

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT PENANG

B E T W E E N :-PHILIP HOALIM JR. and WEMBLEY
ALEXANDRA GOH (m.w.)Appellants

- AND -

THE STATE COMMISSIONER, PENANG
(Respondent)Respondent

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CASE FOR THE APPELLANTS

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1. This is an appeal by leave of the Federal Court of Malaysia at Penang from an Order dated the 10th June 1974 of the said Federal Court (Azmi L.P., Ali F.J. and Raja Azlan Shah F.J.) answering certain questions raised for the decision of the Federal Court by a case stated by the High Court sitting at Penang and in effect confirming the validity of certain legislation which imposed a quit rent on land owned by the Appellants as hereinafter mentioned.

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2. The Appellants are the registered proprietors of certain land known as Holding No. 223(2), Town Sub-division 6, North East District, Penang. Such land (hereinafter referred to as "the Appellants' Land") was granted to the predecessor in title of the Appellants by the East India Company on behalf of Her Majesty, Queen of the United Kingdom of Great Britain and Ireland by an Indenture No.18 of 1858/59 dated the 30th August 1858. By reason of such Indenture the said land was vested in the Appellants for an estate in fee simple without quit rent being payable.

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3. The Appellants' land became held by the Appellants under replacement title issued

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In separate folder pursuant to the provisions of the National Land Code (Penang and Malacca Titles) Act No.2 of 1963 (hereinafter referred to as "the 1963 Act").

In separate folder 4. Section 102 of the National Land Code (No. 56 of 1965) conferred on the State Authority power to direct that rent should become payable in respect of any land notwithstanding that it was before such direction held rent-free.

p.43 5. It was provided by paragraph 9 of the National Land Code (Penang and Malacca) Order 1965 in L.N. 478 inter alia that in the State of Penang Sections 101 and 102 of the National Land Code should not apply in relation to (inter alia) grants (first grade) under the 1963 Act or final replacement title issued in respect of such grants. Accordingly immediately before the passing of the legislation hereinafter mentioned the power conferred by Section 102 of the National Land Code to impose a rent did not apply to the Appellants' land. 10 20

In separate folder 6. On the 1st December 1969 His Majesty the Yang di-Pertuan Agong purportedly in exercise of His Powers under Section 439 of the National Land Code to provide for the application of the Land Code in the States of Penang and Malacca subject to such modifications as he might consider necessary or desirable made an order known as the National Land Code (Penang and Malacca) (Amendment) Order 1969 being P.U. (A) 526/69 which provided that the National Land Code (Penang and Malacca) Order 1965 (L.N. 478/65) was thereby amended by deleting paragraph 9 thereof with effect from the 15th November 1969. The purported result of such amendment was to make the power to impose rent conferred by Section 102 of the National Land Code exercisable in respect of (inter alia) the Appellants' land and by a Direction entitled the National Land Code (Standard Rate Rent) Direction 1969 published in Pg. P.U. 39 of 1969 dated the 31st December 1969 the State Authority in purported exercise of its powers under Section 102 of the National Land Code directed that with effect from the 1st January 1970 all lands specified in the First Column of the Schedule thereto (which includes the Appellants' land) should be subject to the payment of rent at the prevailing standard rate as prescribed in the Second Column of the said Schedule. By a further Direction entitled National Land Code (Periodical Revision of Rent under Section 101) published in Pg. P.U. 4 of 1970 30 40 50

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dated the 16th December 1969 the State Authority in purported exercise of its powers under Section 101 of the National Land Code prescribed in the Second Column of the Schedule thereto revised rates of rent which should be payable in respect of alienated lands as prescribed in the First Column thereto (apparently including the Appellants' land) with effect from the 1st January 1970.

10 7. Quit rent amounting to 123 dollars was assessed upon the Appellants in respect of the Appellants' land purportedly pursuant to the legislation summarised above. On the 11th August 1970 the Appellants commenced proceedings in the High Court of Penang by Originating Motion against the Respondent seeking, inter alia, a declaration that the above-mentioned legislation purporting to impose quit rent on the Appellants' land was null and void and contrary to the Federal Constitution of Malaysia.

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20 8. On the 30th October 1970 it was ordered by the High Court at Penang that the said motion be referred to the Federal Court as the High Court considered that constitutional matters were involved and on the 29th June 1973 the High Court stated a Special Case under Section 48(2) of the Courts of Judicature Act 1964 for consideration by the Federal Court of the following questions, namely:-

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pp.10 et. seq.

30 1. Whether as successor of Her Majesty's Government in respect of the Settlement of Penang, the Governor of the State of Penang is bound by reason of Article 167 (2)(a) of the Constitution towards its subjects in regard to rights, liabilities and obligations which formerly bound Her Majesty's Government towards them;

In separate folder

40 2. Whether the legislations namely L.N. 478/65, P.U. (A) 526/69, Pg. P.U. 39/69 and Pg. P.U. 4/70 are not only contrary to the said Article 167(2)(a) but are also tantamount to deprivation of property under Article 13(1);

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3. Whether the said land of the Appellants is "alienated land" for the purpose of the National Land Code; and

4. Whether it is within the competency of the State Authority for the State of Penang to enact laws, namely Pg. P.U. 39/69 and Pg.

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P.U. 4/70 affecting the rights previously enjoyed by its subjects and, for the purpose of the said motion, whether those rights are to be deemed "vested rights".

- pp.13 et
seq.
9. Judgment was given on the said Case Stated by the Federal Court at Penang on the 10th June 1974. The leading judgment was given by Ali, F.J. On the first question raised by the Case Stated Ali F.J. held that no question as to the effect of Article 167(2)(a) of the Constitution had arisen for the consideration of the Court and that the Indenture whereby the said land was originally granted to the predecessor in title of the Appellants by the East India Company did not create a liability or obligation within the said Article 167(2)(a). 10
- p.18 l.46-
p.19 l.5
10. On the second question raised by the said Case Stated namely whether the legislation L.N. 478/65, P.U. (A) 526/69, Pg. P.U. 39/69 and Pg. P.U. 4/70 are tantamount to deprivation of property contrary to Article 13(1) of the Constitution, Ali F.J. in his judgment held that Article 13(1) of the Constitution does not restrict legislative powers but merely prohibits any illegal executive acts of depriving property. He also said that the four legislative orders mentioned in the said question, particularly Pg. P.U. 39/69 did not have the effect of depriving any person of his property. 20
- p.19 ll.6-
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11. On the third question raised by the said Case Stated, namely whether the said land of the Appellants is "alienated land" for the purpose of the National Land Code, Ali F.J. held that it is not but that it is "land alienated before the commencement of the Code" for the purpose of Section 102(1) of the Code. 30
- p.15 l.24-
p.16 l.30
12. On the fourth question raised by the said Case Stated Ali F.J. held that it was within the competency of the State Authority for the State of Penang to enact Pg. P.U. 39/69 and Pg. P.U. 4/70 since such enactment was not prohibited by Article 13(1) or Article 167(2)(a) of the Constitution. 40
- p.19
13. Azmi L.P. and Raja Azlan Shah F.J. concurred in the judgment of Ali F.J. and accordingly by the said Order dated the 10th June 1974 the Federal Court ordered as follows:-
- p.22-23
- FIRST that the Governor of the State of Penang as successor of Her Majesty's Government in respect of the Settlement of Penang is not bound by reason of Article 167(2)(a) of the

Constitution towards his subjects in regard to the rights, liabilities and obligations which formerly bound Her Majesty's Government towards them;

10 SECONDLY that the legislations namely Federal L.N. 478/65, P.U. (A) 526/69, Penang P.U. 39/69 and Penang P.U. 4/70 are not contrary to Article 167(2)(a) of the Constitution and are not tantamount to deprivation of property under Article 13(1) of the Constitution.

THIRDLY that the said land is not "alienated land" for the purpose of the National Land Code.

20 FOURTHLY that it is within the competency of the State Authority for the State of Penang to enact laws, namely Penang P.U. 39/69 and Penang P.U. 4/70 affecting the rights previously enjoyed by its subjects and that those rights are to be deemed vested rights

AND FURTHER ORDERED that the case be sent back to the High Court for the said Motion to be dismissed with costs

AND that the costs of the proceedings in the Federal Court should be paid by the Appellants.

30 14. By Order dated the 1st October 1974 the High Court at Penang Ordered that the said Motion be dismissed with costs. p.29

15. By Order dated the 14th April 1975 the Federal Court gave Final Leave to the Appellants to appeal to His Majesty the Yang di-Pertuan Agong against the decision of the Federal Court given on the 10th June 1974 as aforesaid. pp.32-33

40 16. The Appellants accept the correctness of the declarations made by the Federal Court in answer to the first and third questions raised by the Special Case Stated. However, the Appellants submit that the declaration made in answer to the second question raised by the Special Case Stated was wrong insofar as it declared that the said legislation Federal L.N. 478/65, P.U. (A) 526/69, Pg. P.U. 39/69 and Pg. P.U. 4/70 were not tantamount to deprivation of property under p.43 p.46 p.52

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p.47	Article 13(1) of the Constitution. The Appellants further submit that the declaration made in answer to the fourth question raised by the Special Case Stated was wrong insofar as it declared that it was within the competency of the State Authority for the State of Penang to enact Penang P.U. 39/69 and Penang P.U. 4/70 so far as the same purported to charge rent on land held under replacement title in the State of Penang in respect of which no rent had previously been payable and in particular in respect of the Appellants' land.	10
p.52 p.47		
p.46 p.52 p.47 In separate folder	17. The Appellants submit that the Order P.U. (A) 526/69 and or alternatively the directions Pg. P.U. 39/69 and Pg. P.U. 4/70 were invalid as being contrary to Article 13(2) of the Constitution insofar as such legislation purported to charge quit rent - or any other rent - on land previously held under replacement title free of any such rent and in particular on the Appellants' land.	20
p.45 In separate folder	18. Prior to the enactment of the aforementioned legislation the Appellants' land and all other land held free of rent under replacement title in the State of Penang was immune by reason of paragraph 9 of L.N. 478/65 from the power of the State Authority to impose a liability for rent under Section 102 of the Land Code. The removal of this immunity by P.U. (A) 526/69 and the imposition of rent on such land by Pg. P.U. 39/69 constituted the compulsory acquisition of the said land or alternatively of rights or interests in or over the said land without compensation contrary to Article 13(2) of the Constitution. Further or alternatively, insofar as the said legislation imposed a rent on the said land with the result that under Section 100 and Part Eight of the Land Code the said land became subject to forfeiture to the State Authority for non-payment of such rent such legislation was contrary to Article 13(2) of the Constitution as providing for the compulsory acquisition of property without compensation.	30
p.46 p.52 In separate folder In separate folder In separate folder		40
In separate folder	19. Further or alternatively the Appellants submit that the provisions of the 1963 Act whereunder the Appellants' fee simple interest in the Appellants' land was extinguished and a replacement title granted by the State substituted therefor thereby provided for the compulsory acquisition of the said land which provision was therefore contrary to Article 13(2) of the Constitution unless adequate compensation was provided by the State. To be adequate compensation for this purpose the	50
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- Appellants submit that the replacement title granted to the Appellants had to be immune from the imposition of rent by the State. If the legislation L.N. 478/65 and P.U. (A) 526/69 and Pg. P.U. 39/69 purportedly imposing rent on the said land was valid then it is submitted by the Appellants that the replacement title granted to them under the 1963 Act was not adequate compensation for the compulsory acquisition or extinction of their pre-existing fee simple interest with the result that such last-mentioned acquisition or extinction was void as infringing Article 13(2) of the Constitution.
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20. The Appellants further contend that since, for the reasons given above, the said legislation P.U. (A) 526/69 and Pg. P.U. 39/69 and Pg. P.U. 4/70 was invalid so far as it purported to affect the Appellants' land as being contrary to Article 13(2) of the Constitution, the purported imposition of a liability to rent on the said land with the consequent liability for forfeiture for non-payment thereof did amount to the deprivation of property (namely of absolute unfettered ownership of the said land) otherwise than in accordance with law contrary to Article 13(1) of the Constitution.
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21. The above argument that the said legislation was contrary to Article 13(2) of the Constitution was not put specifically in those terms before the Federal Court but the Appellants submit that it is material to the second and fourth questions raised by the Special Case Stated and seek leave to adduce such argument on this appeal as being an argument on a question of law raised by the Special Case Stated.
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22. The Appellants submit that the Order of the Federal Court dated the 10th June 1974 in answer to the second and fourth questions raised by the Special Case Stated should be reversed and that instead it should be declared that the purported laws P.U. (A) 526/69 and Pg. P.U. 39/69 and Pg. P.U. 4/70 were void insofar as they purported to affect the Appellants' land and that the Respondent should be ordered to pay the Appellants their costs of this Appeal and of the proceedings in the Federal Court and in the High Court for the following amongst other
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R E A S O N S

- 50 (1) THE National Land Code (Penang and Malacca) (Amendment Order) 1969 passed under P.U. (A) p.46

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526/69 and the National Land Code (Standard Rate Rent) Direction 1969 in Pg. P.U. 39/69 and the National Land Code (Periodical Revision of Rent under Section 101) in Pg. P.U. 4/70 and each of them are void and of no effect insofar as they purport to impose rent on land (including the Appellants' land) held under replacement title issued under the 1963 Act in place of a fee simple estate on the ground that such legislation is contrary to Article 13(2) of the Constitution. 10

(2) ALTERNATIVELY if the last-mentioned laws are not in themselves void as aforesaid then the purported extinction of the Appellants' title to the Appellants' land on the grant of a replacement title pursuant to the 1963 Act was invalid as being contrary to the said Article 13(2) and the Appellants remain entitled to a fee simple title free from rent. 20

(3) IF, as is submitted, the said legislation was invalid, then the attempt by the Respondent to charge the Appellants with rent on the Appellants' land is unlawful in particular as being contrary to Article 13(1) of the Constitution.

Settled,

DONALD RATTEE

Lincoln's Inn,
15th March, 1976. 30

IN THE PRIVY COUNCIL

No.21 of 1975

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Appellants

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Respondent

CASE FOR THE APPELLANTS

KINGSFORD DORMAN & CO.,
13, Old Square,
Lincoln's Inn,
London, WC2A 3UA