

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO: C-02-329-2007**

ANTARA

STANDARD CHARTERED BANK
MALAYSIA BERHAD (115793-P) ... PERAYU

DAN

MOHD. NAZRO BIN ZULKIPELI
(NO. K/P: 2967325) ... RESPONDEN

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ZANESAH BINTI MAT DIN
(NO. K/P: A2702213) ... RESPONDEN

[Dalam Perkara Mahkamah Tinggi Malaya (1) di Kuantan
Saman Pemula No: 24-19 Tahun 2006]

Dalam Perkara Seksyen 265(3) (c)
Kanun Tanah Negara 1965

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Dalam Perkara Mohd Nazro bin Zulkipeli
(K/P No. A 2967325) Pihak Penggadai.

DAN

Dalam Perkara Memorandum Gadaian
Perserahan No. 4389/2000 Jilid No. –
Folio No. – atas Tanah di bawah HS(M)
42008 PT 46392 Mukim Kuala Kuantan.

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Dalam Sijil Rujukan di bawah yang
dikeluarkan oleh Pejabat Tanah,
Kuantan atas fail rujukan PTK
4.5.1.3388 bertarikh 10hb Oktober,
2005.

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Dalam Perkara Aturan 83 Kaedah 2(3)
Kaedah-Kaedah Mahkamah Tinggi,
1980.

ANTARA

Standard Chartered Bank Malaysia Berhad
(115793-P)

... PLAINTIF

DAN

Mohd Nazro bin Zulkipeli
(K/P No. A2967325)

...DEFENDAN

DAN

(Dalam Perkara Mahkamah Tinggi Malaya (1) di Kuantan
Saman Pemula No: 24-18 Tahun 2006

Dalam Perkara Seksyen 265(3) (c)
Kanun Tanah Negara 1965

DAN

Dalam Perkara Zanesah binti Mat Din
(K/P No.A 2702213) Pihak Penggadai.

DAN

Dalam Perkara Memorandum Gadaian
Perserahan No. 7969/2000 Jilid No. –
Folio No. - atas Tanah di bawah HS (M)
42029 PT 46413 Mukim Kuala Kuantan.

DAN

Dalam Sijil Rujukan di bawah yang
dikeluarkan oleh Pejabat Tanah,
Kuantan atas fail rujukan PTK
4.5.1.3418 bertarikh 28hb Oktober,
2005.

DAN

Dalam Perkara Aturan 83 Kaedah 2(3)
Kaedah-Kaedah Mahkamah Tinggi,
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CORAM: ZALEHA ZAHARI, J.C.A
RAUS SHARIF, J.C.A
A.SAMAH NORDIN, J.C.A

JUDGMENT OF THE COURT

[1] There are two appeals before us, namely, civil appeal No. C-02-329-07 (“the first appeal”) and civil appeal No. C-02-330-07 (“the second appeal”). Standard Chartered Bank Malaysia Bhd is the appellant in both appeals. Both parties have agreed that the appeals be heard together. The appeals are against the decision of the learned High Court Judge who dismissed both the appellant’s applications for an order of sale under section 256(3) of the National Land Code 1965 (“the Code”) pursuant to two certificates of reference by the Land Administrator under section 265(3)(b) of the Code.

[2] Briefly, the facts are as follows. On 12th May 2000, the appellant granted a term loan facility of RM395,200 to the respondent in the first appeal. As security for the said loan the

respondent charged a piece of land held under HS(M)No. 42008 PT No. 46393, Mukim of Kuala Kuantan, District of Kuantan, Pahang.

[3] On 17th October 2000, the appellant granted a term loan facility of RM443,394.50 to the respondent in the second appeal. As security for the said loan, the respondent charged a piece of land held under HS(M) 42029 PT 46413 Mukim of Kuala Kuantan, District of Kuantan, Pahang.

[4] The respective land charged as security for the loan in both appeals are lands held under Land Office titles.

[5] Both respondents had defaulted in the repayment of the said facilities. Upon applications by the appellant in Form 16G for orders of sale under section 260(2) of the Code, the Land Administrator held separate enquiries under section 261(1) of the Code. Both respondents were not present at the enquiries before the Land Administrator.

[6] On 7th September 2004 the Land Administrator made an order of sale in respect of the land charged by the respondent in the first appeal. On 6th October 2004 the Land Administrator made an order of sale in respect of the land charged by the respondent in the second appeal.

[7] Two public auctions were held in respect of each land by the Land Administrator. However they were called off as there were no bidders. The Land Administrator then issued a certificate of reference in respect of each land pursuant to section 265(3)(b) of the Code for the determination by the High Court.

[8] In consequence thereof, the appellant filed two separate applications by way of originating summonses for an order under section 265(3)(c) of the Code to substitute the order of sale by the Land Administrator with an order for sale by the Court under section 256(3) of Code. Both originating summonses were served on the respective respondents.

[9] It was only at this stage that the respondents filed their affidavits-in-opposition disputing the orders of sale made by the Land Administrator. They contended that they were not served with the necessary notices in Form 16D as prescribed by section 254 of Code requiring them to remedy the default within the specified period nor were they notified and served by the Land Administrator with the summons to attend the enquiries held by the Land Administrator pursuant to section 261(1) of the Code. They accordingly submitted that such non-compliance with the mandatory provisions of section 254 and section 261 of the Code constituted cause to the contrary which rendered the orders of sale by the Land Administrator null and void: See **Low Lee Lian v Ban Hin Lee Bank Berhad** [1991] 1 AMR 1036. The appellant did not file any affidavit-in-reply to rebut the respondents' contention.

[10] The appellant however contended that the decision in **Low Lee Lian v Ban Hin Lee Bank Berhad**, supra, was inapplicable as it concerned an order of sale of land held under the Registry

title and not land held under the Land Office title as in the present appeals. It was further contended that as the Originating Summons under section 265(3) of the Code was merely a continuation of the proceedings held before the Land Administrator the respondents should have filed an appeal under section 418 of the Code to challenge the orders of sale issued by the Land Administrator. Learned counsel for the appellant cited **Arab Malaysia Finance Berhad v Shamsuddin Ahmad & Anor** [1997] 4 CLJ Supp 469 and **Lee Gee Pheng v RHB Bank Bhd** [2003] 4 CLJ 639.

[11] In **Arab Malaysia Finance Berhad v Shamsuddin Ahmad & Anor**, supra, the Land Administrator made an order of sale pursuant to the plaintiff's application under section 260 of the Code and subsequently held two public auctions which were unsuccessful as there were no bidders. Consequently the Land Administrator referred the matter to the Court pursuant to section 265(3)(b) of the Code. The plaintiff then filed an originating summons in the High Court for an order of sale

under section 256(3) of the Code. The defendant, as the chargor, opposed the application on the ground, inter alia, that there was non-compliance with Order 83 rule 3 of the Rules of the High Court 1980 and that there was cause to the contrary. The issue before the Court was whether section 256 of the Code was relevant, as the land in question was held under the Land Office title and not under the Registry title. The Court nevertheless allowed the plaintiff's application and held that section 256 of the Code was irrelevant. Hishamudin Yunus J. at page 473 said:

"To my mind, section 256 and Order 83 are irrelevant as far as the present application is concerned. This is because section 256 provides the procedure to be adopted for the sale of land held under a Registry Title whereas the title of the property in question is a Land Office Title. It was not legally possible for the plaintiff to have, in the first place, proceeded under section 256 and Order 83. In fact in the present case it had in the first place, correctly proceeded under section 260 by applying for an order for sale from the Land Administrator."

And at page 475 the learned judge emphatically said:

"This reference to section 256 is, to my mind, merely to confer upon the court the power to substitute for an order of sale of the Land Administrator an order of sale by the court **as if** the court's order is made under section 256. This entails making incidental orders on matters such as determining the reserve price and/or directing the

Registrar of the High Court to carry out the sale in accordance with the provisions of section 257.”

[12] In **Lee Gee Pheng v RHB Bank Bhd**, supra, the chargee/bank had earlier granted the chargor/borrower a housing loan of RM80,000 which was secured by a charge over a piece of land held under of Land Office title. The borrower defaulted in the repayment of the loan and the bank served a notice in Form 16D on her. Thereafter the bank applied to the Land Administrator for an order for sale under section 260 of the Code. This was granted by the latter. After two unsuccessful public auctions, the Land Administrator referred the matter to the Court under section 256 of the Code. The Court allowed the bank’s application for an order of sale by public auction. The borrower appealed but later withdrew it. Subsequently the borrower applied to set aside the order of sale. The High Court dismissed it and the borrower appealed against the said decision. The Court of Appeal dismissed the appeal with costs. Nik Hashim JCA (as he then was) at page 644 said:

"The procedure for sale prescribed under section 265(3) is merely a continuation of the proceeding of transforming the order for sale by the Land Administrator into that of the High Court....

Since all the requirements to obtain the 1st order for sale of the land held under Land Office Title had been duly complied with and no challenge had ever been made against it, the appellant could not at the originating summons stage question the merits of the 1st order of sale granted by the Land Administrator. The appellant could have appealed to the High Court under section 418 of the Code which she initially did only to withdraw it later. It follows therefore that the validity of the 1st order for sale cannot now be challenged."

[13] The learned High Court judge in the instant appeals found that the appellant had failed to serve on the respective respondent the necessary notices in Form 16D as required by section 254 of the Code and that the respondents were also not served with the summons to attend the enquiries before the Land Administrator. Hence, there was cause to the contrary and accordingly dismissed both applications for orders of sale under section 256(3) of the Code.

[14] The cases referred to by learned counsel for the appellant are clearly distinguishable as the borrowers in those cases were duly served with notices in Form 16D. In the instant appeals the respondents were not served with the notices in Form 16D.

They were also not served by the Land Administrator with the summons to attend the enquiries held under section 261 of the Code and were never informed of the order of sale by the Land Administrator. Hence they could not exercise their right of appeal to the High Court under section 418 of the Code against the decision of the Land Administrator.

[15] Whilst it can be seen that an application to the Court under section 265(3) of the Code is merely a continuation of the proceeding of transforming the order for sale by the Land Administrator into that of the High Court (**Lee Gee Pheng v RHB Bank Bhd**), we are of the view that the Court is not obliged to make an order of sale under section 265(3) read with section 256 of the Code if it is satisfied that there is in existence cause to the contrary. Section 265(3)(c) clearly states that “the Court may substitute for the order of the Land Administrator an order for sale under section 256, **or make such other order as it may think fit**” (our emphasis). Although the power of the Court to make an order for sale under section 256(3) of the

Code is confined only to land held under the Registry title, the Court is immediately seized of jurisdiction to deal with the land held under the Land Office title upon reference by the Land Administrator. The Court's power under section 256(3) of the Code is not only limited to substituting the order of sale of the Land Administrator with its own order of sale but it can decline to make an order of sale if it is satisfied of the existence of cause to the contrary. The Court does not act as a mere rubber stamp and dutifully makes its own order of sale in place of the order of sale by the Land Administrator regardless of any statutory non-compliance under the Code.

[16] What is cause to the contrary? The Supreme Court (as it then was) in **Low Lee Lian v Ban Hin Lee Bank Bhd**, supra, held that there were only three categories of cases which constitute cause to the contrary. The second category, which is pertinent to our case, is that the chargor may show cause to the contrary by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application

for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary.

[17] In these appeals we found, as an incontrovertible fact that the respondents had never been served with notices in Form 16D. They were also not served with the summons to attend the enquiries held by the Land Administrator under section 261 of the Code to show cause why the orders of sale should not be made against them nor were they informed of the decision of the Land Administrator. The appellant did not file any affidavit in reply to rebut the respondents' assertions. It has been held in **Ng Hee Thong & Anor v Public Bank Bhd** [1995] 1 AMR 622 at page 628 that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is normally treated as an admission by him of the fact so asserted. We are therefore of the view that the learned judge did not err in law or in fact in arriving at his

decision. In the result we hereby dismiss both the appeals with costs and affirm the orders of the learned judge of High Court. The deposits are to be paid to the respective respondents on account of taxed costs.

[18] Before we conclude, we have one observation to make. We note that the intitulement in the appellant's originating summonses refers to section 265(3)(c) of the Code, which was incorrect at the date of filing of the said summonses. Section 265(3)(c) had been amended and replaced by a new section 265(3) by the National Land Code (Amendment) Act 2001 (Act A1104) with effect from 1st December 2001, vide PU(B)559/01. As a result of the amendment, paragraph (c) of section 265(3) had been deleted and is now substituted with a new subsection (3A).

Dated this 27th February 2009

A. Samah Nordin
Judge
Court of Appeal Malaysia
Putrajaya

Parties:

1. En. Vignesh Kumar and Cik Syazlinda Nadia bt. Mohd Nasir
for the appellant
(Messrs Balendran Chong)
2. Dato' Bastian Verdargon and En. R. Sarengapani
for the respondents
(Messrs Vendargon & Partners)