

Tuan Man bin Tuan Lebeh and another - - - - *Appellants*

v.

Mak Ah Cheang - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE FEDERATED MALAY STATES, IPOH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 12TH NOVEMBER, 1929.

Present at the Hearing :

LORD BLANESBURGH.

LORD WARRINGTON OF CLYFFE.

SIR CHARLES SARGANT.

[*Delivered by* LORD WARRINGTON OF CLYFFE.]

The action in which this appeal arises was one in which the respondent was plaintiff and the appellants, as administrators of a deceased woman, who may be referred to shortly as Raja Prempuan, were defendants.

The respondent, a Chinese contractor and miner, is sub-lessee under the appellants as administrator of Raja Prempuan, the lessee from the Crown of a tin mine, and under his sub-lease he is under an obligation to render to the sub-lessors as tribute a certain percentage of the ore gotten from the mine.

The sub-lease contained a provision for the sale of the tribute ore by the lessors to the lessee, and the question in the action was whether such sale is obligatory on the lessors. The respondent asserted that it is, basing his contention first on the true construction of the lease, and secondly on the ground that, if this proved not to be the true construction, the written document was, owing to the mutual mistake of both parties, not in

conformity with an alleged parol agreement between them, and ought to be rectified accordingly. The question of construction was, of course, one of law; the claim to rectification raised issues of fact, viz., whether the alleged parol agreement was in fact made and, if so, what were its terms, and whether the alleged disconformity with it of the written document arose from the mutual mistake of both parties. In the Supreme Court at Ipoh, where the action was tried, the Judge decided both points in favour of the appellants. In the Court of Appeal of the Federated Malay States the Court, while unanimously deciding in the appellants' favour on the point of construction, accepted by a majority the respondent's contention on the other point, and directed the sub-lease to be rectified accordingly. Hence this appeal.

There is no cross-appeal on the question of construction, and the only question now arising for decision is whether the Court of Appeal was justified in directing rectification of the sub-lease. This raises issues of fact only.

The undisputed facts are as follows :—

In 1910 and for some time afterwards Raja Prempuan was working the mine herself and the respondent was acting for her as sole agent for the sale of the ore. She was at all material times heavily indebted to the respondent for advances made by him, and the appellants continued to be so indebted after her death.

At some date prior to June, 1913, the respondent took from her a sub-lease of the mine, under which he became liable to render to her 40 per cent. of the ore gotten from the mine by way of tribute. This sub-lease was not produced, and its precise terms are not known, but its existence is apparent from the document next to be stated.

On the 1st June, 1913, an agreement was made between Raja Prempuan and one Inche Soh. The original document was in the Malay language. The admitted translation is in the following terms :—

“Whereas on the above-mentioned date, I, Raja Prempuan, made two documents of the same wordings, one to be given to Inche Soh and one copy for myself to keep in reference to the tribute of tin ore from Towkay Mak Ah Cheang—whatever amount that may be obtained, I have sold to Inche Soh at the price of \$53/- per picul.

“However, if the price of tin is raised up to \$115/-, Inche Soh is required to add \$2/- more; if the price of tin goes down to \$100/- I allow a reduction of \$3/-. The above-mentioned affairs shall be received in Klian Intan. All expenses for removal of tin ore shall be borne by Inche Soh. I shall commence to sell the said ore from the 27th day of Jemadil Akhir 1331, corresponding to 28 Chinese moon—and the period shall be for 5 years—during which I cannot sell to any other person. At the end of 5 years from this date this document shall expire and cannot be used any more. I subscribe my name below in the presence of witnesses.”

This agreement is hereinafter referred to as “J.”

On the same date an agreement was made between Inche Soh of the one part and the respondent of the other part for the

re-sale to the respondent of the tribute ore bought by Inche Soh under the agreement with Raja Prempuan. This document was also in Malay, and the admitted translation is as follows :—

“Whereas on the above-mentioned date I, Che Soh bin Penghulu Dahayat, and Towkay Mak Ah Cheang Chop Kong Loong, Baling, made two copies of the same wordings, each to retain a copy as a good faith in respect of tribute due to Tengku Raja Prempuan and sold to me as per letter made and given by Tengku Raja Prempuan to dated 27.6.31 Malay and corresponds to 1.6.13 English. Price per picul \$53/- for 6 years. Terms are in accordance with the letter, made and given by Tengku Raja Prempuan to me, which is attached.

“On the execution of these presents I received \$300 advance.”

This is referred to as “K.”

On the 29th June, 1913, a further agreement was made between Inche Soh and the respondent, but this only varied the price to be paid in certain events and need not be set out. This is referred to as “L.”

To pause here for a moment. The legal effect of these documents is reasonably clear. There was no privity of contract between Raja Prempuan and the respondent. The respondent merely bought from Inche Soh the ore he had bought from Raja Prempuan. He did not buy from Inche Soh any right to enforce Raja Prempuan's obligation to sell to him. As a matter of fact, the question never arose, because it is not disputed that Raja Prempuan continued to sell the tribute ore payable under the then subsisting under-lease until the latter was superseded by the fresh under-lease next to be stated.

This is dated the 21st September, 1914, and is in English on a printed form, with certain particulars inserted in ink. The material provisions are as follows :—

“No. 3/1914.

“I, Che Ning binti Che Neh Raja Prempuan, hereinafter called the sub-lessor, being the registered lessee of a piece of mining land at Klian Intan, described in Perak Mining Lease No. 1 of date 13th March 1912, and subject to such encumbrances, liens and interests as are endorsed thereon :

“Do hereby sub-lease to Mak Ah Cheang, hereinafter called the sub-lessee, (a) all that portion of the said piece of mining land estimated to contain 116 acres 2 roods and 29 poles, more or less, for the period of (b) four years and five months or up to the Chinese New Year, 1919, subject to the provisions of ‘The Mining Enactment, 1911,’ and to the following conditions, restrictions and exceptions :—

“1. That the sub-lessee shall pay to the sub-lessor or to his duly appointed agent tribute upon all ore removed from the said land at the rate of—

- (1) Twenty per cent. (20%) when the price of tin in Penang is one hundred dollars (\$100/-) per picul or under :
- (2) Forty per cent. (40%) when the price of tin in Penang is over one hundred dollars (\$100/- per picul.

“2. That the said tribute shall be paid in Klian Intan.”

It will be observed that under this sub-lease the rate of tribute is no longer a flat rate of 40 per cent., but a rate of 20 per cent. only if the price of tin is \$100 or under and 40 per cent. if

the price is over \$100, and no provision is made for the sale of the tribute ore; it is, however, common ground that the arrangements made in 1913 for the sale of the tribute ore by Raja Prempuan to Inche Soh and by him to the respondent continued to be acted on, and it may be that in practice the sale would be made direct to the respondent, but there is no evidence as to this, and under the agreements "K" and "L" the price as between Inche Soh and the respondent was not the same as the price between Inche Soh and Raja Prempuan, and a direct sale to the respondent would require some arrangement.

On the 9th August, 1915, however, a further agreement was made both as to the amount of the tribute and as to the price at which the tribute ore should be sold, and in this agreement Raja Prempuan for the first time came into direct contractual relations on this matter with the respondent. The agreement is expressed to be made between Che Soh—the person who in the previous agreements was called Inche Soh—as attorney for Raja Prempuan of the one part, and the respondent of the other part, and to be supplemental to the sub-lease of the 21st September, 1914. It is in English and was probably prepared by the English solicitor, who attested both signatures. The material provisions are as follows:—

"1. That the amount of the tribute of chabut payable by the said Mak Ah Cheang to the said Che Soh as attorney of the said Che Ning Raja Prempuan on the tin ore to be obtained as mentioned in the said sub-lease of the 21st of September, 1914, shall be 25% (twenty-five per cent.) of the value of each picul of tin supplied by the said Che Soh as such attorney as aforesaid when and if the market price of tin in Penang is under \$100 per picul and 35% (thirty-five per cent.) of the value of each picul of tin when and if the market price for tin in Penang is over \$100 per picul. And these amounts are to be in lieu of or in place of the amounts of 20 per cent. and 40 per cent. respectively mentioned in the said sub-lease of the 21st of September, 1914, but in all other respects except as appears in these presents, the terms and conditions of the said sub-lease of the 21st of September, 1914, shall be and remain in full force and effect.

"2. That the said Mak Ah Cheang will pay to the said attorney as aforesaid the sum of \$50/- for each and every picul of tin supplied to him by the said Che Soh when and if the market price of tin in Penang is over \$100 per picul, \$45 for each and every picul supplied to him as aforesaid when and if the market value of tin in Penang is over \$70 but under \$100 per picul and \$40 for each and every picul supplied to him as aforesaid when and if the market value of tin in Penang is \$70 or under \$70 per picul."

It is common ground that where the name "Che Soh" appears he is only referred to as the attorney of Raja Prempuan, and the agreement must therefore be construed and take effect as if her name were substituted for that of Che Soh. The agreement in fact bore the seal of Raja Prempuan.

The first clause of this agreement varies the percentage of the tribute ore, the ore on which the percentage is reckoned being described first as the ore to be obtained as mentioned in the sub-lease of the 21st September, 1914, and afterwards as "tin supplied

by the said Che Soh " as such attorney as aforesaid. In all other respects except as appears in the agreement the terms and conditions of the sub-lease were to remain in full force and effect. The second clause deals with the price of the tribute ore, which is described as " tin supplied by the said Che Soh," viz., by Raja Prempuan. The clause contains nothing indicating an obligation on her part to supply any tin and the natural, and in their Lordships' opinion the true construction of the clause is, that the supply of tin was optional on the part of Raja Prempuan, but if she did supply it, then the respondent was bound to accept and pay for it upon the terms set out in the clause. Moreover, it is reasonably clear that any right in Che Soh himself to call for a sale of the ore under the agreement of June, 1913 (" J "), must be taken to be superseded by this agreement of 1915, to which Che Soh was a party though not in his personal capacity. The two agreements of 1913 and 1915 cannot stand together.

On the 11th October, 1915, a further agreement was made between Che Soh as attorney for Raja Prempuan and the respondent, the material clause of which is as follows :—

" When the agreement of sub-lease dated 1.11.32 expires I agree to execute a fresh agreement with the said Towkay Mak Ah Cheang on the same terms as the agreement now in force concerning all matters therein contained, it shall not be reduced until all the tin from the land (Lot No. 206) has been worked out, because Towkay Mak Ah Cheang has complied with my request on the said agreement of the sub-lease according to the wishes of Raja Prempuan."

Raja Prempuan died on the 10th September, 1916.

From the date of the sub-lease of September, 1914, the tribute ore was regularly sold by Raja Prempuan, and after her death by the appellants to the respondent on the terms expressed in the agreement of 1915. This continued until the middle of the year 1918, when differences arose, and the appellant having been required by the respondent to grant a new lease under the agreement of October, 1915, refused so to do. Thereupon the respondent instituted a suit, No. 305/1918, claiming specific performance of the last-mentioned agreement.

This suit came on for trial before Farrer Manby J., who by his decree dated the 31st March, 1919, adjudged that the defendants—the present appellants—do perform specifically the agreement of the 11th October, 1915, and do forthwith execute a proper sub-lease accordingly in favour of the plaintiff—the present respondent—the form of such sub-lease to be settled by the Court in case of difference. The defendants in the suit appealed to the Court of Appeal. On the 24th and 25th September, 1919, the appeal was heard, and the Court intimated that it would be dismissed, but the formal judgment to that effect was dated the 26th February, 1920. Both parties, however, were aware, towards the end of September, 1919, that the appeal would fail.

Under these circumstances the respondent at once took steps to obtain from the appellants the execution of the lease directed by the decree. This was duly prepared and executed by the parties. The first appellant signed it on the 29th November and the second signed it on the 13th October, 1919. The document is in English. The sub-lease contained the following clause relating to the sale of tribute ore (that is to say) :—

“ That the said tribute of Parit or Lampaning shall be paid in ore immediately after such weighing of ore, of which weighing the sub-lessors shall have full notice and have the right to be present at such weighing, and to sell such ore to the sub-lessee at the rate of dollars forty (\$40/-) per picul when the market price of tin in Penang is \$70/- or under per picul; dollars forty-five (\$45/-) per picul when the market price of tin in Penang is above \$70/- and not above \$100/- per picul, and dollars fifty (\$50/-) when the market price of tin in Penang is above \$100/- per picul.”

Until the 8th February, 1926, the appellants sold the tribute ore to the respondent, and the respondent bought it on the terms prescribed by the clause set out above, but on that day they gave notice to the respondent that in future they would not sell the ore to him, and, in consequence, on the 11th May, 1926, he commenced the present suit for the purposes and with the result above mentioned.

As already stated, both Courts were of opinion that on the true construction of the above clause of the sub-lease the lessors were to have the right to sell the ore to the respondent, but were under no obligation so to do, and this point is not in question in the present appeal. But the respondent sought to establish that, assuming this construction to be correct, the deed as prepared and executed did not conform with an alleged parol agreement to the effect that the provision as to the sale of the tribute to be inserted in the lease should be obligatory on the appellants as well as on himself, and that such disconformity resulted from a mistake common to both parties, and contended accordingly that the deed ought to be rectified. As already stated, the majority in the Court of Appeal held that he had established his case and ordered rectification accordingly.

At the trial the only real evidence on the part of the respondent was that of himself and his son. The clerk who actually prepared the document in the office of the solicitor acting for both parties was not called, and no sufficient reason was given for his absence. The same in a lesser degree applies to the solicitor himself.

On the other hand, neither of the appellants was called, and there appears to be no sufficient reason why they should not at least have been examined on commission. The evidence of the only witness called on their behalf was quite worthless on the point, even if it were not untrue.

The question, therefore, is whether the evidence of the respondent and his son, uncontradicted by evidence on the part of the appellants, is sufficient to justify an order for rectification of the written document.

As already pointed out, under the agreement, specific performance of which was ordered in the previous suit, the appellants were under no obligation to sell the tribute ore to the respondent, and accordingly the parol agreement which the respondent seeks to establish is one which would give him something beyond what he was entitled to under the decree in his favour, and one which, having regard to the then prevailing price of ore, would have been highly advantageous to him and disadvantageous to the appellants, and a considerable burden is thus cast upon him.

The evidence as to the alleged parol agreement is that of the respondent himself. It is said to have been made at an interview between himself and the appellants after the hearing of the appeal, and therefore at the end of September or early in October, 1925. No one appears to have been present except the respondent and the two appellants. They were two young Malays—one a man, the other a woman. The respondent is a Chinaman, but he apparently speaks and understands Malay. His statement is as follows :—

“ In 1918 I sued the defendants for specific performance of an agreement to grant a sub-lease. I succeeded in both the Court below and in the Court of Appeal.

“ After the appeal I went to Intan and saw the defendants. I said, ‘ Now, you must give a sub-lease.’ I asked for a sub-lease including tin ore, which must be sold to me as before in terms of the document or agreement written in Mr. Wright-Motion’s office of 9th August, 1915 (B.3).

“ I must buy the ore from the defendants, whether I make or lose money, and they must sell the ore to me. This is my view. I thought this was the agreement between us. I asked for the sub-lease. The defendant agreed to give me a sub-lease on these terms.

“ The ore must be sold to me, whether price high or low. We agreed definitely that the defendants must sell the ore to me and I must buy the ore from them.”

It is to be observed that there is no suggestion that he asked the appellants to make with him a fresh agreement as to the sale of the ore ; on the contrary, he said, “ They must sell the ore to me—this is my view—I thought this was the agreement between us.” and, just above, “ I asked for a sub-lease, including tin ore which must be sold to me as before, in terms of the agreement of August, 1915.” But the matter does not rest there. He says the agreement was to be prepared by him, and that he and his son went to Tambiyah, a solicitor in Penang, taking with him copies of the sub-lease of September, 1914 (B.2) and the agreement of August, 1915 (B.3). There he saw a Malay clerk, handed him the two copies, and asked him to prepare the lease. It is true, he says, he told him the parties were agreed “ the ore must be sold to me, and I must buy the same.” but he clearly left the copy agreements as instructions or models, and does not suggest that the clerk was to go beyond what he found therein. The sub-lease was then prepared and was signed by the respondent in Tambiyah’s office after some explanation, the particulars of which are not given. Later he says, “ When I saw the defendants

at Intan, if they had not agreed to sell me the ore, I should have brought them to Court," meaning apparently that he would have referred the difference to the Court under the decree. The cross-examination carries the matter no further.

The son was not present at the respondent's interview with the appellants, but he was present when the instructions were given to the Malay clerk. He says the clerk was told to prepare the sub-lease and to put in a clause that "the defendants must sell the tribute ore and the plaintiff must buy." He also says B.3 with other documents was left with the clerk. Neither of the appellants was present, and any instructions would be no evidence as against them of any prior agreement as to what the lease was to contain. Allusion has already been made to the fact that the Malay clerk was not called, and it is significant that the respondent's son says that, as a result of a talk with him, he had not subpoenaed him.

It is unnecessary to deal at any length with the evidence of Munshi Noordin, who was called for the appellant. He was not present at the crucial interview. He admitted that persons other than the appellants were financially interested in the matter and were bearing the costs of the suit, but all this is irrelevant to the real question whether the alleged parol agreement was made.

On the whole, their Lordships are of opinion that the respondent has failed to prove any agreement with the appellants except that the new lease should be in accordance with the existing agreements, specific performance of which had been decreed. The lease, the subject of this suit, is in accordance with those agreements on the point in question; the lease is on this point the lease which the Court would have decreed if the respondent had brought the appellants to the Court, and is therefore in conformity with the parol agreement, and there is no ground for rectification. It does not appear what meaning the appellants gave to the agreements of 1914 and 1915. It would seem that they neither speak nor understand English, and probably never had any definite opinion on the point.

The majority of the Court of Appeal would, it would seem, have taken the same view but for the documents "J," "K" and "L" hereinbefore mentioned. But, in their Lordships' opinion, these documents do not affect the question. The only documents which are really material are the two agreements of 1914 and 1915, and particularly the latter.

There is one other matter to be mentioned. The appellants obtained leave from this Board to obtain production of certain additional documents, questions of their admissibility, and of the costs of and consequent upon the application for such leave being reserved. Their Lordships have had their attention called *de bene esse* to the material parts of these documents, but their judgment has not been in the least affected by them. The question of admissibility has not been argued, but their Lordships think that their production was wholly unnecessary and that the

appellants ought to pay the costs of and consequent upon the application.

For these reasons their Lordships are of opinion that the appeal ought to be allowed, with costs here and below, that the order of the trial Judge should be restored, and that the costs of and consequent upon the application as to the further documents should be borne by the appellants, with a set-off, and they will humbly advise His Majesty accordingly.

In the Privy Council.

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