HIGH TREES IN MALAYSIA

Murugappa Chettiar v. *Chinniah*[1]

By the application of the 'High Trees' principle Ong J. in this case refused the plaintiff a declaration that he was the beneficial owner of half a house built by the defendant on land in Kuala Lumpur of which each party was the registered proprietor in undivided equal shares. The inevitable result of the decision was that the defendant was recognised as beneficial owner of the whole.

In 1955 the defendant had become a registered co-proprietor of a piece of land with one Wahab by purchase. Wahab charged his portion to the plaintiff, but later transferred it to one Hamzah who also charged it to the plaintiff. Hamzah defaulted, and as a result of a compromise his share was transferred to the plaintiff. The defendant had proposed to Hamzah a subdivision of the land and, as found by the learned judge, the plaintiff agreed to this although it was not carried out. The house was commenced despite a warning by the plaintiff that he would be entitled to a half share. As found by the judge the plaintiff paid a visit to the land and warned the defendant not to encroach on his portion. Before it was completed the plaintiff threatened to take out an injunction if building operations did not cease as zoning restrictions permitted only one house on one lot. No steps were taken and the building was completed.

The plaintiff claimed that as he was registered proprietor of an undivided half share in the whole of the land he was ipso facto the owner of a similar interest in any house erected, anywhere thereon. The learned judge held that this was "a complete fallacy", because a supervening equity had been raised against him by his own conduct. The defendant had been led to believe that so long as he built the house on his portion the plaintiff would claim no benefit from it, and he had incurred heavy expenditure on the faith of such assurances. In accordance with the principle of *Hughes* v. *Metropolitan Railway Co.*,[2] as adopted in the *High Trees* case,[3] "if an assurance was intended to be acted upon and if it was acted upon by one party who altered his own position on the faith of it, it must be held binding on the other".

The effect of the application of the principle was to declare that the plaintiff's right under the Land Code of the former Federated Malay States[4] was subject to the equity caused by his own conduct, i..e he was estopped from asserting his statutory right. The title of a registered proprietor under the Code is indefeasible save for certain specified exceptions, none of which is estoppel.[5] The learned judge did not deal with the question of how an equitable right such as this could succeed *despite* the provisions of the Code. Neither did he deal with those provisions. Had he done so, he could have held (as in fact he seemed to do) that the plaintiff became registered proprietor of the house by misrepresentation, and therefore his title was not indefeasible.[6]

1. (1962) 28 M.L.J. 95.
2. (1877) 2 App. Cases 439.
3. i.e. *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130.
4. c.138 of 1935 Laws.
5. See *ibid* s.42.
6. According to s.42 (ii) of the Code, title obtained by "fraud or misrepresentation" is not indefeasible. There is no decision which interprets this phrase as denoting any representation other than fraudulent. Although in the instant case however the plaintiff did not become registered proprietor of the land by misrepresentation but only of the house on the land presumably the two could be separated.

He could alternatively have relied on the general proposition that the Code does not affect contracts entered into by proprietors, or obligations imposed on him by his own conduct.[7] This type of obligation is akin to that of trust or an equity.[8] Indeed, as a result of the action the plaintiff must have held the half share in the house on trust for the defendant.

In applying the 'High Trees' principle Ong J. made no mention of the limitation imposed on it by *Combe* v. *Combe,*[9] in that it could be used only as part of a cause of action or as a defence. The instant case is an illusory illustration of the principle used as a defence, and more, a classic example of the nonsense of such a limitation when the principle is applied to the transfer of goods or land. The plaintiff was relying on a statutory right, and therefore to defeat him the defendant had to assert a positive right. It is true that all that was decided was that the plaintiff had deprived himself of his statutory right, but what must follow is that the defendant had asserted a right to a transfer of the plaintiffs half share. If the defendant had claimed such a transfer, the principle of *Dillwyn* v. *Llewellyn* [10] would surely have allowed the claim. Although the case was concerned with the validity of an uncompleted gift its basic principle is that an act done in the faith of a representation made creates an obligation that the representation (implied or expressed) shall be carried out. Lord Westbury summarised the principle [11] —

> "The subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift.... If A puts B in possession of a piece of land, and tells him, 'I give it to you that you may build a house on it,' and B on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made."

The idiocy of the limitation imposed by *Combe* v. *Combe* [12] is emphasised by an Irish case *Cullen* v. *Cullen*,[13] in which Kenny J. held that a plaintiff who represented to his son that he could erect a house or land could not then assert a title to the site of the house on the 'High Trees' principle, but that the son could not require his father to transfer the house to him. The learned judge said that he would have made the order for transfer if he could, but did not think he had any jurisdiction. He thought the son could eventually apply after 12 years to be registered as owner as nobody could assert title to the house. The son relied on *Ramsden* v. *Dyson*[14] which depended on the fact that the person erecting a building was mistaken as to the title to the land, but surely *Dillwyn* v. *Llewellyn* [15] would have sufficed.

The application of that authority would prevent the situation existing of no person having title to the house and no person able to claim title to it.

This result was attained by Gresson J. in the Supreme Court of New Zealand in *Thomas* V. *Thomas* [16] where the learned judge ordered the transfer of property of which the respondent (husband) was the registered proprietor to the applicant

7. See e.g. *Haji Abdul Rahman* v. *Mohammed Hussan* and (by analogy) Baker.

8. Under the Code it seems that a trust, as an equity is a personal obligation (see supra).

9. [1951] 2 K.B. 215.

10. (1862) 4 De G. F. & J 517.

11. *Ibid*., at p. 521. For a recent approval of the principle see *Chalmers* v. *Pardoe* [19631 3 All E.R. 553 at P. 555 (P.C.).

12. [1951] 2 K.B. 215.

13. 1962 I. R. 268.

14. (1866) L.R. 1 H.L. 129.

15. (1862) 4 De G. F & J 517.

16. 1956 N.Z.L.R.

(wife), the latter having expended money and acted on the faith of the former's representation. As illustration the learned judge put what was almost the case before Ong J.[17] —

> "If the transaction had been one between strangers where an owner surrendered his property to another by parol and that other on the strength of that surrendering built upon it, equity would not allow such owner to act inconsistently with the agreement."

Mr. Chinniah at the moment may be in the position of the son in *Cullen* v. *Cullen*[18] but apart from any agreement to subdivide the land there ought to be no answer to any action brought to transfer the house and land on which it stands to his name.

THE JUDICIAL PROCESS IN THE TORRID ZONE

In *Mohamed Ibrahim* v. *Public Prosecutor* (1963) 29 M.L.J. 289, the High Court of the Federation of Malaya has done nothing to foster the regard in which Malayan courts are coming to be held in the common law world. The accused was charged with having in his possession for purposes of sale sixty-five copies of Henry Miller's *Tropic of Cancer,* allegedly an obscene book, in contravention of section 292 (a) of the Penal Code. The defence rested on four main points: (1) that the accused was not in possession of the books for purposes of sale; (2) that he was unaware of the obscene nature of the contents of the book; (3) that the book was not obscene; and (4) that he was charged and convicted before. *Tropic of Cancer* was banned under the Control of Imported Publications Ordinance, 1958. This note is not concerned with the first two grounds beyond to state that the court found against the accused on both of them that he was in possession of the books for purposes of sale and that knowledge of the nature of the contents was not an essential element of the offence.

The fourth ground of defence was described by Thomson C.J. as "preposterous". Dissatisfied with this as a sufficient description of the extravagance of the defence, he expressed himself as regarding it as "impossible to find words strong enough to condemn any idea that simply because the Government does not take action against a book under the 1958 Ordinance that book is in every respect innocuous. Even if there were any real responsibility on the Government to guide the nation's reading the sheer impossibility of doing anything of the sort is apparent from the fact that in the U.K. alone there are about 200,000 books actually in print and some 20,000 more are published each year.... the individual citizen must exercise his own judgment" (pp, 290-1). One may ignore for the moment the fact that by exercising powers of censorship at all, the Government is "guiding the nation's reading". By enacting and administering the Ordinance, the responsibility has been assumed. What is more important is whether this defence is so very outlandish as to be beyond the capacity of a High Court judge's vocabulary to describe. "Preposterous", rejected as inadequate, is defined by the Oxford Concise Dictionary as "contrary to nature, reason or common sense; perverse, foolish, absurd". Is it an "absurd" or "foolish" inference from the fact that certain books are prohibited that others are not? It may not be a strictly logical inference. We are not told what the major proposition is. It could be that "ALL obscene books are banned" in which case, the inference would be strictly logical and the very opposite of "absurd"; or merely that "SOME obscene books are banned" in which case the logical error would be an obvious but not uncommon one. Which is the correct formulation must turn in the first place on the terms of the Ordinance which are not examined in the judgment. If the answer is not to be found here, the matter is one of policy and "preposterous" (or a stronger term not available to the Court) is perhaps ill-suited to describe the suggestion that what is impossible for the Government with all the resources of the state at hand, should also be considered non-obligatory for a small-time bookseller with no knowledge of English.

17. 1962 I.E. 268 at p. 292.

18. 1962 I.E. 268.

What is more important, however, is the obscenity issue. The Court relied upon the leading test in *Reg.* v. *Hicklin* (L.R. 3 Q.B. 360, 371) :

"The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."

The ordinary meaning of the verbal formulation of this test calls for an examination of the allegedly obscene material AND a consideration of its potential consequences, as well as an enquiry into its marketing probabilities. It is to the discredit of the English Court of Criminal Appeal, and not of the Federation High Court, that the two latter questions are ignored. Thomson C.J. understandably placed reliance on the decision *Reg.* v. *Reiter* ([1954] 2 Q.B. 16, 20) that the best test of obscenity is examination of the allegedly obscene material. The Magistrate had read it; so had Thomson C.J., who concluded:

> "I can discover nothing on which a reasonable Magistrate would be entitled to say it was anything but obscene."

But how can you, simply by reading a book, ascertain what its effect will be on unidentified readers? The most that can be ascertained is a knowledge of its subject-matter and its effect on oneself and even this might require a measure of self-analysis not within the capabilities of many. How, in particular, can one ascertain:

1. Whether the book has a tendency to deprave and corrupt?

2. Who is likely to read it?

3. Whether their minds are open to immoral influences?

as is required by the test in *Hicklin.* 1. and 3. are matters for psychological enquiry. 2. is a matter for sociological enquiry. None can be answered by a mere reference to the work itself, unless you are prepared to assume that discussion of sex will inevitably corrupt any reader, that the book will be read, and that all readers are open to immoral influences.

These are dangerous assumptions. They involve ignoring the possibility that pornographic literature may be ineffective in any direction or even that it may provide a social service in two ways:—

1. By providing innocuous pleasure for the reader.

2. By reducing the risk of harmful sexual aberration by providing an outlet for persons otherwise disposed towards it.

This is not to say that any of these propositions is established but that they are available as possible conclusions of a psychological enquiry and that no reasons are provided in the judgment for drawing one conclusion rather than another.

The third assumption that the test in *Reg.* v. *Reiter* makes is that all readers are open to corruption. This must, follow if one judges solely on the basis of the text which cannot reveal who is likely to read the book and hence cannot confine the class under consideration. If it were true that all readers are open to corruption, then we ought to give serious consideration to the question whether society can afford the risk of subjecting its judiciary to the trial of obscenity cases. In fact, no one does judge solely on the basis of the text. But the logical assumptions of such judgment make it clear that the test in *Hicklin* does require evidence of psychological and sociological enquiry for its correct application.

Mohamed Ibrahim v. *Public Prosecutor* contains no reference to such evidence, but some inadequately supported sociological conclusions are stated:

"There is no question of corrupting the minds of learned persons devoted to literary studies or to psychological research. The book, however, is published in what is called 'paper back' form and its local price is less than $3....it is thus on sale at a price which brings it within the reach of the great majority of the reading

public, that is to say a public which includes not only the old and learned, but also the young and thoughtless, those who read books for pleasure and not for moral edification or for intellectual improvement....

"To the strong-minded the effect of reading the book would no doubt be a feeling of revulsion. To the philosopher it might suggest some question as to whether there were any limits to the depth to which human nature could fall. But to the ordinary reader, particularly the young reader, it is calculated to convey and instil the impression that casual and frivolous indulgence of the sexual instinct is something of no importance and indeed nothing more than a joke. When such a seed is implanted in the mind the resulting growth can only be depravity and corruption."

Let us list some of the assumptions contained in these passages. Since no indication of any evidence on which they might be based is provided, they must rank as the most remarkable catalogue of examples of judicial notice ever recorded.

1. The minds of learned persons devoted to literary studies or to psychological research cannot be corrupted.
2. The old are learned.
3. The young are thoughtless.
4. The young only read books for pleasure.
5. The young do not read books for moral edification or for intellectual improvement.
6. Those who read books for pleasure are open to immoral influence.
7. Those who read books for moral edification are not open to immoral influence (somebody should tell them).
8. The poor are corruptible.
9. The rich are not.
10. The young are poor.
11. The old are not.
12. The strong-minded experience revulsion at pornographic literature.
13. The weak-minded do not.
14. The young cannot think for themselves.
15. Casual and frivolous indulgence of the sexual instinct is not a thing of no importance.
16. Evil influence inevitably flourishes in the young mind.

It is fair to say that these assumptions are by no means confined to judges in obscenity cases in the Federation of Malaya. They might, indeed, be described as not so much the assumptions of a Malayan judge, as the conclusive presumptions of the social mores of a great part of Western civilisation. This being the case, only two things may be added. First of all, the charge in obscenity cases should, for the future, be re-framed. What are at present couched as questions of fact in substance shroud questions of law and the application of standards. The concepts of 'depravity', 'corruption' and 'immoral influence' are irrelevant. What matters is the simple question "does this book deal with a taboo subject"? Secondly, if there are any evils inherent in existing social mores with regard to sex, we may as well recognise frankly that so far as perpetuating them goes, we are doing a grand job.

But are there any such evils? That is precisely the question which went unanswered in *Mohamed Ibrahim* v. *Public Prosecutor.*

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