1/1962

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 60 of 1960

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N

A.R.P.L. PALANIAPPA CHETTIAR Appellant

— and —

P.L.A.R. ARUNASALAM CHETTIAR Respondent

C A S E FOR THE RESPONDENT

RECORD

1. This is an Appeal from a judgment of the Court of Appeal of the Supreme Court of the Federation of Malaya (Thomson C.J. Rigby J. and Ong J.) dated the 23rd day of April 1959 dismissing the Appeal of the Appellant from a judgment of the Trial Judge (Smith J) dated the 1st day of July 1958 whereby he made a declaration that the Appellant was a trustee of certain land and held the same in trust for the Respondent and further ordered that the Appellant should execute and deliver to the Respondent a valid and registerable transfer of such land in favour of the Respondent on or before the 29th July 1958 together with other consequential relief. Final leave to appeal to His Majesty in Council The Yang di Pertuan Agong was granted to the Appellant by the said Court of Appeal by Order dated the 2nd day of November 1959.

2. The Respondent's claim, as stated in his Statement of Plaint dated the 21st November 1950, can be summarised thus:- pp.1-3

(1) Prior to the 27th February 1935 he was the registered owner of the land held under Certificate of Title No.4246 Lot No. 926 in extent 40 acres 2 roods and 30 poles, situated in the Makim of Si Rusa in the State of Negri Sembilan. Such land was at all material times cultivated with rubber.

(2) On the 27th February 1935 he had transferred the said land to his son, the Appellant, to hold on trust for him. No trust deed was executed and no consideration was paid for the transfer having regard to their relationship.

(3) He had throughout retained possession of the title to the said land and had paid the outgoings on and received the income from such land.

(4) On the 4th October 1950 he had arranged to sell the said land to one Toh See Toh for a sum of $16,000 and accordingly wrote to the Appellant on the same day requesting him to execute a Power of Attorney in his the Respondent's favour to enable him to complete the sale.

(5) The Appellant by letter dated the 14th October 1950 refused to comply with this request.

(6) The Respondent alleged that the said land was merely registered in the name of the Appellant who had no beneficial interest in such land, the beneficial interest in which had always remained vested in the Respondent, and he accordingly claimed a declaration that the Appellant was holding the said land as trustee for the Respondent and an order that the Appellant should execute a transfer of it in his favour, together with other consequential relief.

pp. 3-5 Copies of the two letters above referred to were attached and marked respectively Annexures A and B.

pp. 5-6 3. The Appellant, by his written Statement of Defence dated the 3rd April 1951, admitted that prior to the 27th February 1935 the said land stood registered in the name of the Respondent but alleged the Respondent held it in trust for the Hindu Joint Family of which the Appellant and the Respondent were members. He denied that the land had been transferred to him by the Respondent on the alleged trust, and further alleged that he the Appellant purchased such land from the Respondent for the sum of $7,000.

4. The Appellant by his Defence further denied that the Respondent had enjoyed the income from the said land and alleged that, as being the father of the Appellant, he was entrusted with the management of such land and was accordingly liable to account to the Appellant for the income therefrom. The Appellant admitted that he had been requested to execute the Power of Attorney and had refused, and denied that the Respondent was entitled to the relief claimed. He further counterclaimed for an Order that the Respondent should account to him for the profits from the said land which had accrued since the 27th February 1935 and that the Respondent should pay to him any sum found due on the taking of such account.

5. The Respondent delivered a Reply and Defence to Counterclaim, dated the 30th April 1951 in which, after joining issue with the Appellant on his Defence, he denied that he had at any time held the said land in trust for the Hindu Joint Family or that the Appellant had purchased the said land for $7,000 or that he had managed the said land for the Appellant or was liable to account to him for the income therefrom. p. 7

6. By a letter dated the 29th April 1958 from the Registrar to the parties Solicitors, the case was set down for hearing on the 30th June 1958. On the day of the hearing the Appellant's Solicitor applied to the Trial Judge for an adjournment on the ground of the illness of Mr. Ramani the senior Counsel whom he had retained in 1953 and who had been taken ill at the beginning of May 1958. This application was opposed by the Respondent in accordance with the notification which had been previously given to the Appellant's Solicitor. The learned Judge refused the application, whereupon the Appellant's Solicitor withdrew from the case. The Appellant himself in person then renewed the application for an adjournment on the same grounds and when this application was also refused, the Appellant stated that he did not wish to appear. On being warned by the learned Judge of the possible consequences of taking such a course and after being granted a short adjournment to consider his position, the Appellant stated that he wished to take no

p.12 L.16
p. 8 L. 6
p. 8 L.10
p. 8 L.12
p. 8 L.17
p. 8 L.21
p. 8 L.29

further part in the proceedings and thereupon left the Court.

7. Thereupon the trial proceeded in the absence of the Appellant. Oral evidence was given by the Respondent and one witness which can be summarised as follows:-

p.9 L.12 (i) The Respondent stated that the Appellant was his son by his first wife. In 1934 he had bought the land in question at an auction for $8,081. He produced his ledger Exhibit P.1 to support this. After 6-7 months he transferred it to his son because his holding of rubber would become 139 acres and exceed 100 acres.

p.9 L.20 "My son did not pay $7,000. He paid nothing". He stated that he executed the transfer, a copy of which he produced Exhibit P.4., while they were both in India, that he paid all the costs and that

p.10 L.11 no trust deed was drawn up because it was his own son who was then 22 years old.

p.10 L.12 "He was fully aware of the reason. He knew he held in trust".

p.9 L.24 He further stated that he had received all the income that had accrued from the land and had paid the wages and assessment. His son had never paid any part of the assessment, or received any part of the income. He produced some of his ledgers Exhibit P.3 in support of this. He also produced the Certificate of Title

p.10 L.3 Exhibit P.5. He finally stated that he had agreed to sell the land in 1950 to Toh See Toh, that his son had refused to send him a Power of Attorney and that he was accordingly compelled to institute proceedings. In answer to questions by the

p.10 L.16 Court, the Respondent reiterated that his son had not paid him $7,000. He was under the impression that he had to put an amount in for the sake of registration. He had no intention of making a present to his son.

p.10 L.26 The sole object was to avoid having to disclose that he held more than 100 acres

P.10 L.19 of rubber land. Returns were not called for in respect of the land and the benefit was that he did not send the return.

(ii) The only witness called on behalf of the Respondent was M.S. Perumal, his former agent. He stated that he had purchased the land in question and had later transferred it to the Appellant as agent for the Respondent. He explained that the firm P.L.A.R. of which the Respondent was the sole member had 99 acres, and that if the firm had over 100 acres he had to go to the Controller instead of to the Land Office to get coupon for rubber production, and that it was easier to deal with the Land Office. He had informed the Respondent who told him to prepare a memorandum of transfer mentioning $7,000. He stated that he did not know why $7,000 was put in or whether it was paid or whether they would have accepted the transfer without a sum being mentioned or what the procedure was if no value were stated. He continued:- "I was under impression land still belonged to Plaintiff. I dealt with it on that basis. In 1938 Defendant came to P.D. (Port Dickson). He made no complaint as to way this land was dealt with". p.10 L.33 p.11 L.2 p.11 L.4 p.11 L.9

In answer to questions by the Court, he stated that he did not know if small estates were allowed to tap more than estates over 100 acres, and that he thought that there would be more correspondence with larger estates. p.11 L.14

8. On the 1st July 1958, the learned Judge, after giving the grounds for his decision not to grant the application for postponement of the trial, gave judgment for the Respondent and made orders in the terms prayed. pp.11-12

(i) In the course of giving his reasons for refusing the application for postponement of the trial the learned Judge said:-

> "In view of the Defendant's delay in not indicating that he desired an adjournment until one week before the trial and because the Defendant or his Solicitor must have known at least a month ago that Mr. Ramani might not be able to appear on 30th June 1958, I declined to allow any further adjournment of this case. I gave as an p.12 L.42

additional reason the fact that Mr. Ramani's was not the only advice which the Defendant was able to draw upon in this suit".

(ii) In the course of his judgment, the learned Trial Judge, when considering the reason given by the Respondent for transferring the land to the Appellant, said:-

p.14 L.4

"At that time there was in force legislation supervising and restricting the production of latex, namely the Rubber Regulation Enactment. For the purpose of the legislation, owners of estates exceeding 100 acres were obliged to deal with the Controller of Rubber, owners of small estates under 100 acres with district officers. The Plaintiff who was at that time in India was told of these arrangements by his agent who informed him that it was simpler to deal with district officers rather than with the Controller. The Plaintiff therefore decided to put the property in his son's name so that his rubber land was ostensibly held by two different persons neither of whom held a holding exceeding 100 acres".

(iii) After reviewing the evidence given by the Respondent and his witness, and after reminding himself of the nature of the defence filed by the Appellant, he said:-

p.14 L.44

"The Plaintiff's case had the ring of truth and in the absence of any evidence from the Defendant I regard it as probable. If the story of the Plaintiff is true, it is quite clear that the Plaintiff has practised a deceit on the public administration of the country in order to get a benefit for himself. In view, however, of the Court of Appeal decision in Sarpara Ali v. Sarjan Singh (1957) 23 M.L.J. 165, it appears that the Plaintiff's possible turpitude is no reason for denying to him the orders which he seeks".

(iv) The Learned Trial Judge also considered whether the Respondent was estopped by the terms of the receipt in the transfer from denying that he had received $7,000 consideration from the Appellant for the land and concluded:-

> "In the absence of evidence from the Defendant the explanation given by the Plaintiff appears to me to be probable and to fall within proviso (f) to Section 92 of the Evidence Ordinance 1950" p.15 L.12

/For ease of reference, Section 92(f) of the Evidence Ordinance 1950 provides:-

> (f) Any fact may be proved which shows in what manner the language of a document is related to existing facts./

9. From this judgment the Appellant appealed to the Court of Appeal in the first instance upon grounds set out in the Memorandum of Appeal dated the 15th September 1958. pp.17-18 The appeal was heard by the Court of Appeal (Thomson C.J. Rigby J. and Ong J.) on the 13th and 14th days of October 1958 and p.21 L.5 then, in response to the Appellant's request for an adjournment, the hearing of the appeal was adjourned to enable the Appellant to file additional grounds of appeal. Such additional pp.21-23 grounds of appeal dated the 11th November 1958 were filed and the hearing of the appeal was resumed on the 24th and 25th days of November 1958. The grounds of appeal, which were somewhat lengthy, were conveniently summarised by the learned Chief Justice in the course of his judgment as hereinafter appears.

10. On the 23rd April 1959 the learned Chief Justice delivered judgment with which Rigby J. and Ong J. concurred. In the course of his judgment and after having reviewed the history of the proceedings and the evidence which was given the learned Chief Justice summarised the grounds of appeal as follows:-

> "The first ground of appeal is that the trial judge was wrong in refusing the Defendant's application for an p.29 L.4

adjournment. The other grounds are, in short, that the trial judge was wrong in accepting the Plaintiff's evidence as evidence of truth because the Plaintiff and his agent gave different and conflicting reasons for making the transfer, that evidence was wrongly admitted to show that the transfer was voluntary when the instrument of transfer stated a consideration of $7,000, that in any event the evidence did not make out that the Defendant held the land in trust for the Plaintiff, that to recognise any such trust would be to nullify the provisions of the Land Code and that even if the Appellant did hold it in trust for the Plaintiff the trust was created for an unlawful purpose and therefore the Plaintiff was not entitled to any relief".

11. The learned Chief Justice dealt with these various grounds of appeal as follows:-

(i) As to the refusal to grant an adjournment, he said:-

p.29 L.23 "It is well settled law that the refusal of an adjournment of a trial is a matter within the discretion of the trial judge and the Court of Appeal will be slow to interfere with his discretion unless it appears that the result of an order refusing the adjournment has been to defeat the rights of the applicant altogether and to do that which the Court of Appeal is satisfied is an injustice to him (see Maxwell v. Keun (1928) 1 K.B.645). In my view there is in the present case no question of any injustice".

After reviewing the circumstances in which the application had been made, he continued:-

p.29 L.47 "In the circumstances, it would in my view be wrong to interfere with the discretion of the trial judge in

refusing the adjournment when the Plaintiff was ready and anxious to proceed with his case. It is wrong to say, as is frequently said, that a litigant is entitled to be represented by the Counsel of his choice. The true statement is that he is entitled to be represented by the Counsel of his choice if that Counsel is willing and able to represent him".

(ii) As to the contention that the Respondent's evidence was demonstrably false because the Respondent and his agent gave different and conflicting reasons for transferring the land to the Appellant, he observed that if the substance of the Respondent's evidence was not true, it was "a thousand pities that the Appellant did not go into the witness box to contradict it and give his own version of the transaction". Having pointed out that the Appellant knew from the Plaint what the Respondent's version of the transaction was to be, he continued:- p.30 L.22

> "Now, in effect, he is trying by an ingenious analysis of the Judge's note of the Respondent's evidence to persuade us to differ from the Trial Judge on a question of fact the decision of which must have depended some extent on the Judge's view of the Respondent's credibility in relation to which he did not permit his own credibility to be assessed". p.30 L.32

The learned Chief Justice further considered briefly the provisions of the Rubber Regulation Enactment 1934 on which the Appellant's argument in this respect was based, and, after observing that there was nothing on the face of the legislation nor any evidence to show that a land holder derived any advantage from dealing with the District Officer rather than with the appointed Committee, he said:- p.30 L.40

> "I cannot for myself see here any such material conflict of testimony as would justify this Court in saying that the Trial Judge should have disbelieved the Respondent's evidence as a whole". p.31 L.22

(iii) As to the next three grounds of appeal, namely that evidence was wrongly admitted to show that the transfer was voluntary, that in any event the evidence did not make out that the Defendant held the land in trust for the Plaintiff and that to recognise any such trust would be to nullify the provisions of the Land Code,

P.31 L.36 the learned Chief Justice considered that they could logically be dealt with together. He concluded, rightly it is submitted, that the Respondent's case was that there had been a transfer to the Appellant of the whole right title and interest in the land subject to the personal obligation that the Appellant should hold it in trust for the Respondent, and not, as had been argued, that there was to be presumed a resulting trust in the Respondent's favour by reason of the voluntary transfer of the land to the Appellant for no consideration. Such being the position he considered that the following three consequences followed:-

P.32 L.4 (a) "There was no question of the evidence that no consideration was in fact paid being inadmissible. It was no part of the Respondent' case that the transfer dated 27th February 1935 was anything less than it purported to be, that is to say a complete transfer of the whole right title and interest in the land. In the circumstances, there was no question of admitting evidence to vary the terms of the transfer .... The truth is that the evidential value of the statement that no consideration was in fact paid was not to make out a fact from which a resulting trust could or should be presumed but to make out a fact which, if it were true, added probability to the statement that there was in fact an equitable obligation to hold the land in trust".

(b) "There is no question of a resulting trust being presumed from the circumstances of the transaction, that is to say from no consideration being paid and the Respondent remaining in possession". p.32 L.36

After stating that the relationship of the parties in the absence of any rebutting evidence would probably give rise to the presumption of a gift by way of advancement rather than of a resulting trust, the learned Chief Justice added:-

"Apart from any question of rebutting evidence, there is ground for grave doubt as to how far the Appellant would be able to benefit from any such presumption because of his own sworn statement made and filed under Chapter VIII of the Civil Procedure Code (which was in force at the material time) that the transfer was not voluntary at all but was made for valuable consideration". p.33 L.1

(c) "In the third place I can see nothing in all this that cuts across the provisions of the Land Code. It is true that the Respondent would have been well advised to transfer the land to the Appellant as trustee under Section 160 of the Code and if he had done so the present litigation might have been avoided". p.33 L.14

For ease of reference the following would appear to be the relevant Sections of the Land Code:-

42(i) The title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided.

(ii) In the case of fraud or misrepresentation to which he is proved to be a party, the title of such proprietor chargee or lessee shall not

be indefeasible

(iv) Nothing in sub-sections (ii) or (iii) shall affect the title of a proprietor chargee or lessee who has taken bona fide for valuable consideration from any proprietor chargee or lessee whose registration as such was procured by any such means or by means of any such instrument as aforesaid or of any person claiming bona fide through or under him.

160. When any land is transferred .... to a trustee or trustees the transferor .... may insert in the memorandum of transfer .... the words "as trustee" or "as trustees" as the case may be, and the proper registering authority shall in such case include such words in the memorial of such memorandum to be made by him on the register and issue documents of title to the land intended to be dealt with/.

The learned Chief Justice continued:-

p.33 L.28 "All that, however, is beside the point. What the Respondent is claiming is not any interest in the land, what he is claiming is that there is an equitable personal obligation on the Appellant to deal with the land as if it were the property of the Respondent and in particular to transfer it back to him now that he has been called upon to do so. Equity acts in personam and equity will always give relief against fraud. To my mind the Respondent has brought himself fairly and squarely within the following passage from the judgment of Lord Lindley in the well known case of Rochefoucauld v. Boustead (1897) 1 Ch.196 at 206:-

'It is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land for himself'.

The learned Chief Justice also cited with approval the dictum of Isaacs J. in Barry v. Heider 19 C.L.R. 197 at 213. p.34 L.27

(iv) As to the last of the grounds of appeal, namely that the trust was created for an unlawful purpose and that therefore the Respondent was not entitled to any relief, the learned Chief Justice pointed out that this question had not been pleaded and after having considered the manner in which it had been introduced in evidence and the learned Trial Judge's conclusions upon the matter as set out in paragraph 8(iii) above, he continued:-

"Now, whatever may have been his purpose there is no evidence that the Plaintiff did in fact practice any deceit on the public administration of the country. He may have intended to do so but there is nothing to show that in fact he did do so. Moreover, the bare representation that the two pieces of land were registered in the names of different proprietors even if it were made to anybody (and I repeat there is no evidence of this) would not in itself have been sufficient to have the two pieces of land treated as separate holdings for the purpose of the Enactment, for it is clear from the p.35 L.19

definitions of "holding" and "owner" in Section 2 that what mattered was not who was the registered proprietor of land but who was in charge of it and in the present case the person in charge of both holdings at all material times was the agent, Perumal".

The learned Chief Justice concluded by pointing out that in any event the Appellent would in the circumstances have himself been a party to any such dishonest transaction and accordingly would have had to say so, whereas in fact he had said nothing of the sort and indeed would have been precluded from saying so unless he had amended his pleadings, since by his defence he had alleged that he had bought the land for $7,000.

12. The Appellant's appeal was accordingly dismissed with costs.

13. The Respondent respectfully adopts in its entirety the reasoning of the learned Chief Justice and will contend that he was right in dismissing the Appellant's appeal for the reasons stated in his Judgment.

14. Without derogating from the contention contained in the last paragraph, the Appellant further respectfully submits:-

(1) that in view of the uncontradicted evidence of the Respondent that the land was transferred to the Appellant subject to the personal obligation that he should hold it in trust for the Respondent and in view of the fact that the rights of third parties were not implicated, the fact that the Appellant was registered at the owner of the land is irrelevant nor can the Appellant be permitted to shelter himself under such registration as against the Respondent who has suffered the wrong. The Respondent will refer to and rely upon the principles laid down in Loke Yew v. Port Swettenham Rubber Company Limited (1913) A.C. 491;

(2) that there was no evidence on which the learned Trial Judge could conclude that

the transfer dated the 27th February 1935 was intended to effect any illegal object or did in fact attain any such object so as to be tainted with illegality;

(3) that the Appellant did not seek nor was he compelled either to found his claim on any illegal contract or to plead its illegality in order to support his claim. If the reason which the Respondent gave for his having created the trust did constitute a deceit on the public administration, it was still no part of his claim nor was it incumbent upon him to prove it in order to establish that the land was transferred to the Appellant as a trustee and subject to an equitable personal obligation on him so to hold the right title and interest in the land in trust for the Respondent;

(4) that the Appellant having raised no plea of illegality and having further contended that the property passed to him for valuable consideration is not entitled to rely upon such a ground wholly inconsistent with what he has pleaded so as to defeat the Respondent's claim and thereby to retain the ownership of the land;

(5) that inasmuch as it is manifest on the facts found that the Appellant never paid anything for the land and never laid claim to the benefits therefrom until this action was commenced and never bore any of the burdens incidental to its ownership, it would be contrary to all justice that the ownership of the land should be adjudged to be his;

(6) that the Appellant, having refused or failed to take any part in the hearing before the learned Trial Judge or to lead any evidence or to address any arguments to that Court, should not have been permitted by the Court of Appeal to raise or rely upon any matters not raised in the Court below and should not be permitted to raise or rely upon such matters again on the hearing of this Appeal. Alternatively any such grounds ought to be most jealously scrutinised and effect given to them only

if the Court is satisfied that no satisfactory explanation could have been offered by the Respondent if an opportunity had been afforded to him at the trial.

15. The Respondent will therefore submit that this Appeal should be dismissed for the following (among other)

R E A S O N S

(1) BECAUSE the Respondent transferred the said land to the Appellant to hold in trust for him the Respondent.

(2) BECAUSE the learned Trial Judge properly exercised his discretion in refusing to grant the Appellant's application for an adjournment of the hearing.

(3) BECAUSE the evidence of the Respondent as to the creation of such trust was uncontradicted and on such evidence no other reasonable conclusion could be reached.

(4) BECAUSE there was no material conflict between the evidence given by the Respondent and that given by his agent Perumal.

(5) BECAUSE the evidence of non payment by the Appellant of the sum of $7,000 was admissible by virtue of the provisions of Section 92(f) of the Evidence Ordinance 1950 alternatively because such evidence was not adduced to vary the terms of the transfer.

(6) BECAUSE recognition of the trust created by the Respondent does not conflict with the provisions of the Land Code.

(7) BECAUSE in the light of the trust created by the Respondent, the Appellant is not entitled to rely upon the fact that he is the registered owner of the land to enable him to retain the ownership of the land as against the Respondent.

(8) BECAUSE there was no evidence that the Respondent in creating such trust

practised any deceit so as to taint the transaction with illegality.

(9) BECAUSE the Respondent did not seek nor was he compelled to found his claim on any illegal contract or to plead its illegality to support his claim.

(10) BECAUSE the Appellant did not put forward at the trial any of the matters which he raised before the Court of Appeal and accordingly should have been precluded from relying upon such matters before that Court and on this Appeal.

(11) FOR the reasons contained in the Judgment of the learned Trial Judge.

(12) FOR the reasons contained in the Judgment of the Court of Appeal.

WILLIAM STABB

No.60 of 1960

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N

A.R.P.L. PALANIAPPA CHETTIAR

—— v ——

P.L.A.R. ARUNASALAM CHETTIAR

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