

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO. P-02-63-2001

ANTARA

LIM AH HUN

... PERAYU

DAN

**SOON YEE LING
SOON YEE YUING**

... RESPONDEN

[Dalam Perkara Mahkamah Tinggi Malaya Di Pulau Pinang
Saman Pemula No. 24-1523-2000 (MT-1)]

Antara

Lim Ah Hun

... Plaintiff

Dan

Soon Yee Ling
Soon Yee Yuing

... Responden]

Coram: Datuk Denis Ong, JCA
Dato' Pajang Singh Gill, JCA
Dato' Hashim B. Dato' Hj. Yusoff, JCA

GROUND OF JUDGMENT

1. We unanimously allowed this appeal. I now give our reasons.

Background Facts

2. The Appellant/Plaintiff had entered into a Sale and Purchase Agreement with the Respondents/Defendants dated the 11 April 2000 (“the SPA”) whereby he had agreed to purchase and the Respondents/Defendants agreed to sell some pieces of land in Georgetown, Penang (“the said property”) at a price of RM1,600,992.00. The Appellant had received a deposit of RM264,992.00 on execution of the SPA and the balance of RM1,336,000.00 was to be paid within one year from the date of the SPA with the proviso that if the Respondents could not deliver vacant possession of the said property on the Completion Date, then the Appellant shall extend the Completion Date for a further period of three months without interest, and thereafter if the Respondents still could not hand over vacant possession on the extended Completion Date, then the Appellant shall extend the extended Completion Date for a further period of three months.

3. The said property was sold subject to a Tenancy Agreement dated 1st March 1998 (“the said Tenancy Agreement”) whereby the Appellant was entitled to collect rental at RM6,500.00 per month from the date of the SPA. The said property had been charged to the Bank and the Appellant was to redeem the said property within 60 days from the date of the SPA with an extension of one month. The Appellant had applied for a bank loan of RM800,000.00 which was approved on 26/06/2000.

4. On 21/07/2000 the Respondents terminated the SPA when the Appellant failed to comply with Section 4 of the Fourth Schedule of the SPA which reads:-

“The Purchaser shall pay the full redemption monies for the said Property owing by the Vendor to Standard Chartered Bank Malaysia Berhad and Asia Commercial Finance (M) Berhad within sixty (60) days from the date hereof with an extension of one (1) month.”

At The High Court, Penang

5. The Appellant then sought a declaration in the High Court that the termination of the SPA was null and void and that it was still subsisting and that the forfeiture of the deposit sum of RM160,099.20 by the Respondent was also unlawful. The learned High Court Judge held that since the Appellant failed to redeem the said property within the 60 days as stipulated in the SPA, therefore the Respondents were entitled to terminate the said SPA and forfeit the deposited sum. Dissatisfied, the Appellant is now appealing against the decision of the High Court.

The Appeal

6. Learned counsel for the Appellant, submitted that there is only one central issue i.e. whether the Respondents were entitled to forfeit the deposit of RM160,099.20 because of the Appellant's failure to redeem the said property from the chargees even

before the Completion Date of the SPA for the payment of the balance of the purchase price. He then referred to paragraph 6 of the First Schedule of the SPA which states that the amount of deposit payable on the execution of the SPA was RM264,992.00. But under Section 11 of the same Schedule, the amount of forfeitable deposit was only RM160,099.20. paragraph 9 of the First Schedule stipulates the time and manner of the payment of the balance of the purchase price.

7. Learned counsel for the Appellant submitted that no where is it stated in the SPA, regarding the consequence of the Appellant's failure to pay the redemption sum within the 3 months as required under paragraph 2 of the Fourth Schedule to the SPA. Under clause 8 of the SPA one of the consequences of default by the Appellant to pay the balance of the purchase price or any payment thereof pursuant to clause 2 of the SPA is the forfeiture of the RM160,992.20. But there is no provision to forfeit the deposit by reason of the failure to comply with the requirement for payment of the redemption monies within the time stated (3 months) under paragraph 2 of the Fourth Schedule.
8. Reference was made to the case of **Wisma Sime Darby Sdn. Bhd. v Wilson Parking (M) Sdn. Bhd. [1996] 2 MLJ 81** where the Court of Appeal inter alia held:-

“(1) An option clause is void for uncertainty unless the agreement provided the machinery or some formula which the courts can utilize to ascertain what is

otherwise unascertainable without the parties coming to an agreement. The courts will not lend their aid to the enforcement of an incomplete agreement. In the instance case, the rental for the renewed period of the tenancy had to be agreed by the parties. The agreement for renewal as executory and there was no machinery or formula for the court to ascertain the rent if the parties could not come to an agreement on the rent. On authority and on principle, the alleged agreement was bad for uncertainty. Thus, the option clause for a further term at 'a rent to be agreed' was void for uncertainty and there was no need for a trial to come to that conclusion."

9. Learned counsel for the Appellant further submitted that since there is no provision regarding the failure to comply with paragraph 2 of the Fourth Schedule, therefore the SPA is void for uncertainty by virtue of Section 30 of the Contracts Act 1950.
10. In reply, learned counsel for the Respondents submitted that Section 30 of the Contracts Act 1950 was not pleaded nor canvassed in the High Court and it should not be argued before us. He then relied on the case of **Dial Kaur a/p Tara Singh v Mann Foong Realty Sdn. Bhd. [2000] 2 MLJ 153** where, the brief facts are as follows:-

“The plaintiff instituted proceedings against the defendant for specific performance of an agreement contained in a letter, in particular para (c) thereof, which was for the defendant to execute the transfer of eight titles named in the paragraph to the plaintiff. Paragraph (d) of the agreement stated that the plaintiff had to pay Malayan Banking Bhd RM1,186,640 in order to obtain the release of the said eight titles and the defendant’s 23 titles from the bank. The plaintiff had failed to pay the sum demanded by the bank and it managed to get from the bank only the 23 titles which belonged to the defendant and which it kept.”

11. The Court of Appeal in that case, in allowing the defendant’s appeal to dismiss the plaintiff’s action held, inter alia:-

“(1) The obligation of the defendant under para (c) was merely a subsidiary term, the non-performance of which did not relieve the plaintiff from his primary obligation under para (d). The obligation of the plaintiff under para (d) was a fundamental term. Therefore the promise of the defendant to execute the eight transfers in para (c) could not be claimed by the plaintiff till the plaintiff’s own promise in para (d) had been performed. The non-performance of the plaintiff’s promise to pay the bank in full and to recover all the 31 titles from the bank was fatal to its case. If the plaintiff failed to perform its promise in para (d), it could not claim the performance of the

reciprocal promise by the defendant in para (c) by virtue of s 55 of the Contracts Act 1950. If the plaintiff was not entitled to make such a claim against the defendant till its own obligation in para (d) had been performed, then its action against the defendant must surely fail.”

Court's Finding

12. The Respondents through their solicitors' letter dated 21/07/2000 addressed to the Appellants solicitors informed them that the Appellant/Plaintiff had committed a breach of the said SPA by failing to make the payments pursuant to paragraph 2 of the Fourth Schedule of the SPA within the time stipulated. In the circumstances the Respondents thereby terminated the said SPA and forfeited absolutely the sum of RM160,099.20 as set out in Section 11 of the said SPA from the sum of RM264,992.00 deposited pursuant to Section 6 of the First Schedule of the said SPA as agreed liquidated damages.

13. It is to be noted that, as submitted by learned counsel for the Appellant, paragraph 2 of the Fourth Schedule only stipulates the Appellant's obligation to pay the full redemption sum. There is no mention of the consequences of any default in the payment of such redemption monies. Only clause 8 of the SPA which refer to a failure to pay the balance of the purchase price under clause 2 of the SPA provides that the SPA shall

become null and void. It does not refer to the non payment in full of the redemption monies.

14. With respect to the learned High Court Judge, I cannot agree that the Appellant's failure to comply with paragraph 2 of the Fourth Schedule would entitle the Respondents to terminate the SPA and forfeit the deposit as there is no specific provision to enable them to do so. The case of ***Dial Kaur*** (supra) is distinguishable because in that case it was held that the failure of the Plaintiff to pay the sum demanded by the Bank in order to obtain the release of the 8 titles kept by the Bank to enable the Defendant to execute the transfer of the said 8 titles to the Plaintiff, was fatal to the case. In this instant appeal, while there is provision in the event of a default in the payment of the balance of the purchase price, no such provision is made in the event of default in payment of the redemption monies. It is not for the court to rewrite the SPA to provide for the omission.

15. For the above reasons, we allowed the appeal with costs to the Appellant. The Order of the High Court is set aside. The deposit is also to be refunded to the Appellant.

Signed.
(DATO' HASHIM BIN DATO' HJ. YUSOFF)
Judge
Court Of Appeal, Malaysia

Date: 20th January, 2009

Parties:

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Cases Referred To:

- (1) Wisma Sime Darby Sdn. Bhd. v Wilson Parking (M) Sdn. Bhd.
[1996] 2 MLJ 81
- (2) Dial Kaur a/p Tara Singh v Mann Foong Realty Sdn. Bhd.
[2000] 2 MLJ 153