

Saminathan s/o Vanathan - - - - - Appellant

v.

Pappa d/o Thoppan - - - - - Respondent

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 17TH NOVEMBER 1980

Present at the Hearing :

THE LORD CHANCELLOR

LORD DIPLOCK

LORD EDMUND-DAVIES

LORD RUSSELL OF KILLOWEN

LORD ROSKILL

[*Delivered by* LORD DIPLOCK]

This appeal arises out of a dispute as to the ownership of approximately four acres of padi land in the State of Selangor ("the disputed land"). Miss Pappa, who was plaintiff in the action and is respondent to the appeal, became the registered proprietor of the disputed land on 9 July 1970 by registered transfer from the previous registered proprietor Mr. Palaniandi, who is not a party to the action. He was at all material times living in India but had given to the defendant in the action and appellant in this appeal ("Saminathan") a general power of attorney which authorised Saminathan *inter alia* to sell the disputed land—a power which he purported to exercise on 10 August 1967 when he entered into a written agreement to sell it to Miss Pappa for a price of \$7,500 payable in two instalments of \$5,200 and \$2,300 respectively. Notwithstanding the transfer of the registered title to Miss Pappa, Saminathan continued to occupy and cultivate the disputed land. The present proceedings were commenced by Miss Pappa in March 1972 to vindicate her title and to enjoin Saminathan from trespassing on the disputed land.

As registered proprietor, Miss Pappa had an indefeasible title under section 340 sub-section (1) of the National Land Code, unless Saminathan could bring the case within sub-section (2) which provides:

"(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 . . .”

Saminathan eventually relied upon both of these paragraphs; their Lordships do not, however, find it helpful to refer to the pleadings in the action. The trial itself appears to have been conducted with a fine disregard of them—a procedure which, in their Lordships’ view, is to be deprecated, particularly where allegations of fraud are involved. In the instant case it appears to have had the consequence of obscuring from the learned Judge what the real issues were, and led him to find in favour of Saminathan.

Since their Lordships are in full agreement with the judgment of the Federal Court, which reversed the learned Judge’s judgment and contains a lucid summary of the relevant facts starting with the grant of the power of attorney by Palaniandi to Saminathan (“the Palaniandi P.A.”) on 11 May 1957, their Lordships can restrict themselves to bare references to those facts only which are necessary to a proper understanding of the various defences, developed on behalf of Saminathan at the trial, upon which Azmi J.’s judgment in his favour was based.

The Palaniandi P.A., in addition to authorising Saminathan to sell the disputed land, gave him express power

“To substitute and appoint from time to time one or more attorney or attorneys with the same or more limited powers and such substitute or substitutes at pleasure to remove and another or others to appoint.”

Five years later on 9 July 1962 Saminathan, who was apparently ill at the time, himself granted to Miss Pappa a general power of attorney (“the second P.A.”) in substantially similar terms. It was expressed to be irrevocable and contained no reference to the Palaniandi P.A.: but it included an express provision in Clause 24 empowering Miss Pappa:

“To convey unto herself (grantee) the land held under A.A.814/505/B and 79/575B Sekinchang Kuala Selangor” [i.e. the disputed land] “absolutely.”

There was no evidence that by 9 July 1962 Saminathan had agreed to sell the disputed land to Miss Pappa; and their Lordships agree that the Palaniandi P.A. did not empower Saminathan to authorise Miss Pappa to transfer to herself the title to the disputed land of which Palaniandi was still the registered proprietor except pursuant to an agreement for sale under which Miss Pappa was herself the purchaser.

This express power to transfer to herself the registered title to the disputed land, although it was granted at a time when no sale agreement was yet in existence, was not exercised until after Saminathan had entered into the agreement to sell the disputed land to Miss Pappa of 10 August 1967 (“the sale agreement”) to which reference has already been made. The sale agreement contained express provision to the effect that the purchaser should obtain completion by using the powers vested in her by the second P.A. This she did on 9 July 1970, her registration being obtained by production of the Palaniandi P.A. and the second P.A.

Whatever might have been the position under section 340(2)(b) as regards the sufficiency of the second P.A. if the power to transfer the disputed land which it purported to confer upon Miss Pappa had been exercised by her before the sale agreement had been made, any defect in her power to execute the transfer was cured by the coming into existence of the sale agreement before the power was exercised. Their Lordships agree with the Federal Court that Azmi J.’s holding to the

contrary was wrong. The learned Judge does not appear to have appreciated the relevance of the sale agreement to the validity of the transfer.

Their Lordships accordingly now turn to the three findings of fraud on which the learned Judge relied as defeating the registered title of Miss Pappa under section 340(2)(a). Only one allegation of fraud was made in Saminathan's pleading viz. that Miss Pappa had mis-represented to the Collector of Land Revenue that Saminathan desired the transfer of the title of the disputed land to her. There is a sentence in the trial Judge's judgment which suggests that he found this allegation proved but counsel for Saminathan has been unable to point to even a shred of evidence that any such representation, whether true or false, was ever made to the Collector. The onus of proof of fraud in Malaysia is proof beyond reasonable doubt. In the circumstances the Federal Court were clearly entitled, if not bound, to reject, as they did, the Judge's finding on this matter.

There were, however, two other findings by the Judge of fraud that had *not* been pleaded. The title under which Palaniandi was registered as proprietor of the disputed land was subject to a condition that it should not be transferred without the consent of the Ruler in Council; and the first of the Judge's two findings of unpleaded fraud was based upon a statement in a Statutory Declaration made by Miss Pappa on 11 March 1970, in support of her application for consent to and registration of the transfer. She there stated that Palaniandi and Saminathan were at that date "still living in India". This was accurate in stating that both were living, a matter of importance, since powers of attorney cease to be effective upon the grantor's death; but it was inaccurate in stating that Saminathan was then living in India; he was in fact living in Malaysia. There was no evidence that, when deciding to approve the transfer, either the Executive Council of the State or the Collector of Land Revenue, to whom the statutory declaration was sent, attached any importance to whether Saminathan was living in India or Malaysia, so long as he was still alive; nor was counsel for Saminathan able to suggest any reason why this particular piece of information should be relevant to a decision to approve or reject the transfer that appeared plausible to the members of the Federal Court, who are familiar with the way in which the system of registration of titles in Malaysia works in practice. If Saminathan was relying upon this mis-statement as having induced the Executive Council to assent to the transfer it was for him first to plead it and then to prove it beyond reasonable doubt. Their Lordships agree with the Federal Court that this finding of fraud by the learned Judge cannot stand.

The second finding of unpleaded fraud made by the learned Judge, to which a considerable portion of his judgment was devoted, arose out of the sale agreement and the payment of the purchase price thereunder. The existence of the sale agreement was undisputed, but there was considerable conflict of oral evidence as to whether the whole of the purchase price had been paid before the date of registration of the transfer and if so when individual instalments of it had been paid. Such documentary evidence as there was supported Miss Pappa's claim that it had all been paid by 9 July 1970; but it was conceded that the second instalment had been paid some three months after the contract date, albeit more than two years before the transfer itself. An issue as to underpayment was raised upon the pleadings where it was relied on by Saminathan as a breach of condition; but the Judge appears to have considered that if Miss Pappa relied upon the sale agreement as justifying her use of the second P.A. in order to effect the transfer to herself of the registered title to the disputed land, an onus lay upon her to prove that

the purchase price thereunder had been paid in full and punctually and that no onus lay upon Saminathan to prove the contrary. In this, as the Federal Court pointed out, he was clearly wrong. The learned Judge, although he referred to the conflicting evidence as to payment in considerable detail, was unable to reach any positive finding of fact. All he could do was to express his view that, on the evidence, Miss Pappa had not satisfied the onus of proving full and punctual payment. Her failure to satisfy this onus he treated as equivalent to actual proof of a breach of condition of the sale agreement despite the fact that time had not been made the essence of it, and he went on to hold that Miss Pappa was acting fraudulently in registering the transfer because she had not proved that she had by that date paid the full purchase price.

The Federal Court rejected the learned Judge's reasoning on this part of the case. They also considered that despite the conflict of oral evidence the documentary evidence was strong enough to justify them in making their own finding of fact that the purchase price had been paid in full before the transfer and had been paid punctually except as regards a sum of \$1,700, part of the second instalment, which was paid three months late. Their Lordships, however, do not find it necessary to canvass the justification for that finding of fact by the Federal Court which the trial Judge had refused to make. Miss Pappa's failure to pay the purchase price in full and punctually, even if proved beyond reasonable doubt, could not in law amount to fraud or entitle the unpaid vendor to defeat the registered proprietor's title under section 340(2)(a).

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that this appeal should be dismissed with costs.



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In the Privy Council

SAMINATHAN s/o VANATHAN

P.

PAPPA d/o THOPPAN

DELIVERED BY
LORD DIPLOCK