

No. 13 of 1978

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)B E T W E E N :

MALAYAWATA STEEL BERHAD

Appellants
(Plaintiffs)

- and -

10 (1) THE GOVERNMENT OF THE FEDERATION
OF MALAYSIA(2) OFFICIAL ASSIGNEE FEDERATION OF
MALAYSIA OF THE PROPERTY OF NG
KENG HOOIRespondents
(Defendants)CASE FOR THE APPELLANTSRecordTHE NATURE OF THE APPEAL

- 20 1. This Appeal is brought by leave granted on the 9th January 1978. It is an appeal from a Judgment of the Federal Court of Malaysia (Suffian L.J., Raja Azlan Shah F.J. and Wan Suleiman F.J.) given on the 29th June 1977. The Federal Court was unanimous in dismissing the appeal of the Appellants ("Malayawata") from a judgment of Azmi J. dated the 13th July 1974. pp.64-5
pp.55-61
pp.34-47
- 30 2. Malayawata are suppliers of steel. Their claim arises out of the supply of steel to a construction firm, Ng Kong Hooi Construction (NKHC). On the 30th March 1970 Mr. Ng, the sole proprietor of NKHC was adjudged bankrupt. Thus it is that the Official Assignee is joined as Defendant in these proceedings in place of NKHC.
- 40 3. Malayawata's claim in this Action is brought not against NKHC, to whom the steel was supplied, but against the Government of Malaysia. This is because it is Malayawata's case that NKHC attempted to pay for the steel supplied by assigning to Malayawata the appropriate portion of debts owed

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by the Government to NKHC. The debts consisted of progress payments due from the Government to NKHC in respect of the construction of a Radio House at Bukit Putri, Kuala Lumpur. The Official Assignee is joined in the Action as assignor of the debts.

4. The principle issue raised in this appeal is whether NKHC validly assigned to Malayawata sums owed by the Government, so as to confer upon Malayawata the right to be paid these sums by the Government. Both Azmi J. and the Federal Court held that there was no such assignment. 10

5. Azmi J. further held that, had he not been against Malayawata on the principle issue, their claim would nonetheless have been defeated on the ground that they waived or terminated the alleged assignment. Furthermore, Azmi J. held that the sum claimed by Malayawata of M\$215,618.64 could in no event be substantiated. The most that the evidence suggested might be due was M\$9,045, and even this sum had not been established by Malayawata with sufficient certainty to be recoverable. All these findings are put in issue in the present appeal. 20

THE SUPPLY CONTRACT BETWEEN MALAYAWATA AND NKHC

pp.68-81

p.81

6. Correspondence evidencing negotiations for the supply of steel by Malayawata to NKHC is exhibited to the Record, culminating in an initial order for 1,200 L.T. Attention is particularly drawn to the following :

- (1) All communications expressly related to supply of steel for Radio House. 30
- (2) The quantities under negotiation approximated to the quantity of 1,200 L.T. ordered on July 25th 1968.

THE ASSIGNMENT AGREEMENT

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7. In negotiations Malayawata had been concerned as to the manner in which payment for the steel by NKHC should be secured. They had stipulated for either an irrevocable letter of credit or a guarantee from Jabatan Kerja Raya, the Public Works Department of the Malaysian Government ("PWD"). 40

8. NKHC were not able to comply with Malayawata's requirements as to payment. In the event an alternative method of payment was agreed. PWD was

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to deduct from progress payments due to NKHC so much as was due to Malayawata in respect of steel supplied to NKHC, and pay the same direct to Malayawata. This was expressly agreed to by PWD after Treasury approval had been obtained.

pp.85-87

SUBSEQUENT STEPS IN RELATION TO THE ASSIGNMENT AGREEMENT

10 9. Originally Malayawata intended to send direct to PWD duplicate invoices in respect of steel supplied to NKHC so that they would know the appropriate sums to deduct from progress payments. Subsequently it was agreed that all invoices should be sent to NKHC and NKHC would check them before sending on duplicates of approved invoices to PWD.

p.89

10. In accordance with the procedure set out in 9 above NKHC duly certified to PWD invoices for steel supplied by Malayawata as follows :-

<u>Date</u>	<u>L/T</u>	<u>Price</u> \$	
9.11.68	449.591	165,813.30	p.92
20 18.11.68	441.214	162,846.80	p.93
31.12.68	119.218	42,633.86	p.102
16. 1.69	419.916	155,696.68	p.104
	<u>1,429.939</u>	<u>526,990.64</u>	

PAYMENTS MADE TO MALAYAWATA BY PWD

11. PWD made deductions from progress payments due to NKHC and paid the sums in question to Malayawata as follows :-

<u>Date</u>	<u>No. of Progress Payment</u>	<u>Amount of Progress Payment</u>	<u>Amount of Deduction</u>	
24.10.68	4th	₹108,767.31	₹108,767.31	p. 80, 192
12. 2.69	8th	₹141,450	₹141,450	p.103,104, 258-9
April '69	10th	₹ 45,000	₹ 45,000	p.225
May '69	11th	₹ 7,155	₹ 7,155	pp.123-126
Oct. '69	15th	₹ 6,000	₹ 6,000	p. 5, 26

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PAYMENTS MADE BY PWD TO NKHC IN DISREGARD OF THE ASSIGNMENT

p.96 12. On the 19th December 1968, PWD made the 7th progress payment in the sum of \$119,820. Of this sum JKR stated that \$109,920 was due to Malayawata in respect of steel delivered. Nonetheless, in disregard of the assignment, PWD paid the entire sum of \$119,820 to NKHC. NKHC promptly spent the entire amount and wrote to PWD requesting that the error be rectified by deduction from a subsequent progress payment. Malayawata also wrote to PWD complaining of the error and asking PWD to prevail upon NKHC to pass on the \$109,920 to them, or alternatively, to deduct the sum in question from the next progress payment and pay it direct to Malayawata. After this, on the 12th February 1969, PWD deducted \$141,450 from the 8th progress payment and paid this sum to Malayawata direct (see paragraph 11 above). By this stage, however, the outstanding total of certified invoices amounted to \$526,990.64 as against which PWD had only remitted to Malayawata \$108,767.31.

p.97 10

pp.98-99 20

p.224 13. Despite the deficit in payments to Malayawata, PWD in the latter part of February 1969 made a 9th progress payment of \$203,229 to NKHC. On the 11th April 1969 Malayawata wrote to PWD complaining that a deduction had not been made and remitted to them from this progress payment. Thereafter PWD made some small payments direct to Malayawata in respect of the 10th, 11th and 15th progress payments (see paragraph 11 above) but paid to NKHC, without deduction, the 12th, 13th and 14th progress payments.

pp.118-120 30

pp.135-137 14. In July 1969 NKHC passed on to Malayawata \$1,500 that had been paid to NKHC as the 12th progress payment. On the 11th September 1969 NKHC passed on to Malayawata \$1,500 out of the sum paid to NKHC as the 13th progress payment. Thus out of the total Malayawata have received \$311,372. Their claim is for the balance of \$215,618.64.

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SUBSEQUENT EVENTS

p.43 15. On the 17th October 1969 Malayawata instituted proceedings in the Kuala Lumpur High Court claiming from NKHC the deficit in payment for the steel supplied. This Action came to nought when Mr. Ng was adjudged bankrupt on the 3rd March 1970.

p.27 16. On the 27th November 1969 PWD terminated the contract with NKHC and subsequently entered into

a new contract with another contractor, Sharikat Pembinaan Raya Sdn. Bhd. for the completion of the work.

THE JUDGMENT OF MOHD AZMI J.

17. Having summarised the material facts Malayawata will now consider in turn the material findings of Mohd Azmi J.

THE ASSIGNMENT WAS CONDITIONAL

18. Mohd Azmi J. held as follows :-

- 10 (i) For Malayawata to succeed they had to establish not only an equitable assignment, but an assignment that was absolute and unconditional. p.40
- (ii) The initial agreement that the steel would be paid for by deductions from progress payments constituted an equitable assignment. p.40
- (iii) The assignment was not absolute but subject to the following conditions :-
- 20 (a) "that for the purpose of computing progress payment due to NKHC all steel bars would be valued in accordance with the conditions of contract between NKHC and the Government". p.41
- (b) "to assist the Government Quantity Surveyor in assessing the quantity of steel delivered at the work-site", copies of Malayawata's invoices should be certified to PWD as correct by NKHC. p.41
- 30 (iv) The effect of (iii) was that the assignment was severable and only became binding upon those involved when NKHC directed PWD to make a payment to Malayawata. p.42
- (v) by implication In consequence the claim failed.

19. Malayawata submit that the analysis made by the Judge was imperfect. The true position is as follows:-

- 40 (i) The agreement between Malayawata and NKHC for payment to Malayawata by deductions from progress payments constituted a

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contract for consideration to assign future choses in action. An assignment would become absolute and binding as between Malayawata and NKHC pursuant to this contract upon the following events :

- (a) steel had to be supplied by Malayawata to NKHC, thus giving rise to a debt to be met by the assignment;
- (b) a progress payment had to be due from PWD to NKHC. 10
- (ii) In order for an assignment to become binding upon PWD it was necessary for them to have notice of the particular sum assigned - i.e., the debt due from NKHC to Malayawata for steel supplied.
- (iii) Certification of invoices by NKHC was, inter alia, a mechanism whereby notice of sums due to Malayawata was given to PWD.
- (iv) It was not open to NKHC to prevent an assignment becoming absolute by declining to certify invoices or by giving contrary instructions as to payment to PWD. 20

pp.92, 93
pp.102, 104

20. The considerations set out in the previous two paragraphs may be somewhat academic, for the Judge appears to have overlooked one important fact. NKHC did in fact certify each invoice submitted by Malayawata and instructed PWD to make the appropriate payments out of progress payments - see paragraph 10 above. Thus even if the Judge were correct in holding the assignments conditional upon NKHC directing payment, the condition was satisfied in relation to the entirety of the sum claimed by Malayawata. 30

WAIVER OR TERMINATION

p.43

21. The Judge held that by instructing proceedings against NKHC for the deficit in October 1969 the assignment, if such it was, was terminated or impliedly waived. It is submitted that this finding was incorrect for the following reasons :-

pp.98, 99,
109, 110,
118-120, 135

- (i) By October 1969 rights against PWD pursuant to the assignment, were vested in Malayawata. 40
- (ii) When Malayawata discovered that PWD had been disregarding the assignment agreement they protested to PWD and affirmed their rights.

- (iii) Taking proceedings against NKHC was not inconsistent with asserting rights against PWD under the assignments.
- (iv) PWD did not take or refrain from taking any action in reliance upon the fact that proceedings had been commenced against NKHC nor afford any consideration for the abandonment by Malayawata of their rights against PWD.

10 THE QUANTITY OF STEEL DELIVERED

22. The Judge held that, even if there had been a valid equitable assignment :

(i) the Government would only be liable for the value of Malayawata's steel actually brought onto the Radio House work site;

p.44

(ii) the evidence did not establish how much of Malayawata's steel was brought onto the Radio House work site;

pp.45, 46

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(iii) it is highly probable that NKHC had used a substantial portion of the steel supplied for other projects;

p.45

(iv) the maximum amount of steel supplied by Malayawata which could actually have been incorporated into the Radio House construction was 866 long tons, in which case there would have been a balance outstanding to Malayawata of only M\$9,045;

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(v) Malayawata had failed to prove their entitlement to any sum.

In making the above findings the Judge has proceeded on the basis that Malayawata were only entitled to be paid by PWD for steel that was actually incorporated into the works. Malayawata challenge this premise. It is further submitted that the findings of fact of the Judge were contrary to the weight of the evidence and were wrong.

THE BASIS OF MALAYAWATA'S ENTITLEMENT TO PAYMENT

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23. The value of steel supplied by Malayawata fell to be considered in two different contexts :

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- (i) for the purpose of calculating sums due to Malayawata for steel supplied to NKHC;
- (ii) for the purpose of calculating the amount of the progress payments due from PWD.

p.280 For the first purpose the steel fell to be valued according to 100% of the contract price. For the second purpose the value of the steel was only directly relevant in so far as there was steel on site not yet incorporated in the work. Clause 38(b) of the contract provided that in valuing the work for the purpose of progress payments 75% of the value of unfixed materials on site could be included. The valuation of steel under this clause would not necessarily be governed by the price the contractors had agreed to pay third parties for his materials. 10

pp.21-33 24. One of the witnesses called at the trial by Malayawata was the PWD Quantity Surveyor responsible for recommending payments. It became clear in the course of his evidence that he believed that Malayawata were only entitled to be paid that proportion of any progress payment which represented steel incorporated or on site. Thus he considered Malayawata entitled to no more than 75% of his valuation of steel on site that had been supplied by them. 20

pp.24-25 25. It is submitted that the PWD's Quantity Surveyor had misunderstood the nature of the assignment agreement to which his principal had assented. Malayawata were entitled to receive out of any progress payment due 100% of the invoice value of steel supplied by them to NKHC. The basis for computing the progress payment due did not affect this right. The PWD had made it plain that for the purpose of progress payments steel would be valued according to the construction contract, but this did not purport to affect Malayawata's right to payment in full for steel supplied out of any progress payments due. 30

26. In focussing upon steel incorporated into the works the Judge has, to some extent, fallen into the same error as the PWD Quantity Surveyor. Malayawata submit that the amount of progress payments assigned to them was full payment for steel that they supplied for the Radio House project. If NKHC diverted some of this steel elsewhere, that could not affect Malayawata's rights. 40

THE FACTS

27. The Judge held that Malayawata were only entitled to be paid for "steel actually brought onto the Radio House worksite". He held that they had failed to prove this for two reasons :-

p.44

(i) Not all the invoices state expressly that the steel was delivered to the Radio House site.

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(ii) The PWD Quantity Surveyor calculated in February and March 1970 that steel incorporated into the building or on site of the sizes supplied by Malayawata amounted to no more than 866 long tons.

p.46
pp.27, 28

28. Malayawata submit that the Judge wrongly disregarded clear and uncontradicted evidence that all the steel covered by the invoices was delivered to the Radio House site. Thus Mr. Khoo Soo Pin, the Manager of Malayawata's Business Department said in chief that the steel in respect of which invoices were rendered was "supplied for Radio House to NKHC". He was cross-examined on this but not shaken. He said:

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p.16

p.17

"The invoices in Exhibit C show steel which we have delivered to Messrs. NKHC for the Radio House project. I agree that these invoices do not show that JKR had accepted the steel. But they were delivered to Messrs. NKHC at Radio House site. I agree from the invoices only some show that the steel was delivered to the site. I agree that during this period Messrs. NKHC was doing other projects, but I do not know whether they were Government projects."

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The position as far as the invoices is concerned is that whereas some stated that delivery was to "Radio House Site, Bukit Putri, Kuala Lumpur", others merely stated "To Kuala Lumpur". Thus the invoices were in no way inconsistent with the evidence of Mr. Khoo Soo Pin that all the steel was delivered to the Radio House site.

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pp.160-192

29. The evidence referred to above was corroborated by the fact that NKHC certified that all the steel covered by the invoices was delivered to them for the Radio House project.

pp.92, 93,
102, 104

30. The Judge disregarded the evidence referred to above largely, it would seem, because he considered that it conflicted with oral

p.46

Record

pp.27, 28

evidence given under cross-examination by the PWD Quantity Surveyor. This evidence was that measurements carried out by the PWD in February and March 1970 showed that 788.98 tons were incorporated in the building and about 578 tons on site unincorporated, of which only 466 and 400 long tons respectively consisted of the bar sizes (Nos. 3-9) that Malayawata had contracted to supply. Thus a maximum of 886 long tons could have been supplied by Malayawata.

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31. Any suggestion that Malayawata only delivered to the Radio House site a maximum of 866 tons is not merely in conflict with the evidence referred to under paragraphs 28 and 29 above, but with much other evidence, including that of the Quantity Surveyor himself, i.e. :

p.92

(i) The first batch of seven invoices submitted by Malayawata covered 449.591 tons. This quantity was checked by the Quantity Surveyor who found only a small discrepancy.

p.25

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p. 93

(ii) The second batch of seven invoices submitted by Malayawata covered 441.214 tons. This quantity was checked by the Quantity Surveyor who found it accurate.

p.25

pp.196, 198

(iii) The PWD Statements of Account demonstrate that the check on Malayawata steel had regard to the sizes of bars. Thus there could be no question of Malayawata being credited with sizes supplied by others.

(iv) Thus by the time the first 14 invoices had been presented PWD had checked delivery to the site of approximately 880 tons.

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p.25

(v) When subsequent invoices were presented they also were checked by the Quantity Surveyor. He stated that his figures did not tally with the invoices, but could not provide details. An undated Statement of Account of PWD suggests that their calculations somewhat exaggerated the steel supplied by Malayawata.

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pp.94, 109,
118

(vi) Malayawata on a number of occasions wrote to PWD stating the total of steel supplied to the site. At no time did PWD challenge these figures.

p.32

(vii) Site diaries were kept by PWD personnel during the day. While it is not suggested

that they give a comprehensive record they show delivery of well in excess of 1,000 tons of steel bars of the sizes provided by Malayawata.

10 32. In summary, if the evidence of the Quantity Surveyor of calculations of quantities in February and March 1970 is accurate, the correct inference to be drawn is that the contractors removed steel from the site under cover of darkness - as the Quantity Surveyor conceded was possible. In that event Malayawata would nonetheless be entitled to payment for the steel they delivered to the site. But Malayawata submit that the suggestion that large quantities of steel supplied by them were diverted from the site to other projects makes little sense, for (a) NKHC were liable to pay for all steel delivered in any event and (b) it is incredible that PWD personnel would not notice that steel was being removed.

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20 33. Thus Malayawata submit that each ground adopted by the Judge in finding against them was invalid and that they were entitled to judgment.

THE JUDGMENT OF THE FEDERAL COURT ON APPEAL

34. The judgment of the Court was delivered by Raja Azlan Shah F.J. The Court affirmed the judgment given below on the first ground alone, without dealing with any of the others. It held :-

p.60

30 That the arrangement whereby deductions would be made from progress payments and paid to Malayawata "was not absolute and therefore not a valid equitable assignment but merely a request to the respondents to pay the appellants. Such a request or authorisation did not give the appellants any rights against the respondents, and could be revoked by the creditor ...

40 In the circumstances the learned Judge was right when he said that the assignment was enforceable only on an ad hoc basis whenever the PWD was instructed by NKHC to make the payment direct"

p.61

35. The reasons for attacking this finding have already been developed in paragraphs 19 and 20 above. In short :-

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- (1) Absolute assignments came into existence as soon as there was (a) a payment for steel due to Malayawata and (b) a progress payment due from PWD.
- (2) NKHC gave specific instructions to PWD in the case of each invoice that the invoice was valid and should be paid by deduction from progress payments.

Accordingly it is submitted that the decision of the Federal Court was wrong.

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36. Malayawata submit that this appeal should be allowed and the judgments of the Federal Court and the trial Judge reversed and judgment entered for Malayawata for M\$215,618.64 for the following, among other

R E A S O N S

1. The trial Judge and the Federal Court erred in holding that the sums claimed by Malayawata were not debts owed by the PWD that had been validly assigned to Malayawata.
2. The trial Judge erred in holding that, if there had been a valid assignment, it was waived or terminated by Malayawata.
3. The trial Judge erred in holding that Malayawata had failed to prove the quantity of steel delivered to the Radio House construction site.

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NICHOLAS PHILLIPS

CHIN YEW MENG

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