng Leong who supported the Appellant's evidence about the date of purchase being in 1943. Asked to produce the records of the purchase, he stated, " My offices were destroyed during the war—in one of the Japanese air raids at the start of the war." It was a matter of public knowledge that the Japanese air raids in Malaya had ended long before the alleged date of the purchases of the shares in 1943. Oh Eng Leong stated that when he sent the transfers to be registered (in 1947) he had no idea that the deceased had died in 1942.

p. 46, l. 5.
p. 42, l. 40.

11. Neither the Appellant nor Oh Eng Leong produced any records relating to the month of August, 1947, to disprove that the purchases had been made at that time.

12. At the close of the case on the 12th April, 1956, Mr. Justice Spencer-Wilkinson delivered a short oral judgment in favour of the Appellant. He said :—

> " 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 to the contrary consists of certain statements in the nature of admissions contained in a letter, an affidavit and in the endorsement on the writ . . . "

p. 81, l. 20.

RECORD.

The learned Judge gave a short written judgment on the 9th May, 1956. He said :—

p. 88.

" 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 until 1947 and were so dated. I am unable to accept Mr. Huntsman's argument that the natural and normal thing 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 . . . "

The learned Judge repeated his view that the statements that the sales had taken place in August, 1947, found in the letters, the affidavits and the writs, was a mistake.

13. All three judges in the Court of Appeal were agreed that this judgment should be set aside as being against the weight of the evidence :—

p. 121, l. 25.

(A) Mr. Justice Rigby reviewed the whole of the evidence. He drew attention to the letter of the 5th July, 1955, from the First Respondent's solicitors to Oh Eng Leong, stating that the deceased had died in 1942, followed by the Appellant's Statement of Claim of the 16th August, 1955, alleging for the first time that the sale had been in " 1942 or 1943."

p. 121, l. 41.

" The significance of this letter and the importance to be attached to it, was clearly a matter which required careful consideration when one came to assess the credibility of the witnesses in the light of the fact that it was only some time after the receipt of this letter that the date of acquisition of the shares was altered from 1947 to ' some time during the year 1942 or the year 1943.' Unfortunately, however, no reference is made by the learned judge, either in the brief note of the oral judgment he gave at the conclusion of the trial or in his subsequent grounds of judgment, to this letter."

The learned judge also referred to the improbability of the Appellant's evidence about the amount paid for the shares in Japanese currency, and to the unsatisfactorily explained failure to produce any documentary evidence about the date of the purchase :—

p. 122, l. 33.

" Again, it would seem remarkable that there should be no documentary evidence whatsoever in existence, either in the possession of the First Respondent or of Oh Eng Leong as a director of United Traders Ltd., concerning the sale of these shares. Oh Eng Leong endeavoured to explain that fact by saying that the records of his business of share brokers had been totally destroyed in the bombing. In re-examination, however, he admitted that his offices were destroyed in one of the Japanese air raids at the start of the war. That date would, of course, be many months before this alleged transaction, which must have taken place subsequent to June, 1943."

RECORD.

The learned judge referred to the principles stated by Lord Somervell in *Benmax* v. *Austin Motor Co. Ltd.* about the powers and duties of an appellate Court in such a case as this. He was satisfied that it was the duty of the appellate Court, in accordance with these principles, to set aside the judgment of the trial judge. p. 122, l. 47. p. 123, l. 2.

(B) Mathew, C.J., and Whyatt, C.J., gave similar reasons for allowing the appeal.

14. The First Respondent submits that this appeal should be dismissed for the following (among other)

10

REASONS

(1) BECAUSE the Appellant had failed to prove that he had purchased the shares in 1943.

(2) BECAUSE the judgment of Mr. Justice Spencer-Wilkinson was against the weight of the evidence.

(3) FOR the reasons given by the Court of Appeal.

B. McKENNA.

G. R. F. MORRIS.

Appeal No. 21 of 1957.

In the Privy Council.

ON APPEAL

from the Supreme Court of the Federation of Malaya (Court of Appeal at Penang)

BETWEEN

CHEW BOON Ee . . . . *Appellant*

AND

L. RAMANTHAN CHETTIAR in his capacity as administrator of the Estate of M. R. S. L. Letchumanan Chettiar, deceased . . . . *First Respondent*

RAWANG TIN FIELDS LIMITED

KUNDANG TIN DREDGING LIMITED

RAWANG CONCESSIONS, LIMITED

HARRISONS AND CROSFIELD (MALAYA) LIMITED

Pro Forma Respondents — *Second Respondents*, *Third Respondents*, *Fourth Respondents*, *Fifth Respondents*.

Case for the First Respondent.

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