Privy Council Appeal No. 21 *of* 1957

Chew Boon Ee - - - - - - - - - - *Appellant*

v.

E. Ramanathan Chettiar in his capacity as Administrator of the Estate of M. R. S. L. Letchumanan Chettiar, *deceased* **and others** - *Respondents*

FROM

THE SUPREME COURT OF THE FEDERATION OF MALAYA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST JUNE, 1959

Present at the Hearing:

LORD RADCLIFFE
LORD JENKINS
MR. L. M. D. DE SILVA

[*Delivered by* MR. DE SILVA]

This appeal relates to three cases which have of consent been tried together as the issues which arise are the same in each case.

The appellant sued the 1st respondent the administrator of the estate of one M. R. S. L. Letchumanan Chettiar (hereafter referred to as the deceased) the second, third and fourth respondents three companies registered in Malaya, and the fifth respondent a company which acted as the registrar of the three companies, in the High Court at Penang, for a declaration that he was the owner of certain shares which were registered in the name of the first respondent. The learned trial Judge gave judgment in favour of the appellant. On appeal the Supreme Court of the Federation of Malaya set aside the said judgment and dismissed the action.

The second, third and fourth respondents were discharged by the Supreme Court on the 20th February, 1957 from appearing on this appeal. The questions in dispute arise only between the appellant and the first respondent.

The respondent counter-claimed damages on the ground that the appellant had wrongfully converted certain shares belonging to the respondent in a fourth company. The issues that arose upon the counter-claim were the same as those that arose upon the claim. The counter-claim failed in the trial court and succeeded on appeal.

At a date before the outbreak of war the deceased was the owner of the shares in two of the companies. He executed blank transfers in respect of these shares the signatures being attested by one Oh Eng Leong, a director of United Traders Ltd., a firm of share brokers. The consideration and the date were left blank. The transfers, together with the scrip were deposited with the Penang Branch of the Indian Overseas Bank to cover an overdraft granted to the deceased. Thereafter the deceased executed a power of attorney in favour of one Chidambaram Chettiar and left for India some time in 1941. He died intestate in India on the 16th November, 1942. Shortly after the deceased had returned to India his attorney, acting on his instructions, purchased a further lot of shares and executed a similar blank transfer in respect of them.

That transfer, together with the scrip, was also deposited with the Bank. Later, the attorney paid off the overdraft to the Bank and on the 15th June, 1943 withdrew all the shares from the Bank. At some date subsequent to the 15th June, 1943, the attorney sold those shares to the appellant. The transaction was put through by the same broker, Oh Eng Leong. On the 14th August, 1947 the appellant filled in the blanks on the transfers with his name as that of purchaser and transferee, the 14th August, 1947 as the date and certain sums as consideration.

After the war the respondent came to Malaya from India in May, 1949 and obtained Letters of Administration to the deceased's estate in September, 1950. The shares were still registered in the books of the companies in the name of the deceased and caveats against the registration of a new owner had been lodged by the Overseas Bank which presumably was hoping for a statutory revision of the payment in 1943 in Japanese currency of the debt due by the deceased.

The respondent took steps to have the caveats removed and obtained in May, 1953 fresh scrip for the shares in the three companies referred to earlier, in his name on the ground that the scrip issued to the deceased had been either lost or destroyed. The appellant had applied for but failed to obtain registration in August, 1947 because of the caveats and on a later application in June, 1954 was met with the answer that the respondent had already been registered as the owner. These actions are the result of the dispute which then arose.

It is common ground that if the shares were purchased in 1943 then despite the fact that the principal was then dead, the power of attorney was 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 under the relevant law the power of attorney would have at the time been terminated by the death of the deceased and the attorney would have had no power to pass title to the shares to the appellant.

The sole question for decision is whether the sale took place in 1943 or in 1947.

The case for the appellant was that the transaction of sale took place in 1942 or 1943 on blank transfers during the Japanese occupation. He gave evidence to this effect. Oh Eng Leong gave evidence to the effect that he had arranged the sale and that it had taken place in 1942 or 1943 when the appellant had paid the sale price and received scrip and blank transfers signed by the deceased or his attorney. The respondent's case was that the transaction of sale took place in 1947 and that the appellant and Oh Eng Leong had given a wrong date in their evidence.

The main point made against the appellant and upon which the trial judge had to adjudicate arose out of certain documentary evidence. In the endorsements on each of the Writs in the three cases the appellant stated that the shares were transferred to him by M. R. S. L. Letchumanan Chettiar, deceased on the 14th August, 1947. In three affidavits dated 22nd June, 1955 in support of an application for an interim injunction to restrain any transfer of the shares the appellant stated: "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 . . ." the shares in question. In Statements of Claim, delivered on the 16th August, 1955, he stated for the first time that he had purchased these shares "at some time during the year 1942 or the year 1943, during the Japanese occupation of Malaya, which he was unable more precisely to specify."

Previous to issuing writ in certain correspondence with the respondent's solicitor and others the appellants' solicitors had given the date of purchase of the shares as the 14th August, 1947.

The learned trial judge having held in favour of the appellant in an oral judgment, at the outset of a later written judgment stated as the basis for his decision—

> "The Plaintiff and his witness, Mr. Oh Eng Leong, both gave their evidence in a very straight-forward 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."

It is clear that his decision rested entirely upon his view of the credibility of the appellant and his witness Oh Eng Leong.

The trial judge went on to say referring to the date 14th August, 1947 :—

> "I accepted the Plaintiffs' 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."

On appeal Rigby J. who delivered the main judgment said :—

> "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."

He then went on to give reasons, discussed in paragraphs which follow, why the appellant should be disbelieved and the judgment of the trial judge set aside. On an examination of those reasons their Lordships do not think that the trial judge's view of the evidence of the appellant and his witness should have been disturbed. The other learned judges followed in the main the same line of reasoning as Rigby J.

The chief reason which appears to have prompted the Court of Appeal to hold that the appellant should be disbelieved arises from a letter written by the respondent's solicitors to United Traders Limited on a date between the filing of the affidavits and the date of the statements of claim in the following terms :—

Mercantile Bank Building,
Ipoh.
5th July, 1955.

FOR THE ATTENTION OF
MR. OH ENG LEONG

United Traders Ltd.,
4-D, Beach Street,
Penang.

Dear Sirs,

Re : The Estate of M. R. S. L. Letchumanan Chettiar deceased

We have been instructed by Ramanathan Chettiar the Administrator of the above estate to write you concerning the sale and disposal of certain shares in the undertakings known as Rawang Tin Fields Ltd. Rawang Concessions Ltd., Kundang Tin Dredging Ltd. and Takuapa Valley Tin Dredging (No Liability).

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. It appears from our records that your office acted as brokers when these sales were effected, and there is no doubt whatsoever that your Mr. Oh Eng Leong witnessed, in each case, the signature of Mr. Chew Boon Ee on the respective forms of transfer.

A dispute has now arisen between Mr. Chew Boon Ee and our client as the Administrator of the estate over the ownership of the shares, and proceedings to determine the ownership of the shares have been instituted in the High Court at Penang. We think that it is inevitable that Mr. Oh Eng Leong will be called as a witness in the proceedings to explain exactly how the shares came into his possession and how the purported sale to Mr. Chew Boon Ee was effected.

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 (*b*) the name and address of the person (if known) who instructed Mr. Oh Eng Leong to sell the shares, (*c*) the name and address of the person (if known) to whom the proceeds of sale were paid after the purported sale has been effected and (*d*) the amount (if known) which was paid to this person.

Yours faithfully,

Sd. MAXWELL, KENION, COWDY & JONES.

Oh Eng Leong stated in evidence that he did not reply to this letter as he had already promised to give evidence for the appellant and that he handed the letter over to the appellant's solicitor. This evidence was accepted by the trial judge. There was nothing improper in Leong's conduct. It was suggested by the respondent both before the trial court and the appeal court that the appellant learnt the date of death of the deceased for the first time from the letter and that, acting in concert with Oh Eng Leong, he dishonestly changed the date of sale from 14th August, 1947 to a date in 1942 or 1943.

The trial judge accepting the evidence of the appellant and regarding him as an honest witness rejected the suggestion. The Court of Appeal accepted the suggestion and it is largely on this acceptance that it based its judgment. Wyatt C.J. said—

> " The Plaintiff did not attempt to elucidate how the mistake arose nor—which is more significant—how it came to be discovered between the 22nd June 1955, when the Affidavit was sworn, and the 16th August, when the Statement of Claim was delivered. The learned trial judge thought the mistake arose because the Plaintiff and his Solicitor had taken the date of sale from the share transfers and had not noticed the error until the Statement of Claim was drafted. Oddly enough, this explanation was not offered by the Plaintiff himself and indeed if it had been, it would still have left unexplained why, if the mistake was apparent on the 14th August when the Statement of Claim was drafted, it was not equally apparent on the 22nd June when the Affidavit was sworn. It seems to me much more likely that the Plaintiff's change of front was due to the letter of the 5th July 1955 containing the information that the seller had died in 1942. This was a vitally important matter on any view of the case but, as I have already mentioned, it is not referred to in the judgment of the learned trial judge. The one outstanding and incontrovertible feature of this case is that every document, with the solitary exception of the Statement of Claim, supports the Defendant's contention that the sale took place on the 14th August

1947. The proper conclusion, in my view, is that the sale did in fact take place on that date and not in 1942 or 1943 as alleged by the Plaintiff ".

On the question of elucidation their Lordships have formed the following view:—

As stated earlier the finding by the trial judge upon which his decision in the case rested was that a mistake had been made in the statements in the documents and that the sale had taken place in 1942 or 1943 and not in 1947. In answer to a question as to how the wrong date came to be stated in the documents the appellant said it was a mistake made by his solicitor. He was not asked to elucidate how the mistake came to be made. An elucidation would no doubt have assisted in arriving at a conclusion if there had been any doubt in the mind of the trial judge. The respondent argued that the appellant should have elucidated the point in examination-in-chief but it is nevertheless true that the question how the mistake was made and connected questions could have been put to the appellant in cross-examination. Assuming against the appellant that he should have elucidated the point the failure to do so would have been matter for legitimate comment before the trial judge. But if the point was not argued before the trial judge or if it was argued and the trial judge nevertheless held a mistake had been made no grounds arose upon which the view of the trial judge as to the credibility of the appellant should be interfered with.

The observation " It seems much more likely that the plaintiff's " i.e. the appellant's " change of front was due to the letter of the 5th July, 1955 containing the information that the seller had died in 1942 " appears in the passage quoted above from the judgment of the Court of Appeal. The appellant has not stated that the change of date was not a result of the receipt of the letter. He was never asked whether this was so or not. It may fairly be assumed that his solicitor on receipt of the letter from Oh Eng Leong did show it to him although, again, the appellant was never asked whether it was so shown, and if shown what happened thereon. On the question of what happened thereon there are at least two possibilities: one that the appellant changed his story and, with Oh Eng Leong, fabricated a falsehood, the other that discussion revealed for the first time that the true date of the sale was not the date on the transfers but the date of an earlier transaction when scrip and blank transfers were handed over in exchange for consideration. Both the appellant and his solicitor could have, for different reasons perhaps, have made the mistake of assuming that the date of the sale was the date on the transfer. The appellant cannot be held guilty of dishonesty without being given the opportunity of giving an explanation either on the lines of the possibility outlined above or some other explanation.

In the argument on this appeal the respondent was not able to suggest that the appellant in his evidence had said directly or by implication that what he meant by mistake by his solicitor was that the solicitor having, prior to the date of the documents, received instructions from which he had gathered the correct date of sale, had inserted a wrong one in the documents. On the material available it is not known how fully the solicitors had gone into the matter before the documents with the wrong dates were drafted. The significance of the date of sale being a date other than that appearing on the transfer was probably not realised till the letter of July, 1955 was received by the appellant.

The respondent's solicitor asking for certain information in a letter dated the 4th April, 1955 to the appellant's solicitor said:—" If you forward us the forms of transfer for inspection as we have requested above it will, of course, not be necessary for you to advise us separately as to the date of sale and the name of the agent." The appellant's solicitor could equally before making detailed investigation have assumed, as the learned trial judge thinks he did, that the date of the sale was the date of the transfer. The appellant though he knew the details

may not have known what in law was the date of the sale. No questions were asked from him and no inference adverse to him can be drawn.

If the true date of the transaction was in 1947 the letter of July, 1955 provided an opportunity for a dishonest man to fabricate evidence by changing the date; it equally provided an occasion, if the true date was in 1942 or 1943, for an honest man to discover the correct date of sale and to state it for the first time in the statements of claim. The trial judge on an assessment of the character and credibility of the appellant came to the conclusion that the change of date was honest and their Lordships are of the opinion that nothing that flows from a consideration of the letter of the 5th July, 1955 alone or in conjunction with the other points appearing in the judgments of the Court of Appeal justifies the view that that assessment by the trial judge is wrong.

The point is made in the passage quoted earlier that the argument that the letter of July, 1955 made the appellant dishonestly change the date, is not referred to in the judgment of the learned trial judge. It is true that the short judgment of the trial judge does not mention it but it appears from the record that his judgment was delivered on the very day that the argument took place. For this among other reasons their Lordships do not think that he failed to give due consideration to it.

It has been argued by the respondent that the appellant's solicitor should have been called by the appellant. The appellant argued among other things that his evidence was not admissible. It is not necessary for their Lordships to decide this point because assuming, without deciding, that his evidence was admissible, whatever weight the point could carry would not be sufficient to reverse the trial judge's view of the credibility of the appellant.

A point argued before the Court of Appeal and accepted by it was that the price in Japanese currency stated by the appellant to have been paid for the shares in 1942 or 1943 was incredibly high. It is to be observed that if in fact the appellant had concocted a story he could have put into it any price he wished. In coming to the conclusion that the price was too high comparison was made with the values of Japanese currency at different periods during the occupation in a schedule in certain post-war legislation. Though no doubt the values in the ordinance must have been carefuly worked out it does not appear that the appellant at the relevant time worked out similar values or that he could have done so. He was not asked if the prices were high and if so why he paid them. In the absence of such an enquiry from him their Lordships do not think any inference adverse to him can be drawn from the prices that he paid.

A third point made against the appellant is stated thus by Rigby J.:—

> "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."

Oh Eng Leong did say his offices had been destroyed by bombing and that the bombing had been at the beginning of the war. He also said certain papers of his had been destroyed by the bombing. But he did not say that papers kept in the occupation period were destroyed by the bombing. He was not asked whether he had had any papers relating to the sale, and if so what had happened to them. According to him the transaction originated not in an office but in a house where several Chettiars resided during the occupation. Upon the evidence no inference that Oh Eng Leong was giving false evidence can be drawn.

A Court of Appeal has no doubt jurisdiction to reverse a trial court on all questions of fact and law but as stated by Lord Reid in *Benmax* v. *Austin Motor Co. Ltd.* ([1955] A.C. 370 at p. 375) " it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness ". The principles which should guide a Court of Appeal dealing with findings of fact by a trial court have been set out in many cases and several of them have been cited to their Lordships. They think it would be sufficient for the purposes of this appeal to refer to two passages from the judgment of Viscount Simonds in *Benmax* v. *Austin Motor Co. Ltd.* the case mentioned earlier. Referring to cases previously decided he said :—

> " I have found, on the one hand, universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge."

He went on to say:—

> " In a case like that under appeal where, so far as I can see, there there can be no dispute about any relevant specific fact, much less any dispute arising out of the credibility of witnesses, but the sole question is whether the proper inference from those facts is that the patent in suit disclosed an inventive step, I do not hesitate to say that an appellate court should form an independent opinion though it will naturally attach importance to the judgment of the trial judge."

In the present case the credibility of the appellant and his witness was the main question for consideration and for the reasons which they have given and upon a review of the case as a whole their Lordships can find no reason for interfering with the judgment of the trial judge. They will report to the Head of the Federation of Malaya as their opinion that the appeal should be allowed, the judgment of the Court of Appeal set aside and the judgment of the trial judge restored. The first respondent must pay the costs of this appeal and the costs of the hearing before the Court of Appeal.

(39810) Wt. 8078—37 100 6/59

In the Privy Council

CHEW BOON EE

v.

L. RAMANATHAN CHETTIAR IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF M. R. S. L. LETCHUMANAN CHETTIAR, *deceased* **AND OTHERS**

DELIVERED BY

MR. L. M. D. DE SILVA

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