

**DALAM MAHKAMAH RAYUAN MALAYSIA  
(BIDANGKUASA RAYUAN)  
RAYUAN SIVIL NO. W – 02 – 862 – 1999**

ANTARA

HONGKEW HOLDINGS (M) SDN BHD  
(Syarikat No. 071196-M)

... PERAYU

DAN

HYUNDAI HEAVY INDUSTRIES CO LTD  
(Syarikat No. B & F 993391-X)

... RESPONDEN

(Dalam Mahkamah Tinggi Malaya di Kuala Lumpur  
(Bahagian Sivil)

Saman Pemula No S3-24-946-97

Dalam perkara Seksyen 326  
Kanun Tanah Negara 1965

Dan

Dalam perkara Gadaian melalui  
Perserahan No. 3447/96, Jilid  
288 Folio 13 terhadap tanah yang  
dipegang di bawah GM 350/93,  
No. P.T. 3984, Mukim Ketil,  
Dearah Gua Musang, Negeri  
Kelantan

Antara

Hyundai Heavy Industries Co Ltd  
(Syarikat No. B & F 993391-X)

... Plaintiff

Dan

Hongkew Holdings (M) Sdn Bhd  
(Syarikat No. 071196-M)

... Defendan)

Coram : Gopal Sri Ram, J.C.A.  
Abdul Kadir bin Sulaiman, J.C.A.  
Arifin bin Haji Jaka, J.C.A.

### **JUDGMENT OF THE COURT**

1. This appeal (by the defendant in the court below) is directed against an order for sale made against it pursuant to section 256 of the National Land Code 1965 (“the Code”). The order was made on 22 February 1999. Notice of appeal was lodged on 2 November 1999. No grounds of judgment were ever written by the learned judge. As such this Court was put to the trouble of trawling through the appeal record to appreciate the respective parties’ cases in the court below. In this respect this Court can do no better than to quote from the judgment of Salleh Abas LP in **Wong Chee Hong v Cathay Organization [1988] 1 MLJ 92:**

“We hope that judges should endeavour to write their grounds of decision and take delight in this aspect of judicial work as a matter of personal pride and satisfaction and not as a burdensome task. Failure on the part of judges to write their grounds of decision will certainly undermine their authority to insist upon magistrates and presidents of Sessions Courts to write theirs. If the practice of not writing grounds of judgment is widespread, the system of administration of

justice will tumble down.”

2. The facts which form the background to this appeal are these. The plaintiff (chargee) and the defendant (chargor) entered into a turnkey agreement to build a cement factory on the defendant's subject land. There was a supplemental agreement but nothing turns on this. The construction cost of USD 126 million was payable by the defendant to the plaintiff. The sum was payable in instalments, the precise details of which are not relevant for present purposes. In consideration of the foregoing the defendant executed a charge in the plaintiff's favour. The defendant failed to make one or more of the payments under the turnkey contract. The plaintiff having served the statutory demand in Form 16 D then took out a summons seeking an order for sale which it obtained.

3. Before us the only point taken was that there was no loan from the plaintiff to the defendant and therefore the charge was not enforceable. Accordingly, the defendant had shown cause to the contrary. In our judgment the answer to the defendant's submission is to be found in section 242(1) of the Code which says this:

“Every charge to secure the repayment of a debt,  
**or the payment of any sum other than a debt,**

(in either case, whether the amount in question is

to be paid as a lump sum or by instalments) shall be effected by an instrument in Form 16A.”  
[Emphasis added.]

The section recognises that a charge may be secured to repay a debt or a sum which is not a debt. In short, Parliament has made it possible for registered proprietors of land to create charges to secure payments such as those in the present case. There is accordingly no merit whatsoever in the point taken by the defendant.

4. A further submission was made with considerable diffidence that the sum set out in the Form 16 D demand was not due. But this argument was not seriously pursued. What the defendant’s complaint really boils down to is this. The plaintiff committed a breach of its obligations under the turnkey contract and is therefore not entitled to enforce the charge. This submission fails. For, it is settled law that an application for an order for sale is not an action on the covenant: it is the exercise of a statutory remedy. As Seah SCJ observed in **Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd [1988] 1 MLJ 257:**

“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."

5. In **Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77** the Federal Court limited the categories which constitute cause to the contrary under section 256 of the Code. They are (i) where the chargor is able to successfully impeach the chargee's title to the charge on any of the grounds provided in section 340 of the Code; (ii) where there is a failure on the part of the chargee to meet the conditions precedent for the making of an application for an order for sale; (iii) where to grant an order for sale would contravene some rule of law or equity. The instant defendant has plainly failed to bring the facts of his case within any of these categories. Accordingly no cause to the contrary was established before the High Court.

6. In the light of the foregoing the appeal was dismissed without the necessity for calling upon counsel for the respondent. The orders usually consequent upon a dismissal were made.

Dated: 24 July 2007.

Gopal Sri Ram  
Judge, Court of Appeal  
Malaysia

Counsel for the appellant: Leong Chuan Wah

Solicitors for the appellant: Tetuan Tee Tan & Partners

Counsel for the respondent: Liau Y-Ky (Hasmaliza bte Othman  
with him)

Solicitors for the respondent: Tetuan Iza Ng Yeoh & Kit)