DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO. J – 02– 641 – 2006

ANTARA

NG SEE LIANG … PERAYU

DAN

NG SAY HOON @ NG SAY HUEN … RESPONDEN

(Dalam Mahkamah Tinggi Malaya di Johor Bahru
Guaman Sivil No: 22-24 Tahun 1998

Antara

Ng See Liang
No. 774, Medan Ko-op
Jalan Bakek
8200 Pontian
Johor … Plaintif

Dan

Ng Say Hoon @ Ng Say Huen
No. 761, Medan Ko-op
Jalan Bakek
8200 Pontian
Johor … Defendan)

Coram: Gopal Sri Ram, J.C.A.
Ahmad bin Haji Maarop, J.C.A.
Kang Hwee Gee, J.

ORAL JUDGMENT

Gopal Sri Ram, J.C.A. delivering judgment:

1. This is the judgment of the Court.

2. The appellant (plaintiff in the court below) and the defendant in the action (now deceased and whose estate is under the representation as respondent before us) were brothers. The dispute

between them concerns 4 lots of land – we will refer to them as "the subject land" – which the appellant says belongs to him because it was held in trust for him by the deceased defendant. The defendant's case in the court below and before us is that he is the absolute owner of the subject land. It is not in dispute that in 1948 when the deceased defendant was 10 year's old his father purchased the subject land and had it registered in the defendant's name. It appears that under the Johore Land Enactment then in force in that State, infancy was not a disability in so far as the ownership of land is concerned. The father died in 1958. In or about 1992, the defendant decided to develop the land. He entered into an arrangement with PW2, a licensed housing developer to subdivide the subject land and to construct houses on it. Some of the subdivided lots were later transferred by the defendant to his other brothers and sisters. The appellant got nothing.

3. The issue before the High Court was whether the land originally purchased by the father in the defendant's name was meant as a gift to him or was intended by him to be held in trust by the defendant for his siblings. The defendant relied heavily in the court below on the presumption of advancement. Learned counsel for the respondent has reiterated this argument before us this morning. And in support of his response to this appeal he relies on the speech of Viscount Simonds in the case of **Shephard & Another v Cartwright & Others [1955] AC 431**. Here is the passage read to us:

> "I think that the law is clear that on the one hand where a man purchases shares and they are

> registered in the name of a stranger there is a resulting trust in favor of the purchaser; on the other hand, if they are registered in the name of a child or one to whom the purchaser then stood in loco parentis, there is no such resulting trust but a presumption of advancement. Equally it is clear that the presumption may be rebutted but should not, as Lord Eldon said, give way to slight circumstances: *Finch v Finch* [1808] 15 Ves 43."

4. While we agree with the view expressed above, we would hasten to add two qualifications to it. First, it is now clear that the presumption of advancement "is a relatively weak presumption which can be rebutted on comparatively slight evidence", to borrow the words of Neuberger LJ in **Laskar v Laskar [2008] EWCA Civ 347**, citing Lord Upjohn's speech in **Pettit v Pettit [1970] 1 AC 777, at 814**. Second, the approach to the ascertainment of a donative intention must be in accordance with the facts and circumstances of each case. In our judgment the primary function of the court in a dispute of this sort is to determine whether the initial donor intended to make a gift of the property be it movable or immovable, or whether he intended it to be held by the donee in trust for some other person or persons.

5. In **Hang Geck Kiau v Goh Koon Suan [2007] 6 CLJ 626**, this Court, when dealing with similar case as the present, had this to say:

> "In our judgment the correct approach in cases such as the present is for a court first to determine

the true intention of the purchaser. The question whether the purchaser in a particular case had a donative intention is to be determined objectively through a meticulous examination of the facts and evidence of the surrounding circumstances. If after such an examination the court concludes that there was a donative intention on the part of the purchaser that is the end of the matter and there is no room for the operation of the presumption of resulting trust or advancement as the case maybe. It is only where there are no or insufficient facts or evidence from which a fair inference of intention maybe drawn that a court should turn to presumptions as a last resort to resolve the dispute. As Devlin L.J observed in *Berry v. British Transport Commission* [1961] 3 All ER 65, 75:

> '... presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable ... because they prevent the court from ascertaining the truth, which should be the prime object of a judicial investigation, and because, if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of it is own.'

That the presumption of resulting trust operates only where there is absent evidence as to the true intention of the parties is borne out by what Lord Upjohn said in *Pettitt v. Pettitt* [1970] AC 777,814:

> '…*in the absence of evidence to the contrary* if the property be conveyed into the name of a stranger he will hold it as trustee for the person putting up the purchase money.' (Emphasis added).

The position is no different in our jurisdiction as demonstrated by the following passage by SK Das' work '*The Torrens System in Malaya'* where the learned author says this(at p.192):

> 'A resulting trust arises when a person purchases property in the name of another *not intended as a gift'* (Emphasis added).

We therefore approve of the following statement of the law by Gabriel Moss Q.C (sitting as a Deputy High Court Judge) in **Kyriakides v Pippas [2004] EWHC 646 (Ch)**:

> 'Where there is no declaration, the court puts itself in the position of a jury and considers all the circumstances of the case, so as to arrive at the purchaser's

> real intention: *Snell* para 9-15. It is only where there is no evidence to contradict the presumption that it will prevail: *Ibid*. The case-law has developed in such a way that even "comparatively slight evidence" will rebut the presumption and a less rigid approach should also be adopted to the admissibility of evidence to rebut the presumption of advancement' *Lavelle v. Lavelle* [2004] EWCA Civ 223 (CA) per Lord Phillips MR at para 17.
>
> I suspect the position we have now reached is that *the courts will always strive to work out the real intention of the purchaser and will only give effect to the presumptions of resulting trust and advancement where the intention cannot be fathomed* and a 'long-stop' or "default" solution is needed.'" (Emphasis added).

6. We would adopt the same approach in the present case. Now, there is evidence, unrebutted by the defendant, that he instructed PW2, the developer, to prepare a plan showing the lots to be given to his siblings including the appellant. This is very strong evidence that the defendant treated his conscience as being bound by a trust. Additionally, the defendant's answer to the appellant's case in the court below appeared in wholly inconsistent versions. In his pleaded

case he said that he did not transfer the 4 lots in question to the appellant because he had already settled other property upon him. In his evidence in chief, given in the form of a witness statement he said he kept the appellant out because they were not in good terms. In an affidavit affirmed on 17 September 1998 he said that he was not under an obligation to settle the 4 lots on the appellant because the latter was established in business and was financially well off. Although there is no written judgment from the learned judge who passed away before he could write it, it is apparent to us that he could not possibly have addressed his mind to this inconsistency. Here you have a case where a young child is given the property which he some 40 years later asserts as his own as having been gifted to him. The man who made the gift was dead when the assertion was made. Based on his own evidence of ill will against the appellant, there was a strong motive for the defendant to deny the trust. This is an element which the learned judge should have taken into consideration when assessing the defendant's evidence. It is our respectful view that had the learned judge judicially appreciated the defendant's evidence and treated it with suspicion and caution he would not have found against the appellant. Put differently, a reasonable tribunal acting upon the facts and evidence presented to the court below in the instant case and properly directing itself on the law would have found against the defendant.

7. Having come to the conclusion there could have been no judicial appreciation of the evidence we have no alternative but to intervene. True it is that the ring of truth is more audible to the

primarily trier of fact. See **Ryan v Jarvis [2005] UKPC 27**. But where, as here, there has been a failure to properly evaluate the proved and admitted facts, it is the function, and indeed the duty of this court, to intervene and put matters right.

8. For the reasons already given, the appeal is allowed. There shall be judgment for the appellant in the following terms:

(a) a declaration that the defendant holds the 4 Lots described as HS (D) 5644 PTD 10702, HS (D) 5630 PTD 10688, HS (D 5685 PTD 10743 and HS (D) 5686 PTD 10744 all in the Mukim of Pontian together with the dwelling house and shophouse erected thereon as a trustee of the plaintiff, Ng See Liang;

(b) a declaration that the plaintiff Ng See Liang is the beneficial owner of all that 4 Lots described as HS (D) 5644 PTD 10702, HS (D) 5630 PTD 10688, HS (D) 5685 PTD 10743 and HS (D) 5686 PTD 10744.

(d) an order that the defendant do convey and transfer the property known as HS (D) 5644 PTD 10702, HS (D) 5630 PTD 10688 HS (D) 5685 PTD 10743 and HS (D) 5686 PTD 10744 into the name of the plaintiff forthwith;

(e) an order that the defendant do discharge of charge on Lots held under HS (D) 5685 Lot 10743 and HS

(D) 5686 Lot 10744 from Hock Hua Bank Berhad within 30 days from the date of this order.

9. The appellant will also have his costs here and in the court below. The deposit in court is to be refunded to the appellant.

Judgment delivered in Open Court at the conclusion of arguments on 2 March 2009.

Counsel for the appellant:	Hisyam Teh Poh Teik (Sukhaimi Mashud with him)
Solicitors for the appellant:	Tetuan Teh Poh Teik & Co.
Counsel for the respondent:	S. Gunasegaran
Solicitors for the respondent:	Tetuan John Ang & Jega

Verified with Y.A. Gopal Sri Ram, J.C.A. and certified by me to be correct.