Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nye Rai, Administrator of Prah Primoon Sombat Puket (deceased) v. Lim Loh, from the Supreme Court of the Straits Settlements, Singapore; delivered 18th December 1901.

Present at the Hearing:

LORD MACNAGHTEN.
LORD SHAND.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.

[*Delivered by Lord Shand.*]

The question raised by this Appeal relates to the beneficial interest in a property of some value situated in Commercial Square now Raffles Place, Singapore. The Appellant the Plaintiff claims the property as administrator of his father Prah Primoon Sombat (hereinafter called Primoon), founding on a deed of conveyance dated 10th February 1873 by Khoo Cheng Tiong of Singapore then proprietor of the lands in his favour, which proceeds on the narrative of a purchase by him of the property at the price of 25,000 dollars. This deed of conveyance is produced and admitted to be genuine.

The Respondent and Defendant bought the property at a public sale in September 1897 as part of the estate of Khoo Tiong Poh, deceased, merchant in Singapore (hereinafter called Khoo Poh), at the price of 71,000 dollars, under conditions of sale peculiar in their terms, and to

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which reference will be afterwards made. Since he obtained possession he has made considerable improvements on the property. The main defence to the Appellant's claim is that although the *ex facie* title of 1873 was taken and stands in the name of Primoon he was not in reality purchaser or even the real owner of the property who was Phyat Wichit Rajah of Tongkah—that he was not even a trustee vested with the property, on the footing that he should deal with it and administer the rents to be received by him for trust purposes, but that by arrangement with the Rajah, his name merely was used in taking the title—that in truth the transaction was one of *benami*, and Primoon was only a name lender or Benahmidar.

Primoon was a cousin of the Rajah Wichit and was his first secretary and was therefore in such confidential relations with him that he was one of the class of persons to whom, if a *benami* transaction was contemplated, the Rajah might naturally turn, for the use of his name – although it must be added that there has not been direct evidence in this case that he did so. This is no doubt a circumstance of importance, but it is not to be forgotten that the present claim was not made till the year 1897—twenty-four years after the deed of 1873 came into existence.

The learned Chief Justice before whom the evidence, not taken on Commission, was led held that the Claimant the Appellant is entitled to succeed, and that under the title of 1873 he vindicated his right to the property, but this judgment has been reversed on Appeal for reasons fully stated by Mr. Justice Law and Mr. Justice Leach. Their Lordships propose to consider the question whether as the result of the evidence on the question in whom the beneficial interest in the

property was vested, it has been shown that Primoon was at his death the beneficial owner of the property and the Appellant is therefore now the beneficial owner and entitled to succeed in the Appeal.

On that question, with the conveyance of 1873 in favour of Primoon, the onus of proof is on the Defendant to shew that this deed was a *benami* transaction, in which the name of Primoon only was used, while the real right to the property was as alleged in the Rajah Wichit. It will be unnecessary to recapitulate in detail the evidence written and oral. The history of the case is given in the earlier part of the careful and able judgment of the Chief Justice, who mentions all the leading facts disclosed by the evidence. In their Lordships' opinion with deference to his Honour he has failed to give due weight to what their Lordships regard as real evidence in the case, viz., the proof afforded by the books of the two firms of Eng Hoon & Co. and Ban Hin, on which the Defendant mainly relies, for the entries in these books, shewing as they do in their Lordships' view the actual transactions in the purchase and subsequent dealings with the property, give a complete answer to the argument founded on the deed of 1873, an answer which entirely discharges the *onus* on the Defendant, and the effect of which is not removed by such evidence, entirely parole, as the Appellant has adduced.

In the class of questions relating to the beneficial ownership of property, especially when raised after the lapse of many years, as in the present case, the consideration to which the Court attaches the greatest weight is the ascertainment of the facts by whom was the price of the property paid, and by whom have the rents and

profits throughout the course of years been received and the burdens and outlays on the property borne? If the claimant to the property has the real ownership he must have paid the price (where gift is not suggested) and he must in any view have received the profits less outlays and expenses, himself, or by an agent who has accounted to him for his intromissions. Their Lordships may at once say that in this case they are satisfied on the evidence (1) not only that the Appellant's father did not pay any part of the price of the property when it was bought in 1873, but that it was bought and paid for by the Rajah Wichit as a purchaser on his own account, (2) that no part of the rents and profits were paid to Primoon or claimed by him during the years from 1873 till he died in 1878, and (3) that no part of these rents was claimed or paid after his death to any one representing him.

The genuine character of the books founded on by the Defendant and of the accounts there recorded has not been impugned and at all events has been clearly proved; and indeed the learned Chief Justice in his judgment accepts the entries in the books as to the payment of the price as correct, while as to the rents he says:—"The books of the firm "are produced in which entries of those rents "are found. A carefully prepared summary of "such of those entries as are important has "been put in by the Defendant's solicitors. I "have found it of much assistance."

What then do these books show? First as regards payment of the price of the property when bought. There is no entry in the books of the firm of Eng Hoon & Co. by whom the purchase was carried out which can suggest that Primoon had anything to do with

the purchase. His name is nowhere even mentioned. The witness Soh Ong Chuan who paid the 25,000 dollars for the property by cheques the particulars of which he gives states that the Rajah was in Singapore in 1872 and then made an arrangement to buy the property through a broker named. Whether this visit was made at the time mentioned or not, the entries in the book shew conclusively not only that the Rajah, by drafts on third parties transmitted by him to the firm, paid for the property, the price of which was expressly debited to him, but shew also that the expenses of two messengers sent by him from Tongkah to complete the purchase and bring the deed to him were also charged to him. The important entry is "Purchasing Khoo Cheng "Tiong's Godown 25,000.00," but the subsidiary and smaller items are also of importance. How then is this clear and unambiguous evidence met? The Appellant's counsel could only do so by suggesting that the entries might be merely the record of banking transactions, in which the Rajah was really transmitting money for Primoon and not his own money, and the learned Chief Justice, after stating that the account shews that the price was debited to the Rajah, says:—"I am not satisfied the property "was paid for by the Rajah with his own money. "I think it quite possible that the funds re- "mitted to Soon Bee Koh Guan of Penang came "from Primoon who had property at Tongkah "and may have arranged with his cousin the "Rajah to send the money through him to "his the Rajah's bankers." To displace the effect of the entries by the suggestion of a possibility, and a possibility for which no foundation in fact is suggested, is a view which their Lordships cannot adopt and accordingly

they hold it is proved that the purchase was made by the Rajah for himself and with his own funds. It no doubt appears that Primoon had some interest in tin mines and paddy fields but it nowhere appears that he had any superfluity of means either for the purchase of a property, or even as the means of provision for his wife and children.

Then as to the rents of the property there is not any evidence that for the long period from 1873 downwards Primoon or his representatives ever received a farthing of the rents of the property or paid any part of the expenses of maintenance, or in any way interfered in regard to its administration or as to important changes made on it by Khoo Poh. It is true there is some loose evidence about receipts which Mr. Weber says he has seen given by Primoon to Khoo Poh which he seems to suggest or to say might be for rents received. At the best this again is a possibility, for he did not read the receipts so as to know their contents, and in cross-examination he says "To the best of my "belief it was in 1875 and 1876 that I saw two "receipts handed to Primoon in Tongkah. I don't "know where they were written." Are these two receipts which may have been connected with transactions in tin or otherwise—and at the best two receipts only during a period of years—to be assumed to relate to rents of this property? This cannot be without very different evidence. The entire rents were in the first instance credited to the Rajah and, after the time when Khoo Poh alleges that he became proprietor by arrangement with the Rajah, were credited to him and the expenses and quit-rent on the other hand debited in the same way. It is further to be observed that on the death of Primoon the Rajah's son Puket took a warm interest in his family and appears

to have assisted them from time to time with money for their maintenance, there being no suggestion then that they had right to this valuable property—and finally it is proved that Khoo Poh himself in 1883 made important alterations and improvements at considerable expense on the property. In the result the evidence which has now been noticed appears clearly to show that though the title was in the name of Primoon he had not at any time the beneficial ownership of the property.

What is there to lead to a different conclusion? To meet that evidence the counsel for the Appellant placed great reliance in the first place on the fact sworn to by Mr. Weber that Primoon granted a power of attorney to Khoo Poh for the management of the property and the receipt of the rents. This would no doubt have been of great value had there been any evidence that Primoon either had paid for the property or received its rents, but in the absence of such evidence it adds no real weight to the terms of the title, for the title being *ex facie* in his name a power of attorney would properly be also in his name to have legal effect with third parties, though really granted for the benefit of the beneficial owner.

The Appellant's counsel again relied greatly on the evidence of Mr. Weber and Mr. Neubronner as to verbal statements made to them by Khoo Poh to the effect that the property did belong to Primoon and not to the Rajah. Such statements cannot outweigh the real evidence afforded by the actings of the parties and the books. They may to some extent be explained by the fact that in a sense it was true that Primoon was the proprietor, for the title was in his name, but in addition it appears that when Weber and

Neubronner in their character of executors or administrators of Puket's estate were in Singapore and had their dealings with Khoo Poh in that character it is clear that he was in hostility to them, and having it in view apparently to be ultimately undisputed owner of the property himself, and probably having completed arrangements with this end, concealed and certainly did not think fit to disclose to them the real state of the facts. In any view such parole evidence as to the effect of conversations, more or less casual, and referring to dates a number of years ago, cannot outweigh that of the material facts of the case.

Much argument was founded on the want as part of the Respondent's title of any title by way of conveyance or assignment of the lease of the property by Primoon in favour of Khoo Poh, the nature of the sworn declarations made by Khoo Poh, and the peculiar and unusual conditions of sale under which the Respondent acquired the property. It is true that in selling the property the conditions of sale made it clear that Khoo Poh sold on a possessory title only, and that he did not profess to give a title in virtue of any assignment of the lease of the property in his favour. In his declaration of 21st December 1891 he has stated the reason he alleges as the cause of this, viz. the absence of Primoon from Tongkah in 1878 when he went there as he says to complete the exchange of the title of the Malacca Street property for that of the property in question, and the death shortly afterwards of both Primoon and the Rajah. Their Lordships do not propose to enter on a consideration of these matters farther than to observe that they are not prepared to regard the alterations which Khoo Poh in his re-declara-

tion of 1891 made on his original declaration of 1886 as obviously fraudulent which is the view taken by the Chief Justice. The events to which the declaration related had taken place in 1878, eight years before, in the same year in which Primoon and the Rajah both died, and after such an interval Khoo Poh might have forgotten that it was temporary absence shortly before his death, and not the death itself of Primoon, which prevented the granting of an assignment; and if his conduct was really fraudulent it is scarcely to be expected that he would provide the means of detecting a fraud by leaving a document (the re-declaration) having such alterations on its face as might suggest fraud, in place of destroying the declaration of 1886, and leaving only that of 1891 in all respects regular. But however this may be the Appellant has no title to raise any question or discussion on this matter. As their Lordships hold on the evidence that Primoon never had any beneficial interest in the property, it follows that he has no right or title either to question the title of Khoo Poh, founding on the want of an assignment by Primoon or the Rajah, or to challenge the accuracy of the declarations. If such a right exists it must be in the heirs or representatives of the Rajah the original purchaser and real owner of the property till at least it was acquired as alleged by Khoo Poh the Respondent's author.

For the same reason their Lordships do not enter on any consideration of the question of limitation under the Indian Act or the Straits Settlements Ordinances. The Plaintiff has no title even to discuss any such question. His case fails not because of the strength of the case for the Respondent either on possession or title,

but because he has himself no title as beneficial owner to maintain his claim to the property. On the whole their Lordships are of opinion that the Appeal should be dismissed, and they will humbly advise His Majesty accordingly. The Appellant must pay the costs.