

44/84

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N:

SUN KEE & CO. (Sued as a firm) Appellants

- AND -

CHOP SIN HUA HIN First Respondent

HO HAI POH Second Respondent

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CASE FOR THE FIRST RESPONDENT

RECORD

1. This is an Appeal from the Judgment and Order of the Federal Court of Malaysia (Raja Azlam Shah, C.J., Abdul Hamid, F.J. and Abdoolcader J.) dated the 23rd day of July, 1981, dismissing with costs the Appeal of the Appellants herein from the Judgment and Order of the High Court of Malaya at Kuala Lumpur (Commercial Division) (Mohd. Azmi J.) dated the 24th day of March, 1980, whereby the Application of the Appellants herein to set aside the sale by public auction of two pieces of land formerly belonging to them was dismissed with costs.

Pp.89-92

2. The sole question which fell for decision before the Federal Court and which is open to the Appellants before Your Lordships' Board is whether or not the learned Judge hearing the Appellants' Application at first instance was entitled to reject the contention of the Appellants that the reserve price for the said pieces of land did not reflect the estimated market value of the same.

Pp.78-87  
P.21

3. The procedure under which land is sold in cases such as the instant Appeal in execution of a Judgment of the High Court in Malaya, elsewhere than in the States of Malacca and Penang, is governed by the provisions for the initiation of the process laid down by Order 43, Rule 2 of the Rules of the Supreme

Court, 1957. In summary, the land must be seized by obtaining Leave from the Court to obtain an Order which prohibits the Judgment debtor from affecting any dealing with land which the Judgment creditor wishes to be sold in execution proceedings. Such an Order is called a "Prohibitory Order", and takes effect when it is entered on the registered document of title to the land to which it relates. The provisions relating thereto are found in the National Land Code (Act 56 of 1965) in Part 19 which deals with "Restraints on dealing" and more particularly in Chapter 2 thereof which deals specifically with "Prohibitory Orders". The relevant sub-rules of Rule 2 of Order 43 provide as follows.

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"(1) Seizure shall be made by an order prohibiting the judgment-debtor from transferring, charging or leasing such property or interest. For the purposes of this rule "charging" shall include the creation of a lien by deposit of a document of title;

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(2) A copy of the order shall be served on the judgment-debtor and one or more copies, as the case may require, shall be issued to the judgment-creditor in order that he may present the same, in compliance with the provisions of any written law relating to such land, for registration of the Registry of Titles or Land Office whereat the Land or interest in land specified in such order is registered;

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(3) No prohibitory order issued under this rule shall affect any immovable property or registered interest therein and no immovable property or registered interest therein shall be deemed to have been seized until such prohibitory order shall have been registered as provided by any written law relating to such land."

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The relevant part of Chapter 2 of Part 19 of the National Land Code is as follows

Meaning of "prohibitory order"

"334. In this Chapter "prohibitory order" means, where land or an interest in land held by a judgment-debtor is to be sold in execution proceedings, an order made pursuant to rules of court by a court of competent jurisdiction prohibiting the judgment-debtor from effecting any dealing therewith or from effecting such dealing therewith as may be specified in the order.

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335. (1) No prohibitory order shall take effect until it has been entered by the Registrar, in accordance with the provisions of this section, on the register document of title to the land to which, or an interest in which, it relates:

Prohibitory orders in-effective until entered by Registrar

Provided .....

.... (2) .....

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336. (1) The effect of an prohibitory order duly entered on any register document of title and expressed to relate to the land itself shall, subject to sub-section (3) of this section and to sub-section (2) of section 337, be to prohibit so long as it continues in force the registration, endorsement or entry thereon of -

Effect of prohibitory orders.

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(a) any instrument of dealing executed by or on behalf of the proprietor thereof (but not any certificate of sale relating thereto);

(b) any claim to the benefit of any tenancy exempt from registration granted by the said proprietor; and

(c) any lien-holder's caveat in respect thereof.

(2) .....

(3) .....

(4) .....

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(5) .....

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337. (1) No sale of any land or interest for the purpose of satisfying any judgment debt shall become absolute until it has been confirmed by an order made pursuant to rules of court; and any such order shall be sufficient authority for an officer of a court of competent jurisdiction to execute in favour of the purchaser at the sale the appropriate instrument of transfer under this Act in the name, and on behalf, of the judgment-debtor.

Sale of land or interest subject to prohibitory order

(2) The prohibition imposed by any prohibitory order shall not apply to any such instrument of transfer."

4. The facts which are relevant to the determination of the instant Appeal fall within a

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narrow compass. The First Respondent obtained a Judgment against the Appellants and sought to enforce the same by obtaining sale of two pieces of land belonging to the Appellants. Having consented to the obtaining of a "Prohibitory Order" by the First Respondent and having failed to attend the Summons for Directions for Sale of the relevant land, the Appellants applied by Motion on the 20th day of March, 1980 to set aside the sale that had been effected by public auction on the 17th day of March, 1980.

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5. The following chronological table sets out all matters which appear to be of any significance which are mentioned in the record. The marginal reference is to the first page of the document itself but where that document is not copied or where it is a reference to an event other than a documented event the reference is made in parentheses to the point in the record where the document or event is the subject of a reference thereto

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PAGE	DATE	EVENT	
P. (78)	6th March 1978	First Respondent obtains Judgment against Appellants for \$164,000	
P.13	19th March 1979	Valuation of Lew, Chin Chuan & Co on the footing of market value for submission to Appellants' Bankers for financing purposes at \$360,000 effective on this date	30
P.38	1st August 1979	Summons for leave to obtain a Prohibitory Order issued	
P.40	7th September 1979	By consent leave to obtain a Prohibitory Order granted by Court	40
P.41	6th November 1979	Summons for directions for sale issued	
P.32	10th December 1979	Valuation of Jones Lang and Wootton on footing of open market value at \$300,000 and on footing of forced sale value at \$270,000 effective on this date	

PAGE	DATE	EVENT	
	P.26	11th December 1979	Submission of valuation of Jones Lang & Wootton to Court by letter from First Respondent's Solicitors
10	P.58	11th January 1980	Valuation of Jordon Lee and Jaafar on footing of market value for mortgage purposes at \$495,000 effective on this date made for Appellants
	P.1	11th January 1980	Order for sale with reserve price of \$270,000
	P.75	13th January 1980	Proclamation of sale made by Auctioneer
20	P.(25)	7th February 1980	Order for sale served
	P.53	11th March 1980	Public Bank Berhad advise Appellants that they offer them loan of \$140,000 and an overdraft of \$115,000
30	P.35	15th March 1980	Appellants' solicitors write to Respondent's solicitors to warn that sale might be postponed through payment of judgment debt being made
	P.77	17th March 1980	Sale by auction effected for \$275,000 and memorandum signed. Notice of motion to prohibit sale filed
	P.15		
	P.4	20th March 1980	Notice of motion to set aside sale filed
40	P.20	24th March 1980	Mohd. Azmi J. dismisses motion to set aside sale
	P.74	27th March 1980	Second Respondent pays balance of purchase price
	P.84	28th March 1980	Notice of Appeal served

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PAGE	DATE	EVENT	
P.49	21st April 1980	Standard Industrial Engineering advises Appellants of occupation and request removal of Appellants' property	
P.(67)	24th April 1980	Gan Siew Kee is alleged by Lam Fung Hong to have made an offer to sell land on behalf of Second Respondent to Lam for \$510,000	10
P.50	26th April 1980	Appellants' solicitors request Standard Industrial Engineering to remove. Lam allegedly writes to Gan for confirmation of offer of 26th April 1980	20
P.69			
P.48	3rd May 1980	Appellants' solicitors write to Samaco Engineering protesting about trespass and to Standard Industrial about damage	
P.51			
P.22	5th May 1980	Issue of summons for stay pending Appeal	
P.78	23rd December 1980	Grounds of Judgment of Mohd. Azim J.	30
P.86	24th February 1981	Memorandum of Appeal	
P.89	23rd July 1981	Judgment of the Federal Court	
P.94	22nd March 1982	Order giving the Appellants final leave to appeal to His Majesty the Yang di Pertuan Agong	
6.	At the conclusion of the hearing before Mohd. Azmi J. on 24th March, 1980	the learned Judge made the following finding	40
P.20 Ll. 49-33		"I find no material irregularity in this case. No protest was made by the Applicants' solicitors as to reserve price and directions as to the sale."	

The learned Judge thereafter dismissed the

Appellants application with costs.

7. In accordance with local Rules of Court Mohd. P.78-83  
Azmi J. gave written grounds of Judgment in respect  
of his said Order of 24th March, 1980 on 23rd  
December, 1980. He commenced his Judgment by P.78  
reciting how the Application came to be before  
him and the evidence upon which it was made.  
The basis upon which the Appellants had put  
10 their case was stated to be as follows:-

"Firstly, the order disclosed the actual P.79 Ll.11-23  
reserve price; and, secondly, no provision  
was made for the two lands to be offered  
for sale individually in a specified order  
as provided by Section 257 (2) of the  
National Land Code 1965. Further, it is  
contended the reserve price of the two  
lands fixed at \$270,000/- is not "equal  
20 to the estimated market value of the  
land in question" and therefore is contrary  
to the provision of Section 257 (1)(d) of  
the National Land code."

After dealing with the valuation evidence the Pp.79-80  
learned Judge set out the provisions of Order  
43 Rule 11 (e) of the Rules of the Supreme Court  
under which the application had been brought.

8. The learned Judge thereafter held that he P.80  
found no merit in the complaint that the Order  
of Sale disclosed the actual reserve price.  
30 Likewise he held that there was no merit in  
the complaint that the two pieces of land should  
have been auctioned separately. The First  
Respondent respectfully submits that for the  
reasons adverted to in the Judgment of the  
Federal Court referred to hereinafter the  
provisions of Sections 256 and 257 of the  
National Land Code were not relevant to the  
instant matter. If, contrary to the views of the  
Federal Court, it should be held that the said  
40 Sections are applicable the First Respondent will  
submit as follows. As sub-section 2 of Section  
257 allows any Order for sale made by the Court  
under Section 256 to contain such other  
directions with respect to the sale as the Court  
may think fit the inclusion of the reserve  
price in the Order is permissible. Further that  
as the word "may" appears in sub-section of  
Section 257 there is no obligation to sell  
50 parcels of land individually. In addition the  
First Respondent respectfully submits that the  
learned Trial Judge was right in holding that  
the matters complained of and each of them were  
incapable of amounting to a material irregularity  
within the meaning of the said Rule 11(e).

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- Pp.81-82 9. The learned Judge thereafter went on to hold that the only question which required serious consideration was whether the reserve price of \$270,000/- fixed for both lots by the Registrar represented a price equal to the estimated market value of the lands in question as required by the provisions of Section 257 of the National Land Code. The learned Judge held that the reserve price of \$270,000/- was a price equal to the estimated market value of the two lands. For the reasons adverted to in the previous paragraph the First Respondent respectfully submits that Section 257 has no application to the instant matter and, in the premises, there is no obligation to fix a reserve price as equal to the "estimated market value". If, however, such is held to be the case the First Respondent respectfully submits that the words "estimated market value" are estimated market value on the footing of an enforced sale. In the premises as the price achieved for the two lands of \$275,000 exceeded the reserve price the said sale is unimpeachable. 10 20
- Pp.82-83 10. Thereafter the learned Judge went on to hold, it is submitted correctly, that if the reserve price should have been \$300,000 the difference between that and the figure of \$270,000 was so small that the same could not constitute a material irregularity in the meaning of the said Rule 11(e). So far as may be necessary the First Respondent would support the said conclusion, but in the submission of the First Respondent it is not necessary for him to do so. 30
- Pp.84-85 11. By a Notice of Appeal dated 29th March, 1980, the Appellants herein gave notice of their intention to Appeal to the Federal Court. Pp.86-87 In their Memorandum of Appeal, dated 24th February, 1981, the Appellants set out numerous grounds of Appeal. As it appears from the Judgment of the Federal Court that the only argument which was pursued before that Court was the question of the reserve price not reflecting the estimated market value of the lands in question, the First Respondent does not propose to summarise the same herein. The Appellants' Appeal to the Federal Court herein duly came on for hearing before Raja Aslam Shah, C.J., Abdul Hamid, F.J. and Abdoolcader J.. The Judgment of the Court was delivered by Abdoolcader J.. After setting out the history of the matter the matters put forward by the Appellants were reiterated. P91 Ll.84 -51 40 50
- Pp.89-92
- Pp.89-90



The learned Judge then recorded that Counsel for the Appellants had conceded that Section 257 of the National Land Code had no application in this matter. The said concession, it is respectfully submitted was clearly correct. The First Respondent would further submit that albeit the said concession was a concession of law the Appellants should not be permitted to reargue this matter before Your Lordships' Board. Thereafter the learned Judge said,

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"The incorporation of the reserve price in the Order of 11th January, 1980 is not an irregularity which would vitiate the sale nor indeed, quite apart from the provisions of Section 257 (2) of the Code which do not apply and which in any event are only directory and discretionary, is the fact that the two lands were not directed to be sold separately."

P.91, L1 26-34

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12. The Judgment of the Federal Court then dealt with the substantive ground of Appeal namely as to whether or not the reserve price reflected the estimated market value. The Court held, it is submitted correctly, that the reserve price was a fair estimate of the market value. In the premises there are concurrent findings of fact in the courts below. The Court further held, it is submitted correctly, that because the Appellants had failed to object at the proper time to the Order for Sale that they could not do so in the instant proceedings. The Appellants Appeal to the Federal Court was thereupon dismissed.

Pp.91-92

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13. By Order dated the 22nd March, 1982, the Appellants were granted Final Leave to Appeal to His Majesty the Yang di Pertuan Agong against the decision of the Federal Court herein.

14. The First Respondent respectfully submits that the Appeal of the Appellants herein should be dismissed with costs for the following, amongst other

R E A S O N S

- (a) BECAUSE the Judgment of the Federal Court was right
- (b) BECAUSE the Judgment of the learned Trial Judge was right save as to the applicability of the provisions for sale of charged land in the National Land Code

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- (c) BECAUSE the sale was carried out pursuant to an unimpeached court order and cannot be challenged other than for fraud or material irregularity and the Courts below have found no such fraud or material irregularity existed.
- (d) BECAUSE there are concurrent findings of fact.

NIGEL MURRAY

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IN THE JUDICIAL COMMITTEE OF THE PRIVY  
COUNCIL

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ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

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BETWEEN:

SUN KEE & CO.,  
(Sued as a firm)

Appellants

- AND -

CHOP SIN HUA HIN

First Respondent

HO HAI POH

Second Respondent

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CASE FOR THE FIRST RESPONDENT

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