

**DALAM MAHKAMAH RAYUAN MALAYSIA DI PUTRAJAYA
(BIDANGKUASA RAYUAN)
RAYUAN SIBIL NO: C-02-1082 TAHUN 2001**

ANTARA

PUBLIC BANK BERHAD

PERAYU

DAN

**LEE BAK SOON @ LEE PAK CHOON
AND 2 OTHERS**

**RESPONDEN-
RESPONDEN**

**(Dalam perkara Guaman Sibil NO : 22-2-1989
Dalam Mahkamah Tinggi Malaya di Kuantan)**

ANTARA

PUBLIC BANK BERHAD

PLAINTIF

DAN

1. **LEE BAK SOON @ LEE PAK CHOON**
2. **CHAN BOI LOI**
3. **WONG PONG YAP**

**DEFENDAN-
DEFENDAN**

CORAM:

**Y.A. DATIN PADUKA ZALEHA BINTI ZAHARI, JCA
Y.A. DATO' NIHRUMALA SEGARA A/L M.K. PILLAY, JCA
Y.A. DATUK AHMAD BIN HJ. MAAROP, JCA**

JUDGMENT

This is an appeal by the plaintiff bank against the decision of the learned judge High Court, Kuantan on 9/11/2001, dismissing its claim against the defendants

for the sum of RM455,659.37 and interest at the rate of 11% or any other rates subject to variation as from 2nd December 1988, to date of realization.

All the 3 defendants had a joint fixed loan account FL- 1328 and a joint current account 4420, with the plaintiff bank. By a letter dated 18/6/1982 (exhibit P1) the plaintiff bank approved a fixed loan facility of RM220,000.00 subject to the conditions set out in the letter which included:

- “c) To be fully secured against the undermentioned properties:-
 - i) Land and shophouse at No. 34 Jalan Suasa Dua, off Jalan Wong Ah Jang, Kuantan under GM 2494 Lot 8113, Mukim Kuala Kuantan and
 - ii) Land and shophouse at Jalan Suasa Dua, off Jalan Wong Ah Jang, Kuantan under HS(M) 6552 Lot PT 5874, Mukim Kuala Kuantan.

- d) The loan is to be released upon completion of legal formalities.”

The plaintiff bank by another letter, also dated 18/6/1982 (exhibit P2), further approved to all the 3 defendants jointly, an overdraft facility of RM140,000.00, subject to the conditions set out in the said letter which included:

“d) To be fully secured against the undermentioned properties:

i).....

ii).....

(that is, the same properties properties described in c)
above)

e) The loan is to be released progressively as follows:

i) \$120,000-00 upon completion of legal formalities and

ii) \$20, 00-00 upon issuance of CFO.”

The 3 defendants executed and registered 2 legal charges under the National Land Code (NLC) on 24/9/1982 and 1/10/1982 (exhibits P3 & P4) in favour of the plaintiff bank over the 2 properties stated in the plaintiff bank’s letters dated 18/6/1982, as security for the loan facilities. The defendants serviced the loans without problems till 1986 and thereafter, upon default of the defendants, the plaintiff terminated the facilities and took legal action.

In the statement of claim dated 5/1/1989 the plaintiff pleaded that the 1st 2nd and 3rd defendants are joint account holder of the plaintiff's bank vide account 05-08-71328-0 and 01-08-04420-7 and that:

“3.The Plaintiff's claim against the Defendants is for the sum of \$455,659.37 (as at 2nd December, 1988) being monies due and owing by the Defendants to the Plaintiffs for monies advanced by the Plaintiffs to the Defendants and for monies paid by the Plaintiffs for the Defendants as bankers for the Defendants at their request and for interest agreed at the rate of 11% per annum or any other rates subject to variation.

PARTICULARS

a) FL 1328-0	...\$264,434.78
b) C/A 4420-67	...\$191,224.589

	..\$455,659.37
	=====

4) The said Defendants executed a 1st and 2nd charge dated 20th September, 1982 and 21st September, 1982 respectively in favour of the plaintiffs to secure banking facilities.

5).....

6) Despite repeated requests, the last of which was made by the Plaintiff’s Solicitors. M/s.....by an A.R. Registered letter dated 9th December, 1988, the 1st Defendant has failed and/or refused to settle the sum of \$455,659.37 or any part thereof with the Plaintiffs. However, the said A.R. Registered letter addressed to the 2nd and 3rd Defendants was returned and marked “unclaimed”.

Wherefore the Plaintiffs pray judgment for:-

.....”

The plaintiff bank did not plead at all that it had commenced foreclosure proceedings against the defendants under the NLC for the sale of the charged properties pursuant to exhibits P3 & P4, upon default by the defendant.

In sharp contrast to the plaintiff bank’s silence in its pleadings on its rights under the legal charges and the non disclosure of the fact of having already commenced proceedings to foreclose, the defendants in their respective statements of defence have pleaded, inter- alia, as follows:

DEFENCE OF FIRST AND THIRD DEFENDANTS

.....

1.....

2.....

3. In the alternative, when the Defendants created the charges in favour of the plaintiff on 20th September, 1982 and 21st September, 1982 it was expressly agreed that the personal liability of the defendants to pay any outstanding sum will arise if, after sale of the charged land, there is still a balance or difference due to the Plaintiff. In the circumstances, and since the charged lands have yet to be sold, the personal liability of the Defendants to pay the alleged sum does not arise.

4. In the further alternative, the Plaintiffs have begun proceedings at the Kuantan Land Office to have the charged lands sold and an enquiry pursuant to sections 260 and 261 of the National Land Code has been held on 8th December, 1987 and is pending further directions from the Land Administrator. In the circumstances, this suit ought to be stayed pending completion of those proceedings.

5.

- 6. Whereof the First and Third Defendants pray that the Plaintiff's claim be stayed and /or dismissed with costs.

STATEMENT OF DEFENCE OF 2ND DEFENDANT

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.

8. Further and/or in the alternative, even if the 2nd Defendant is indebted to the Plaintiff (which is denied) for the sum claimed or any part thereof, the 2nd Defendant aver that the Plaintiff is attempting to unfairly place the burden of the debt on the 2nd Defendant and the 2nd defendant will aver that he has an equity against the Plaintiff and the Plaintiff should be prevented from proceeding against the Defendant until the Plaintiff have realized the securities charged to the Plaintiff.

9. The 2nd defendant further aver that the said securities if sold will be more than sufficient to satisfy the debt (which is denied) owed to the Plaintiff.

10. Further and/or in the alternative, the 2nd Defendant aver that it is an implied and/or express warranty on the part of the Plaintiff to realize the securities first before any proceedings is taken against the 2nd Defendant.

From the evidence adduced at the trial in the High Court there can be no serious dispute that the plaintiff bank had already commenced foreclosure proceedings under the NLC even before the writ in this civil suit was issued on 6/1/1989. In fact, as early as 3/9/1986 (see exhibit P7) the plaintiff had given notice to the defendants that it will proceed with foreclosure proceedings over the properties held under GM2494, Lot 8113 and HS(M)6552, Lot 5874, both in Mukim Kuala Kuantan, without any further notice.

SP2, who was the Bank Manager of the plaintiff in 1986, testified under cross-examination:

“In respect of the two facilities the Plaintiff obtained security of 2 charges. Two pieces of property were charged to the bank. I still hold those charges.

The Plaintiff did take proceedings in land office to have these 2 pieces of land sold prior to taking these proceedings. I have not sold these lands. I agree the proceedings are still pending in the land office.

The Defendant has been defending the case in the land office. I agree because of the steps taken by the Defendant with the land office the two pieces of land remain unsold. The last time the Defendant succeeded in aborting the land office sale was about 2 years ago. The defendant filed discrepancy order against my 16H issued by the land office. The 16H was wrongly issued by the land office. We had gone back to the land office to amend. And the Defendant objected saying it was not the right procedure. The case is left hanging.

The Defendant was successful in his objection. That was about 2 years ago.

Q: Why is it not possible to go back to land office?

A: We are waiting for direction from our solicitors for the next step.

If they are willing to sell the lands and settle the debt we are agreeable.”

Now, the testimony of the 1st defendant in respect of the foreclosure proceedings at the land office, under cross-examination, is rather illuminating vide the conduct of the plaintiff bank at the land office, in respect of a valid and lawful order for sale (Form 16H) dated 28/7/1992, well before the

commencement of the trial of the civil suit in the High Court, Kuantan on 5/12/2000:

“The two properties are still subject to the charge by the bank.

The first time foreclosure proceedings commenced by the bank was in December, 1987. To date the two properties have not been sold.

Q: Do you know why the properties could not be sold until now.

A: They keep on changing the procedures. The bank.

They keep on changing the outstanding amount due on the charge. I raised the point on the changing of amount. The Form 16H was set aside by the Court 4 times. For the first time the Form 16H dated 28.7.92. It was set aside on 30.6.93 by Justice Lamin. I was advised by lawyer that the valuation was different. They issued Form 16H in 1992 for an appearance made in 1987 using the valuation which was not revised. The fault was on the part of the bank.

The 2nd Form 16H was set aside because they changed the outstanding sum on the form from RM 264,000 + to RM 96,000+. The Land Office amended the figure. It

must be at the request of the bank. This is also the fault of the Plaintiff bank that it was set aside.

The third Form 16H again changed the figures by adding more than RM 1,000,000. This was again set aside by the Court. The fault lies with the Plaintiff.

The fourth Form 16H was set aside because the Land Office used the 1992 Form 16H which already set aside by High Court earlier. They just amended the figure by adding to the figures and chop. It was not our fault.”

The Form 16H referred to above by the 1st defendant is the order for sale by the Land Administrator under section 263 NLC. For ease of reference section 263 NLC reads:

“ (1) At the conclusion of any enquiry under section 261, the Land Administrator shall order the sale of the land or lease to which the charge in question relates unless he is satisfied of the existence of cause to the contrary.

(2) Every such order shall be in Form 16H, and shall –

(a) provide for the sale to be by public auction;

- (b) specify the date on which the sale is to be held, being a date not less than one month after the date on which the order is made;
- (c) specify the amount due to the chargee at the date on which the order is made;
- (d) fix a reserve price for the purpose of the sale, being a price equal to the market value of the land or a lease in question as estimated by the Land Administrator.
- (e) Specify that no bidder shall be allowed to bid in the sale unless the Land Administrator is satisfied that the bidder possesses, at the time of the sale, the sum equivalent to ten per centum of the reserve price specified under paragraph (d);
- (f) Specify that where the full amount of the purchase price is not paid after the fall of the hammer by the successful bidder, the sum specified in paragraph (e) shall be paid to the charge and forthwith credited into the account of the chargor pending the settlement of the balance of the purchase price;

(g) specify that the balance of the purchase shall be settled on-any date not later than one hundred and twenty days from the date of the sale and that there shall be no extension of the period so specified; and

(h) specify that where the balance of the purchase price is not settled on a date specified under paragraph (g), the sum paid as deposit under paragraph (f) shall be forfeited and disposed off in the manner specified under section 267A.

(3) The provisions of sub-sections (2) and (3) of section 257 shall apply *mutatis mutandis*, to orders under this section as they apply to orders of the Court under section 256.”

It is pertinent to note that section 263(2)(d) differs from section 257(1)(d) in that under section 257(1)(d) the order for sale shall require the Registrar of the Court to fix a reserve price unlike section 263(2)(d) where the Land Administrator himself shall fix the reserve price at the time the order for sale is made by him at the conclusion of the enquiry under section 261.

For ease of reference and comprehension section 257(1)(d) NLC is reproduced below:

“Every order for sale made by the Court under section 256 shall be in Form 16H and shall ---

(a)

(b)

(c)

(d) Require the Registrar of the Court to fix a reserve for the purpose of the sale, being a equal to the estimated market value of the land or lease in question; and

(e)

(f)

(g)

(h)”

The NLC also contains certain general provisions relating to enquiries and decisions or orders of the Land Administrator made therein. Section 33 provides that “save in the special circumstances specified in section 34, a decision or order of the Land Administrator in any enquiry shall not be altered or added to except for the purpose of correcting verbal errors or remedying some accidental defect or omission not affecting a material part of the enquiry.” Section 34 provides for re-opening of an enquiry.

“(1) In any of the circumstances specified in sub-section (2), a Land Administrator may re-open any enquiry held under this Act by himself or any predecessor in office and, where it appears to him just to do so, may vary or set aside any decision or order previously given or made therein:

Provided that no enquiry shall be re-opened under this section-

- (i) at any time after an appeal has been lodged therein as mentioned in section 37, unless the appeal is subsequently withdrawn, or
 - (ii) more than three years after the date on which any decision or order therein was first given or made.
- (2) The said circumstances are as follows –
- (a) where fresh evidence of a material nature is available, not being evidence which could, by the exercise of reasonable diligence, have been produced at any earlier hearing;
 - (b) where any earlier hearing was conducted in the absence of any necessary or proper party whose absence was not due to any default or neglect on his part.

- (3) A Land Administrator shall record briefly his reason for re-opening any enquiry under this section.”

It would appear that the Land Administrator did make a valid and lawful order for sale on 28/7/1992 in respect of the said charged lands under section 263 NLC. However, on 30/6/1993 in dissolving an *ex parte* injunction dated 2/10/1992 granted to the plaintiffs (ie the defendants herein) in Kuantan High Court CS 22-60-1992 , Lamin J, purportedly set aside the order for sale and directed the parties to appear before the Land Administrator to submit only on the issue of the reserve price in order for the auction on the said lands to proceed, pursuant to the order for sale made by the Land Administrator (see exhibit D13). The purported setting aside (probably was never intended at all) is clearly an error on the face of the record in view of the direction that immediately followed *vide* the reserve price, thereby patently manifesting that the order for sale subsists. Furthermore, any order by the High Court setting aside the order for sale of the Land Administrator would have been made without jurisdiction as there was no appeal, under section 418 NLC, against the order for sale before the learned High Court judge.

Datuk Bastian Pius Vendargon, counsel for the defendants, upon the court seeking clarification in the course of his submissions in the present appeal, confirmed that there has been no appeal under section 418 NLC against the order for sale dated 28/7/1992. He conceded, in the circumstances, the reserve price fixed by the Land Administrator under section 263 (2) (d) NLC stands, notwithstanding the direction made by Lamin J on 30/6/1993, in some other collateral proceeding, for the parties to appear before the Land Administrator to submit on the issue of the reserve price (see exhibit D13). A Land Administrator cannot re-open any enquiry more than three years after the date on which any decision or order therein was first given or made, even if the criterion of the “special circumstances” in section 34 NLC are fulfilled. Under section 37 NLC an appeal lies to the High Court from any decision or order given in an enquiry in accordance with the provisions of section 418 NLC. The latter section allows an appeal only within a time limit of three months.

Clause 16 of the annexure to the Charge (exhibit P3) and Clause 8 of the annexure to the Charge (exhibit P4) is identical and reads:

“ If the amount realized by the Bank on a sale of the said land under the provisions of the National Land Code after deductions and payment from the proceeds of such sale of all fees, dues, costs, rents, rates, taxes and other outgoings on the said land is less than the amount due to the Bank and whether at such sale the Bank is the purchaser or otherwise, the Chargor shall pay to the Bank the difference between the amount due and the amount so realized and until payment, will also pay interest on such balance at the prescribed rate with monthly rests.”

It is patently clear that the **personal liability** of the chargor (that is the defendants, herein) is only to the extent of the balance of the amount as determined under clause 16 and 8 of exhibit P3 and P4. The chargor and chargee are bound by the terms and conditions of the charge and, to realize the amount owing, the land must be sold in accordance with the provisions of the NLC. If the amount realized from the sale is not sufficient to cover the amount due then it is implied that a separate *action in personam* may be taken against the debtor/chargor to recover the balance should he fail to pay the chargee the difference.

In *Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah* [1991] 3 MLJ 119, the question posed to the High Court was: “whether the plaintiff being also the chargee of the property comprised under HS(M) 13399 lot 3134/29

in the mukim of Kuala Kuantan was entitled at law and in equity to proceed by way of civil suit before first realizing the security under the charge and if so, whether the plaintiff was entitled to proceed concurrently on all its remedies.” The High Court answered the question posed in the negative and accordingly ordered the civil suit to **be stayed**. The plaintiff’s appeal to the Supreme Court was dismissed.

In the above circumstances, the learned trial judge High Court, Kuantan was not altogether right in **dismissing** the plaintiff’s claim on the ground no cause of action was disclosed, when he ruled as follows on 9/11/2001:

“Tuntutan Plaintiff ditolak dengan kos kerana didapati tidak berasas memandangkan tindakan 19aling tebus masih berterusan dan P3 dan P4 hanya membolehkan tuntutan dibuat terhadap Defendan-Defendan setelah tindakan 19aling tebus selesai. Tiada kausa tindakan dibuktikan.”

I shall, therefore, allow this appeal and make the following orders:

- (i) that the order of the learned trial judge dismissing the suit be set aside;

- (ii) that there be a retrial of the civil suit limited to determining, the short-fall, if any, due to the plaintiff from the defendants after the plaintiff has pursued with his remedy to foreclose under the NLC pursuant to the order for sale of the Land Administrator dated 28/7/1992;

- (iii) that the costs of the first trial, this appeal and the retrial do follow the event of the retrial.

(NB: This is the minority judgment)

(DATO' NIHRUMALA SEGARA A/L M.K. PILLAY)
Judge
Court of Appeal
PUTRAJAYA

Reference:

Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah [1991]
3 MLJ 119

PEGUAM PERAYU

1. ENCIK VIGNESH KUMAR KRISHNASAMY
2. ENCIK MOZAMIL ALIF BIN MUHAMAD

PEGUAM RESPONDEN

1. ENCIK MURA RAJU (BAGI PIHAK RESPONDEN 1 & 3)
2. DATO' BASTIAN P. VENDARGON (BAGI PIHAK RESPONDEN 2)

13HB NOVEMBER 2007