



**IN THE COURT OF APPEAL OF MALAYSIA
(APPELLATE JURISDICTION)
[CIVIL APPEAL NO: B-02-1469-06/2013]**

BETWEEN

KOGILAMAH MALAYAN

... APPELLANT

AND

AIEYAPPAN TULUKANAM

... RESPONDENT

[In the matter of Civil Suit No: MT2-22-620-2001
In the High Court of Malaya in Shah Alam]

BETWEEN

AIEYAPPAN TULUKANAM

... PLAINTIFF

AND

KOGILAMAH MALAYAN

... DEFENDANT

(Sebagai pengganti Defendan kepada
PATCHAIMAH A/P PERUMAL, Simati
Menurut Perintah bertarikh 10.11.05)

CORAM:

**MOHD HISHAMUDIN MOHD YUNUS, JCA
LINTON ALBERT, JCA
HAMID SULTAN ABU BACKER, JCA**

Hamid Sultan Bin Abu Backer, JCA (Delivering Judgment of The Court)

GROUND OF JUDGMENT

[1] The appellant's (defendant) appeal against the decision of the learned High Court judge granting relief without strict proof of the respondent's case and very importantly without exhibiting related documents of title and/or evidence of the original owners of the property came up for hearing on 23-10-2014 and upon hearing, we adjourned it for further submission on 13-02-2015, and upon hearing the parties we allowed the appeal.

Preliminaries and Jurisprudence

[2] This case relates to sub-sale of property by sale and purchase agreement and deed of assignment relating to an estate. In such cases, it is elementary principle that the original owner of the estate who was granted the title to the property and/or successors in the title need to be called and the relevant titles need to be exhibited, etc. It is also crucial to note that in any deed of assignment to pass the beneficial interest of the property to any other person, the master title holder must endorse the deed of assignment. A deed of assignment without such assignment is bad in law and will not pass any right or interest relating to the purchaser's interest in the portion of the estate. [See Civil Law Act 1956; *Malayan Banking Berhad v. Worthy Builders Sdn Bhd & Ors* [2015] MLJU 45]. It must also be noted that the law does not readily allow fragmentation of an estate without the approval of the relevant

authorities. [See *Damai Jaya Realty Sdn Bhd v. Pendaftar Hakmilik Tanah, Selangor* [2015] 2 MLJ 768].

[3] In the instant case, the learned trial judge had taken cognizance that there was no sufficient evidence produced by the respondent, but nevertheless went on to decide and grant part of the prayers. Such an approach breaches the principles of civil litigation and in consequence we were constrained to allow the appeal, not because we were impressed by the appellant's case, but for fact that the appellant and respondent did not have valid documents to sustain their position as beneficial owners of the property according to law.

[4] The learned judge had documented the facts and reason to reach the decision. We take the view that court's time will be much saved by reproducing the brief judgment and set out our grounds.

[5] The brief judgment of the learned trial judge reads as follows:

“This is a classical case where most of the important witnesses from both sides are not before the Court to give their oral testimonies either they have passed away or could not be traced since the filing of the suit before the matter is heard.

Be that as it may, the Court will have to make do with whatever evidence available whether documentary or oral testimonies of witnesses.

The Plaintiff had called 5 witnesses including the Plaintiff himself whereas the Defendant had called 2 witnesses before closing respective case.

The Plaintiff's case can briefly be narrated as stated in the Statement of Claim as follows namely:

At all material time, Ng Kim Chuan had sold 311.52 acres of land known as Lot 746, CT 4828 Mukim Tg Dua Belas, Daerah Kuala Langat, Negeri Selangor to 81 purchasers (hereinafter called 'the said Land'). One of the 81 purchasers was Ong Tai Bak who purchased 21/2 acres of Sub-Lot 46 (hereinafter called 'the half share of Lot 46') from Ng Kim Chuan *via* Sale and Purchase Agreement dated 17th July 1978 (hereinafter called 'the 1st S&P'). Subsequently, Ong Tai Bak sold the half share of Lot 46 to the Plaintiff *via* S&P dated 18th July 1978 (hereinafter called 'the 2nd S&P'). The Plaintiff had paid quit rents for the half share of Lot 46 since 1982 and thereafter had cleared the said half share and developed it by planting oil palm. The Defendant had trespassed on the said half share of Lot 46 and had evicted the Plaintiff from the said half share of Lot 46 from April 1998. The Plaintiff suffered loss of profit from the sale of oil palm fruits about RM800 - RM1000 per month as the Defendant had collected the same since April 1998 till today.

The Plaintiff claims against the Defendant the following reliefs namely:

The Plaintiff had withdrawn the 1st prayer for a declaration that the Judgment obtained earlier ie, on the 2nd November 1995 that the Defendant was the rightful owner of the 5 acres as the same had been set aside by the Plaintiff on the 18th October 2012.



The Plaintiff prays for a declaration that the Plaintiff is the beneficial owner of the half share of Lot 46, special damages for loss of profit, general damages, interest and costs.

The Defendant's case:

The Defendant's late father was one of the purchasers of the said Land who bought it from Ng Kim Chuan for a purchase price of RM2,500.00 on the 30th October, 1969. Ng Kim Chuan did not provide a written S&P of Lot 46 despite attempts to obtain it from him. A sum of RM20.00 was paid as fees for the said agreement and also paid quit rents for Lot 46. Ng Kim Chuan was alleged to have taken advantage of the Defendant's late mother illiteracy and by fraudulent means had let the Defendant's late mother into signing a S&P dated 30th October, 1981 for the sale of only 2½ acres of Lot 46. The Defendant's late mother had commenced another civil suit against Ng Kim Chuan that she was entitled to the 5 acres of Lot 46. The judgment in respect of this suit obtained by the Defendant against Ng Kim Chuan had been set aside by the Plaintiff on the 18th October 2012. The issue of fraud in that suit has never been ventilated at the trial either in that suit independently or by way of consolidation with the present case.

The evidence by the Plaintiff:

The Plaintiff relied heavily on the 3 documentary evidence alluded to the Court in the course of the trial namely:

That there were documentary proof that 21/2 half share of Lot 46 was sold by Ng Kim Chuan to Ong Tai Bak dated the 17th July 1978 for \$1000. Then there was an agreement entered between Ong Tai Bak with the Plaintiff whereby the former had sold the 21/2 half share of Lot



46 to the latter for \$10,0000. This S&P is marked as exhibit P1. According to the Plaintiff there was no agreement to show that 5 acres of Lot 46 was sold to the father of the Defendant. However there a deed of assignment dated 1st October 1985 (exhibit D46) between the Defendant's late mother Patchaimah and the Defendant whereby the Defendant's late mother had assigned 2½ acres of half share of Lot 46 to the Defendant.

Defendant's evidence:

The Defendant doubted the validity of S&P between Ng Kim Chuan and Ong Tai Bak and also the S&P between Ong Tai Bak and the Plaintiff. That the best person to verify both S&Ps would be Ng Kim Chuan and Ong Tai Bak and since both have passed away the issue of the authenticity of both S&Ps are not proven and remains doubtful.

Ng Kim Chuan did not state anywhere in its affidavit in Reply exhibit P20 that he had ever signed S&Ps with either Ong Tai Bak or the Plaintiff. Failure to verify both the S&Ps means that there is a break in the chain of evidence. The Defendant also avers that the witness to the Plaintiffs S&P was one Dato' Lee Eng Teh. He is the best person to confirm the signing of the Plaintiff's S&P. Dato' Lee Eng Teh would be an independent witness and credible. The Defendant also doubted that Ong Tai Bak fully understood the nature and contents of the 2 S&Ps. The Defendant also alleged that the witnesses called by the Plaintiff could be interested or witnesses who could be biased in their evidence as they are related to the Plaintiff in one way or another.



Finding of the Court:

It is rather unfortunate that when this case came up for trial important witness who could shed light on the case were not here to testify because they have either passed away or could no longer be traced. Invariably this posed the Court with documentary evidence which is the bone of contention of this trial as the stake involved is high. The Court does not envy its position when it is asked to adjudicate on a matter which has profound effect on the parties when the Court is hampered in its availability of coherent witnesses.

Be that as it may the Court had spent days hearing oral testimonies of witnesses from both side of the divide and the Court has analysed the evidence before the Court with a fine tomb comb and is now ready to give its decision.

The Court has heard the oral testimony of witnesses and agree with the view of the learned counsel for the Plaintiff that the documentary evidence such as the S&P between Ng Kim Chuan and Ong Tai Bak and S&P between Ong Tai Bak and the Plaintiff and the Deed of assignment between the Defendant's late mother and the Defendant are all compelling evidence for the Court to consider. The Court should not also lose sight of the fact the Plaintiff is the purchaser in the 2nd S&P dated 18th July, 1978 between him and Ong Tai Bak. The Defendant is the Assignee in the Deed of Assignment (exhibit D46) dated 1st October 1985 wherein her mother had assigned to her the half share of the said land in Lot 46. The Court cannot disregard the documentary evidence as they are quite clear in its meaning.

Having considered the evidence as a whole the Court is of the view that the Plaintiff has succeeded in proving its claim for the 2½ acres being half share of Lot 46 on the balance of probability. The Court hereby allowed the Plaintiff's claim for a declaration that the Plaintiff is the rightful beneficial owner of 2½ acres being half share of Lot 46 under CT 4828, Lot 746, Mukim Tg. Dua Belas, Kuala Langat, Selangor.

The Court also allowed special damages for loss of income of RM186,000.00 from April 1998 till realization. General damages is not allowed as it is not proven. And interest of 5% from date of judgment till realization. Costs of RM15,000.00 to the Plaintiff. Parties are at liberty to apply.

On 9th September, 2013 the Plaintiff filed an application to amend the draft judgment to include the rate of interest at 4% from date of filing till date of judgment and thereafter interest at 5% per annum till realization. The Court allowed the Plaintiff's application after hearing argument from both parties. The Court was of the view that the Court had the power to recall an order pronounced but not perfected. In *Re Harrison's Shore A Settlement* [1955] 1 Ch 260 the Court held that an order pronounced by a judge whether in open court or chambers, can always be withdrawn, altered, modified by him, either on his own initiative or on the application of a party until such time as the order has been drawn up, passed and entered."

[6] We have read the Memorandum of Appeal and the submission of the parties. We take the view that the appeal must be allowed. Our reasons *inter alia* are as follows:

- (a) It is well established that the legal burden is on the plaintiff to prove its case. [See s. 101 of Evidence Act 1950]. It is clear from the facts of the case that the plaintiff has not proved his case according to law. It was misdirection on the part of the court to say that it is obliged to make a finding based on whatever evidence is available. The approach taken by the court has in actual fact compromised the integrity of the decision making process and is contrary to established jurisprudence relating to burden of proof.
- (b) The plaintiff in this case has not been issued with title. What they are holding are contractual documents evidencing an interest in land without appropriate endorsement from registered owners of the property. The three documentary evidence relied by the court were hearsay documents in respect of ownership of the land relating to the master title. These three documents will not entitle the plaintiff to seek the prayer as stated in the statement of claim. [See *Malayan Banking Berhad v. Worthy Builders Sdn Bhd & Ors* [2015] MLJU 45].
- (c) The learned trial judge is not required in law to take into account sterile documents to establish interest in land in the absence of the master title holder and other relevant witness to overcome the hearsay rule.

[7] For reasons stated above, we allowed the appeal and set aside the order of the High Court with costs of RM30,000.00. The deposit is to be refunded.



We hereby ordered so.

Dated: 16 NOVEMBER 2015

(HAMID SULTAN ABU BACKER)

Judge
Court of Appeal
Malaysia

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Note: Grounds of Judgment subject to correction of error and editorial adjustment etc