

No. 1 of 1971

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN :

PEGANG MINING CO. LIMITED Appellant

- and -

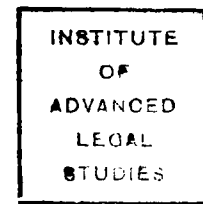
1. CHOONG SAM First Respondent

- and -

10 2. LIM CHIM YEE and CHAN
HON PENG (f) as Executors
of CHAN PHOOI HOONG
deceased Second Respondents

- and -

3. TONG SWEE KING (f)
as Executrix of the
Estate of Ho Kok Yew
deceased Third Respondent



CASE FOR THE FIRST RESPONDENT

In the Federal
Court of
Malaysia

20 1. This is an Appeal from a Judgment and
Order of the Federal Court of Malaysia dated
the 23rd day of July 1970 whereby the said
Federal Court allowed an appeal from the
Judgment and Order of the High Court in Malaya
at Ipoh dated 9th day of December 1966 whereby
in an action instituted by Tong Swee King (f)
the said High Court ordered that the said

RECORD
pp.101-129

pp.82-91

In the
Federal
Court of
Malaysia
RECORD

Tong Swee King's suit be dismissed and that she should pay to the Appellant Company their costs of the suit as taxed and that she should pay the Second Respondents their costs to be taxed up to the time when the pleadings were closed. The said Federal Court ordered that the Appeal of the Respondents herein be allowed and that the said Order of the said High Court be set aside and declared and ordered as follows :-

pp.127-129

"(1) That the Agreement of the 22nd day of October 1931 is valid and binding between the parties thereto and their respective successors and that the material rights and obligations of the parties and their successors remain effective, except as varied by consent of all parties; 10

(2) That pursuant to the said Agreement the Pegang Mining Company Limited the Respondent firstly abovenamed /Appellant herein/ in consideration of the payment of tribute at 7% do execute subleases to the Appellants secondly abovenamed /Second Respondents herein/ as representative of the Estate of Chan Phooi Hoong, deceased, over the following lands, that is to say : 20

(i) the lands formerly comprised in M.L.889 and 10217 for Lots 21952, and 24766 respectively; 30

(ii) M.C.3255 now M.L.14509 for Lot No. 44407;

(iii) M.C.3256 now M.L.14507 for Lot No. 30286;

(iv) The whole of the Railway Reserve now M.L.14508, for Lot No.44408; and

(v) M.L.11543 for Lot No.29650.

(3) That the Pegang Mining Company Limited, the Respondent firstly 40

abovenamed/Appellant herein do execute in favour of Tong Swee King (f) as Representative of the Estate of Ho Kok Yew deceased, the Respondent secondly abovenamed Third Respondent herein

In the
Federal
Court of
Malaysia

RECORD

- (i) a sublease over the land formerly held under M.L.9946 for Lot No.26173 in consideration of the payment of tribute at 7%; and
- 10 (ii) a sublease over the lands formerly held under M.L.11646 and M.L.11647 for Lots 31089 and 31091 respectively in consideration of the payment of tribute at 8%
- (4) That the Appellants secondly abovenamed Second Respondents herein in consideration of the payment of tribute at 10% do execute sub-subleases over all the lands subleased to them by Pegang Mining Company Limited the Respondent firstly abovenamed Appellant herein in favour of Tong Swee King (f) as Representative of the Estate of Ho Kok Yew deceased, the Respondent secondly abovenamed: Third Respondent herein
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- (5) That in the event of Tong Swee King(f) the Respondent secondly abovenamed Third Respondent herein neglecting or failing to accept within two (2) weeks of notice being given to her of the subleases and Sub-leases as hereinbefore stated being ready for her acceptance and execution, the Registrar of this Court be and is hereby directed to accept such subleases and sub-subleases so as to carry out the obligations of the Estate of Ho Kok Yew deceased to Choong Sam, the Appellant firstly abovenamed, First Respondent herein and so as to enable him to enter upon and work the lands covered by such subleases and sub-subleases in accordance with the terms of his Agreement with the Estate of Ho Kok Yew deceased dated July, 27 1964:
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In the
Federal
Court of
Malaysia

RECORD

AND IT IS DECLARED that Choong Sam, the first Appellant, [First Respondent herein] is entitled to specific performance of his said Agreement with the Estate of Ho Kok Yew deceased either by the representative of the said Estate the Respondent secondly abovenamed [Third Respondent herein] or by the Registrar of this Court as the case may be, so long as the Mining Leases and sub-leases and sub-subleases over the said lands shall be renewed or continue in force: 10

AND IT IS DIRECTED that the Collector of Land Revenue, Batu Gajah, do make the appropriate memorials and entries on the Register of Mining Titles in respect of the said lands to give effect to the terms of this Order:

AND IT IS ORDERED that the Order of the High Court of the 25th day of October, 1965 as varied by the Order of the 9th day of December, 1966 be and is hereby discharged: 20

AND IT IS ORDERED that the right of the Respondent firstly abovenamed [Appellant herein] to remain on and mine such part of the said lands as it had entered upon be and is hereby terminated:

AND IT IS ORDERED that the Respondent firstly abovenamed [Appellant herein] do deliver up possession of the said lands it had entered upon to the Appellant firstly abovenamed [First Respondent herein] on or before the 31st day of August, 1970: 30

AND IT IS ORDERED that the Respondent firstly abovenamed [Appellant herein] do pay over to the Appellant firstly abovenamed [First Respondent herein] on or before the 31st day of August 1970 the nett proceeds of sales of ore won from Lots 44407, 44409 and 30286 as undertaken by the Respondent firstly abovenamed [Appellant herein] and set out in the Order dated 25th October, 1965: 40

AND IT IS ORDERED that there be liberty to all parties to apply generally;

In the
Federal
Court of
Malaysia

RECORD

10 AND IT IS ORDERED that the Respondent firstly abovenamed [Appellant herein] do pay to the Appellant firstly abovenamed [First Respondent herein] and the Appellants secondly abovenamed [Second Respondents herein] the costs of this Appeal and the costs in the High Court, except that as to the costs of the Appellants secondly abovenamed [Second Respondents herein] in the High Court they shall be limited to the extent stated in the Order of Court dated the 9th day of December, 1966:

AND the Court certifies for two Counsel for the Appellant firstly abovenamed [First Respondent herein] both here and in the Court below:

20 AND IT IS LASTLY ORDERED that the sum of \$500/- (Dollars five hundred only) deposited in Court by the Appellants [First and Second Respondents herein] as security for costs of this Appeal to be paid out to the Appellants."

30 The said action was instituted by the said Tong Swee King as executrix of the Estate of Ho Kok Yew deceased against the Appellants, and the second Respondents as Executors of the Estate of Chan Phooi Hoong deceased. By Order of the Federal Court dated the 17th July 1967, upheld by the Privy Council on the 1st July 1969, the First Respondents and the Second Respondents were substituted for the said Tong Swee King as Appellants in the said appeal before the Federal Court and the said Tong Swee King was transposed from being Appellant to be the Second Respondent to the said appeal.

pp.94-95

40 2. The principal question which arises for determination in this appeal is whether, as the Federal Court held, on a true construction of an agreement dated 22nd October 1931 the Second Respondents were entitled to a sub-lease of the said lands set out in the order of the Federal Court set out in paragraph 1 hereof and the said Tong Swee King was entitled to the

pp.15-20

In the
Federal
Court of
Malaysia

RECORD
pp.15-20

p.102
11.32-42

p. 17
11.23-39

pp.1-14

subleases and sub-subleases set out therein.

3. The said Tong Swee King sued upon an agreement in writing dated 22nd October 1931, made between the Pegang Prospecting Company Limited by which name the Appellant Company was formerly known [therein called "the Company"/] Ho Kok Yew [therein called "the Miner"/] of whose estate the said Tong Swee King was executrix; and Ho Man [therein called "the Sub-lessee"/] whose interests in the said agreement were assigned to Chan Phooi Hoong, of whose estate the Second Respondents are the executors. The said agreement provided as was found by the Federal Court "for the bringing together of 14 different parcels of mining land under a single mining scheme known as the Kacha-Menelai Comprehensive Mining Scheme to be operated as one mine by the aggregation of Pegang's property with all other parcels then being worked as sub-sublessee by Ho Kok Yewunder the name or style of Khong Heng Kongsii." Clause 4 of the said Agreement provided as follows :-

"The Sub-lessee and the Miner and each of them hereby undertake and agree that they will not nor will either of them in any way obstruct or interfere with or attempt to obstruct or interfere with the acquisition by the Company (or its nominees) in the vicinity of the said Khong Heng Kongsii mine of any mining lands or any right title or interest therein (including water rights, rights of depositing tailings or other rights incidental to mining) which the Company may desire to acquire for the purpose of including same in the said Mining Scheme and the sub-lessee and the Miner hereby undertake and agree that they and each of them will use their best endeavours to assist the Company by acquiring such mining lands or interest therein."

4. By Writ and Statement of Claim dated the 7th day of July 1964 as amended and further amended the said Tong Swee King brought an action

against the Appellant and the Second Respondents
in the High Court of Malaya at Ipoh praying :-

In the
Federal
Court of
Malaysia

"(i) a declaration that the said agreement
of 22nd October 1931 is valid and binding
between the parties thereto and between
the parties hereto as their respective
successors;

RECORD
p.13 l.18 -
p.14

10 (ii) an order that the First Defendant
Company [Appellant herein] do execute
valid and registrable subleases in favour
of the Second Defendants [Second Respondents
herein] in accordance with the terms of the
said agreement of 22nd October 1931 in
respect

(a) Mining Certificate No.3255 for
Lot 44407,

(b) Mining Certificate No.3256 for Lot
30286,

20 (c) the Mining Title to the said portion
of the said Railway Reserve approved
to it as and when the same is issued;

(iii) an injunction restraining the First
Defendant Company [Appellant herein] from
mining the said Lot 30286 held under
Mining Certificate No.3256;

(iv) an order that the rate of tribute
in such subleases be at 7 per cent;

30 (v) an order that the Second Defendants
[Second Respondents herein] do in turn
execute sub-subleases over the lands set
out in (ii) above in favour of the
Plaintiff [Third Respondent herein] in
accordance with the terms of the said
agreement of 22nd October 1931;

(vi) such further or other relief as may
be just or necessary; and

(vii) costs of this suit."

In the
Federal
Court of
Malaysia

RECORD

5. In the said Statement of Claim as amended and re-amended the said Tong Swee King pleaded that upon a proper construction of the agreement of the 22nd October 1931 the Appellant Company obliged to grant subleases to the Second Respondents and they in turn to grant sub-subleases to her, of certain lands in the vicinity of the said mine which the Appellants had acquired by the grant to it of mining leases.

p.19

6. The lands listed in the Schedule to the agreement of the 22nd October 1931 included lands leased to the Appellants by Mining Leases Nos.8899 and 11543, which were separated by the permanent way (the reserved lands) along a railway line (the Ipoh-Tronoh Railway Reserve). The lands the subject of Mining Leases Nos. 8899 and 11543 had become worked out on the surface, but the interjacent lands had become available for mining after the closure of the railway line and mining leases over them had been granted to the Appellant in respect of the following lands :-

p.12 1.33-
p.13 1.5

(a) a section of the former Ipoh-Tronoh Railway Reserve approximately $18\frac{1}{2}$ acres in area (Mining Lease 14508 for Lot 44408)

(b) the area formerly held under Mining Leases Nos.10526 for Lot 28358 and 10527 for Lot 28390 now consolidated as Lot 44407 and held under Mining Certificate No.3255; and

(c) the area formerly held under Mining Lease No.11447 now known as Lot 30286 and held under Mining Certificate 3256.

The said Tong Swee King alleged that the Appellant had applied for the said lands in express reliance upon the provisions of the said Agreement of 22nd October 1931 and that the said lands were required for future extension of the existing mines which said mines at the

time of the said application were being operated by the Khong Heng Kongsu in accordance with the said Agreement of 22nd October 1931.

In the
Federal
Court of
Malaysia

10 7. The Appellant Company in their Further Amended Defence dated the 14th August 1964 pleaded inter alia that they admitted having been a party to the said Agreement of 22nd October 1931 but denied that the application for the said lands had been made in reliance thereon. They further pleaded that the said Agreement of 22nd October 1931 had lapsed by effluxion of time and/or by repudiation and acquiescence by the other parties to the said Agreement and that they were no longer bound by the said Agreement by virtue of the breach thereof by the other parties thereto; and that in any event if the said Agreement was still valid and subsisting between the parties the Appellants were no longer under any obligation thereunder to grant the sub-leases claimed. They further pleaded that the said section of the former Ipoh Tronoh Railway Reserve could not be included in the said Agreement or the said Mining Scheme and that specific performance couldnot be given.

RECORD
pp.32-38

30 8. The Second Respondents by their Defence dated the 24th December 1964 pleaded that they had always been ready and willing to do everything in their power to fulfill their obligations to the said Tong Swee King but that they had been unable to do so because the Appellant Company had refused to adhere to its obligations to the Second Respondents as set out in the Statement of Claim.

p.39

9. The case was heard on the 3rd, 4th, 5th, 6th, 7th, 8th, 10th, 11th 12th, 13th, 14th, 15th, 17th, 18th, 19th, 20th and 29th days of January 1966.

40 10. On the 9th December 1966 the High Court in Malaya (Ali J.) gave Judgment in which he dismissed (it is submitted wrongly) the said Tong Swee King's suit. The Learned Trial Judge held that Clause 4 of the said Agreement (which he considered to be the only relevant clause) was not a complete or definite agreement but an

pp.82-90

In the
Federal
Court of
Malaysia

RECORD

expression of hope by the parties. The Learned Trial Judge further held that even if there were an agreement between the parties it was no more than an agreement which contemplated the execution of a further agreement between them which further agreement would be the sub-leases.

pp.92-93

11. By Notice of Appeal dated the 6th January 1967 the said Tong Swee King appealed to the Federal Court against the whole of the said decision. The said appeal was heard by the Federal Court on the 11th, 12th, 13th, 14th, 16th, 17th and 18th days of March 1970 at which hearing, by virtue of the aforesaid order of the Privy Council, the First Respondent herein and the Second Respondents herein were Appellants and the Appellant herein and the said Tong Swee King were Respondents.

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pp.101-125

12. The Federal Court (Ong C.J., Suffian F.J., and Gill F.J.) gave judgment on the 23rd day of July 1970 allowing the appeal.

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13. The Federal Court held, it is submitted correctly:

p.105
11.22-30

(a) That Clause 4 of the said Agreement of 22nd October 1931 contemplated future acquisition of land in the vicinity of Khong Heng Kongsu Mine and that the railway reserve which "ran through these lands like a spinal cord" should necessarily form part of the Khong Heng Mine under the Comprehensive Scheme.

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p.107
11.1-5

(b) That the said Clause 4 was inserted into the said Agreement "in order to ensure that any available new lands which might fall to be mined by Ho Kok Yew should be liable to payment of tribute to Pegang in the same manner as the lands comprised in the Scheme."

p.109
11.20-30

(c) That "however remote the possibility, there is no rule of law which says that

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any agreement made relating to a future event which may never happen is not a binding contract" and that accordingly the Learned Trial Judge was wrong in holding that as there was no certainty as to the contingency provided for in the said Clause 4 the said clause was unenforceable.

In the
Federal
Court of
Malaysia

RECORD

10 (d) That the said Clause 4 was self-contained and self sufficient by virtue of the explicit reference to the Kacha-Menelai Comprehensive Mining Scheme and accordingly the Learned Trial Judge was wrong in finding that the Agreement was unenforceable because it contemplated the execution of a further agreement namely the subleases which require further agreement settling material terms and conditions.

p.111
11.12-20

20 (e) That at all material times the parties were fully conscious of their precise mutual rights and obligations under the said clause 4 with regard to the said Railway reserve.

p.111
11.21-24

p.114
11.25-30

30 (f) That as the Appellant Company had at all material times represented that in accordance with the said Agreement of 22nd October 1931 it would grant the subleases claimed and the said Tong Swee King having acted upon the faith thereof the Appellant could not be permitted to resile from that position

pp.116-117

(g) That the said Tong Swee King had not either by herself or by her agents acquiesced in the Appellant operating the said Railway reserve themselves.

p.118 1.43-
p.119 1.14

(h) That the said Agreement of 22nd October 1931 had not lapsed by effluxion of time or by repudiation and that the Appellant could not claim no longer to be bound thereby.

pp.119-120

40 14. By an Order dated the 17th day of August 1970, the Federal Court granted the Appellant

pp.130-131

In the
Federal
Court of
Malaysia

RECORD
p.132

Conditional leave to Appeal to the Privy Council from its said judgment of the 23rd day of July 1970.

15. By an Order dated the 2nd day of November 1970, the Federal Court granted the Appellant Final Leave to Appeal.

16. The First Respondents humbly submit that this Appeal should be dismissed with costs for the following among other

R E A S O N S

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(1) BECAUSE the Appellant Company was at the material time bound by the said Agreement of 22nd October 1931.

(2) BECAUSE on a proper construction of Clause 4 read with the said Agreement as a whole the Appellant was bound to grant the sub-Leases and the Second Respondents to grant the sub-subleases claimed.

(3) BECAUSE the lands the subject of the suit were lands which were within the purpose and intent of the said Agreement namely their inclusion within the Kacha-Menelai Comprehensive Mining Scheme.

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(4) BECAUSE the amount of tribute, which was the only substantial matter for further agreement between the parties was subsequently agreed and fixed as found and ordered by the Federal Court.

(5) BECAUSE the Appellants are estopped from denying that they are liable to grant the aforesaid sub-leases in view of their conduct as summarised in the aforesaid judgment of the Federal Court.

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(6) BECAUSE the said Agreement has not been validly modified or varied.

(7) BECAUSE no breaches of the said Agreement had been committed which entitled the

Appellant Company to claim that they were discharged from their obligations thereunder; alternatively if there were such breaches, they were waived by the Appellant Company.

In the
Federal
Court of
Malaysia

RECORD

- (8) BECAUSE the Judgment of the Federal Court was right for the reasons therein stated.

(Sgd) E.F.N. GRATIAEN

(Sgd) EUGENE COTRAN

(Sgd) DAVID HANDS

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Counsel for the First Respondent

No.1 of 1971
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:

PEGANG MINING CO. LIMITED Appellant

- and -

1. CHOONG SAM First
Respondent

- and -

2. LIM CHIM YEE and CHAN
HON PENG (f) as
Executors of CHAN Second
PHOOI HOONG deceased Respondents

- and -

3. TONG SWEE KING (f) as
Executrix of the Estate Third
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CASE FOR THE FIRST RESPONDENT

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