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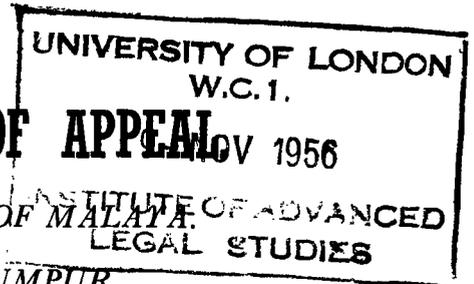
No. 45 of 1951.

In the Privy Council.

ON APPEAL FROM THE COURT OF APPEAL

SUPREME COURT OF THE FEDERATION OF MALAYA.

IN THE HIGH COURT AT KUALA LUMPUR.



APPELLANT'S CASE.

Between

P. C. RM. L. LETCHUMANAN CHETTIAR (Plaintiff) - - *Appellant*

and

A. L. S. SADAYAPPA CHETTIAR (Defendant) - - - *Respondent.*

CASE FOR THE APPELLANT.

1. This is an appeal from a Judgment of the Court of Appeal of the Supreme Court of the Federation of Malaya given upon the 29th May 1951 whereby the Court allowed an appeal from the Judgment of Mr. Justice Charles Abbott sitting in the High Court at Malacca on the 6th October 1950 and entered judgment for the Respondent with costs of the hearing before Mr. Justice Abbott but made no order as to costs of the appeal.

RECORD.
pp. 13 to 17

2. The matters in issue arise out of the repayment on the 25th September 1944 by the Respondent as mortgagor to the Appellant as mortgagee of certain sums due under an Indenture of Statutory Mortgage dated the 6th October 1941. The said Indenture had been entered into between the parties before the Japanese occupation of Malaya but the repayment was made in Japanese occupation currency.

3. The principal question arising on the appeal is whether upon the construction of certain sections of the Debtor and Creditor (Occupation Period) Ordinance 1948 being Ordinance No. 42 of 1948 of the Federation of Malaya the said repayment of 25th September 1944 should be revalued and should be a valid discharge of the debt due under the said mortgage only to the extent of such revaluation.

RECORD.

4. Section 4 of the said Ordinance provides as follows:—

(1) Subject to the provisions of sub-section (2) of this section where any payment was made during the occupation period in Malayan currency or occupation currency by a debtor or by his agent or by the custodian or a liquidation officer purporting to act on behalf of such debtor to a creditor or to his agent or to the custodian or a liquidation officer purporting to act on behalf of such creditor and such payment was made in respect of a pre-occupation debt such payment shall be a valid discharge of such pre-occupation debt to the extent of the face value of such payment.

(2) In any case

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(a) Where the acceptance of such payment in occupation currency was caused by duress or coercion; or

(b) Where such payment was made after the 31st December 1943 in occupation currency in respect of a pre-occupational capital debt exceeding 250 dollars in amount which

(i) was not due at the time of such payment; or

(ii) if due was not demanded by the creditor or by his agent on his behalf and was not payable within the occupation period under a time essence contract; or

(iii) if due and demanded as aforesaid was not paid within three months of demand or within such extended period or was mutually agreed between the creditor or his agent and the debtor or his agent; or

(c) Where such payment was made in occupation currency to a custodian or liquidation officer in respect of a pre-occupation capital debt exceeding 250 dollars in amount except where payment as aforesaid was caused by duress or coercion;

such payment shall be revalued in accordance with the scale set out in the Schedule to this Ordinance and shall be a valid discharge of such debt only to the extent of such revaluation.

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(3) In sub-section (2) of this section

(a) the expression "pre-occupation capital debt" means any pre-occupational debt other than a sum accruing due after the commencement of the occupation period in respect of

(i) rent; or

(ii) interest;

(b) the word "demand" includes the rendering of an account for goods supplied or services rendered.

(4) Where any pre-occupation debt as is mentioned in sub-section (1) of this section purports to have been wholly or partly discharged during the occupation period by payment in occupation currency no interest on such

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debt or any portion thereof purporting to have been so discharged shall be chargeable in respect of the period between the date of such payment and the date of the commencement of this ordinance notwithstanding that such debt or portion thereof may under the provisions of sub-section (2) of this section be deemed to be partly undischarged. RECORD.

(5) Section 2 of the said Ordinance is in these terms:—

2. (1) In this Ordinance, unless the context otherwise requires, the following expressions shall have the meanings hereby respectively assigned to them, that is to say—

10 “absent” means absent from territories under the sovereignty, or in the occupation, of the Occupying Power, and an individual who died during the occupation period while so absent shall be deemed to have continued to be so absent, and a body corporate shall be deemed to have been so absent while its registered office was not in any such territory;

 “agent”, in relation to the occupation period, includes a person deemed to have been an agent in accordance with the provisions of sub-section (2) of this section, but does not include the Custodian or a liquidation officer;

20 “Custodian” means the person or persons appointed by the Occupying Power as Custodian of Enemy Property, or to receive rents, interest, debts, or other moneys due to enemies of the Occupying Power, and includes any person acting, or purporting to act, under his or their authority;

 “debt” means a sum certain in money payable by virtue of a legal obligation and recoverable when due by process of law;

30 “liquidation officer” means any person appointed by, or purporting to act under the authority of, the Occupying Power or the Custodian and acting as liquidator of any corporation, company, firm, association, club or any professional or commercial undertaking;

 “Malaya” means the territories now comprising the Federation of Malaya and the Colony of Singapore;

 “Malayan currency” means the dollar currency in circulation and constituting legal tender in the territories now comprising Malaya before or after the occupation period;

 “occupation currency” means any currency issued by the Occupying Power and in circulation during the occupation period, but does not include Malayan currency;

40 “occupation debt” means a debt payable by virtue of an obligation incurred during the occupation period and accruing due at any time;

 “occupation period” means the period commencing on the fifteenth day of February, 1942, and ending on the fifth day of

RECORD.

September, 1945, both dates inclusive, and includes any part of such period;

“Occupying Power” means the Power or Powers exercising, during the occupation period, the functions of Government in Malaya;

“pre-occupation debt” means a debt payable by virtue of an obligation incurred prior to the commencement of the occupation period and accruing due at any time;

“prescribed” means prescribed by Rules made under this Ordinance;

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“property” includes any thing in action and any interest in movable or immovable property;

“time essence contract” means a contract the parties to which intended that it should be of the essence of the contract that payments under it should be made on a date or dates certain.

(2) For the purposes of this Ordinance any person who, immediately prior to the commencement of the occupation period, had authority (hereinafter referred to as his “former authority”) to act as agent for another (hereinafter referred to as his “former principal”) shall be deemed to have been the agent of his former principal to the extent that he continued, during the occupation period and while his former principal was absent, to act on behalf of his former principal in any matter which would have been within the scope of his former authority, notwithstanding that his former authority had, upon the commencement of, or during, the occupation period and while his former principal was absent, been determined in any of the following ways, that is to say—

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(a) by operation of law, as a result of the occupation of Malaya by the Occupying Power;

(b) by the expiration of the period of such person’s agency, except where such agency was for the purpose of a particular transaction only;

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(c) in any other manner:

Provided that no such person shall be deemed as aforesaid to have been the agent of his former principal for the purpose of any transaction with a third party if such third party had, or would, if he had exercised due diligence, have had, at the time of such transaction, notice of any fact or facts which had determined such person’s former authority in any manner other than those mentioned in paragraphs (a) and (b) of this sub-section.

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(3) Notwithstanding anything contained in sub-section (2) of this section, if the former authority of the agent was determined during the occupation period by the former principal present in Malaya at the date of such determination, such agency shall not be deemed to have revived by reason of the absence of the former principal occurring subsequently to the date of such determination.

(6) Section 11 of the said Ordinance provides as follows:—

RECORD.

11. (1) In any case where a debt purporting to have been discharged in whole or in part by payment in occupation currency is, by virtue of the provisions of this Ordinance, deemed to be partly undischarged, and where the payment of such debt before it purported to be discharged as aforesaid was secured by a charge over property movable or immovable and such charge has, or purports to have, been discharged by the chargee or by his agent or by the Custodian or a liquidation officer, such discharge shall (subject to the provisos next following) be void as against the chargor or his personal representatives and any person claiming through or under him or them, and the charged property shall stand charged with the revalued balance of the debt and interest, if any, accrued and unpaid and to accrue thereon:

Provided that—

(a) where the charged property is movable property and such property has, after its discharge or purported discharge as aforesaid, been transferred or charged to a *bona fide* purchaser or chargee for value; or

(b) where the charged property is immovable property and such property has, after its discharge or purported discharge as aforesaid, been transferred or charged to a *bona fide* purchaser or chargee for value without the intervention in the transaction of the Custodian or a liquidation officer;

the discharge to the chargor by the chargee or his agent shall not be void as aforesaid, but the title of such *bona fide* purchaser or chargee for value, or any person claiming through or under him shall prevail against the title of the original chargee.

(2) The provisions of sub-section (1) of this section shall take effect without prejudice to any provision of any law for the time being in force relating to the rectification of titles to land affected by transactions during the occupation period which provides for the voiding of discharges by the Custodian or a liquidation officer.

(3) Where the rights of a creditor in relation to any charge have been deemed, by virtue of sub-section (1) of this section, not to have been extinguished, the creditor may give notice in writing of not less than one month calling upon the debtor and any third party who furnished the security to reinstate or replace such charge and to execute all documents and do all acts necessary for that purpose.

(4) When the debt was secured by a charge of immovable property, the debtor, or any third party who furnished the security, to whom a notice has been given under sub-section (3) of this section may, in lieu of reinstating the security by the execution of a new charge, require the Registrar of Titles or Registrar of Deeds, as the case may

RECORD.

be, to reinstate in the Register the charge and (unless the rights of any person appearing from the Register to be a purchaser or chargee who purchased or advanced money on or after the date of the purported discharge, would thereby, without the consent of such person, be affected) the Registrar shall rectify the Register accordingly.

(5) In any case where—

- (a) the debtor or a third party who furnished the security makes default in complying with a notice given by a creditor under sub-section (3) of this section; or
- (b) the rights of any person appearing from the Register to be a purchaser or chargee who purchased or advanced money on or after the date of the purported discharge, will be affected by the reinstatement of a security; or
- (c) any difference or dispute has arisen touching the reinstatement of any security under this section;

the creditor or the debtor or any person interested may within one year from the commencement of this Ordinance apply to the High Court by way of originating motion or summons for such relief as the nature of the case requires; and the Court may determine any claim by any person to be a *bona fide* purchaser or chargee for value within the proviso to sub-section (1) of this section and may make an order that the security shall not be reinstated or may make an order for the reinstatement of the security or its replacement with other security for such amount as may be specified in the order, or may make such further or other order as to the Court shall seem fit, and may direct that the Register shall be rectified accordingly. 20

(6) Where any person neglects or refuses to comply with an order under sub-section (5) of this section directing him to execute any transfer, conveyance, charge, contract or other document, or to indorse any negotiable instrument, the Court may, on such terms and conditions, if any, as may be just, order that the transfer, conveyance, charge, contract or other document shall be executed or that the negotiable instrument shall be indorsed by such person as the Court may nominate for that purpose, and a transfer, conveyance, charge, contract, document or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it. 30

(7) In any case where the amount of the debt as re-valued does not exceed one thousand dollars, an application under sub-section (5) of this section may be made to the Sessions Court in lieu of the High Court in accordance with the procedure of the Sessions Court and, in any such case, the Sessions Court shall have and exercise the jurisdiction conferred upon the High Court by that sub-section. 40

(8) The High Court or the Sessions Court, as the case may be, when making an order under sub-section (5) of this section, on being

satisfied that the security will be replaced by an equivalent security, may direct that the provisions of sub-section (3) or (4) of this section, whichever is applicable, shall cease to apply in respect of the immovable property which was the subject-matter of the original security, and, on the production of such order to the registering authority, the charge, caveat or assurance evidencing the security shall be removed from the Register. RECORD.

(9) In this section—

10 the expression “*bona fide* purchaser or chargee” means a purchaser or chargee who has obtained title otherwise than by fraud, misrepresentation, duress or coercion to which he was a party, or by forgery;

“charge” includes a charge or mortgage, whether legal or equitable, and whether created by an instrument or memorandum or by deposit of documents of title or otherwise; and “chargor,” “chargee” and “charged” have a corresponding meaning;

20 “discharge” of charged or mortgaged property includes a reconveyance, re-assignment or discharge of charge whether by a memorandum or instrument or by delivery up of documents of title;

“Register” includes, as well as a Register of Titles or Register of Deeds, as the case may be, a register of stocks, shares, debentures, debenture stock, or bonds.

The Schedule to the said Ordinance sets out the Scale of the value of occupation currency for the purpose of re-valuation under the provisions of section 4 above.

30 (7) By the said Indenture of Statutory Mortgage of the 6th October 1941 certain lands at Machap Settlement of Malacca were conveyed by the Respondent to the Appellant by way of mortgage to secure the repayment of the sum of 26,000 dollars and interest thereon. On the 16th July 1943 the Respondent paid the sum of 10,000 dollars and on the 25th September 1944 a further sum of 16,000 dollars both payments being made in occupation currency together with payment in such currency of all interest owing under the said mortgage whereupon the property comprised in the said mortgage was reconveyed and the title deeds returned to the Respondent. The revalued amount of the payments made as aforesaid under the provisions of the Schedule to the aforementioned Debtor and Creditor (Occupation Period) Ordinance 1948 hereinafter called the said Ordinance is 40 11,142.86 dollars. If therefore the provisions of sub-section (2) (b) (iv) of the said Ordinance apply to the said repayment so that the same was a valid discharge of the said debt only to the extent of such revaluation the Respondent was liable to the Appellant at the commencement of the present proceedings to the amount of the balance of the capital sum secured by the said mortgage with interest.

RECORD.
p. 2

(8) The action was instituted by the Appellant by Originating Summons dated the 30th December 1949. The said Summons in effect claimed:

- (1) A declaration that the Indenture of Reconveyance dated the 25th September 1944 was void.
- (2) A declaration that the lands the subject of the mortgage were charged with the payment of the capital sum of 14,857.14 dollars together with interest thereon at the rate of 6 per cent. per annum from the 1st October 1949 until repayment of the said capital sum. 10
- (3) An order for delivery up by the Respondent to the Appellant of the title deeds of the said lands.
- (4) Alternatively an order that the Respondent should execute in favour of the Appellant a legal mortgage securing payment to the Appellant of the said sum of 14,857.14 dollars with interest as aforesaid.

pp. 3 & 4

(9) This Summons was supported by an affidavit affirmed on the 30th December 1949 by S. P. Karuppiah Attorney of the Appellant who after referring to the terms of the Indenture of Statutory Mortgage dated the 6th October 1941 and to the two repayments and the reconveyance deposed that neither the Appellant nor any person on his behalf had demanded payment of the principal sum due under the said mortgage. 20

p. 5

(10) An affidavit in answer to the affidavit referred to in paragraph 9 was affirmed on the 7th August 1950 by P. Ramalingam Pillay. He deposed that he had been Attorney of the Respondent during the occupation period and that demands for repayment of the mortgage debt had been made verbally by the Appellant's then Attorney down to September 1944. In paragraph 6 of the said affidavit he deposed "I have no record of the dates upon which verbal demands were made but I say that the final payment made on the 25th September 1944 was made within 3 months of demand by the Plaintiff's then Attorney." 30

p. 6

p. 3

(11) The parties agreed by their Counsel before Mr. Justice Charles Abbott on the 6th October 1950 that the sole issue was whether the Appellant had demanded repayment of the mortgage debt on the footing that if he had not done so he would be entitled to reply upon the provisions of section 4 (2) (b) (ii) of the said Ordinance and to his claim that the payment should be revalued. It was further agreed by Counsel that the onus of proving that such a demand had been made was upon the Respondent.

p. 7

(12) Counsel on behalf of the Respondent called K. Murugappan the Respondent's Attorney. He identified Karuppiah who he said was in Court and said that the Appellant's Attorney several times during the occupation period went to the house where he was living with Ramalingam the Respondent's then Attorney to demand repayment of money lent by the Appellant. 40

(13) Counsel on behalf of the Appellant called no evidence and after both Counsel had addressed the Court Mr. Justice Charles Abbott found that the evidence called on behalf of the Respondent had failed to satisfy him that any demand was in fact made. He therefore gave judgment for the Appellant with costs. RECORD.

10 (14) The Respondent appealed to the Court of Appeal and the case was heard on the 29th May 1951 by Chief Justice Foster Sutton Mr. Justice Taylor and Mr. Justice Wilson. The Appellant contended that in constructing a statute the onus of proof rested on the person asserting the affirmative which was in truth the Respondent. He further contended that as no objection to the affidavit filed on behalf of the Appellant had been taken and as Counsel for the Respondent had agreed that the onus of proof was upon his client the Court even if against him on the question of construction should order a new trial. p. 15

(15) The Court allowed the appeal and entered judgment for the Respondent with costs in the Court below but in view of the concurrence of Counsel for the Respondent in the procedure adopted below made no order as to costs on the appeal. p. 17

20 (16) The only reasoned judgment with which the two other judges concurred without giving their reasons was that of Chief Justice Foster Sutton. After reciting the facts the various proceedings in the case and the contentions of the two parties the learned Chief Justice considered the construction of section 4 (2) (b) (ii) of the said Ordinance and held that the onus of proving that no demand for repayment had been made was upon the Appellant. He then considered the affidavit affirmed by Karuppiyah and filed on behalf of the Appellant and found that although it was not objected to by Counsel on behalf of the Respondent it did not contain admissible evidence under the provision of Order 36 rule 3 (1) of the Rules of the Supreme Court Straits Settlements. In those circumstances he found that the appeal should be allowed. pp. 13 to 17

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(17) The Learned Chief Justice then considered the question of a new trial. He found that it must have been apparent to the Appellant that it was the Respondent's intention to contest the Appellant's averment that the last payment was made without any previous demand because the issue was clearly raised in the affidavit affirmed on the 7th August and filed on the 19th. He further found that there was no suggestion that the Appellant had been taken by surprise. The learned Chief Justice applied the principle in *Shedden v. Patrick* (1869) L.R. 1. H.L. Sc. 470-541 and concluded that as the Appellant had chosen to proceed in the way in which he had there was no reason to order a new trial.

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(18) On the 3rd October the Court of Appeal granted to the Appellant final leave to appeal from the said judgment of the Court of Appeal. p. 19

RECORD.

(19) The Appellant submits that the judgment of the Court of Appeal should be reversed and that judgment be entered for the Appellant or alternatively that a new trial be ordered for the following amongst other

REASONS.

1. Because the judgment of Mr. Justice Charles Abbott was right and should be affirmed.

2. Because upon the true construction of section 4 (2) (b) (ii) of the said Debtor and Creditor (Occupation Period) Ordinance 1948 the onus of proving that a demand for repayment of a debt has been made is upon the debtor. 10

3. Because the admission by Counsel on behalf of the Respondent that the onus of proof was upon the Respondent induced the Appellant to refrain from calling evidence and was conclusive.

4. Because no objection having been taken to the affidavit affirmed by Karuppiyah the contents of the said affidavit were *prima facie* evidence that no demand had been made on behalf of the Appellant. 20

5. Because Mr. Justice Charles Abbott having rejected the evidence of Murugappan there was no evidence of demand on behalf of the Respondent.

6. Because if Mr. Justice Charles Abbott was wrong in his acceptance at the trial of the onus of proof substantial injustice was caused to the Plaintiff and the Court of Appeal should have ordered a new trial.

7. Because the judgment of the Court of Appeal was wrong and should be reversed.

H. J. AILLMORE

In the Privy Council.

On Appeal from the Court of Appeal.

*SUPREME COURT OF THE FEDERATION OF
MALAYA*

IN THE HIGH COURT AT KUALA LUMPUR

P. C. RM. L. LETCHUMANAN CHETTIAR

and

A. L. S. SADAYAPPA CHETTIAR.

Case for the Appellant.

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Appellant's Solicitors.