

The Official Assignee of the Estate of Cheah Soo Tuan - - *Appellant*

v.

Khoo Saw Cheow - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS.
(SETTLEMENT OF PENANG.)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 29TH JULY, 1930.

Present at the Hearing :

VISCOUNT DUNEDIN.

LORD TOMLIN.

LORD RUSSELL OF KILLOWEN.

[*Delivered by LORD TOMLIN.*]

This is an appeal by the official assignee of the estate of Cheah Soo Tuan, a bankrupt, from an order of the Court of Appeal of the Straits Settlements (Settlement of Penang) dated the 8th April, 1929.

By the order of which the appellant complains the Court of Appeal set aside a judgment dated the 17th July, 1928, of Mr. Justice Sproule and ordered a new trial.

Mr. Justice Sproule had declared that a conveyance dated the 2nd June, 1926, by the bankrupt to his secondary wife, the respondent, of No. 121, Beach Street, Penang, was void as against the appellant and ought to be set aside, and ordered delivery up of such conveyance.

By Section 50 of Ordinance No. 44 relating to Bankruptcy it is provided that --

“ Any settlement of property not being . . . a settlement made in favour of a purchaser . . . in good faith and for valuable consideration . . . shall if the settlor becomes bankrupt within two years after the date of this settlement be absolutely void as against the official assignee.”

And also that—

“Settlement for the purposes of this section includes any conveyance or transfer of property. . . .”

The bankrupt was the sole proprietor of a *Chop* or business called Guan Hup Hin.

On the 10th June, 1927, the bankrupt was adjudicated bankrupt upon an act of bankruptcy dated the 18th May, 1927.

Less than a year before the act of bankruptcy, namely, on the 2nd June, 1926, the bankrupt had conveyed a property belonging to him to his secondary wife, the respondent.

The property in question with an adjoining piece of land, had been purchased by the bankrupt in November, 1919, from Yap Chor Ee for \$35,000, of which \$30,000 was left on mortgage to Yap Chor Ee.

Later the bankrupt sold the adjoining land for \$10,000, which he paid to Yap Chor Ee, thus reducing the latter's mortgage to \$20,000.

By the conveyance of the 2nd June, 1926, the property in question was conveyed to the respondent, subject to Yap Chor Ee's mortgage for \$20,000. The consideration expressed to be paid was \$5,000, and the conveyance contained a covenant by the respondent to pay all principal moneys secured by the mortgage and to keep the bankrupt indemnified against the same.

On the 24th August, 1927, the appellant moved the Supreme Court for an order setting aside the conveyance under Section 50 of Ordinance No. 44.

At the trial certain facts were agreed, and the learned Judge then called on the respondent's counsel to begin, ruling that the onus of proof lay on the respondent.

In the course of the trial the depositions of the bankrupt on his public examination, and of the respondent upon her examination under Section 31 of the Ordinance were “formally put in by consent.”

The learned Judge reserved his judgment and delivered it on the 26th April, 1928.

He stated that the respondent's counsel at the hearing accepted the burden of proof upon admitted facts. He outlined those admitted facts, which were in substance the facts to which reference has already been made. Upon the construction of Section 50 of the Ordinance he held that the burden of proof was thrown upon the respondent. He further held that \$25,000 was under value, but he added that he could not find it was gross under-value.

At the end of his judgment the learned Judge said:—

“Upon the whole I could not find that she” [i.e. the respondent] “had proved that the conveyance to her of the property was genuine—I thought indeed that it was tainted with fraud intrinsically and apart from any question of the onus of proof.”

He then declared the conveyance absolutely void.

Upon appeal by the respondent the Court of Appeal directed a new trial, holding that the trial Judge had adopted a wrong construction of Section 50 of the Ordinance with regard to the onus of proof, and had accordingly misdirected himself. Mr. Justice Deane who delivered the leading judgment concluded his judgment in the following words :—

“ For these reasons I have come to the conclusion that the learned Judge misdirected himself as to the onus, and that the result of the misdirection was very serious, since it coloured his whole outlook as to the facts and substantially prejudiced the appellant’s ” [meaning thereby the present respondent’s] “ chances.

“ It is true that the learned Judge, after stating that he could not find that she (the appellant) had proved that the conveyance of the property to her was genuine proceeded, ‘ I thought, indeed, that it was tainted with fraud intrinsically, and apart from the question of the onus of proof,’ but putting aside the difficulty of understanding what is meant by saying that a conveyance is tainted with fraud ‘ intrinsically ’ when on the face of it there is nothing suspicious except that it is a conveyance by a husband to a wife, I do not think that a mere casual expression of this kind with nothing to support it can cure so serious a defect as there was in this trial. In my opinion the judgment of the lower Court should be set aside and a new hearing of the motion ordered. In view of the fact that appellant’s Counsel in the Court below made no demur to the ruling that the onus was upon him, I think there should be no order as to the costs of this appeal ; the costs of the first hearing of the Court below should abide the result of the new hearing.”

Their Lordships are of opinion (1) that the trial Judge was wrong in his construction of Section 50 of the Ordinance ; (2) that there was nothing in the admitted facts to shift the onus of proof to the respondent, and (3) that the respondent ought not to be precluded from objecting to the judgment, as the Judge’s note shows that the respondent’s counsel was called upon to begin as the result of the ruling given as to onus.

The fact that the wrong party was called upon to begin, taken alone, might not be sufficient ground for a new trial. Here, however, there was more. The trial Judge had taken an erroneous view as to the law in regard to onus. His mind was coloured by that view, and he was thereby disabled from weighing evenly the evidence. Thus the respondent was placed at a disadvantage as the direct result of the trial Judge’s error.

In their Lordships’ judgment the order of the Court of Appeal was correct and the language of Mr. Justice Deane, which has been already quoted, adequately and accurately expressed the position and the conclusions which should follow from it.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed.

In the Privy Council.

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DELIVERED BY LORD TOMLIN.

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