

# In the Privy Council.

## ON APPEAL

FROM THE COURT OF APPEAL IN THE SUPREME COURT  
OF THE FEDERATION OF MALAYA.

Suit No. 34 of 1949.

F.M. Civil Appeal No. 5 of 1951.

UNIVERSITY OF LONDON  
W.C.1.  
24 FEB 1955  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

BETWEEN

T. R. M. THEVARAYA PILLAY (Defendant) . . . *Appellant*

10

AND

MOOKA PILLAY s/o MUTHIAH PILLAY (Plaintiff) . . . *Respondent.*

37708

## Case for the Appellant.

RECORD.

1. This is an Appeal from a Judgment dated 28th March, 1951, p. 77.  
of the Court of Appeal of the Supreme Court of the Federation of Malaya,  
pursuant to leave granted by the said Court on 10th July, 1951, dismissing p. 85.  
with costs the Appellant's Appeal from a Judgment of the Supreme Court  
of the Federation of Malaya dated 5th February, 1951, whereby Judgment p. 64.  
was entered for the Respondent who was Plaintiff on the Claim and  
Counter-claim with costs. The substance of the Judgment on the Claim  
20 was that the Appellant should specifically perform a contract to convey  
certain lands to the Respondent ; and the substance of the Judgment on  
the Counter-claim was that the Appellant was not entitled to enter on  
the said land, or to participate in the profits made from the said land.
2. The subject-matter of dispute between the parties is as to their  
respective rights in the said land, being an estate of about 650 acres at  
Teluk Bharu in Malaya (hereinafter called "the Estate"). This Estate  
was admittedly purchased in 1940 by the following parties in the following p. 61, ll. 16-18.  
proportions, namely, as to half by the Appellant, as to a third by the  
Respondent, and as to a sixth by one Pitchay Pillay.
- 30 3. The proceedings were commenced by the Respondent on the  
1st April, 1949, by Plaintiff. In his Plaintiff the Respondent alleged that on pp. 1-3.  
the 17th January, 1947, whilst both he and the Appellant were in India, p. 2, ll. 1-11.  
by Deed of Sale dated 17th January, 1947, he bought from the Appellant  
the Appellant's half share in the Estate for Rs.17,000/- ; that the  
Appellant therein undertook to give him a registerable Transfer of Title

pp. 3-4. in respect of the said interest ; and in satisfaction of his right to receive the Rs.17,000/-, the Appellant accepted a share in a textile business known as Kansan Store in satisfaction of Rs.5,000/-, and a Promissory Note for Rs.12,000/- in satisfaction of the balance. The Respondent delivered with the Plaint a document marked M.P.1, which, he alleged, was a certified translation of the original Deed of Sale.

p. 2, ll. 12-16. 4. The Respondent further alleged that shortly thereafter he was put into possession of the Estate in pursuance of the Deed of Sale. He then alleged that in 1949, after the Appellant had returned to Malaya, he requested the Appellant to execute a Transfer but that the Appellant 10 had refused so to do.

p. 2, ll. 17-20. 5. The Respondent admitted that the money due under the Promissory Note had not been paid because, it was alleged, it had not been presented. The Respondent offered to bring into Court the amount of capital and interest due under the Promissory Note and thereupon claimed that the Appellant be ordered to execute a registerable Transfer of Title.

pp. 3-9. 6. On the 29th July, 1949, the Appellant delivered the Defence and Counter-claim. In his Defence the Appellant admitted that he had sold the Estate to the Respondent on the terms of a Deed of Sale dated 20 17th January, 1949, but denied that the document M.P.1 was a translation of the said Deed. He alleged that the original document was torn up by the Respondent in or about January, 1949 ; that the pieces were recovered, and that a document marked D.1 and delivered with the Defence was a true translation of the original Deed of Sale. The significant difference between the terms of the two documents is that the body of the document D.1 concluded with the following words :—

“ If I do not agree to execute the Transfer, I shall pay an  
“ extra Rs.5,000/- and take over the Estate.”

p. 7, ll. 14-17. 7. The Appellant further denied that the Respondent was let into 30 possession of the Estate in pursuance of a Deed of Sale. He alleged that the Respondent, as part owner, was already in possession and, by consent, was managing the Estate.

p. 8, ll. 1-3. 8. The Appellant admitted that he had refused to execute a Transfer of the Estate to the Respondent. He alleged that he had made repeated requests to the Respondent prior to July, 1947, for payment of the moneys due under the Promissory Note which the Respondent had neglected to pay, and that he was thereby relieved of his obligation to fulfil any contract of sale of the Estate that may exist between himself and the Respondent.

p. 8, ll. 9-13. 9. In his Counter-claim the Appellant repeated his Defence. He 40 alleged that he had cancelled the Deed of Sale by letters, the last of which was the 31st July, 1947, and a copy of this was delivered with the Defence and Counter-claim marked D.3. He alleged that the Respondent had, in 1949, refused him access to the Estate, and had denied his right to possession and to a share of the profits.

10. The Appellant relied on a letter dated 9th April, 1949, a copy of which was delivered with the Defence and Counter-claim marked D.4, in which his Solicitors offered to return the Promissory Note, Rs.5,000/-, and to pay the extra Rs.5,000/- in accordance with the terms of the document D.1. The Appellant agreed to submit to any terms as to payment which the Court might impose and thereupon asked for a Declaration that he is entitled to such possession of the Estate as is consistent with ownership of an undivided half share, and for an account of profits as from the 31st July, 1947.

p. 8, ll. 23-26.  
pp. 11-12.

10 11. On 7th September, 1949, the Respondent delivered a Reply denying that the Appellant had any right to possession of the Estate, or to a share in the profits. p. 13.

12. The main questions which arise in this Appeal are :—

(1) Whether in fact the Trial Judge and the majority Judges in the Court of Appeal based their findings of fact in favour of the Respondent on the evidence of Mr. Bhaduri.

(2) Whether in law the evidence of Mr. Bhaduri was capable of being a relevant and/or determined factor in resolving the conflict of evidence.

20 (3) Whether or not Briggs, J., the third Judge in the Court of Appeal, was justified in holding that the extent to which the Trial Judge had misunderstood the effect of the evidence of Mr. Bhaduri did not warrant the decision of the Trial Judge in favour of the Respondent being upset.

(4) Whether or not both Courts based their findings of fact in favour of the Respondent by relying on inferences which they drew from the "incident in Nadessah's shop"; whereas, in fact, such inferences could not be drawn.

30 (5) Whether, in consequence of the above, the Appellant is entitled to a re-trial.

13. The case was heard by the Honourable Mr. Justice Hill on the 4th, 5th, 6th, 7th, 18th, 19th, 20th and 21st September, 1950, and on the 4th, 5th, 6th December, 1950, and on the 5th February, 1951, the Learned Judge gave Judgment for the Respondent on the Claim and Counter-claim.

14. The Appellant is obliged to concede that evidence was given on behalf of the Respondent which, as a matter of law, the Trial Judge was entitled to accept and which, if accepted, entitled the Respondent to Judgment on the Claim and Counter-claim. The Appellant further contends that evidence was given on behalf of the Appellant which, as a matter of law, the Trial Judge was entitled to accept and which, if accepted, entitled the Appellant to Judgment on the Claim and Counter-claim.

15. The Appellant, therefore, refrains from analysing all the evidence in the case and weighing in the balance those features which appear to favour the cases of the respective litigants. In this Appeal the Appellant

sets out the conflicting evidence given by the witnesses for the Respondent on the one hand, and the Appellant on the other hand, on the res gesta of the dispute and contends that he is entitled to a new trial because it is manifest from the Judgment of the Trial Judge and of the Judgment of Chief Justice Foster Sutton, with whom Mr. Justice Jobling concurred, that this conflict of evidence was resolved in favour of the Respondent by relying on other particular evidence in the case, and by drawing inferences from such particular evidence and that, in doing so, the learned Judges misconceived the effect of such other particular evidence, and purported to draw from it inferences which did not logically follow. This other particular evidence is dealt with herein and relates to the "incidents in Nadessah's shop" and in "Mr. Bhaduri's office."

16. The history of the matter, which is not in dispute, may be taken from the Judgment of the Trial Judge :—

p. 61.

"The history of this dispute really starts in 1940, when the Plaintiff, Defendant and a third man named Pitchay Pillay, agreed to buy the Estate for \$42,000/- in the respective shares of one-third, one-half and one-sixth.

p. 61, ll. 16-44.

"\$12,000/- was paid the Vendor in cash, of which sum the Defendant provided half . . . The Plaintiff managed the Estate for about three months and then departed to India. The Defendant then took charge and remained in actual or nominal control until he, too, went to India in 1946.

"During these years there seems little doubt that the property did not flourish . . . a further deterioration . . . The result of all this was that, before his departure for India in 1946, the Defendant was anxious to dispose of his share in the property and made more than one attempt to do so. He appears to have been no less anxious to sell after his arrival in India, and, after negotiation, agreed to sell his share to the Plaintiff for Rs.17,000/-. This sum was made up by a Promissory Note for Rs.12,000/-, and a share in a textile business valued at Rs.5,000/-.

"This transaction took place on the 17th January, 1947, and it is from this date onwards that the facts are really in dispute, with the result that I have to decide the all-important question as to which of the exhibits P.13 [which was the original from which M.P.1 was a translation] or X.14 [the original from which D.1 was a translation] and X.15 [Appellant's alleged copy of X.14] was the Agreement of Sale signed and witnessed on that day."

17. The res gesta of the dispute is confined to the events on the 17th January, 1947. Thereafter the facts were continuously in dispute but these facts are only material in so far as they are able to assist the Court in determining what happened on the 17th January, 1947.

18. On the 17th January, 1947, it was common ground that the Appellant and the Respondent agreed that the Appellant should sell and the Respondent should buy the Appellant's interest in the Estate; that this agreement was reached in the Respondent's house and was there and

then reduced into writing; that there were present the Appellant, the Respondent, Balakrishnan Chetty (who was a school-teacher), and Rathna Pillay (who was a farmer); and that the signatures of all these parties were on the original Agreement; that in part satisfaction of the purchase price a Promissory Note for Rs.12,000/- was made and signed by the Respondent and handed to the Appellant; that this document bore the signatures of the Respondent, Balakrishnan Chetty and Rathna Pillay; and that there was also a copy of the original Agreement which was kept by the Appellant. There was a dispute as to whether this was signed or  
 10 unsigned.

19. At the trial the Respondent produced what he alleged to be the original agreement, namely, P.13. He said that Balakrishnan Chetty wrote this document, which was a fair copy of another document written by the latter and unsigned, which the Appellant subsequently kept as his copy. He said that all four signatures on P.13 were genuine. He was shown Exhibits X.14 and X.15, the body of which were both in the handwriting of the Appellant, and said that his signatures on both these documents were forgeries. He was also shown X.18, the Promissory Note subsequently produced by the Appellant, and said that this was a forgery and that the  
 20 authentic Promissory Note was payable in one year's time. He was also shown X.20, a bundle of torn letters subsequently produced by the Appellant purporting to have been written by the Appellant to him in 1947 and 1948, and he said that he had never received such letters. The case for the Respondent was that these letters and exhibit X.19, carbon copies of exhibit X.20, also subsequently produced by the Appellant, were manufactured for the purpose of this action to support the Appellant's contention that he had continuously pressed for payment of the Promissory Note and then cancelled the contract.

20. The Respondent called as a witness Balakrishnan Chetty, who said that he wrote the Appellant's copy of the Deed of Sale, the Respondent's copy and also the Promissory Note. He identified his signature on P. 13 and generally corroborated the Respondent as to the circumstances in which the documents were made. He was also shown Exhibits X.14, X.15 and X.18, and said they were all forgeries.

21. The Respondent also called as a witness Rathna Pillay, who generally corroborated the preceding witnesses as to the above events. He testified that his signature on Exhibit X.13 was genuine, and that his signatures on Exhibits X.14, X.15 and X.18 were forgeries.

22. The Appellant gave evidence as to the events of this day. He said that he, himself, wrote both the Respondent's copy and his own copy, and also the Promissory Note. He produced these documents, which were Exhibits X.14, X.15 and X.18. He said his signature on Exhibit P.13 was a forgery. He also produced Exhibits X.19 and X.20; Exhibit X.19 were letters pressing for payment of a Promissory Note. The circumstances in which the Appellant alleges that he became possessed of Exhibits X.14 and X.20 are dealt with in Paragraph 27 hereof.

pp. 55, 57.

23. The Appellant called as a witness Puram Singh, a handwriting expert, who gave his opinion that the Appellant's signature on P.13 was a forgery.

24. The Appellant admits that he would be bound to fail in this Appeal if the Trial Judge had elected to accept the evidence of the witnesses for the Respondent on the ground that he was satisfied that they were credible witnesses, or because he found that their version of the transaction was corroborated by other evidence in the case to such an extent as to justify its acceptance, provided such other evidence was in law capable of providing such corroboration. 10

25. The Appellant contends that it is manifest that the Trial Judge accepted such evidence only because he held it was corroborated by other particular evidence. This appears from the following passage of the Judgment :—

p. 61, l. 46  
to p. 62, l. 6.

“ I have to decide the all-important question as to which of the exhibits, P.13 or X.13 and X.15, was the Agreement of Sale signed and witnessed on that day.

“ I think the answer to this question is clear. It is not to be found in the evidence of the handwriting expert (which he rejected) . . . The answer could be found, perhaps, by my believing the evidence of this or that witness ; but it is, in my opinion, conclusively found from the incidents in Nadessah's shop and in Mr. Bhaduri's office in Teluk Anson . . . 20

“ But what does Mr. Bhaduri say ? And his is evidence that I unhesitatingly accept. Of what was actually said his recollection is naturally hazy, but Mr. Bhaduri was certain that, when they came the Plaintiff handed P.13 to him and he put it in his safe.”

p. 17, ll. 34-35.

26. The Appellant contends that, on the evidence, it is not permissible for the Trial Judge to hold as a fact that P.13 was handed to Mr. Bhaduri on that day and from this fact to draw inferences unfavourable to the Appellant. Such a finding is inconsistent with the evidence, both of the Appellant and of the Respondent who testified to the contrary. Moreover, it is not a fair summary of the evidence of Mr. Bhaduri himself to say that he was certain when he, himself, admits that he was not certain. His evidence contains the following passages :— 30

p. 23, ll. 24-32.

“ I am an advocate and solicitor at Teluk Anson for past 21 years . . .

“ Both of them came to me early in 1949. They were excited. I can't well remember what took place. I was due in Court . . . 40  
“ When they came the Plaintiff handed me the document, P.13 ;  
“ I put it in my safe ; I told them to settle and went to Court.  
“ My recollection is not clear.”

27. The Judge's version of the incidents in Nadessah's shop and Mr. Bhaduri's office is as follows :—

p. 62, ll. 7-33.

“ According to the Defendant, on the morning of their visit to Mr. Bhaduri the Plaintiff first came to Nadessah's shop.

“ There he produced a bundle of papers and tore it up. This  
 “ bundle contained the originals of some of the carbon copies  
 “ forming Exhibit X.19 and Exhibit X.14 which, the Defendant  
 “ alleged, was Plaintiff’s copy of the Agreement made in India on  
 “ the 17th January, 1947. Immediately after this they both went  
 “ to see Mr. Bhaduri, before whom the Defendant says they agreed  
 “ to settle the matter by a payment by him of \$10,000/- to the  
 “ Plaintiff on which he would receive back his share of the  
 “ property.

10 “ But what does Mr. Bhaduri say? And his is evidence  
 “ which I unhesitatingly accept. Of what was actually said his  
 “ recollection is naturally hazy; but Mr. Bhaduri was certain that,  
 “ when they came, the Plaintiff handed P.13 to him and he put  
 “ it in his safe.

“ Mr. Bhaduri remembered that Defendant subsequently visited  
 “ him at his office and at his house in connection with the matter.  
 “ The Defendant said that he went very often to the lawyer’s  
 “ office.

20 “ If the Defendant’s story is true, I could understand why  
 “ he made no protest to Mr. Bhaduri when Plaintiff handed him  
 “ P.13, for he might then not have known what it was. But that  
 “ very morning, according to Nadessah, the torn papers were  
 “ collected and handed to the clerk to give to Defendant, and this  
 “ clerk did give them to Defendant.

“ Exhibit X.14 is not so badly torn that it is not easily  
 “ recognisable and, if Defendant’s story is true, it is amazing that he  
 “ made no protest to Mr. Bhaduri and . . .

30 “ It is even more amazing that the Plaintiff should tear up  
 “ a genuine document in front of the Defendant and, leaving the torn  
 “ pieces on the ground to be recovered, a few minutes later produce a  
 “ forgery, again in front of the Defendant, to Mr. Bhaduri. I think  
 “ such conduct is too Machiavellian even for a litigant of this type.”

28. The Appellant contends that, what is clear from the evidence  
 of Mr. Bhaduri is that there was a dispute between the parties of such a  
 nature that he advised the parties to settle it. This is not consistent  
 with the Respondent’s evidence, for nowhere in the Respondent’s evidence  
 is there any suggestion that the Appellant raised any grounds, real or  
 imaginary, for not completing the Transfer. If, in fact, the Appellant  
 had not put forward any grounds, real or imaginary, which would entitle  
 40 him to refuse to complete, it is contended that Mr. Bhaduri would not have  
 advised a compromise.

29. The Appellant contends that the advice given by Mr. Bhaduri  
 is consistent with his own evidence that he was claiming that he was  
 under no obligation to complete the Transfer because the Respondent had  
 failed to pay the Promissory Note.

30. The Appellant contends that the Trial Judge was not justified in drawing any inference adverse to the Appellant by reason of the fact that the Appellant made no protest to Mr. Bhaduri because, at the time the parties were consulting Mr. Bhaduri, there is no evidence that they were disputing what were the terms of the actual Agreement made on the 17th January, 1947.

31. Accordingly, the Appellant contends that the finding of the Trial Judge should be set aside.

32. The Appeal came on for hearing on the 27th and 28th March, 1951, before the Honourable Sir Stafford Foster Sutton, Chief Justice, 10 the Honourable Mr. Justice Jobling and the Honourable Mr. Justice Briggs. And, on the 28th March, 1951, the Court unanimously ordered that the Appeal be dismissed with costs.

33. In the course of his Judgment, Briggs, J., said :—

“ Still on the issue of forgery, I would refer shortly to the  
 “ evidence of Mr. Bhaduri. I think the Learned Trial Judge did, to  
 “ some extent, misunderstand its effect. He thought Mr. Bhaduri  
 “ had sworn that the Plaintiff handed Exhibit P.13 to him on the  
 “ very day when Exhibit X.14 was allegedly destroyed and the  
 “ parties together saw him in his office. The case was so put to 20  
 “ him by Counsel in his reply, but the evidence was not quite to  
 “ that effect. The Plaintiff was clear that he had taken P.13 to  
 “ Mr. Bhaduri some time before he and the Defendant saw  
 “ Mr. Bhaduri together, and that, on that occasion, the Defendant  
 “ did not read P.13. The Defendant’s own evidence confirms this.  
 “ Mr. Bhaduri says his recollection on the point is not clear. I  
 “ think, however, that this is not a matter of sufficient weight to  
 “ throw any doubt on the general correctness of the Learned Trial  
 “ Judge’s finding.”

p. 74, l. 40  
 to p. 75, l. 4.

34. The Appellant contends that the Learned Judge was wrong in 30 taking this view. It is contended that, where there is conflicting evidence, the unsuccessful party is entitled to a new trial if it can be shown that the actual decision reached was based on a particular view of particular evidence which cannot be justified in law.

35. The Appellant contends that Foster Sutton, C.J., also mistook the effect of the incident in Mr. Bhaduri’s office. In the course of his Judgment he says :—

“ It seems reasonably clear that Exhibit P.13 was the document  
 “ which was handed by the Respondent to Mr. Bhaduri when he  
 “ and the Appellant paid him a visit early in 1949, and it has never 40  
 “ been suggested that the Appellant contested its validity in the  
 “ presence of Mr. Bhaduri.”

36. Jobling, J., concurred with the Judgment of Foster Sutton, C.J.



37. Accordingly, the Appellant humbly submits that this Appeal be allowed and that the Judgment of the 5th February, 1951, be set aside, and that a new trial be had between the parties for the following, amongst other,

### REASONS

- 10
- (1) BECAUSE the Trial Judge misunderstood the evidence relating to the incident in Mr. Bhaduri's office.
  - (2) BECAUSE the Trial Judge misunderstood the inferences to be drawn from the Appellant's own version of the incident in Nadessah's shop.
  - (3) BECAUSE the Trial Judge based his findings of fact on evidence which was unacceptable in law.
  - (4) BECAUSE by reason of the above the Trial Judge misdirected himself.
  - (5) BECAUSE the Court of Appeal were wrong in law in failing to order a new trial between the parties.
  - (6) BECAUSE Foster Sutton, C.J., and Jobling, J., were wrong in holding that P.13 was handed by the Respondent to Mr. Bhaduri in the presence of the Defendant.

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  - (7) BECAUSE Foster Sutton, C.J., and Jobling, J., were wrong in thinking that any inference adverse to the Appellant could be drawn from the fact that the Appellant did not protest when P.13 was handed by the Respondent to Mr. Bhaduri in the Appellant's presence.
  - (8) BECAUSE Briggs, J., was wrong in holding that the extent to which the Trial Judge had misunderstood the evidence of Mr. Bhaduri did not justify the Court in ordering a new trial.

IAN BAILLIEU.

No. 40 of 1951.

In the Privy Council.

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ON APPEAL

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**Case for the Appellant**

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PEACOCK & GODDARD,  
1 Raymond Buildings,  
Gray's Inn, W.C.1,  
*Solicitors for the Appellant.*