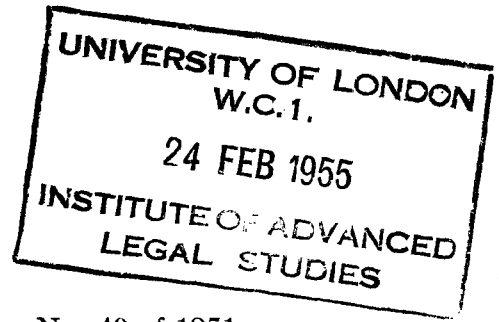


12,1954



In the Privy Council.

No. 40 of 1951

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

37789

SUIT No. 34 of 1949

F.M. CIVIL APPEAL No. 5 of 1951

BETWEEN: T. R. M. THEVARAYA PILLAY (Defendant) - *Appellant*

— AND —

MOOKA PILLAY s/o MUTHIAH PILLAY  
(Plaintiff) - - -

10

*Respondent*

**Case for the Respondent**

1. This is an Appeal by leave of the Court of Appeal in the Supreme Court of the Federation of Malaya from the Order of the Court of Appeal (Foster Sutton, C.J., Jobling and Briggs, J.J.) dated March 28th 1951 dismissing with costs the Appeal of the Appellant from an Order of the High Court at Ipoh (Hill J.) dated February 5th 1951 made in favour of the Respondent in certain proceedings brought by the Respondent against the Appellant concerning the right to a one-half ( $\frac{1}{2}$ ) undivided interest standing in the Appellant's name in certain lands in the Mukim of Teluk Bharu, in the District of Lower Perak, consisting of 650 acres, which lands had been owned in shares by the Appellant and the Respondent and one Pitchay Pillay.

Record  
pp. 84-5.  
p. 77.  
p. 64.  
p. 70, ll. 30-32.

2. In the said proceedings, by Plaint dated April 1st 1949, the Respondent as Plaintiff claimed that the Appellant as Defendant be ordered to execute and give to the Respondent a registrable transfer of the Appellant's one-half ( $\frac{1}{2}$ ) undivided interest in the lands held under Mukim Teluk Bharu Grant for Land No. 11490 for Lot No. 1701 and Entry Mukim Register Nos. 1724, 1723, 1720, 1045, 982, 973 now known as 2457 and 1753 for Lot Nos. 1671, 1670, 1667, 861, 433 A, 889 and 1681 in the Mukim of Teluk Bharu, in the District of Lower Perak.

pp. 1-3.

3. The basis of the Respondent's said claim was (as he alleged) that on January 17th 1947 while the parties were in India the Appellant by a Deed in Tamil of that date sold his (the Appellant's) said one-half ( $\frac{1}{2}$ ) share in the said lands to the Respondent for the sum of Rs. 17,000/- (for which

p. 2, ll 1-11.

the Respondent gave a Promissory Note for Rs. 12,000/- and a share in a certain textile business for the balance) and agreed to give a registrable transfer to the Respondent in respect of the said lands but had subsequently refused to do so.

pp. 3, 4.  
p. 16, l. 43.

4. A certified translation of the Deed relied upon by the Respondent was annexed to the Plaint. The original document relied upon by the Respondent was produced by him in evidence at the trial: it is not printed in the Record but photographs thereof are available.

p. 4, ll. 11, 12.

5. The said Deed relied upon by the Respondent purported to be witnessed by Thenoor S. Rethinam Pillay and N. Bala Krishnan Chetty. 10

pp. 7, 8, 9.

p. 7.

6. The Appellant delivered a Defence and Counterclaim in the said proceedings dated July 29th 1949. By his Defence the Appellant *inter alia* denied that he had executed the Deed relied upon by the Respondent and alleged that the true agreement between the parties in respect of the said lands was contained in a document which the Respondent subsequently tore up in the presence of the Appellant but the pieces whereof had been recovered. The Appellant further alleged that at the time of the transaction between the parties he was not capable of understanding it and alternatively that it was induced by the undue influence of the Respondent. The Appellant also alleged by way of defence that the Respondent had failed to pay the sum of Rs. 12,000/- due under a Promissory Note given by the Respondent and that the Appellant was thereby relieved of any obligation to fulfil any contract which might exist between the parties. By his Counterclaim the Appellant sought a declaration that he was entitled to such possession of the said lands as was consistent with ownership of an undivided half share thereof and for an account of profits. 20

pp. 8, 9.

pp. 9, 10.

p. 36, l. 18.

7. A certified translation of the document relied upon by the Appellant as being the agreement between the parties was annexed to the Defence and Counterclaim. The original document relied upon by the Appellant and what he stated to be a contemporary signed copy thereof were produced by him in evidence at the trial: they are not printed in the Record but photographs thereof are available. 30

p. 10, ll. 11, 12.

8. The document relied upon by the Appellant purported to be witnessed by Thenoor Seena Rethinam Pillay and N. Balakrishnan Chetty, that is to say the two same persons as in the case of the Deed relied upon by the Respondent, although slightly differently described.

p. 10, ll. 6, 7.

9. The important difference between the documents respectively relied upon as aforesaid by the parties as containing the true agreement between them was that in the document relied upon by the Appellant there was at the end a clause giving him a discretion to refuse to execute a transfer of his one-half share in the said lands and requiring him in such event to pay an extra sum of Rs. 5,000/-. The material words were "If I do not agree to execute a transfer I shall pay an extra Rs. 5,000/- five thousand and take over the estate" 40

10. The Respondent delivered a Reply dated September 7th 1949 putting in issue the material parts of the Defence and Counterclaim. p. 13.

11. It was accordingly common ground between the parties that there was an agreement entered into between them on January 17th 1947 for sale by the Appellant to the Respondent of the Appellant's half share in the said lands for the sum of Rs. 17,000/- for which the Respondent gave a Promissory Note for Rs. 12,000/- and a share in a certain textile business by the said Thenoor S. Rethinam Pillay (or Thenoor Seena Rethinampillay, as described in the document relied upon by the Appellant) and the said N. Bala Krishnan Chetty (or N. Balakrishnan Chetty, as described in the document relied upon by the Appellant). The main dispute was, therefore, as to the identity of the document of agreement between the parties and in particular whether it did or did not contain the qualifying words alleged by the Appellant as aforesaid. p. 10, ll. 11, 12.  
p. 10, ll. 11, 12.

12. After a hearing which occupied some 11 days and at which detailed evidence was given by the parties and their witnesses Mr. Justice Hill found in favour of the Respondent on all issues and by his Order dated February 5th 1951 ordered (i) that the Appellant should execute a registrable transfer of his one-half ( $\frac{1}{2}$ ) undivided share in the said lands in favour of the Respondent, (ii) that the Appellant's Counterclaim be dismissed, (iii) that the Appellant should pay the costs of the proceedings, and (iv) that on the Appellant sufficiently indemnifying the Respondent against any claim on the Promissory Note executed by the Respondent in favour of the Appellant on January 17th 1947 that the Appellant be at liberty to set off against the taxed costs a sum of \$7698.48 (equivalent to Indian Rs. 12,000/-) with interest at 3% per annum from January 17th 1947 to April 1st 1949. p. 64, ll. 12-19.  
pp. 13-60.  
p. 64.

13. Mr. Justice Hill delivered a reserved Judgment in the said proceedings on February 5th 1951 and found that the document relied upon by the Respondent was the true agreement between the parties and that the Appellant had himself prepared for the purposes of the case the document of agreement and its copy relied upon by him and also the document which he stated was the original Promissory Note given by the Respondent. A certified translation of the document which the Appellant stated was the Promissory Note was annexed to the Defence and Counterclaim and the original was produced by the Appellant in evidence at the trial: it is not printed in the Record but photographs thereof are available. p. 61-63.  
p. 62, ll. 38-44.  
p. 62, ll. 45-47.  
and  
p. 63, ll. 1-4.  
p. 10.  
p. 36, l. 9.

14. In the course of his Judgment Mr. Justice Hill said—"To sum up, my view of the matter is that the Defendant, for the reasons already stated, was anxious to sell, and did sell, by the execution of Exhibit P.13, in January 1947, to the Plaintiff. Subsequently, he became even more anxious to recover his share of the estate because of its greatly increased value and revenue and that his case, far from being the reasonable one suggested by Mr. Joaquim, is manufactured for this purpose". p. 63, ll. 23-28.

15. At the trial before Mr. Justice Hill the Respondent had given evidence to the effect *inter alia* (a) that the agreement between the parties was the Deed relied upon by him (Exhibit P.13) and not the document (Exhibit X.14) relied upon by the Appellant, and (b) that the document alleged by the Appellant to be the Promissory Note given by the Respondent (Exhibit X.18) was not in fact the Promissory Note so given.

p. 16, l. 43.  
p. 20, ll. 47, 48.  
and p. 21, l. 1.  
  
p. 17, ll. 1, 2.  
p. 19, ll. 40-42.

16. The said witness N. Bala Krishnan Chetty gave evidence on behalf of the Plaintiff at the trial before Mr. Justice Hill and identified the document relied upon by the Respondent as being the one that he (the witness) had signed, and declared that what purported to be his signatures on the document relied upon by the Appellant as containing the Agreement between the parties and on its copy and on the Promissory Note relied upon by the Appellant were forgeries. The other admitted witness to the documents of January 17th 1947, the said Thenoor S. Rethinam Pillay, described as Rathna Pillay, also gave evidence on behalf of the Respondent and to like effect.

p. 25, ll. 30-32.  
  
p. 25, ll. 33-38,  
ll. 41, 42.  
  
p. 26, ll. 14-15.  
  
pp. 28, 29.

17. At the trial before Mr. Justice Hill the Appellant gave evidence in support of the documents relied upon by him. Evidence was also called on his behalf to support his case that the Respondent had torn the original of the agreement relied upon by the Appellant. A handwriting expert was also called on his behalf.

pp. 35-44.  
pp. 46-48.  
  
pp. 51-55.  
pp. 57, 58.  
  
pp. 55-57.

18. The Appellant gave Notice of Appeal on February 14th 1951 from the said Order of Mr. Justice Hill and in a Memorandum of Appeal dated March 5th 1951 set out a number of grounds of appeal. The said Appeal was heard by the Court of Appeal (Foster Sutton, C.J., Jobling and Briggs, J.J.) on March 27th and 28th 1951 and was on March 28th 1951 dismissed with costs. Each of the members of the Court of Appeal subsequently gave a written Judgment and the Order of the Court of Appeal was unanimous.

p. 65.  
pp. 66-70.  
  
p. 77.  
pp. 70-76.

19. In his Judgment Chief Justice Foster Sutton said *inter alia* "In my opinion, the findings of the learned trial Judge, that Exhibit P.13 was the actual agreement entered into by the parties on the 17th January 1947, and that Exhibits X.14 and X.15 were documents which had been fabricated for the purposes of this case, can reasonably be regarded as justified by the evidence before him".

pp. 70-72.  
p. 71, ll. 30-38.

20. Mr. Justice Jobling concurred with the Judgment of Chief Justice Foster Sutton.

p. 73.

21. In his Judgment Mr. Justice Briggs agreed with the said Judgments and went on to deal with and reject submissions made on behalf of the Appellant, (a) that the contract proved by the Respondent had been repudiated, and (b) that the Respondent was not entitled to Specific Performance.

pp. 73-76.

22. The Respondent submits that the primary question at issue was as to the identity and nature of the agreement made between the parties on January 17th 1947, that such was essentially a question of fact, that there was ample evidence to support the findings of the learned Trial Judge and that the decision of the learned Trial Judge on that matter and its confirmation by the Court of Appeal were right. The Respondent further submits that the Appellant established no grounds in fact or law which would render the agreement between the parties ineffective or which would disentitle the Respondent to Specific Performance thereof. The Respondent therefore  
 10 submits that this Appeal should be dismissed for the following amongst other

REASONS

1. BECAUSE the decision of the learned Trial Judge as confirmed by the Court of Appeal was primarily based upon findings of fact, which findings were amply supported by the evidence.
2. BECAUSE the Respondent had proved his case and Specific Performance was the appropriate and correct remedy.
3. BECAUSE the Appellant failed to establish his Counterclaim or to prove any part of his case.
4. BECAUSE the Judgment of the learned Trial Judge was right.
- 20 5. BECAUSE the Judgment of each of the Judges of the Court of Appeal was right.

JAMES COMYN.

In the Privy Council.

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

BETWEEN:

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

— AND —

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

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**Case for the Respondent**

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