

DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO. N-02-135-1995

ANTARA

R. THANGARATNAM D/O VYTHILINGAM ... PERAYU

DAN

- 1. VINAYAGAMOORTHY A/L RAJARATNAM**
- 2. VINAYAGAMOORTHY A/L RAJARATNAM
(as Trustee for Ravindran a/l Vinayagamoorthy)**
- 3. RAVINDRAN A/L VINAYAGAMOORTHY ... RESPONDEN-**
- 4. HARIHARAN S/O RAJARATNAM RESPONDEN**

DAN ANTARA

BALASEKARAN A/L RAJARATNAM ... PERAYU

DAN

- 1. AGILESVARY W/O VINAYAGAMOORTHY**
- 2. AGILESVARY W/O VINAYAGAMOORTHY
(as Trustee for Ravindran a/l Vinayagamoorthy)**
- 3. RAVINDRAN A/L VINAYAGAMOORTHY ... RESPONDEN-**
- 4. HARIHARAN S/O RAJARATNAM RESPONDEN**

(Melalui Perintah untuk meneruskan bertarikh 24.3.2004)

[DALAM PERKARA GUAMAN SIVIL NO. 22-158-1989
DALAM MAHKAMAH TINGGI MALAYA DI SEREMBAN

Antara

R. THANGARATNAM D/O VYTHILINGAM ... PLAINTIF

Dan

- 1. VINAYAGAMOORTHY A/L RAJARATNAM**
- 2. VINAYAGAMOORTHY A/L RAJARATNAM
(as Trustee for Ravindran a/l Vinayagamoorthy)**
- 3. RAVINDRAN A/L VINAYAGAMOORTHY ... DEFENDAN-**
- 4. HARIHARAN S/O RAJARATNAM DEFENDAN]**

Koram:

Abdul Aziz Mohamad, JCA (now FCJ)
James Foong, JCA
Zaleha Zahari, JCA

FOUNDATIONS OF JUDGMENT
of
Abdul Aziz Mohamad JCA

Having read in draft the grounds of judgment of my learned brother James Foong JCA, I feel obliged to say a few words for my part.

In his oral submission in the appeal, the appellant's counsel indicated that he would be submitting on two issues, the first issue being whether the power of attorney that the appellant granted to the first respondent, her son, could be varied or altered by the appellant's letter dated 23 December 1983, by which she asked the first respondent to transfer the land into his name and which her counsel said could not amount to a variation of the power of attorney.

As for the second issue, the appellant's counsel said that it would concern the question of the burden of proof on the appellant to prove fraud, the fraud being, counsel said, in the transference of the land into the first appellant's name as trustee for his son the third respondent. It is a fact that in paragraph 6 of the statement of claim the appellant's case was one of

fraud on the part of the first respondent. It is also a fact that in paragraphs 7 and 8 of the statement of claim the appellant's case was also one of conspiracy on the part of the first and fourth respondents to cheat and defraud the appellant, in which the main allegation was that the appellant's letter of 23 December 1983 was a forgery devised by the fourth respondent, the first respondent's brother, the action against whom was, however, withdrawn upon his demise. And it was obvious from the memorandum of appeal that the appellant was not taking up in the appeal the question of conspiracy-forgery but only the question of variation of the power of attorney by the letter of 23 December 1983. The appellant's counsel said that the need to prove fraud related to section 340 of the National Land Code. According to subsection (2)(a) of the section, the first defendant's title to the land as trustee for the third respondent would become defeasible if he was party to a fraud in his getting on the title. Counsel said that the trial judge applied the criminal burden. Obviously he intended to show when coming to submit on the second issue that the civil burden should have been applied.

After hearing the appellant's counsel in elaboration of the first issue, in which the facts of the case were glimpsed, we decided, after a half-hour recess, to dismiss the appeal without hearing counsel on the second issue and without hearing the respondents' counsel, the reason that

was announced being that after hearing the submission of the appellant's counsel on the first issue we were of the view that there was no fraud, whether civil or criminal.

It seemed to me that the appellant's submission on the first issue, whether the power of attorney could be varied by the letter of 23 December 1983, was aimed at showing the existence of fraud in the civil sense. I thought that the question was misconceived, my reasons being the same as those for which my learned brother says at the end of the first paragraph under his "Analysis": "So the question of 'extra power' through the appellant's letter dated 23.12.1983 to be loaded onto the Power of Attorney does not arise". As for my finding that there was no fraud, whether civil or criminal, my reasons were as stated in my learned brother's second paragraph under his "Analysis".

Dated: 27 December 2007

DATO' ABDUL AZIZ BIN MOHAMAD
Judge
Federal Court of Malaysia

Counsel for the appellant: Sri Dev Nair (together with Cik Nora Hayati and B. Sivaruben)

Solicitors for the appellant: Nora Hayati & Associates

Counsel for the respondents: A.D. Rajah (together with C.S. Khoo)

Solicitors for the respondents: A.D. Rajah