

In the Privy Council

P.C. No. 45 OF 1956 UNIVERSITY OF LONDON
W.C.1.

ON APPEAL FROM THE COURT OF APPEAL

9 - NOV 1956

SUPREME COURT OF THE FEDERATION OF MALAYA INSTITUTE OF ADVANCED

LEGAL STUDIES

IN THE HIGH COURT AT KUALA LUMPUR

Between:

P. G. Rm. L. LETCHUMANAN CHETTIAR

(Plaintiff)

Appellant

and

A. L. S. SADAYAPPA CHETTIAR

(Defendant)

Respondent

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Case for the Respondent

1. This is an appeal from a judgment and decree dated 29th day of May 1951, of the Court of Appeal, Supreme Court of the Federation of Malaya, in the High Court at Kuala Lumpur, reversing a judgment and decree dated 6th day of October 1950, of Abbott, J. sitting as a judge of first instance in the said Honourable Court in the Settlement of Malacca in favour of the present Appellant as Plaintiff. The order of the said Court granting leave to appeal to Her Majesty in Council is dated the 3rd day of October 1951 (No. 13 R. of P).

RECORD

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2. The questions raised by this Appeal concern the application of certain provisions of the Debtor and Creditor (Occupation Period) Ordinance 1948, Ordinance No. 42 of 1948 Federation of Malaya

(hereinafter referred to as “ the said Ordinance ”). The said Ordinance which came into effect on the 1st day of October 1949, was designed to regulate the relationship between debtors and creditors in respect of debts incurred prior to and during the period of enemy occupation of the territories comprising the Federation of Malaya.

3. The period of occupation (as defined by the said Ordinance) was from the 15th February 1942 to the 5th September 1945. During this period the Japanese issued a new dollar currency (referred to in the said Ordinance as “ occupation currency ”) which circulated freely throughout the said territories side by side with the existing Malayan dollar currency. Occupation currency was commonly used to meet and discharge liabilities and debts but during the latter part of the occupation period it depreciated severely in terms of Malayan dollars. 10

4. To meet this situation the said Ordinance provided for relief in certain circumstances and subject to certain conditions. The relevant provisions are as follows :

“ S.4(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 to a 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 to the extent of the face value of such payment. 20

(2) In any case

(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 thirty-first day of December 1943, in occupation currency in respect of a pre-occupation capital debt, exceeding two hundred and fifty dollars in amount, which— 30

- (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 . . .

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.

10 5. By an Indenture of Statutory Mortgage dated the 6th day of October 1941 (hereinafter referred to as " the said mortgage ") made between the Appellant and the Respondent certain lands in the settle-
ment of Malacca were conveyed by the Respondent to the Appellant by way of mortgage to secure the repayment by the Respondent to the Appellant of the capital sum of \$26,000 (and interest thereon).

20 6. On the 16th day of July 1943 the Respondent paid to the Appellant the sum of \$10,000 and subsequently on the 25th day of September 1944 the Respondent paid to the Appellant a further sum of \$16,000 together with all interest accrued due. Both of these payments were made in occupation currency and were referable to the said mortgage. The lands were accordingly released from the said mortgage and by an Indenture of Reconveyance dated 25th day of September 1944 they were reconveyed by the Appellant to the Respondent.

7. The Appellant now contends that the payment of \$16,000 made on the 25th September 1944 falls within section 4(2) (b) (ii) of the said Ordinance in that it was made after the 31st December 1943 and, though due, was not demanded by the Appellant or by his agent on his behalf. He therefore claims that it should be revalued in accordance with section 4 (2) and calculates that of the capital sum of \$26,000 secured by the said mortgage the sum of \$14,857.14 remains unpaid. The basis of the calculation is as follows :—

	Payment of \$10,000 on the 16th July 1943	...	\$10,000
30	Payment of \$16,000 on the 25th September 1944		
	revalued at \$100 Malayan currency for every		
	\$1,400 occupation currency	\$1,142.86
			\$11,142.86
	\$26,000 —	\$11,142.86 =	\$14,857.14

8. The Respondent has contended throughout that the payment of \$16,000 was demanded by the Appellant's agent, and accordingly that section 4 (2) has no application. This is the sole issue of fact between the parties.

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9. The Appellant having given notice to the Respondent under Section 11 (3) of the said Ordinance to reinstate the said mortgage and the Respondent having refused to comply with such notice, the Appellant instituted proceedings pursuant to the provisions of Section 11 (5) of the said Ordinance by an Originating Summons in the High Court of the Federation of Malaya dated 30th December 1949 (No. 1 R of P). By this summons the Appellant claimed a declaration that the Indenture of Reconveyance dated the 25th September 1944 was void and that the lands remained subject to the said mortgage and were now charged with the capital sum of \$14,857.14 together with interest.

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10. The Originating Summons was supported by an affidavit affirmed on the 30th December 1949 by one Karuppiah, the Appellant's present attorney, and setting out the history of the transaction. Paragraph 4 of this affidavit reads as follows: "My Principal the Plaintiff nor any other person on his behalf demand payment of the principal sum due under the said mortgage"; but the affidavit nowhere discloses the source of the deponent's information, as required by Order XXXVI Rule 3 (1) of the Rules of the Supreme Court, Straits Settlements (No. 2 R of P). In opposition to the summons the Respondent filed an affidavit affirmed on the 7th August 1950 by one Ramalingam Pillay, who deposed that he had been the Respondent's attorney in charge of his Malacca business during the occupation period and that the Appellant's then attorney (being a person other than the said Karuppiah) had made to the deponent a succession of oral demands for repayment during the period July 1943 to September 1944 in consequence of which the repayments above mentioned were made (No. 3 R of P).

11. The Originating Summons was heard before Abbott, J. on the 6th October 1950. At the outset of the hearing it was submitted by the Appellant's advocate that the onus was upon the Respondent debtor to prove that a demand for payment had been made so as to exclude the

operation of sub-section 2 (b) (ii) of Section 4 of the said Ordinance. This submission seems to have been accepted by the Respondent's advocate, and formed the basis of the decision of the learned Judge.

12. The only evidence before the learned Judge consisted of the affidavits aforesaid and the oral testimony of one Murugappan, the Respondent's present attorney, who testified (*inter alia*) that during the occupation period the said Karuppiah was not the Appellant's attorney and that the person who was during that period the Appellant's attorney several times and in the hearing of the witness demanded from the said Ramalingam Pillay the repayment of money loaned by the Appellant to the Respondent. The Appellant's advocate did not call any evidence, although the said Karuppiah was present at the hearing. Abbott, J. without giving any reasons held that the evidence called on behalf of the Respondent had failed to satisfy him that any demand was in fact made for repayment. He accordingly gave judgment for the Appellant (No. 6 R of P).

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13. In deciding as he did, Abbott, J. was, it is respectfully submitted, wrong : first in holding that the onus was upon the Respondent debtor, and secondly or in the alternative in failing to give effect to the only admissible evidence before the Court.

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14. Notice of Appeal against the judgment of Abbott, J. was given on the 25th October 1950 and the Memorandum of Appeal was filed on the 28th October 1950. By the memorandum it was contended on behalf of the Respondent (*inter alia*) :

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(a) That the finding of the learned Judge was against the weight of the evidence and was against the only admissible evidence adduced ;

(b) That the learned Judge should have rejected the said affidavit evidence of the said Karuppiah on the ground that such evidence was hearsay given on information and belief and that since no source for the information was stated the evidence was inadmissible ;

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(c) That the learned Judge was wrong in holding or ruling that on the only issue—namely whether a demand or demands for payment had been made—the burden of proof lay in the first place on the Respondent ;

(d) That since the Appellant's case was that by virtue of the provisions of the said Ordinance the debt was deemed to be partly undischarged and since the Appellant relied on Section 4 (2) (b) (ii) of the said Ordinance the learned Judge should have held :

(i) That it was essential to the Appellant's case that he should assert the fact that no demand for payment of the said debt was made ; 10

(ii) That by virtue of Section 101 of the Evidence Ordinance 1950 (No. 11 of 1950 Federation of Malaya) the burden of proving the fact lay on the Appellant ;

(iii) That the Appellant wholly failed to discharge that burden.

p. 13 15. The judgment of the Court of Appeal was given on the 29th May 1951 by Foster Sutton, C.J. (Taylor and Wilson, J.J. concurring). The Court held (*inter alia*) :

(a) That where a Plaintiff was seeking to obtain a revaluation under Section 4 (2) (b) (ii) of the said Ordinance of a payment made to him by a Defendant the onus of proof that no demand was made was upon the Plaintiff ; 20

(b) That the present Appellant in seeking relief which he could only obtain if he could show that payment was made in the circumstances set out in Section 4 (2) (b) (ii) was asserting that a certain state of facts was absent and in order to succeed was obliged to prove the averment positively ;

(c) That paragraph 4 of the said Karuppiah's affidavit dated 30th December 1949 did not contain facts which the deponent was able of his own knowledge to prove as required by Order XXXVI 30

r.3 (1) of the Rules of the Supreme Court Straits Settlements and was therefore inadmissible ; nevertheless the present Respondent having failed to object to it at the trial its technical inadmissibility should be disregarded ;

(d) That with reference to its evidentiary value in discharging the onus of proof which was upon the present Appellant it completely failed in its purpose ;

10 (e) That, since there was no room for any suggestion that the nature of the defence raised by the present Respondent at the hearing had taken the present Appellant by surprise, the latter was not entitled to a retrial for the purpose of adducing further evidence (No. 10 R of P).

16. The Respondent humbly submits that the Appeal should be dismissed for the following (among other)

REASONS

- 20 (1) *Because* upon the true construction of the said Ordinance the onus of proving that payment was not demanded lies on the creditor, namely the Appellant ;
- (2) *Because* no admissible evidence that payment was not demanded was ever tendered by the Appellant ;
- (3) *Because* the only admissible evidence which was tendered to the learned trial Judge clearly established that demands for repayment had been made by or on behalf of the Appellant ;
- (4) *Because* the Appellant having had an opportunity to call evidence in rebuttal before the trial Judge elected not to do so ;
- (5) *Because* the judgment of the Court of Appeal was right.

C. HARVEY.

G. R. F. MORRIS.

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Case for the Respondent

LAWRANCE, MESSER & CO.,

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