

P. C. RM. L. Letchumanan Chettiar - - - - - Appellant

v.

A. L. S. Sadayappa Chettiar - - - - - Respondent

FROM

**THE COURT OF APPEAL, SUPREME COURT OF THE
FEDERATION OF MALAYA**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 12TH JANUARY, 1953

Present at the Hearing:

LORD NORMAND

LORD COHEN

SIR JOHN BEAUMONT

[Delivered by LORD NORMAND]

This is an appeal from a judgment of the Court of Appeal of the Supreme Court of the Federation of Malaya reversing a judgment of Abbott J. sitting as judge of first instance in the High Court at Malacca. The questions at issue are concerned with the application of certain provisions of the Debtor and Creditor (Occupation Period) Ordinance No. 42 of 1948 Federation of Malaya, which came into effect on 1st October, 1948, and was designed to regulate the relationship of debtor and creditor as regards debts incurred before and during the enemy occupation of the territory of the Federation. The period of occupation as defined by the Ordinance was from the 15th February, 1942 to the 5th September, 1945 (Section 2 (1)).

In this period the Japanese issued a new dollar currency, referred to in the Ordinance as "occupation currency" which circulated freely throughout the Federation side by side with the existing Malayan currency. Occupation currency was used to meet and discharge liabilities and debts but in the latter part of the occupation period it depreciated severely in terms of Malayan dollars and finally became valueless. It was to remedy injustices suffered by creditors who were repaid in depreciated occupation currency that the Ordinance was made.

The relevant provisions of the Ordinance are:—Section 4 (1) Subject to the provisions of subsection (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 . . . to a creditor or to his agent . . . 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 . . . (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 . . . (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 . . . such payment shall be revalued in accordance with the scale

set out in the schedule to the Ordinance and shall be a valid discharge of such debt only to the extent of such revaluation." "Preoccupation capital debt" is defined as meaning any preoccupational debt other than a sum accruing due after the commencement of the occupation period in respect of rent or interest (section 4 (3)) and pre-occupation debt is defined as a debt payable by virtue of an obligation incurred prior to the commencement of the occupation period and accruing due at any time (section 2 (1)). There is a provision by which for the purposes of the Ordinance any person who had authority to act as agent for another immediately prior to the commencement of the occupation period was deemed, subject to certain safeguards, 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 (section 2 (2)). There are also provisions enabling the creditor whose debt had been secured by a charge over property to have the property charged with the revalued balance of the debt and interest. (Section 11.)

The facts are simple. In October, 1941, the appellant advanced 26,000 dollars to the respondent secured by a mortgage. The debt was a pre-occupation capital debt. On 16th July, 1943, the respondent paid to the appellant the sum of 10,000 dollars, and on 25th September a further sum of 16,000 dollars together with all interest accrued due. These payments were in occupation currency. The mortgaged land was accordingly released from the mortgage and reconveyed by the appellant to the respondent.

The appellant's contention is that the payment of 16,000 dollars made on 25th September, 1944, being a payment in occupation currency made after 31st December, 1943, had not been demanded, though it was due, by him or his agent on his behalf, and should therefore be revalued under section 4 (2). By the application of the schedule to the Ordinance the sum of 16,000 dollars would then fall to be revalued at 1,142.86 dollars, with the result that of the capital sum of 26,000 dollars only 11,142.86 dollars would have been repaid, leaving an unpaid balance of 14,857.14 dollars.

The appellant, after giving notice to the respondent to reinstate the mortgage under section 11 (3) of the Ordinance, and after the refusal of the respondent to comply, instituted proceedings pursuant to section 11 (5) of the Ordinance by an Originating Summons dated 30th December, 1949, claiming a declaration that the lands originally mortgaged were charged with the capital sum of 14,857.14 dollars with interest.

The Summons was supported by an affidavit of 30th December, 1949, by one Karuppiyah, who affirmed "I. I am the attorney of the . . . plaintiff." In the second and third paragraph of the affidavit the history of the transaction is narrated. In paragraph 4 it is said, "My Principal the plaintiff nor any other person on his behalf demand payment of the principal sum due under the said mortgage." It will be observed that the affidavit does not state that Karuppiyah was the appellant's attorney when or before the repayments were made. An affidavit in answer was made on 7th August, 1950, by Ramalingam Pillay, who deposed that he had been the respondent's attorney during the occupation period and that demands for repayment of the debt had been made verbally by the appellant's *then* attorney down to September, 1944. The implication is that Karuppiyah had not been the appellant's attorney in the period down to September, 1944. No application was made to the court in order that either Karuppiyah or Ramalingam Pillay's evidence should be tested by cross-examination.

The case came before Abbott J. on 6th October, 1950. It appears from the formal order made by the court that the affidavit of Karuppiyah was read in court but that the affidavit of Ramalingam Pillay was not read,

and there is nothing in the record to show that Abbott J. regarded either affidavit as of any importance. At the outset of the hearing the appellant's advocate submitted that the issue was one of "demand" (i.e., whether repayment had been demanded by the appellant before it was made) and that it was for the respondent to prove it. The respondent's advocate agreed, and the court accepted the view that the *onus* was on the respondent to show that a demand had been made. The respondent then adduced a witness named Murugappan. He deposed that he was the respondent's attorney and that he knew the appellant's attorney who was then in court. He said that in the occupation period he was in Malacca but that Ramalingam was then the respondent's attorney. He also said that the appellant's attorney was not then Karuppiah. As to the demand for repayment he said that in the occupation period Ramalingam and he lived in the same house and shared a room, and that the appellant's attorney came several times to their house and demanded payment in his hearing. He was cross-examined to credibility and in answer to one question he said that all the other people who were present when the demands were made were now in India. The appellant's advocate at the end of Murugappan's evidence said that he would call no evidence.

The judgment of Abbott J. is very brief. He said, "The evidence called upon the part of the defendant has failed to satisfy me that any demand was in fact made. There must, therefore, be judgment for the plaintiff with costs."

The respondent appealed and in the Court of Appeal the judgment was given by Foster Sutton C.J. with whom Taylor J. and Wilson J. concurred. The question mainly argued was that of *onus* and the learned Chief Justice held that the *onus* of proving no demand rested on the appellant. Their Lordships have not the smallest doubt that this is the correct view for it was the appellant who relied on the terms of the Ordinance and it was therefore for him to bring himself within them. The judgment of the Chief Justice on this point is not now seriously challenged. It is not necessary to say more on this aspect of the case, but it does appear from the judgment that in at least one case decided by the Court of Appeal after the date of the judgment of Abbott J. in this case, the same question had arisen and it is not unlikely that, as the appellant's counsel suggested, the practice in the Courts of first instance had been proceeding on an erroneous view on the question of *onus*.

The learned Chief Justice then dealt with an argument that Karuppiah's affidavit was inadmissible under Order XXXVI rule 3 of the Rules of the Supreme Court, Straits Settlement, because it contained statements which the deponent was not able by his own knowledge to prove. On this the Chief Justice held that since the affidavit had not been objected to at the trial the complaint came too late; but he held that the affidavit had little evidentiary value in discharging the *onus* of proof. Their Lordships find it unnecessary to consider this matter further, for it was not argued to their Lordships that if the *onus* was on the appellant it had been discharged, or that the Court of Appeal should have given judgment for the appellant.

The true issue in the appeal is the last point dealt with by the Chief Justice, whether in the circumstances a new trial should be ordered. He held that the proper course was not to order a new trial but to enter judgment for the respondent. The reason given by him is that the appellant knew what the issue was from the affidavit of Karuppiah and that there was no suggestion that he had been surprised. He cited a well-known passage from the speech of Lord Chelmsford in *Shedden v. Patrick* (1869) L.R. 1 H.L. Sc. 470 at 545:—"It is an invariable rule in all the Courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided

adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial."

In the argument which the appellant's counsel addressed to their Lordships there was no challenge of the principle enunciated by Lord Chelmsford and no contention that the appellant had been surprised. What was said was that the Trial Judge had decided the case on an erroneous view of the *onus* which had been accepted by him before any oral evidence was led, and that in consequence of the wrong direction upon *onus* the appellant had at the trial probably or possibly refrained from calling a witness whom he might have called, and that in this way the appellant had suffered injustice in consequence of the Judge's wrong direction.

An erroneous direction on *onus* is ground for granting a new trial, if the error has led to substantial injustice. That is the result of two decisions in the middle of last century cited by the appellant's counsel (*Doe d. Bather v. R. Brayne and another* (1848) 5 C.B. 655, *Brandford v. Freeman* (1850) 5 Exchequer 735), in which the effect of an erroneous ruling as to the right to begin was the point under consideration. The rule established by these and other cases is repeated in Order 39, rule 6, of the Rules of the Supreme Court in England. There was some doubt whether it formed part of the law of Malaya. Their Lordships were not referred to any Malayan Ordinance or order or printed rule excluding it and they will assume in favour of the appellant that it prevails in the Courts of Malaya (Ordinance No. 43 of 1948, s. 36 (2)). But it is necessary that the appellant should show that the condition on which the right to a new trial depends has been fulfilled. That condition is clearly stated by Pollock C.B. and by Parke B. in *Brandford v. Freeman*. Pollock C.B. in that case cited from his own judgment in *Edwards v. Matthews* 4 D. & L. 72, a passage in which he said "that the plaintiff or defendant having been called on to begin, when proof of the issue lay on his adversary, is not a sufficient ground for a new trial, unless it is manifest that the course of justice has been thereby interfered with, and some substantial injury effected." Parke B said, "This Court has settled, that when there has been a mere error with respect to the order of beginning, as deduced from the pleadings, no new trial ought to be granted, but that it is otherwise if the error has led to substantial injustice." In *Sanders v. Sanders* (1881) 19 Ch. D. 373, Jessel M.R., dealing with an application to bring forward fresh evidence before the Court of Appeal said: "The application is for an indulgence. He might have adduced the evidence in the Court below. That he might have shaped his case better in the Court below is no ground for leave to adduce fresh evidence before the Court of Appeal. As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in Court. The exact point on which evidence is wanted having thus been discovered, to allow fresh evidence to be introduced at that stage would offer a strong temptation to perjury." These considerations apply with at least equal force when the application is for a new trial. Their Lordships must therefore consider whether the appellant has succeeded in making out a case of manifest injustice. He can do this by satisfying the Board that there is a strong probability that he has been prejudiced by the error of the Trial Judge in throwing the *onus* on his opponent. In considering this question their Lordships are not disposed to attach importance to the fact that at the trial the appellant's advocate himself appears to have taken the initiative in inducing the error or to the fact that the respondent's advocate agreed that the *onus* lay on him and then changed his attitude in the Court of Appeal. The question where the *onus* lies is a question of law and an admission of law may be subsequently withdrawn. There is also some reason for thinking that the two advocates were only stating to the Trial Judge what at the time was held by the Courts of first instance to be the correct rule.

What is said is that at the moment when the respondent's only witness left the witness box, the appellant's counsel had to make up his mind whether he would adduce any evidence either to establish his own case or to rebut the respondent's case. He had in the appellant's attorney Karuppiah a witness present and available whom he might have called and who might have said that he was attorney for the appellant in the occupation period. Such evidence, if believed, would have given value to his own affidavit and would also have discredited the evidence for the respondent. It must, it was urged, be assumed that Karuppiah could have given this evidence for to suppose otherwise would be to assume that his affidavit was put forward dishonestly and for the purpose of deceiving the Court, and that was not a permissible assumption.

Ingenious as the argument is, their Lordships are unable to give their assent to it. It is all speculation and, if there were substance in it, it ought to have been developed in the Court of Appeal. It is going too far when it is said that an advocate did not adduce evidence which would have been so important to his case merely because he had in his favour a ruling on *onus* and because he had formed a low opinion of his adversary's evidence and believed that the Judge would reject it. It is at least as probable that the appellant's advocate did not call Karuppiah because he feared that his evidence would not help or might even harm his case. But this is also a speculation. Their Lordships do not choose between the various possible explanations of the course taken by the advocate and they certainly make no reflection whatever on his conduct of the case. Their opinion is that the appellant has failed to show with any probability that injustice or prejudice resulted from the ruling on *onus*.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

In the Privy Council

P. C. RM. L. LETCHUMANAN CHETTIAR

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A. L. S. SADAYAPPA CHETTIAR

DELIVERED BY LORD NORMAND

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