

No. 20 of 1978

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

SAMINATHAN s/o VANATHAN Appellant

- and -

PAPPA d/o THOPPAN Respondent

10 CASE FOR THE RESPONDENT

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| | | <u>Record</u> |
| | 1. This is an Appeal from the Judgment and Order of the Federal Court of Malaysia (Suffian, L.P., Ali Hassan, F.J. and Suleiman, F.J.) dated the 3rd day of September, 1975, which allowed an Appeal by the Respondent (Plaintiff in the original action) from the Judgment of the High Court of Malaya in Kuala Lumpur (Azmi, J.) dated the 14th day of October, 1974. | pp. 93-106 |
| 20 | 2. This Appeal is concerned with the ownership of land held under E.M.R. 5089 for Lot 10600 and Lot 5406 in the Mukim of Tanjong Karang, in the District of Kuala Selangor, and hereinafter referred to as "the disputed property". The disputed property was originally held under Approved Application numbers 814/50 and 79/57 by one Palaniandy s/o Murugan. The said Palaniandy appointed the Appellant as his attorney giving him powers, inter alia, to deal with the disputed property under the Power of Attorney dated the | pp. 64-80 |
| 30 | 11th May, 1957 (hereinafter referred to as "the First | pp. 113-117 |

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pp. 131-135	Power of Attorney"). On the 9th July, 1962 the Appellant, pursuant to the First Power of Attorney executed an irrevocable Power of Attorney (hereinafter referred to as "the Second Power of Attorney") authorising the Respondent, inter alia, to convey the disputed property to herself absolutely. On the 10th August, 1967 the Appellant and the Respondent entered into a Sale Agreement whereby the Appellant agreed to sell and the Respondent agreed to buy the disputed property for \$7,500. The agreement provided that the Respondent was to pay the Appellant \$5,200 on the date of the agreement, leaving a balance of \$2,300 to be paid on or before 31st October, 1967. It was a condition imposed upon alienation of the disputed property that the said Palaniandy should not transfer the disputed property without the written consent of the Ruler in Council.	10
pp. 141-142	On the 31st May, 1970 the Respondent applied by letter for consent to the transfer of the disputed property to her. The application was approved and the disputed property was registered in the name of the Respondent on the 9th July, 1970. The Appellant did not vacate the disputed property and the Respondent instituted these proceedings.	20
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pp. 1-6	3. In the Respondent's Statement of Claim it was alleged that the Appellant was a trespasser on the disputed property which was registered in the name of the Respondent. The Respondent in the alternative relied on the aforesaid agreement of sale and claimed that the entire sum due thereunder had been paid to the Appellant and that the Appellant should execute a fresh Memorandum of Transfer of the disputed property to the Respondent.	30
pp. 7-8	4. The Appellant in his Defence denied that he was a trespasser and claimed that the Respondent had fraudulently transferred the disputed property into her own name, the particulars of fraud being that the Respondent had applied for the said transfer without the knowledge of the Appellant and that she had misrepresented to the Collector of Land Revenue that the Appellant desired the transfer of the approved application to the Respondent. The Appellant denied any agreement of sale. The Appellant in his Counterclaim	40
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prayed for a declaration that the Second Power of Attorney was void and that the Appellant was still the proprietor and owner of the disputed property.

5. The matter came up for hearing in the High Court of Malaya on the 14th June, 1973. The Assistant Collector of Land Revenue gave evidence for the Respondent that the Respondent was the present registered owner of the disputed property. He further stated that there had been two applications to obtain the consent of the Ruler in Council. The first application by the Appellant had been refused because of the Respondent's application which enclosed the second of the two Powers of Attorney referred to above. In cross-examination the Witness stated that he agreed that the transfer to the Respondent of the disputed property was done on the strength of the two Powers of Attorney. The Respondent called a Petition Writer (P.W. 2) who gave evidence of the agreement of sale. He stated that a sum of \$2000 was deducted from the total purchase price because that amount had been paid by one Kobale s/o Kovindan also known as Gopal to the Appellant and that the said sum of \$2000 was owed to the Respondent. According to the witness the sum of \$3,200 was paid to the Appellant by the Respondent in the presence of the witness and counted by the witness.
6. The Respondent gave evidence through an interpreter that she was illiterate. Her evidence is fully set out in the Notes of Azmi, J. She stated that the initial purpose of the Second Power of Attorney was that the Appellant wanted her to cultivate the disputed property but that he subsequently decided to sell the said property to her, and that was why the Second Power of Attorney was executed. She denied that that Power of Attorney was executed because of her undertaking to look after the Appellant and his wife. She stated that she had declared in her Statutory Declaration that the said Palaniandy had gone to India but that it was not explained to her that she had also declared that the Appellant had gone to India, which was not true.
7. Evidence was given by the Chief Clerk, High Court Registry, Kuala Lumpur, (P.W. 4), that, as a

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Clerk at the Kuala Selangor Land Office, he had had two meetings with the Appellant and the Respondent at the end of 1967 and in January, 1968. Both Appellant and Respondent agreed that at that time \$5,800 had been paid to the Appellant in respect of the disputed property leaving a balance of \$1,700 owing to him. The Respondent asked for a guarantee in case the Land Office did not approve the transfer of the disputed property. The Appellant proposed that he would repay the sum of \$7,500 in that event, and the Respondent agreed. Accordingly the witness prepared P7 being an "I.O.U." for \$7,500, payable by the Appellant if the said transfer were not approved. The Appellant's grandson, one Muniandy, stood as guarantor in the event of the Appellant's death.

pp. 45-50
pp. 163-168

8. The final witness to give evidence for the Respondent was the said Kobale s/o Kovindan, also known as Gopal. He stated that he gave the Appellant a total of \$1,700 in respect of three tenancy agreements and \$300 by way of loan to be allowed against a further tenancy agreement (which was never made). The total sum of \$2000 was to be deducted from the sale price of the disputed property. After the date of the sale agreement the Respondent was substituted for the Appellant as the landlord of the said Gopal.

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pp. 50-58

9. The Appellant was the first witness to give evidence for the Defence. He stated that the said Palaniandy who was still alive and living in India had given him the First Power of Attorney in 1957 - a general power in connection with the disputed property. In 1962 he had been seriously ill and had been visited in hospital by the Respondent and by the Appellant's younger brother Poongian s/o Vanathan also known as Poonga. He gave the Respondent the Second Power of Attorney so that the Respondent could look after the Appellant, the Appellant's wife and children in the event of the Appellant's death and in order that the Respondent might cultivate the land the subject of the dispute. He did not intend the Respondent to sell the land. The Respondent visited the Appellant in hospital, and brought him food and money. After the date of the Second Power of Attorney, when the Appellant had been discharged from hospital, the Respondent continued to

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- help the Appellant by way of financial support. The Appellant received \$1,650 in rents from the said Gopal and he denied receiving the said loan of \$300. The effect of the agreement of sale of the disputed property was not explained to the Appellant, nor was the effect of P7 (the I. O. U.) explained. The clause in the Second Power of Attorney that gave the Respondent power to sell the disputed property (Clause 24) was also not explained to the Appellant. He would not have agreed to it had he known about it.
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10. One Chelvanayagam, a lawyer (D.W.2), gave evidence that he prepared the Second Power of Attorney in 1962 on instructions from the Appellant in the presence of the Respondent. The Appellant was very ill and wanted the power to take effect on his death. He also wanted the Respondent to look after his property during his life, and upon his death to transfer the property into her own name provided the Respondent looked after members of the Appellant's family. The Power of Attorney was made irrevocable because it was to take effect on the death of the Appellant. In cross-examination the witness stated that he explained in Tamil to the Appellant the effect of Clause 24 of the Second Power of Attorney, namely, that it gave the Respondent the legal power of transfer of the disputed property to herself subject to the consent being obtained of the Ruler in Council. The witness went on: "The Defendant did not object. This is of course subject to his death". The witness agreed that there was nothing in the Power of Attorney to say that it was to take effect only on the death of the Appellant. The son of the Appellant, the said Poongian, was the last witness to be called for the Defence. He stated that the Respondent used to visit the Appellant in hospital and bring him food and money. The Appellant wanted to give the witness a Power of Attorney but he refused. The Respondent agreed to accept the Power of Attorney which was duly executed in the presence of the witness.
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11. On the 14th October, 1974 the learned Trial Judge dismissed the Respondent's claim with costs and gave judgment for the Appellant on the counterclaim.
12. In his judgment, the learned Trial Judge reviewed
- p. 57
- pp. 58-61
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- pp. 61-62
- p. 63
- pp. 64-79

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the evidence and concluded (it is respectfully submitted wrongly) that :

- pp. 68-72 (a) The Appellant had established fraud and misrepresentation on the part of the Respondent within the meaning of Section 340(2)(a) of the National Land Code, set out on pages 67-68 of the Record.
- pp. 72-73 (b) The First Power of Attorney did not entitle the Appellant to confer on the Respondent an irrevocable Power of Attorney in 1962 in respect of the disputed property. The Second Power of Attorney was therefore null and void, and hence an insufficient or void instrument under Section 340(2)(b) of the National Land Code. 10
- (c) Hence the Respondent did not acquire an indefeasible title under the National Land Code, Section 340.
- pp. 73-78 (d) The Respondent had not paid the total sum due under the agreement of sale of the disputed property, or had not paid the same by the due date, and was hence barred from the relief of specific performance of the said agreement. 20
- p. 78 (e) The Respondent was fraudulent in applying to the Land Office for the transfer of the disputed property as she had not at the date of the application paid the full purchase price in respect of it.
- pp. 75-76 It is respectfully submitted that the learned Trial Judge was correct in concluding that there had been an agreement between the Appellant and the Respondent to sell the disputed property. 30

13. In respect of the findings of fraud and misrepresentation (sub-paragraphs 12(a) and (e) above) it is respectfully submitted that the learned Trial Judge based his findings upon inference and that there was no evidence upon which fraud or misrepresentation could

be proved. It is submitted that the learned Trial Judge did not test the conduct of the Respondent by the standard laid down by Lord Lindley in Assets Company Limited v. Mere Roihi 1905 A.C. 176 at 210 - 212.

10 14. In respect of the findings of the learned Trial Judge upon the nullity of the Second Power of Attorney it is respectfully submitted that Clause 23 of the First Power of Attorney expressly gave the Appellant authority to draw up the Second Power of Attorney, as did Clause 9. It is respectfully submitted that the learned Trial Judge was wrong to conclude that the Second Power of Attorney was drawn up for the reason given by the Appellant (to look after his family after his death) because under Section 154 of the Contracts Act 1950 (as amended in 1974) "An agency is terminated . . . by either the principal or agent dying".

20 15. It is respectfully submitted that the learned Trial Judge was wrong to conclude that the Respondent was barred from the relief of Specific Performance of the agreement of sale of the disputed property for the reasons given by the Court of Appeal. It is submitted that P7 (the I.O.U.) is clear in indicating that the Appellant regarded himself as liable to pay the "whole sum" in respect of the disputed property if the transfer was not approved by the Ruler in Council, and that the Appellant had "no claim" over the disputed property. Under Section 92 of the Evidence Act 1950 it is sub-
30 mitted that no oral evidence should be admitted for the purpose of adding varying or contradicting the said I.O.U. document.

Further, it is respectfully submitted that the learned Trial Judge was wrong to conclude that the Respondent had failed to establish the initial payment of \$ 5200 towards the purchase-price, since the Appellant had previously pleaded, in the associated civil action between the same parties commenced in the Magistrates' Court at Kuala Selangor (No.36 of 1971)(Exhibit P.9) that the said sum "had been paid in various amounts, leaving a balance sum of \$2300/-."

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(a) The Second Power of Attorney was granted in accordance with the First Power of Attorney.

(b) The Respondent had paid the money due under the said agreement of sale and the Appellant was estopped from alleging he had not been paid by the due date.

(c) The Appellant had not proved fraud beyond reasonable doubt. It is submitted that the statement that the Appellant was living in India, though admittedly incorrect, was and could not have been fraudulent on the evidence. The transfer of the disputed property had been effected mainly on the strength of the first and second Power of Attorney and there was no evidence that the Land Office was influenced by the statement that the Appellant was living in India. It is submitted that the Land Office was chiefly concerned with whether the donors of the Powers were alive, rather than with where they were living. Similarly, the Land Office was not concerned with the purchase price of the said property nor whether it had or had not been paid. Under the Powers of Attorney the Respondent was not obliged to pay any sum, and this was all that concerned the Land Office.

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pp.108-109

18. The Appellant was given Final Leave to Appeal to the Yang di-Pertuan Agong on the 12th July, 1976.

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19. The Respondent respectfully submits that the Appeal should be dismissed with costs and the Judgment and Order of the High Court quashed for the following, among other

R E A S O N S

1. BECAUSE there was no or no sufficient evidence of fraud or misrepresentation on the part of the Respondent.

2. BECAUSE fraud or misrepresentation had not been proved beyond reasonable doubt.
3. BECAUSE the Powers of Attorney authorised the transfer of the disputed property.
4. BECAUSE there was an agreement of sale whose terms had been carried out in respect of the disputed property.
- 10 5. BECAUSE the findings of the learned Trial Judge were wrong in law and unsupported by the evidence.
6. BECAUSE the Judgment and Order of the Federal Court were right.

GEORGE WARR

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CASE FOR THE RESPONDENT

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