



So, the respondent took out an application under section 256 of the Code seeking an order for sale of the subject land. It is the appellant's case that the foreclosure proceedings are barred by limitation since the loan had remained inactive for more than 6 years and the respondent had taken no proceedings to recover the same. The High Court ruled against the appellant and he appealed to this Court which dismissed the appeal.

3. In my judgment the appellant overlooks a point that is central to this case. He has treated the respondent's application to have the subject land sold in public auction as an action to recover the debt owed. That it certainly is not. The true nature of such a proceeding was described by Seah SCJ in **Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd [1988] 1 MLJ 257** as follows:

“The claim of the appellant in the court below was in exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code 1965. The appellant's claim was not under a covenant but under the registered charge.”

**American International Assurance Co Ltd v Union Builders (Malaysia) Sdn Bhd [1973] 1 MLJ 95**, was prayed in aid of this conclusion. In that case, Ong CJ (Malaya) said:

“The chargees' claim herein was not on the covenant but in exercise of their statutory remedy against a chargor in default. Hence there could not have been any merger. In this connection I

might add in parenthesis that, ordinarily, a chargee hardly ever has occasion to sue on the covenant, except where the moneys realised fall short of the amount needed to satisfy his claim for principal and interest.”

Accordingly, section 21(1) of the Limitation Act 1953 which provides that: “(1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued” has no application to this case. The proceeding in the court below was not – to quote the words of the subsection – “an action ... brought to recover any principal sum of money secured by a mortgage”.

4. Similarly, section 21(2) of the Limitation Act which reads:

“(2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of twelve years from the date on which the right to foreclose accrued:

Provided that if, after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his possession discontinued.”

also has no application to this case. That is because the cause of action here, that is to say, the right to exercise the statutory remedy of an order for sale did not arise until after the appellant had failed to remedy the default specified in the Form 16D notice. The originating summons was here filed on 6 April 2001, well within the 12 year period prescribed by section 21(2) of the Limitation Act.

5. I have in this judgment, referred to section 21 of the Limitation Act. That section speaks of a “mortgage”, which is a type of security that the Code does not recognise. However, in **Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266**, the former Federal Court speaking through Salleh Abas CJ (Malaya) held that: “when section 21(1) of our Limitation Act speaks of a ‘mortgage’, it must mean a ‘charge’ as understood and provided for in Part Sixteen of our National Land Code”. It is precisely for that reason that section 21 is the relevant and applicable law.

6. In view of the foregoing this appeal was devoid of merit and was dismissed and the usual orders consequent upon a dismissal were made.

7. My learned brother Mohd Ghazali bin Mohd Yusoff, J.C.A. (now F.C.J.) has seen this judgment in draft and has expressed his agreement with it.

Dated: 16 April 2009.

Gopal Sri Ram  
Judge, Federal Court  
Malaysia

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