

No. 13 of 1978

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 IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
 

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ON APPEAL

 FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE  
 JURISDICTION)
 

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B E T W E E N :-

MALAYAWATA STEEL BERHAD

Appellants

- AND -

 10 (1) THE GOVERNMENT OF THE FEDERATION OF  
 MALAYSIA

 (2) OFFICIAL ASSIGNEE FEDERATION OF  
 MALAYSIA OF THE PROPERTY OF NG KENG  
 HOOI
Respondents


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 CASE FOR THE RESPONDENTS
 

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1. This is an appeal from the Judgment of the Federal Court of Malaysia (Suffian L.P., Raja Azlan Shah F.J., and Wan Suleiman F.J.) dismissing an appeal by the Appellants against an order made by Mohamed Azmi J. on 13th August 1974 which dismissed a claim by the Appellants against the First Respondents by virtue of a purported assignment dated 20th July 1969, and against the Second Respondents as Assignors, for payment by the Respondents of the sum of \$215,618.64, for interest, and for costs. p.55  
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2. The facts underlying the issues are not in dispute. By a written contract dated 18th January 1967 Ny Kong Hooi Construction ("NKHC") agreed with the First Respondents to construct a broadcasting centre comprising a Radio House, two office towers and an auditorium for \$7,870,013.95. By an exchange of letters dated 25th June 1968, 2nd July 1968 and 25th July 1968 NKHC agreed with the Appellants that the Appellants would supply steel bars for the construction of the Radio House development with terms of payment by way of irrevocable letter of credit or by guarantee by the Jabatan Kerja Rays ("J.K.R." - an agency of the Government). By a letter dated 20th July 1968 NKHC informed the Appellants of the acceptability of an alternative arrangement for payment for steel supplied by NKHC authorising the Public Works Department ("P.W.D." - also of the Government and p.269  
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the English equivalent of Jabatun Kerja Raya) to deduct the amount owing for such steel from interim payments to NKHC and making direct payments to the Appellants instead of a J.K.R. Guarantee. On 20th July 1968 NKHC wrote to the J.K.R. stating NKHC's agreement to such deduction from progress payments and direct payment to Appellants, and provided Appellants with a copy of this letter. On 8th August 1968 the J.K.R. by letter informed NKHC that the Treasury had approved their request but that for the purpose of progress payments the steel bars, whether an unfixed materials on site or incorporated in the works, would be valued in accordance with the conditions of contract and that to assist the J.K.R. in determining the quantities of steel supplied to NKHC copies of Appellants' delivery notes should be sent to the J.K.R. By letter dated 10th August 1968 NKHC agreed to these stipulations. But by letters between NKHC and the Appellants dated 13th September 1968 (A20) and 18th September 1968 (A22), copies whereof were sent to the Respondents, it was agreed varying the previous arrangements that the Appellants would supply all invoices for checking and verification to NKHC who would forward appropriate invoices to the J.K.R. with recommendation for payment. Between October 1968 and October 1969 the Appellants received seven payments for steel supplied two such payments being made direct by NKHC. The sole proprietor of NKHC was one Ng Kong Hooi. On 17th October 1969 the Appellants sued NKHC for an alleged balance due in respect of steel bars supplied as at 30th September 1969 but before determination of the said claim Ng Kong Hooi was in March 1970 declared bankrupt. In consequence the Appellants brought the present action against the Respondents joining the Second Respondents as co-Defendants, on the grounds that the Malaysian Government was liable to pay the sum of \$215,618.64 to the Appellants pursuant to an alleged assignment of the said sum by NKHC to the Appellants.

3. The issues which arise upon this appeal are:

- (1) Whether, having regard to the altered arrangements for payments for steel supplied to NKHC by the Appellants to the Radio House site, there was a valid assignment by NKHC to the Appellants of NKHC's right to interim payments in respect of such steel so as to enable the Appellants to claim such interim payments from the First Respondents. 40
- (2) Whether, if there was any such valid assignment, the Appellants by instituting an action against NKHC on 17th October 1968 for monies due for such steel supplied as at 30th September 1968 terminated or impliedly waived any such assignment; or whether by reason of events from September 1968 onwards the Appellants are otherwise estopped from relying upon the same. 50

(3) Whether, if any such assignment was held to be valid, the Appellants have established that any payment over and above sums already paid is due to them in respect of steel delivered to the site of Radio House in any event.

10 4. Mohd. Azmi J. held that there was no unconditional equitable assignment. Having regard to the correspondence, and in particular the letters of 13th September 1968 (A20) from NKHC to the Appellants and to the Appellants' reply of 18th September 1968 (A22) which were copied to all parties; to the oral evidence and in particular to the evidence of the Appellants' own witness Khoo Soo Pin that "NKHC had to certify the steel covered by our invoices as correct and thereby recommend to J.K.R. for payment"; to the fact that of the seven payments allegedly made pursuant to the alleged assignment two such payments were in fact made by NKHC direct to the Appellants and the remaining five progress payments, which were only five out of a total of 15 instructions of NKHC: the Learned Judge found as a fact that the arrangement expressly agreed between the parties was that all invoices had to be forwarded to NKHC for checking and verification before being forwarded to the Government for payment, and no invoices should be submitted to the Government direct. In the premises the Learned Judge held that any assignment which might arise was conditional upon such checking taking place; that any such assignments were severable; and that such assignments if any were only enforceable by the Appellants on an ad hoc basis once the Government had been instructed by NKHC from time to time to make the payment in question direct to the Appellants. Unless such instructions were forthcoming from NKHC as to the amount to be released from each progress payment the Government could not be held to be under any obligation to make such payment to the Appellants.

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40 The Learned Judge further held that the Appellants having so agreed and acknowledged to the Government that such was the arrangement were estopped from saying that there had been any breach of the terms of any original assignment. He therefore held that there was no enforceable equitable assignment and that the claim should be dismissed.

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50 The Learned Judge further held in the alternative that in suing NKHC in October 1969 rather than bringing any action against the First Respondents, notwithstanding that they knew that the Government had made two further progress payments which would have constituted breaches of any absolute equitable assignment, the Appellants terminated or waived any such assignment as from the date of the said Writ. He further held that the said action was inconsistent with the existence of an equitable assignment in any event.

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p.46 The Learned Judge further held in relation to the third issue that the Appellants had failed to discharge the onus of establishing what, if any, steel, over and above that already paid for by the Government, had been delivered by the Appellants to the site for the construction of Radio House and what, if anything, was the value of such further steel. The evidence showed that at the outside the Government had received no more than 866 tons instead of the alleged 1,429,939 tons and even the evidence as to the former amount was unsatisfactory; that there was no satisfactory evidence as to the value of even that steel; that it was not for the Court to speculate on the matter; and that therefore even if an equitable assignment had been established, which it had not, no sum had been shown to be due from the Respondents in any event. 10

p.55 5. Upon appeal by the Appellants to the Federal Court of Malaysia (Suffien L.P., Raja Azlan Shah F.J., Wan Suleiman F.J.) Raja Azlan Shah F.J. delivering the judgment of the Court affirmed the judgment of Mohd. Azmi J. He directed himself that whether the arrangement between the parties constituted a valid equitable assignment of the progress payments completely and absolutely to the Appellants was a matter of the intention of the parties to be inferred from the arrangement itself and from the evidence. Following Durham Bros. v. Robertson [1898] 1 Q.B. 765 and looking at the arrangement as a whole as found by the Learned Judge at first instance he held that there was no clear and unconditional assignment of the progress payments and that liability to make any particular payment by the Respondents to the Appellants was conditional upon the need to refer back to NKHC to ascertain from NKHC the state of accounts between themselves and the Appellants in order to verify that the steel for which payment was claimed had in fact been supplied. In the premises he held that there was no valid equitable assignment but merely a request to the Respondents to pay the Appellants which could be revoked by the creditor NKHC and which gave the Appellants no rights as against the Respondents. In the premises the Federal Court upheld the ruling of the Learned Judge at first instance that no assignment was enforceable save on an ad hoc basis whenever the Government was specifically instructed by NKHC from time to time to make a payment direct. The appeal was therefore dismissed with costs. 20 30 40

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6. The Respondents first submit that on the evidence no absolute equitable assignment has been established. On the arrangements agreed between the parties no payment was to fall due from the Government unless and until the amount of such payment had first been checked and notified to the Government by NKHC. In the premises any equitable assignment was subject to conditions which had never been fulfilled and only arose 50

on an ad hoc basis as and when such conditions were fulfilled.

7. The Respondents further submit that if there had been any such assignment evidenced by the initial letters in July and August 1968 the Appellants are estopped by their conduct and by their representations in the letters A20 and A22 in September 1968 from relying upon the same. The Respondents further submit that if, contrary to their primary contention, there had been any such assignment the same was terminated or waived by the commencement by the Appellants in October 1969 of the original action against NKHC.

8. The Respondents finally submit that even if there was a valid assignment the Appellants, who as found by the Judge at first instance were delivering steel to NKHC in respect of a number of other projects, had failed at any stage to establish that steel over and above that already paid for by the Government was ever delivered by the Appellants to the site of the Radio House; and in the premises have failed to establish that any sum is due to the Appellants pursuant to such an assignment in any event.

9. The Respondents submit that the decision of the Federal Court and of the Judge at first instance should be upheld for the following, among other:

R E A S O N S

- (1) BECAUSE the arrangement between the parties never constituted an absolute equitable assignment of progress payment due from the Respondents to NKHC.
- (2) BECAUSE any assignment was conditional upon NKHC first checking the invoices of the Appellants and notifying the Respondents as to any sum payable.
- (3) BECAUSE the Appellants are estopped by their correspondence and conduct from September 1968 onwards from relying upon any earlier assignment.
- (4) BECAUSE any such assignment was terminated or waived in October 1969.
- (5) BECAUSE no sum has been established by the Appellants as due and owing pursuant to such an assignment, if any, in any event.
- (6) BECAUSE the judgments of the Federal Court and of the Judge at first instance are right.

NICHOLAS LYELL

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CASE FOR THE RESPONDENTS

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