

A Tan Ying Hong v Tan Sian San & Ors

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO
02(F)-19 OF 2009(C)

B ZAKI AZMI CHIEF JUSTICE, ALAUDDIN PCA, ARIFIN ZAKARIA
CJ (MALAYA), ZULKEFLI AND JAMES FOONG FCJJ
21 JANUARY 2010

C *Land Law — Indefeasibility of title and interests — Forged charge — Proper
construction to be accorded to s 340(1), (2) and (3) of the National Land Code
— Whether Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yoke Eng
[2001] 1 MLJ 241 case should be followed — Whether proviso after s 340(3)
D applied to other provisions of s 340 — National Land Code s 340(1), (2) & (3)*

E The plaintiff/appellant ('appellant') was the registered owner of a piece of
land situated in Kuantan, Pahang ('the land') which was charged to the
United Malayan Banking Corp, the third respondent, to secure loans
amounting to RM300,000 made in favour of Cini Timber Industries Sdn
Bhd, the second respondent. The first respondent, who was purporting to act
under a power of attorney, had executed the charges in favour of the third
respondent bank. The appellant only became aware of the charges when he
F received a notice of demand from the third respondent. The appellant
claimed that he had not signed the power of attorney, that it was forged and
that the charge instruments executed in favour of the third respondent were
void. The appellant then filed a claim in the High Court seeking, inter alia,
G a declaration that the said charges were void, an order expunging from the
register and the issue document of title the memorial of charges against the
land and an order directing the third respondent to deliver up to him the
issue document of title to the land. The High Court judge found that the
appellant had never granted the power of attorney to the first respondent and
that therefore the first respondent had no authority to charge the land to the
H third respondent bank. As such the registration of the appellant in the issue
document of title was found to be obtained by fraud or forgery. However the
court was bound by the decision of the Federal Court in *Adorna Properties
Sdn Bhd v Boonsom Boonyanit @ Sun Yoke Eng* [2001] 1 MLJ 241 ('the
Adorna Properties' case'), which held, inter alia, that by virtue of the proviso
I to s 340(3) of the National Land Code ('the NLC'), any purchaser in good
faith for valuable consideration enjoyed immediate indefeasible title to the
lands. This meant that despite the court's finding that the registration of the
appellant in the issue document of title was obtained by fraud or forgery, the
third respondent obtained an indefeasible title to the land. The appellant

appealed against the decision and the principal issues for the court in this instance were whether s 340 of the NLC conferred upon the registered proprietor or any person having a registered interest in the land an immediate or deferred indefeasibility, that is whether the *Adorna Properties*' case was correctly decided, and the proper construction to be accorded to s 340(1),(2) and (3) of the NLC.

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Held, allowing the appeal with costs here and below:

- (1) (per **Zaki Azmi Chief Justice Malaysia** and **Arifin Zakaria CJ (Malaya)**) Section 340(1) of the NLC confers an immediate indefeasible title or interest in land upon registration, subject to the exceptions set out in s 340(2) and (3). According to the *Adorna Properties*' case, Adorna Properties, the appellant, had acquired its title to the land through or under a forged instrument and it therefore came under the category of s 340(2)(b). The court then held that such a title was insulated from impeachment by the proviso in s 340(3) of the NLC. The question which arose was whether the proviso immediately after s 340(3) applied to other provisions of s 340, in particular, to s 340(2)(b). This could only be deduced from the proviso itself. From the authorities it was clear that a proviso to a subsection would not apply to another subsection and that a proviso carved out an exception to the provision immediately preceding the proviso and to no other. As such the proviso immediately after s 340(3) of the NLC is directed towards s 340(3) alone and not to the earlier subsection. This is supported by the use of the words 'in this subsection' in the proviso. Therefore its application could not be projected into the sphere or ambit of any other provisions of s 340 (see paras 6–10, 44–45 & 48–51).
- (2) (per **Zaki Azmi Chief Justice Malaysia** and **Arifin Zakaria CJ (Malaya)**) Further, even though s 340(3)(a) and (b) refer to the circumstances specified in s 340(2) they are restricted to a subsequent transfer of an interest in the land. Therefore, a person or body in the position of Adorna Properties could not take advantage of the proviso to s 340(3) to avoid its title or interest from being impeached. It is trite law that this court may depart from its earlier decision if the former decision sought to be overruled was wrong, uncertain, unjust or outmoded or obsolete in the modern conditions. As it was clear that the Federal Court in the *Adorna Properties* case had misconstrued s 340(1), (2) and (3) of the NLC and thus come to the erroneous conclusion that the proviso to s 340(3) applied equally to s 340(2), this error needed to be remedied forthwith in the interest of all registered proprietors (see paras 11, 52–53).

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- A (3) (per **Arifin Zakaria CJ (Malaya)**) According to the facts of the present case, it was not in dispute that the two charges registered in favour of the third respondent were based on void instruments as they were not executed by the appellant. It therefore followed that the two charges in this case were liable to be set aside under s 340(2)(b) since they were based on void instruments. As the third respondent was an immediate holder of these charges it could not take advantage of the proviso to s 340(3) of the NLC. The fact that the third respondent acquired the interest in question in good faith for value was not in issue because the charges arose from void instruments. It automatically followed that such charges were liable to be set aside at the instance of the registered proprietor namely, the appellant (see paras 55–56 & 60–61).

[Bahasa Malaysia summary

- D Plaintiff/perayu ('perayu') adalah pemilik berdaftar sebidang tanah terletak di Kuantan, Pahang ('tanah tersebut') yang telah digadaikan kepada United Malayan Banking Corp, responden ketiga, untuk menjamin pinjaman sejumlah RM300,000 yang dibuat bagi pihak Cini Timber Industries Sdn Bhd, responden kedua. Responden pertama, yang mendakwa bertindak di bawah surat kuasa wakil, telah menyempurnakan gadaian-gadaian tersebut bagi pihak responden ketiga. Perayu hanya sedar mengenai gadaian-gadaian tersebut apabila dia menerima notis tuntutan daripada responden ketiga. Perayu mendakwa bahawa dia tidak menandatangani surat kuasa wakil, bahawa ia telah dipalsukan dan bahawa surat cara gadaian yang disempurnakan memihak kepada responden ketiga adalah batal. Perayu kemudiannya memfailkan tuntutan di Mahkamah Tinggi memohon, antara lain, perisytiharan bahawa gadaian-gadaian tersebut adalah batal, perintah memadamkannya daripada daftar dan dokumen hakmilik peringatan gadaian-gadaian terhadap tanah tersebut dan satu perintah mengarahkan responden ketiga menyerahkan kepadanya dokumen hakmilik tanah tersebut. Hakim Mahkamah Tinggi mendapati bahawa perayu tidak pernah memberikan surat kuasa wakil kepada responden pertama dan bahawa responden pertama tidak mempunyai kuasa untuk mengadai tanah tersebut kepada responden ketiga. Oleh itu, pendaftaran perayu terhadap dokumen hakmilik tersebut didapati telah diperolehi melalui fraud atau pemalsuan. Walau bagaimanapun, mahkamah terikat kepada keputusan Mahkamah Persekutuan di dalam kes *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yoke Eng* [2001] 1 MLJ 241 ('kes *Adorna Properties*'), yang mana diputuskan, antara lain, bahawa berdasarkan proviso kepada s 340(3) Kanun Tanah Negara ('KTN'), mana-mana pembeli yang suci hati untuk balasan nilai menikmati hakmilik tak boleh sangkal langsung terhadap tanah tersebut. Ini bermaksud, walaupun mahkamah mendapati bahawa pendaftaran perayu di dalam dokumen hakmilik diperolehi secara fraud atau

pemalsuan, responden ketiga memperoleh hakmilik tak boleh sangkal terhadap tanah tersebut. Perayu merayu terhadap keputusan tersebut dan isu-isu utama untuk pertimbangan mahkamah ini adalah sama ada s 340 KTN diberikan kepada pemilik berdaftar atau mana-mana orang yang mempunyai kepentingan berdaftar di dalam tanah tersebut merupakan satu ketakboleh sangkal langsung atau tertanggung, bahawa sama ada kes Adorna Properties diputuskan secara betul, dan tafsiran betul harus diberikan kepada s 340(1),(2) dan (3) KTN.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Rayuan:

- (1) (oleh **Zaki Azmi Ketua Hakim Negara** dan **Arifin Zakaria HB (Malaya)**) Seksyen 340(1) KTN memberikan hakmilik atau kepentingan tak boleh sangkal langsung ke atas tanah selepas pendaftaran, tertakluk kepada pengecualian-pengecualian yang ditetapkan dalam s 340(2) dan (3). Mengikut kes *Adorna Properties*, Adorna Properties, perayu, telah memperoleh hakmiliknya terhadap tanah tersebut melalui atau di bawah surat cara pemalsuan dan oleh itu ia terangkum di bawah kategori s 340(2)(b). Mahkamah kemudiannya memutuskan bahawa hakmilik sedemikian dilindungi daripada pencabaran oleh proviso di bawah s 340(3) KTN. Persoalan yang berbangkit adalah sama ada proviso kepada s 340(3) digunakan kepada peruntukan-peruntukan s 340 yang lain, terutamanya, kepada s 340(2)(b). Ini hanya dapat disimpulkan daripada proviso itu sendiri. Daripada authoriti-authoriti adalah jelas bahawa proviso kepada sub-seksyen tidak akan digunakan kepada sub-seksyen lain dan bahawa proviso membentuk suatu pengecualian kepada peruntukan yang mendahului proviso tersebut dan bukan kepada peruntukan yang lain. Oleh itu proviso kepada s 340(3) KTN diarahkan terhadap s 340(3) sahaja dan bukan kepada sub-seksyen yang terdahulu. Ini disokong dengan penggunaan perkataan 'in this subsection' di dalam proviso tersebut. Oleh itu, permohonannya tidak dapat diunjurkan ke dalam lingkungan apa-apa peruntukan s 340 yang lain (lihat perenggan 6–10, 44–45 & 48–51).
- (2) (oleh **Zaki Azmi Ketua Hakim Negara** dan **Arifin Zakaria HB (Malaya)**) Selanjutnya, walaupun s 340(3)(a) dan (b) merujuk kepada keadaan yang ditetapkan di dalam s 340(2) ia terhad kepada pindah milik berikutnya atas kepentingan kepada tanah tersebut. Oleh itu, seseorang atau badan seperti dalam kedudukan Adorna Properties tidak dapat mengambil kesempatan terhadap proviso kepada s 340(3) untuk mengelak hakmilik atau kepentingannya dicabar. Adalah undang-undang nyata bahawa mahkamah ini boleh menyimpang

- A daripada keputusannya yang terdahulu jika keputusan tersebut dipohon untuk ditolak adalah salah, tidak pasti, tidak adil atau tidak digunakan lagi dalam keadaan moden. Memandangkan adalah jelas bahawa Mahkamah Persekutuan di dalam kes *Adorna Properties* telah salah mentafsir s 340(1), (2) dan (3) KTN dan oleh itu mencapai keputusan
- B yang salah bahawa proviso kepada s 340(3) juga digunapakai kepada s 340(2), kesalahan ini perlu diremedikan untuk kepentingan kesemua pemilik berdaftar (lihat perenggan 11, 52–53)..
- (3) (oleh **Arifin Zakaria HB (Malaya)**) Mengikut fakta kes ini, tidak
- C dipertikaikan bahawa kedua-dua gadaian tersebut yang didaftar bagi pihak responden ketiga adalah berdasarkan surat cara-surat cara yang tidak sah disebabkan oleh surat cara-surat cara tersebut tidak disempurnakan oleh perayu. Maka, kedua-dua gadaian dalam kes ini boleh diketepikan berikutan s 340(2) disebabkan gadaian tersebut berlandaskan surat cara-surat cara yang tak sah. Memandangkan
- D responden ketiga adalah pemegang langsung gadaian-gadaian ini ia tidak dapat mengambil kesempatan terhadap proviso kepada s 340(3) KTN. Fakta bahawa responden ketiga memiliki kepentingan yang dipersoalkan dengan suci hati untuk nilai bukan satu isu kerana gadaian-gadaian tersebut berbangkit daripada surat cara-surat cara yang tidak sah. Oleh itu gadaian-gadaian sedemikian boleh diketepikan atas permohonan pemilik berdaftar, iaitu perayu (lihat perenggan 55–56 & 60–61).]

F Notes

For cases on forged charge, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2921–2922.

Cases referred to

- G *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; [2001] 2 CLJ 133, FC (overd)
- Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136; [2007] 4 CLJ 526, CA (refd)
- Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62; [1997] 3 CLJ 17, CA (refd)
- H *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1, FC (refd)
- Frazer v Walker & Ors* [1967] 1 AC 569, PC (refd)
- Ismail bin Mohamad & Anor v Ismail bin Husin & Ors* [2005] 7 MLJ 103; [2005] 6 AMR 123, HC (refd)
- I *M/S Gajo Ram v State of Bihar* AIR 1956 Pat 113 (refd)
- M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, SC (refd)
- Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53, HC (refd)

- Mok Yong Chuan v Mok Yong Kong & Anor* [2006] 7 MLJ 526, HC (refd) A
OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor Darul Takzim
 [1999] 2 MLJ 511; [1999] 2 CLJ 949, CA (refd)
PTJV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ
 136, FC (refd)
Ram Narain Sons Ltd v Assistant Commissioner of Sales Tax AIR 1955 SC 765 B
 (refd)

Legislation referred to

- National Land Code ss 258(a), (b), 261(1)(c), 340, 340(1), (2), (2)(a), (b), C
 (c), (3), (3)(a), (b), Form 16A

Appeal from: Civil Appeal No C-02–800 of 2003 (Court of Appeal, Putrajaya)

- T Mura Raju (Bob S Arumugam with him) (Siva, Ram & Kong) for the D
 appellant.*
*Bastian Vendargon (Ong Siew Wan with him) (Andrew David Wong & Ong) for
 the third respondent.*
*See Mee Chun (Azizah Nawawi with her) (Senior Federal Counsel, Attorney E
 General's Chambers) watching brief.*
Roger Tan (Tony Woon with him) watching brief for the Bar Council.

Zaki Azmi Chief Justice:

[1] I had the privilege of reading the draft of my learned Chief Judge of F
 Malaya Arifin Zakaria's grounds of judgment. I must give him credit for
 having traced the history of decisions made on the interpretation of s 340 of
 the National Land Code ('NLC'). I agree with his conclusions. G

Section 340 Registration to confer indefeasible title or interest, except in certain
 circumstances

- (1) The title or interest of any person or body for the time being H
 registered as proprietor of any land, or in whose name any lease,
 charge or easement is for the time being registered as proprietor of an
 land, or in whose name any lease, charge or easement is for the time
 being registered, shall, subject to the following provisions of this
 section, be indefeasible.
 (2) The title or interest of any such person or body shall not be I
 indefeasible —
 (a) in any case of fraud or misrepresentation to which the person or
 body, or any agent of the person or body, was a party or privy; or

- A** (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
- (c) where the title or interest was unlawfully acquired by the person or body is in the purported exercise of any power or authority conferred by any written law.
- B** (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —
- C** (a) it shall be liable to set aside in the hands of any person or body to whom it may subsequently be transferred; and
- (b) by any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
- D** Provided that nothing in this sub-section shall affect any title or interest acquired by any person or body claiming through or under such a purchaser.
- (4) Nothing in this section shall prejudice or prevent —
- E** (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
- F** (b) the determination of any title or interest by operation of law.

[2] I wish to, however, express my own views in support of that judgment.

- G** [3] The facts of this case, which are not disputed, have been well narrated in his judgment and I do not wish to repeat them here.

[4] I would like to look at s 340 of the NLC in a more simplified manner.

- H** [5] Let us refer to the first owner of a piece of land as 'A' who then transfers the same piece of land to 'B' and which subsequently is transferred to 'C'.

[6] As far as s 340(1) of the NLC is concerned, A's title to the land is totally indefeasible. In short if A's name appears on the registration, no one can come and claim for that title. The law will not entertain it at all.

- I** [7] Now comes the next person, B, whose name appears in the register. If it can be shown that the title or interests obtained by B was obtained by fraud or misrepresentation by him or anyone else to which he was a party or privy

then his claim to the title or interest can be defeated (see s 340(2)(a) of the NLC). Otherwise, B stands in the same position as A. A

[8] The situation where it is proved that the registration in B's name was obtained by forgery or by means of an insufficient or void instrument is the same (see s 340(2)(b) of the NLC). His title or interest to the land is liable to be set aside by the previous owner who has a good title. In this latter instance, there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument. B

[9] The third instance where B's title or interest could be defeated is where it was *unlawfully* acquired through the exercise of any power or authority conferred by any law. Section 340(2)(c) of the NLC deals with one who was for example acting in his capacity as an agent to a power of attorney. Even if C is in the same position as B, sub-s (3) also does not give protection to C unless he can show that he had acquired the title or interest *in good faith and for valuable consideration*. Any title or interest gained by any person thereafter is also liable to be set aside unless it could be shown that he had acquired it in good faith and for valuable consideration. This is what is called deferred indefeasibility of title. If his title or interest is challenged on similar grounds, the burden of proving there was valuable consideration and good faith lies on him. C
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[10] As far as I am concerned, that is the simplest way of looking at s 340 of the NLC. I totally agree with the learned Chief Judge of Malaya's view that the error committed by the Federal Court in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 was to read the proviso to sub-s (3) as being a proviso to sub-s (2) as well. The error is very obvious because the proviso expressly refers to 'this sub-section' which must in the context of that subsection be read as proviso to sub-s (3) only. F
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[11] I am legally obligated to restate the law since the error committed in *Adorna Properties* is so obvious and blatant. It is quite a well known fact that some unscrupulous people have been taking advantage of this error by falsely transferring titles to themselves. I hope that with this decision, the land authorities will be extra cautious when registering transfers. H

[12] In the circumstances and for the reason mentioned above, I would concur with the Chief Judge of Malaya, Arifin Zakaria, allow this appeal and make the same orders made by him. I also agree that the costs of this appeal and the courts below be awarded to the appellant. I

A **Arifin Zakaria CJ (Malaya):**

INTRODUCTION

B [13] This is an appeal against the decision of the Court of Appeal dated 27 August 2008 dismissing the appellant's appeal. Leave to appeal was granted on a single question which reads:

C Whether an acquirer of a registered charge or other interest or title under the National Land Code 1965 by means of a forged instrument acquires an immediate indefeasible interest or title.

THE FACTS

D [14] The facts relevant to this appeal may briefly be stated as follows: the appellant/plaintiff is the registered owner of a piece of land held under HS (M) No 6033 PT No 6371 Mk Kuala Kuantan, Kuantan, Pahang ('the land'). The first respondent/defendant purporting to act under a power of attorney No 80/97 ('PA') executed two charges in favour of United Malayan Banking Corporation, the third respondent/defendant herein, to secure the loans of RM200,000 and RM100,000 respectively. The loans were made in favour of Cini Timber Industries Sdn Bhd, the second respondent/defendant.

E [15] The appellant claimed that he did not sign the PA. He claimed it was forged. He only became aware of the forgery when he received a notice of demand from the third respondent dated 9 March 1985.

He then filed a claim in the High Court seeking the following reliefs:

- F**
- G** (a) a declaration that the said charges are void ab initio;
- (b) an order expunging from the register and the issue document of title the memorial of charges against the land;
- (c) an order directing the third respondent to deliver up to him the issue document of title to the land; and
- H** (d) a declaration that the PA purportedly executed by him in favour of the first respondent is void ab initio and an order cancelling or revoking the same.

I [16] It is pertinent to note that the learned High Court judge made the following findings, which were not disputed by the parties, namely:

- (a) the registration of the appellant in the issue document of title was obtained by fraud or forgery;

- (b) the appellant had never charged the land to the third respondent; A
- (c) the appellant had never granted the PA to the first respondent; and
- (d) the appellant had never given authority to the first respondent to charge the land to the third respondent. B

[17] It is common ground that the third respondent, in whose favour the charges were registered, is an immediate holder of the interest on the land.

THE ISSUES C

[18] The principal issue in this case is whether s 340 of the National Land Code ('NLC') confers upon the registered proprietor or any person having registered interest in the land an immediate or deferred indefeasibility. This, was once thought to be a settled question of law until the decision of this Court in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 (*Adorna Properties*). In that case it was held, inter alia, that by virtue of the proviso to sub-s (3) of s 340 of the NLC, any purchaser in good faith for valuable consideration is excluded from the application of the said provision. It follows, therefore, that this category of proprietors enjoy immediate indefeasible title to the lands. Therefore, despite the court's finding that the instrument of transfer was forged the appellant nevertheless obtained an indefeasible title to the land. The decision of this court in that case had a far reaching effect on the land law and land administration in this country. For ease of reference we set out below s 340(1), (2) and (3). It reads: D E F

340 Registration to confer indefeasible title or interest, except in certain circumstances

- (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible. G
- (2) The title or interest of any such person or body shall not be indefeasible — H
 - (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
 - (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or I
 - (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

- A (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —
- (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
- B (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested.
- C Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

- D [19] Section 340 of the NLC introduced into our land law the concept of indefeasibility of title. This is central to the system of registration of title under the Torrens system. Raja Azlan Shah (as His Royal Highness then was) in *PTJV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 observed that ‘the concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it’. Indefeasibility is defined by the Privy Council in *Frazer v Walker & Ors* [1967] 1 AC 569:
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- F The expression not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.
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- H [20] Indefeasibility can be immediate or deferred. The distinction between the two is well explained in para 404 of *The National Land Code, A Commentary* (Vol 2) by Judith Sihombing which reads:

- I There are two types of indefeasibility; immediate and deferred. The factor which distinguishes the two is the common law effect given to the instrument even after registration; in addition; in a regime of deferred indefeasibility, the role of registered volunteer might be more relevant than under an immediate indefeasibility system. If, after registration has occurred, the system then ignores the substance, form and probity of the instrument used to support the registration, the system is likely that of immediate indefeasibility. Thus, registration has cured any defect in the instrument being registered. If the instrument, despite registration, still has the power to affect the registered interest or estate, the system will probably be that of deferred indefeasibility.

[21] In short, immediate indefeasibility means that the immediate registered title or interest of the proprietor or transferee immediately to the vitiating circumstances will be conferred statutory protection despite the existence of any vitiating circumstances. In the case of deferred indefeasibility, the indefeasibility only comes to be attached to the title or interest upon a subsequent transfer. Thus, the difference between immediate and deferred indefeasibility hinges on the effect of registration vis-a-vis the title or interest.

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[22] Before the decision of *Adorna Properties* the prevailing view was that s 340 of the NLC confers deferred indefeasibility as opposed to immediate indefeasibility. This was confirmed by the Federal Court in *Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53. This is further reinforced by the Supreme Court's decision in *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294. There the Supreme Court, comprising of Abdul Hamid Omar LP, Edgar Joseph Jr and Wan Yahya SCJJ held that indefeasibility can be rebutted not only by fraud but also in cases where registration is obtained by the use of an insufficient or void instrument or where the title or interest is unlawfully acquired.

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[23] In that case, it was held that failure to comply with the statutory requirements of paras (a) and (b) of s 258 and para (c) of s 261(1) of the NLC was not just a mere irregularity, but was an illegality which struck at the root of the first respondent's right to be heard. Therefore, the certificate issued by the senior assistant registrar was ultra vires the statutory provisions of the NLC and the title was unlawfully acquired by the first appellant. The title of the first appellant was defeasible under s 340(2)(c) of the NLC and the learned judge had arrived at a correct decision when he made the order for the cancellation of the registration of the transfer.

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[24] The above position is reflected in the judgment of the Court of Appeal in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62; [1997] 3 CLJ 17. This was followed by another panel of Court of Appeal in *OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor Darul Takzim* [1999] 2 MLJ 511; [1999] 2 CLJ 949. In the latter case the appellant bank granted an overdraft facility to one Ng See Chow ('the borrower') which was secured by a charge registered in favour of the appellant over some lands in Johore. The borrower defaulted in the overdraft facility and the appellant commenced foreclosure proceedings and obtained an order for sale on 12 May 1992. On 15 September 1992, at the request of the police, the respondent entered a registrar's caveat on the land on the basis of police investigations into the report of one Ng Kim Hwa who claimed that the land belonged to him and that he had never executed any transfer in favour of the borrower. Nevertheless, this first caveat was removed on 3 February 1993 with the consent of the respondent. Ng Kim Hwa thereafter brought an action against

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A the borrower to recover the land and intervened in the appellant's foreclosure proceedings to set aside the order for sale or to stay the execution of the same pending the outcome of his civil suit against the borrower. The appellant contended that the charge on the land was indefeasible pursuant to s 340 of the NLC as the appellant had obtained the same in good faith for valuable consideration.

C [25] The High Court dismissed Ng Kim Hwa's application and based on this decision the appellant took steps to proceed with the auction. Two days prior to the date of the auction, a second caveat was entered by the respondent based on similar grounds as in the first caveat as well as letters from the Central Registry of Criminals Malaysia. The appellant applied to remove the second caveat but the application was dismissed by the High Court. The Court of Appeal having heard the submissions of the parties, dismissed the appeal.

D [26] NH Chan JCA in delivering the judgment of the Court of Appeal was of the opinion that the proviso to s 340(3) of the NLC applies exclusively to those situations which are covered by sub-s (3). The court then went on to hold that the charge granted by Ng See Chow to the appellant was liable to be set aside by the true owner since the title was obtained by forgery. On the facts of that case, we agree that the title of Ng See Chow is defeasible under s 340(2) of the NLC as he obtained his title through a forged instrument. However, we are of the opinion that the appellant bank, being the holder of subsequent interest in the land is protected by the proviso to s 340(3) of the NLC. For that reason we are of the view that the finding of the Court of Appeal in that case is to that extent flawed.

G [27] That was the position prior to the decision of this court in *Adorna Properties*. In *Adorna Properties*, the respondent was the registered proprietor of a piece of land which had been sold and transferred to the appellant. The respondent claimed that the vendor had forged her signature, sold and transferred the land to the appellant. The High Court dismissed the respondent's claim. The decision of the High Court was reversed by the Court of Appeal. The appellant appealed. The questions of law posed for decision of this court were:

- H (a) whether the standard of proof to prove forgery is on balance of probabilities or beyond reasonable doubt; and
- I (b) whether the appellant, a bona fide purchaser for valuable consideration without notice, acquired an indefeasible title to the land by virtue of s 340(3) of the NLC.

[28] This court in a panel comprising of Eusoff Chin Chief Justice, Wan Adnan CJ (Malaya) and Abu Mansor FCJ held that by virtue of the proviso to s 340(3) of the NLC, a purchaser in good faith and for valuable consideration is excluded from the application of the substantive provision of s 340(3). This category of registered proprietors obtains immediate indefeasible title to the land. Thus, on the facts of that case, even if the instrument of transfer was forged, the appellant nevertheless obtained an indefeasible title to the land.

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[29] The effect of *Adorna Properties* is to confer immediate indefeasibility to the registered proprietor. That decision was followed, albeit reluctantly, in a number of subsequent cases. In *Ismail bin Mohmad & Anor v Ismail bin Husin & Ors* [2005] 7 MLJ 103; [2005] 6 AMR 123, where I sat as a High Court judge, I held that I was bound by *Adorna Properties* and on that premise, I ruled in favour of the fourth defendant.

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[30] In that case, the plaintiffs, the registered proprietors of three pieces of land ('the said lands'), entered into a sale and purchase agreement ('the agreement') with the first defendant whereby the first defendant agreed to purchase the said lands for a total consideration of RM7.5m. The agreement was prepared by the second defendant, an advocate and solicitor, practising under the name of Sajali & Aziz, the third defendant in the suit. Under the agreement, a sum of RM150,000 was to be paid on the date of the execution of the agreement and a further sum of RM50,000 was to be paid within a period of one month from the date of the agreement. The balance sum of RM7,300,000 was to be paid to the third defendant as the stakeholder within three months from the date of the agreement. The first defendant paid the two sums of RM150,000 and RM50,000 as agreed; the balance sum of RM7,300,000 remained unpaid. Upon enquiry, the plaintiffs discovered that the said lands had been charged to the fourth defendant as security for a term loan of RM16m to the fifth defendant, out of which RM10m had already been disbursed to the fifth defendant. The plaintiffs claimed that they had no knowledge of the charge and that they had not signed the charge document nor the charge annexure. They further claimed that what purported to be their signatures on the charge document and the charge annexure were forgeries. The plaintiffs brought a suit, their case being that the defendants' intention to defraud the plaintiffs had been conceived even before the agreement was entered into. The plaintiffs submitted that in the circumstances, the interest registered by way of a charge in favour of the fourth defendant was defeasible under one or more of the grounds set out in s 340(2) of the NLC.

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[31] In that case, even though I found that the signatures of the plaintiffs both on the charge and the annexure to the charge were forged, I held that

A the charge was valid as I was bound by the decision of the Federal Court in *Adorna Properties*. Therefore, the chargee bank's interest in the said land is indefeasible. I said at p 139:

B ... on that premise I would dismiss the first ground relied upon by learned counsel for the plaintiffs. Similarly I find no merit in the second and third grounds advanced herein. I am of the view that the decision of the Federal Court is binding on this court despite whatever criticism that may be levelled against it. To hold otherwise would be to go against the principle of stare decisis.

C My decision in that case was reversed by the Court of Appeal, in a majority decision, on another ground which is not relevant to the present case.

D [32] In *Mok Yong Chuan v Mok Yong Kong & Anor* [2006] 7 MLJ 526 the plaintiff and the first defendant were brothers and the subject of the dispute concerned the 2/3 share in the property ('the property') which was at one time registered under the name of 'Boh Yong Kwang' which the first defendant maintained was a variant spelling of his name. The first defendant had caused a rectification of the spelling of the name 'Boh Yong Kwang' on the documents of title to the property to his name 'Mok Yong Kong' and thereafter transferred the property to the second defendant. The plaintiff claimed for declaratory reliefs that the rectification of the name 'Boh Yong Kwang' to 'Mok Yong Kong' on the title of the property by the first defendant and the subsequent transfer of the property to the second defendant be declared unlawful and void. The plaintiff predicated his claim on fraud by the first defendant and conspiracy by the second defendant. He alleged that the first defendant had committed fraud in holding himself out as 'Boh Yong Kwang' and in rectifying the spelling of 'Boh Yong Kwang' to 'Mok Yong Kong' on the documents of title to the property as Boh Yong Kwang was their late father and not the first defendant. The second defendant denied any conspiracy with the first defendant to defraud the plaintiff and averred that as a bona fide purchaser for value and upon registration he had acquired an indefeasible title under s 340 of the NLC.

H [33] The learned judge found that the plaintiff failed to prove fraud being committed by the first defendant. By way of obiter he observed that based on *Adorna Properties* currently the law in Malaysia adopts the doctrine of immediate indefeasibility, and that put the second defendant's position in that case beyond doubt.

I [34] In *Liew Yok Yin v AGS Harta Sdn Bhd* [2006] 7 MLJ 49, the plaintiff was the original registered owner of a piece of land. Subsequently the land was registered in the name of the defendant. The plaintiff claimed for a declaration that the plaintiff was still the owner of the land and that the defendant's registration was void on the ground that the registration of title

in the defendant's name was obtained by forgery and/or by means of an insufficient and/or void instrument as the plaintiff had never at any time executed any instrument of transfer in the defendant's favour, that the original issue document of title had all along been in her possession and that she never parted with it. The defendant in their defence denied this and pleaded even if forgery existed they were bona fide purchaser for value having paid the full purchase price of RM500,000 and the relevant stamp duties and registration fees and by reason thereof had acquired indefeasible title under s 340 of the NLC.

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[35] The learned judge found that the sale documentation was a forgery as it does not bear the signature of the plaintiff and hence the defeasibility provision of s 340(2)(b) of the NLC applies. He said that even applying *Adorna Properties* to defeat the applicability of s 340(2)(b) the defendant has to prove that he is a bona fide purchaser for value under the proviso to s 340(3) of the NLC, a burden which the defendant failed to discharge.

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[36] Raus Sharif JCA (as he then was) in *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136; [2007] 4 CLJ 526 in discussing on the proviso of s 340(3) of the NLC said:

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To me, by virtue of s 340(2)(b) of the Code, the title of Adorna Properties was not indefeasible as the registration was obtained by forgery. Section 340(3) does not apply to s 340(2). The proviso states 'Provided that in this subsection' and this subsection refers to s 340(3) and not s 340(2). Section 340(3)(a) refers to 'to whom it may subsequently be transferred' which means that the intended purchaser is the subsequent purchaser and not the immediate purchaser.

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[37] Gopal Sri Ram JCA (as he then was) in the same case opined that the Federal Court's decision in *Adorna Properties* was decided per incuriam and should not be treated as binding for the reasons that:

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- (a) s 340(3) applies to subsequent acquirers of land, taking from a registered proprietor whose title is defeasible as stipulated in s 340(2), a class which *Adorna Properties* does not belong to since it took its title from a forger;
- (b) the Federal Court in *Adorna Properties* when arriving at its decision, overlooked at least two authorities which hold that the Code provides for deferred indefeasibility; in *Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53; [1981] 1 LNS 114 and *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294; [1994] 2 CLJ 14; [1994] 2 BLJ 156 which propagate the doctrine of deferred indefeasibility in the NLC; and

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- A (c) the learned Chief Justice in *Adorna Properties* equated purchasers and registered proprietors overlooking the provisions of s 5 of the Code which defines them separately and differently.
- B [38] Apart from above, much criticism have been levelled against the judgment of the Federal Court in *Adorna Properties* by academic writers. PK Nathan in his article *Nightmare for Registered Owners of Landed Property* published in [2002] MLJ xxiii said:
- C The decision of the Federal Court in the case of *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; [2001] 2 CLJ 133 has placed registered owners of landed properties on thin ice and in jeopardy. As a result of the decision, land owners may, one morning, find themselves no longer owning their landed properties without any fault, doing or knowledge in their part.
- D [39] Associate Professor Teo Keang Sood of the Faculty of Law, National University of Singapore in an article *Demise of Deferred Indefeasibility under the Malaysia Torrens System?* (Singapore Journal of Legal Studies, 2002 at pp 403–408) stated:
- E Having misconstrued the legislative intent as embodied in s 340, the case of *Adorna Properties Sdn Bhd* is clearly wrongly decided on the issue of indefeasibility involving forgery and should not be followed. Whatever may be the advantages of immediate indefeasibility, it is for Parliament, to change the law, and until that is done, it is for the courts to interpret the law as it stands.
- F [40] The learned writer again in a paper presented at the Malaysian Law Conference on 29 October 2007 entitled *Basics of Indefeasibility under the National Land Code* said:
- G With its decision in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng*, the Malaysian Federal Court has not only spawned academic articles on the subject of indefeasibility of title and interests under the National Land Code 1965 (hereinafter referred to as ‘the NLC’) but has, unfortunately, also left an unwanted trail of uncertainty and insecurity of title for landowners which the Torrens system of land registration embodied in the NLC seeks to avoid, not to mention the slew of conflicting decisions pronounced in its aftermath.
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- I [41] It is trite law that this court may depart from its earlier decision if the former decision sought to be overruled is wrong, uncertain, unjust or outmoded or obsolete in the modern conditions (see *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1).

[42] At this juncture it may be appropriate for us to consider what was in fact the decision in *Adorna Properties* and the underlying reasons for the decision. In that case two questions were posed to the Federal Court arising from the decision of the Court of Appeal in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62; [1997] 3 CLJ 17. What concern us is the second question which reads: 'Whether the appellant, a bona fide purchaser for valuable consideration without notice, acquired an indefeasible title to the land by virtue of s 340(3) of the NLC.' The court answered the question in the positive.

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[43] The reasons underlying this decision appeared in the judgement of the court rendered by Eusoff Chin CJ. He said that the court is not to look at what is the Torrens system as practised in other jurisdictions but to interpret s 340 as it stands, '... and to find the real intention of Parliament when enacting it ... and the intention of Parliament must be deduced from the language used'.

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[44] We agree with the court that the issue before the court, and likewise before us, is one of proper interpretation to be accorded to s 340(1), (2) and (3) of the NLC. The court then went on to say that s 340(1) of the NLC confers an immediate indefeasible title or interest in land upon registration, subject to the exceptions set out in s 340(2) and (3). Thus far, we think the court was right. The difficulties arose in the interpretation of sub-s (2) and sub-s (3). This is what it said at p 245:

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Subsection (2) states that the title of any such person, ie any registered proprietor or coproprietor for the time being is defeasible if one of the three circumstances in sub-s (2)(a), (b) or (c) occurs. We are concerned here with sub-s (2)(b) where the registration had been obtained by forgery.

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Subsection (3) says that where that title is defeasible under any of the three circumstances enumerated under sub-s (2), the title of the registered proprietor to whom the land was subsequently transferred under the forged document, is liable to be set aside. Similarly, sub-s (3)(b) says, any interest under any lease, charge or easement subsequently 'granted thereout', ie out of the forged document may be set aside.

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At p 246 it said:

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The proviso to sub-s (3) of s 340 of the NLC deals with only one class or category of registered proprietors for the time being. It excludes from the main provision of sub-s (3) this category of registered proprietors so that these proprietors are not caught by the main provision of this subsection. Who are those proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of sub-s (3). For this category of registered proprietors, they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document.

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- A [45] In that case, it was stated that the court was concerned with sub-s (2)(b) where the registration had been obtained by forgery. This is correct because the appellant obtained its title through or under a forged instrument of transfer. That was the finding of the Court of Appeal and affirmed by the Federal Court.
- B [46] The Court of Appeal took the view that 's 340 of the Code makes defeasible the title of a registered proprietor tainted by one or more of the vitiating elements set out in its second subsection but creates an exception in favour of a bona fide purchaser who takes his title from such a registered proprietor'. By this bifurcation, the Court of Appeal concluded that Parliament had intended to confer deferred and not immediate indefeasibility. The Court of Appeal stated with approval the view of Dr Visu Sinnadurai in his book entitled *Sale and Purchase of Real Property in Malaysia* which reads:
- D In Malaysia, it is submitted that under s.340 of the National Land Code, deferred indefeasibility applies. The registered proprietor who had acquired his title by registration of a void or voidable instrument does not acquire an indefeasible title under s.340(2)(b). The indefeasibility is postponed until the time when a subsequent purchaser acquires the title in good faith and for valuable consideration. In other words, a registered proprietor, the vendor, under a sale and purchase agreement, even though he himself does not possess an indefeasible title, may give an indefeasible title to a *bona fide* purchaser.
- E [47] What the Federal Court differed from the Court of Appeal was on the effect to be given to sub-s (3).
- F [48] Having said that the appellant in *Adorna Properties* had acquired its title to the land through or under a forged instrument and it therefore came under the category of title in sub-s (2)(b), the court then went on to hold that such a title is insulated from impeachment by the proviso to sub-s (3).
- G [49] The question is, does the proviso following immediately after sub-s (3), apply to the other provisions of s 340, in particular to sub-s 2(b). This can only be deduced from the proviso itself. *NS Bindra's Interpretation of Statutes* (9th Ed) at p 110 states that: 'A proviso is something engrafted on a preceding enactment. The proviso follows the enacting part of a section and is in a way independent of it. Normally, it does not enlarge the section, and in most cases, it cuts down or makes an exception from the ambit of the main provision.' A proviso to a subsection would not apply to another subsection (*M/S Gajo Ram v State of Bihar* AIR 1956 Pat 113). A proviso carves out an exception to the provision immediately preceding the proviso and to no other (*Ram Narain Sons Ltd v Assistant Commissioner of Sales Tax* AIR 1955 SC 765).
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[50] As we see it, sub-s (3) merely provides that any title or interest of any person or body which is defeasible by reason of any the circumstances specified in sub-s (2) shall continue to be liable to be set aside in the hands of subsequent holder of such title or interest. This subsection, however, is subject to the proviso which reads:

Provided that nothing *in this subsection* shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser'. (Emphasis added.)

[51] We are of the view that the proviso is directed towards the provision of sub-s (3) alone and not to the earlier subsection. This in our view is supported by the use of the words 'in this subsection' in the proviso. Therefore, its application could not be projected into the sphere or ambit of any other provisions of s 340.

[52] Furthermore, eventhough sub-s (3)(a) and (b) refer to the circumstances specified in sub-s (2) they are restricted to subsequent transfer or to interest in the land subsequently granted thereout. So it could not apply to the immediate transferee of any title or interest in any land. Therefore, a person or body in the position of *Adorna Properties* could not take advantage of the proviso to the sub-s (3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable solely to sub-s (3) ought not to be extended as was done by the court in *Adorna Properties*, to apply to sub-s (2)(b). By so doing, the court had clearly gone against the clear intention of Parliament. This error needs to be remedied forthwith in the interest of all registered proprietors. It is, therefore, highly regrettable that it had taken some time, before this contentious issue is put to rest.

[53] For the above reasons, with respect, we hold that the Federal Court in *Adorna Properties* had misconstrued s 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in sub-s (3) equally applies to sub-s (2). By so doing, the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision of s 340 of the NLC.

[54] It is interesting to note that learned counsel for the third respondent and the representatives of the attorney general agreed that *Adorna Properties* was wrongly decided. But notwithstanding that concession, learned counsel for the third respondent maintained that the application by the appellant could not be sustained on other grounds. We will consider his contentions in the subsequent part of this judgment.

- A [55] Reverting to the facts of this case, it is not in dispute that the two charges registered in favour of the third respondent were based on void instruments as the relevant Form 16A were not executed by the appellant. They were executed by the first respondent pursuant to a forged PA. Thus, the charge instruments (Form 16A) used in the present case were indisputably void instruments. It follows, therefore, that the two charges in this case are liable to be set aside under s 340(2)(b) since they are based on void instruments.
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- C [56] The third respondent is an immediate holder of these charges. That being the position, the third respondent could not take advantage of the proviso to sub-s (3) of s 340.
- D [57] For the reasons given above, we would therefore answer the question posed to us in the negative. However, learned counsel for the third respondent contended that even if the answer to the question is in the negative, the appeal would still fail for the reason that, the appellant on his own admission said that he had not applied for the land and that he was not aware that the land was registered in his name until the third respondent issued a notice of demand on him.
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- F [58] Learned counsel argued that the appellant in the circumstances of this case is not entitled to and ought not to be granted the declaratory reliefs sought for. A declaratory relief, he contended, is a matter of discretion and in the circumstances of this case, the High Court had correctly exercised the said discretion and this was confirmed by the Court of Appeal.
- G [59] The Court of Appeal while agreeing that the issue of ownership of the land is a contentious issue, in view of *Adorna Properties*, said that regard must be had to the evidence before the High Court. The Court of Appeal at p 32 of the appeal record concluded in the following words:
- H The position seems to be this, that the appellant though registered as land owner did not actually own the land. On the facts, this position can be distinguished from those in *Adorna Properties*. However the interest of the said land was subsequently granted to the third respondent as chargee who is bona fide and who acquired the interest in good faith with consideration.
- I [60] With the utmost respect to the Court of Appeal, we are of the view that the Court of Appeal was unnecessarily concerned with the manner the appellant got his name registered on to the title. That in our view is not the issue which should concern the court because it was never challenged by any party including the third respondent that the appellant was the registered proprietor of the land. The question before the court was whether the charges

registered in favour of the third respondent are defeasible under s 340(2)(b). At one instance, the Court of Appeal answered the question in the positive having regard to *Adorna Properties*, but in the penultimate paragraph, it stated that the interest of the third respondent in the land was an interest subsequently granted by the appellant. With respect, we think the Court of Appeal had misdirected itself on the issue before the court.

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[61] We must stress that, the fact that the third respondent acquired the interest in question in good faith for value is not in issue, because once we are satisfied that the charges arose from void instruments, it automatically follows that they are liable to be set aside at the instance of the registered proprietor namely, the appellant.

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CONCLUSION

[62] For the above reasons, we allow this appeal and make an order in terms of prayers (a), (b), (c) and (d) of the amended statement of claim. Costs of this appeal and in the courts below be awarded to the appellant.

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[63] Finally we wish to thank learned counsel for the appellant and the third respondent and the representatives of the attorney general and the Bar Council for their candid arguments which certainly had assisted us in the consideration of the issues before us and in arriving at our decision.

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Appeal allowed with costs here and below.

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Reported by Kohila Nesan

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