37, 1971

No. 22 of 1970

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR
(APPELLATE JURISDICTION)

BETWEEN :

LINGGI PLANTATIONS LIMITED — Appellants (Defendants)

- and -

T. PASUBATHY AMMAL alias Pasubathy Jagatheesan, Executrix of the last Will of S.K. Jagatheesan deceased — Respondent (Plaintiff)

(IN THE MATTER OF KUALA LUMPUR HIGH COURT CIVIL SUIT NO. 249 of 1963

BETWEEN :

S.K. JAGATHEESAN — Plaintiff

- and -

LINGGI PLANTATIONS LIMITED — Defendants)

RECORD OF PROCEEDINGS

E.F. TURNER & SONS,
66 Queen Street,
London, EC4R 1AS.
Solicitors for the
Appellants.

No. 22 of 1970

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BETWEEN :

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- and -

T. PASUBATHY AMMAL alias Pasubathy Jagatheesan, Executrix of the last Will of S.K. Jagatheesan deceased — Respondent (Plaintiff)

(IN THE MATTER OF KUALA LUMPUR HIGH COURT CIVIL SUIT NO. 249 of 1963

BETWEEN :

S.K. JAGATHEESAN — Plaintiff

- and -

LINGGI PLANTATIONS LIMITED — Defendants)

RECORD OF PROCEEDINGS

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Notice of Motion for leave to Appeal to the Judicial Committee of the Privy Council	24th September 1969
Affidavit of David Stringer Hilton in support of Motion	22nd August 1969

No. 22 of 1970

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA
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(APPELLATE JURISDICTION)

BETWEEN :

LINGGI PLANTATIONS LIMITED

Appellants
(Defendants)

10 - and -

T. PASUBATHY AMMAL alias Pasubathy Jagatheesan, Executrix of the last Will of S.K. Jagatheesan deceased

Respondent
(Plaintiff)

(IN THE MATTER OF KUALA LUMPUR HIGH COURT CIVIL SUIT NO. 249 of 1963

BETWEEN :

S.K. JAGATHEESAN Plaintiff

20 - and -

LINGGI PLANTATIONS LIMITED Defendants)

RECORD OF PROCEEDINGS

In the High Court in Malaya at Kuala Lumpur

No. 1

WRIT OF SUMMONS No. 249 of 1963

No.1

Writ of Summons No. 249 of 1963

16th April 1963

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO. 249 of 1963

Between: S.K. Jagatheesan Plaintiff

- and -

Linggi Plantations Limited Defendants

30 THE HONOURABLE DATO SIR JAMES THOMSON, P.M.N., P.J.K., Chief Justice of the Federation of Malaya in the name and on behalf of His Majesty the Yang di-Pertuan Agong.

In the High Court in Malaya at Kuala Lumpur

No. 1

Writ of Summons No. 249 of 1963

16th April 1963 (continued)

To:
Messrs. Linggi Plantations Limited
No. 4 Mountbatten Road
c/o Messrs. Guthrie Agency (M.) Ltd.,
Kuala Lumpur.

WE COMMAND YOU, that within (8) days after the service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of S.K. Jagatheesan of No. 35 Station Road, Ipoh.

AND TAKE NOTICE that in default of your so doing the Plaintiff may proceed therein and judgment may be given in your absence.

WITNESS RAJA AZLAN SHAH, Registrar of the Supreme Court of the Federation of Malaya.

Dated the 16th day of April, 1963.

Sd: Braddell & Ramani
Plaintiff's Solicitors

L.S.

Sd: E.E. Sim
Senior Assistant Registrar, High Court, Kuala Lumpur.

N.B. This Writ is to be served within twelve months from date thereof, or, if renewed, within six months from the date of last renewal, including the day of such date, and not afterwards.

The Defendant (or defendants) may appear hereto by entering an appearance (or appearances) either personally or by Solicitor at the Registry of the Supreme Court at Kuala Lumpur.

A defendant appearing personally may, if he desires, enter his appearance by post, and the appropriate forms may be obtained by sending a Postal Order for $3/- with an addressed envelope to the Registrar of the Supreme Court at Kuala Lumpur.

INDORSEMENT OF CLAIM

The plaintiff's claim is to have declared void the forfeiture by the Defendants of a deposit of $377,500/- made under the terms of an agreement

No. 1

Writ of Summons No. 249 of 1963

16th April 1963 (continued)

the Plaintiff is the assignee; for an assessment of the damages actually suffered by the Defendants and liable to be paid by the Plaintiff as such assignee in accordance with the terms of the said agreement and costs.

Dated this 16th day of April, 1963.

Sd: Braddell & Ramani
Solicitors for the Plaintiff.

10 THIS WRIT was issued by Messrs. Braddell & Ramani, Advocates & Solicitors, whose address for service is at Room No. 201, 2nd Floor, Chan Wing Building, Mountbatten Road, Kuala Lumpur, Solicitors for the said Plaintiff who resides at No. 35 Station Road, Ipoh.

This Writ was served by me at
on the Defendants on
day of 1963 at the hour of

Indorsed this day of 1963.

20 Process Server, High Court,
Kuala Lumpur.

No. 2

No. 2

Statement of Claim

16th April 1963

STATEMENT OF CLAIM

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO. 249 of 1963

Between:

S.K. Jagatheesan ... PLAINTIFF

And

Linggi Plantations Limited ... DEFENDANTS

30 STATEMENT OF CLAIM

The abovenamed Plaintiff states as follows:-

1. The Plaintiff is a land owner residing at No. 35 Station Road, Ipoh.

In the High Court in Malaya at Kuala Lumpur

No. 2

Statement of Claim

16th April 1963 (continued)

2. The Defendants are a limited company incorporated in England and having an office or place of business at No. 4, Mountbatten Road, Kuala Lumpur, that is to say at the offices of their local Agents Messrs. Guthrie Agency (M) Ltd.

3. By an Agreement dated the 25th day of May 1962 the Defendants agreed to sell and A.N. Karuthan Chettiar (hereinafter called "the Purchaser") of 32 Ampang Street, Kuala Lumpur agreed to buy the land described therein for the sum of $3,775,000/-. Prior to the said Agreement the Purchaser had paid to the Defendants the sum of $377,500/- as a deposit which sum was lent to the Purchaser by the Plaintiff pursuant to an Agreement made between the Plaintiff and the Purchaser and others dated 17th day of April, 1962.

4. The Agreement dated the 25th day of May, 1962 provided that the time for completion of the said purchase should be calculated in the following manner:-

> "3. Completion of the said purchase shall take place on or before the expiry of ninety days from the date hereof or in the event that the consents referred to in clause 2 hereof shall not have been obtained then within thirty days of the receipt by the Purchaser of a notice that the consents referred to in Clause 2 hereof had been obtained by the Vendor and in the interpretation of this Clause time shall be deemed to be of the essence."

The Plaintiff admits that the Treasury Consents referred to were obtained by the Defendants on the 24th day of May, 1962 and were acknowledged by the Purchaser upon the following day. The Plaintiff further admits that the time for the completion of the purchase has expired and that the balance of the purchase price has not been paid.

5. Clause 5 of the said Agreement provided as follows:-

> "5. If due to any act or default of the Purchaser the said purchase shall not be completed as herein provided the Vendor shall be entitled by notice in writing to the Purchaser to declare this agreement at an end and thereupon this agreement shall cease to be of any

force or effect and the sum of $377,500/- (Dollars Three hundred and seventy seven thousand five hundred) referred to in Clause 1 hereof shall be forfeited to the Vendor to account of damages for breach of contract."

By a Deed of Assignment dated the 17th day of July 1962 made between the Plaintiff and the Purchaser, the Purchaser assigned the said Agreement absolutely to the Plaintiff. The Plaintiff admits that on the 27th day of August 1962 his solicitors in Kuala Lumpur received a notice in writing from the Defendants' Solicitors terminating the said Agreement. The Defendants further claimed that the deposit of $377,500/- was wholly forfeited.

6. At a meeting held in London on the 20th day of August 1962 between the parties hereto and their advisers, the Defendants categorically refused any extension of time to the Purchaser for completion and also refused to return any part of the deposit to him.

7. The Plaintiff avers that the Defendants have not suffered damage as a result of the breach of contract to the extent of the amount of the deposit and puts the Defendants to proof of the damage that they have in fact suffered.

8. The Plaintiff further avers that the forfeiture of the deposit operates in fact and was intended to operate as a penalty and is thus void.

9. And the Plaintiff has suffered damages.

The Plaintiff prays judgment

(a) That the forfeiture of the deposit of $377,500/- is a penalty and void;

(b) For an assessment of the damages suffered in fact by the Defendants;

(c) For such further or other relief as to the Court seems fit and proper;

(d) Costs.

Dated this 16th day of April, 1963.

Sd: Braddell & Ramani.

Solicitors for the Plaintiff.

In the High Court in Malaya at Kuala Lumpur

No. 3

Defence and Counterclaim

22nd May 1963

No. 3

DEFENCE AND COUNTERCLAIM

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO. 249 of 1963

Between:

S.K. Jagatheesan ... PLAINTIFF

And

Linggi Plantations Limited ... DEFENDANTS

DEFENCE AND COUNTERCLAIM

1. Paragraphs 1 and 2 of the Statement of Claim are admitted.

2. The Defendants admit that by an Agreement in writing dated the 25th day of May 1962 they agreed to sell and one A.N. Karuthan Chettiar (hereinafter called the Purchaser) agreed to buy the land therein described for the purchase price of $3,775,000/-, and further admit that prior to the execution of the said Agreement the Purchaser paid to the Defendants the sum of $377,500/- as a deposit, being 10 per cent of the said purchase price. The Defendants crave leave to refer to the said Agreement at the trial of the action for the full terms and effect thereof. Save as aforesaid, no further admission are made as to the matters contained in Paragraph 3 of the Statement of Claim.

3. Paragraph 4 of the Statement of Claim is admitted. The failure to complete the purchase was due to the default of the Plaintiff in failing to pay the balance of the purchase price within the time provided by the terms of the said agreement.

4. Paragraph 5 of the Statement of Claim is admitted. The Defendants will contend that by reason of the Plaintiff's said default they were entitled to treat the said Agreement as at an end and to forfeit the said deposit as therein alleged.

5. Save that it is admitted that on the 20th day of August 1962 at a meeting in London the Defendants refused to accede to the Plaintiff's request for an extension of time within which to complete the said purchase, no further admissions are made as to the matters contained in Paragraph 6 of the Statement of Claim.

6. Paragraph 7 of the Statement of Claim is denied. Alternatively, if (which is denied) the Defendants by reason of the Plaintiff's admitted breach of contract have not suffered damage to the extent of the amount of the said deposit as therein alleged, the Defendants will contend that they were nevertheless entitled under the terms of the said agreement to forfeit the said deposit the same being a reasonable amount.

7. Paragraph 8 of the Statement of Claim is denied.

8. Further or in the alternative, by reason of the Plaintiff's said default in failing to complete the said purchase in the manner provided by the terms of the said agreement the Defendants have suffered damage to an extent which exceeds the said sum of $377,500/- as hereinafter appears and are thereby entitled to retain the said sum of $377,500/-.

9. In the further alternative, should it be held contrary to the Defendants' contention that the Plaintiff is entitled to the return of the said sum of $377,500/- or any part thereof, the Defendants will claim to set off against such sum an equal part of the amount hereinafter counterclaimed.

10. In the premises the Defendants deny that they are indebted to the Plaintiff in the amount claimed herein or any part thereof or that the Plaintiff is entitled to the relief claimed or any relief.

COUNTERCLAIM

11. The Defendants repeat Paragraphs 1 to 5 of the Defence herein.

12. By reason of the matters contained in the Statement of Claim hereinbefore admitted and by reason of the Plaintiff's said default and breach of contract the Defendants have suffered damage.

In the High Court in Malaya at Kuala Lumpur

No. 3

Defence and Counterclaim

22nd May 1963 (continued)

PARTICULARS

Contract Price of the said land	$3,775,000
Market Price of the said land as at the date of the termination of the said Agreement	$3,045,610
	$ 729,390

The Defendants will give credit against such amount for such sum as they may be held entitled to retain by way of deposit forfeited.

Dated this 22nd day of May, 1963.

(Sgd) Shearn, Delamore & Co.

Solicitors for the Defendants.

This Defence and Counterclaim is filed on behalf of the Defendants by Messrs. Shearn Delamore & Co. and Drew & Napier the Solicitors for the Defendants of and whose address for service is Top Floor, Eastern Bank Building, 2, The Embankment, Kuala Lumpur.

No. 4

Reply and Defence to Counterclaim

5th July 1963

No. 4

REPLY AND DEFENCE TO COUNTERCLAIM

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO. 249 of 1963

Between:

S.K. Jagatheesan ... PLAINTIFF

And

Linggi Plantations Limited ... DEFENDANTS

REPLY AND DEFENCE TO COUNTERCLAIM

1. The Plaintiff joins issue with the Defendants in their Defence save in so far as the same consists of admissions.

No. 4

Reply and Defence to Counterclaim

5th July 1963 (continued)

2. In answer to paragraph 12 of the Defendants' Counterclaim, the Plaintiff denies that the Defendants have suffered damage in the sum of $729,390.00 as alleged or any damage at all and puts the Defendants to strict proof thereof.

Dated this 5th day of July, 1963.

(Sgd) Braddell & Ramani
Solicitors for the Plaintiff.

This Reply and Defence to Counterclaim is filed on behalf of the Plaintiff abovenamed by Messrs. Braddell & Ramani, Advocates & Solicitors whose address for service is Hongkong Bank Chambers, Second Floor, The Embankment, Kuala Lumpur.

No. 5

Judgment of Gill J.

25th November 1966

No. 5

JUDGMENT OF GILL, J.

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO. 249 of 1963

Between:-

S.K. Jagatheesan ... PLAINTIFF

And

Linggi Plantations Limited ... DEFENDANTS

JUDGMENT OF GILL, J.

This action arises out of an agreement dated the 25th day of May, 1962, whereby the defendants agreed to sell certain lands for a sum of $3,775,000 to A.N. Karuthan Chettiar, who, by a Deed of Assignment dated the 17th day of July, 1962, assigned the agreement absolutely to the plaintiff. Prior to the execution of the agreement the defendants had received from the purchaser a sum of $377,500 "by way of deposit and part payment", as stated in Clause 1 of the agreement.

Clause 3 of the agreement provided that the

In the High Court in Malaya at Kuala Lumpur

No. 5

Judgment of Gill J.

25th November 1966 (continued)

purchase shall be completed on or before the expiry of 90 days from the date of the agreement. Clause 5 of the agreement stated as follows: "If due to any act or default of the Purchaser the said purchase shall not be completed as herein provided the Vendor shall be entitled by notice in writing to the Purchaser to declare this agreement at an end and thereupon this agreement shall cease to be of any force or effect and the sum of $377,500/- (Dollars Three hundred and seventy-seven thousand five hundred) referred to in Clause 1 hereof shall be forfeited to the Vendor to account of damages for breach of contract."

The plaintiff's solicitors by their letter dated 19th July, 1962 gave notice to the defendants' solicitors of the assignment and enclosed a copy of the Deed of Assignment for inspection and return. The Defendants' solicitors returned the Deed of Assignment to the plaintiff's solicitors with their letter dated 26th July, 1962 in which they drew attention to the date of completion of the sale. On 27th July, 1962 the plaintiff's solicitors wrote to the Defendants' solicitors to ask for an extension of the period of completion by a further period of 90 days. The defendants' solicitors replied by their letter dated 1st August, 1962 to say that their clients were not prepared to consent to any extension of time. On 27th August, 1962 the Defendants' solicitors wrote to the plaintiff's solicitors giving notice on behalf of their clients that the agreement was at an end and that the sum of $377,500/-, being the deposit paid, was forfeited to account of damages for breach of contract. They further stated that their clients reserved to themselves any right of action arising out of the breach of the agreement.

It is common ground that the time was of the essence of the contract and that, as the plaintiff had committed a breach of the agreement by reason of his failure to complete the purchase within the stipulated period, the defendants were perfectly within the right to terminate the agreement. The plaintiff, however, contends that the forfeiture of the deposit of $377,500/- was a penalty and therefore void, and he is asking for a judgment accordingly. He is also asking for an assessment of the damages in fact suffered by the defendants and for such relief as this court may deem fit and

proper. In effect his action is for the recovery of the whole or a part of the deposit made under the agreement.

In view of the nature of the plaintiff's case, the main question to be decided is whether in all the circumstances of the case he is entitled to any relief from the forfeiture of his deposit. The answer to that question depends upon whether the deposit paid under the agreement is to be regarded as a penalty or liquidated damages.

In Wallis v. Smith (1) Lord Jessel M.R., in discussing the English rules as to when a sum named in a contract as the amount to be paid in the event of breach is to be regarded as a penalty or liquidated damages, stated that where there is a condition for the forfeiture of a deposit for the breach of various stipulations, even though some of them may be very trivial, or for the payment of a fixed sum of money, the forfeiture will be enforced and not treated as a penalty.

In the case of Howe v. Smith, (2) in which there was no express agreement that the deposit shall be forfeited, and the question was considered on the footing that time was not of the essence of the contract, it was held that the deposit, although to be taken as part payment if the contract was completed, was also a guarantee for the performance of the contract, and that the plaintiff, having failed to perform his contract within a reasonable time, had no right to a return of the deposit. Fry, L.J. said in that case at page 101:-

> "Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a

(1) (1882) 21 Ch.D. 243, 258.
(2) (1884) 27 Ch.D. 89.

In the High Court in Malaya at Kuala Lumpur

No. 5

Judgment of Gill J.

25th November 1966 (continued)

motive in the payer to perform the rest of the contract."

In Mussen v. Van Diemen's Land Co. (3) it was held that the provision in the contract relating to the sale of certain lands in Tasmania for the retention of all moneys already paid by the plaintiff was not a penalty and that the plaintiff was therefore not entitled to recover them. Farwell, J. said in that case (at page 217):-

> "It is no ground for giving relief to a person from the effect of the contract which he himself has made to say that he has, through no fault of the defendant whatsoever, found himself in difficulties, or that it may turn out to be not a good bargain from his point of view. Considerations of that sort are wholly irrelevant. It matters not, so long as nothing has been done which can be said to be the fault of the defendant. There mere fact that the plaintiff finds himself in difficulties is in itself no ground for invoking the assistance of equity."

In Stockloser v. Johnson (4) (at page 637) Denning L.J. summed up the legal position with regard to deposits made under sale agreements as follows:-

> "It seems to me that the cases show the law to be this. (i) When there is no forfeiture clause, if money is handed over in part payment of the purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money, but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages: .... (ii) But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause), then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation

(3) (1938) 1 A.E.R. 210
(4) (1954) 1 A.E.R.630.

> in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. ... Two things are necessary: first, the forfeiture clause must be of a penal nature in the sense that the sum forfeited must be out of all proportion to the damage; and, secondly, it must be unconscionable for the seller to retain the money."

In the preceding paragraph of his judgment at the same page His Lordship had this to say:

> "In the present case, however, the defendant is not seeking to exact a penalty. He only wants to keep money which already belongs to him. The money was handed to him in part payment of the purchase price and, as soon as it was paid, it belonged to him absolutely. He did not obtain it by extortion or oppression or anything of that sort, and there is an express clause - a forfeiture clause, if you please - permitting him to keep it. It is not the case of a seller seeking to enforce a penalty, but a buyer seeking restitution of money paid."

The cases which I have cited above, except the case of Wallis v. Smith (1), were considered in Tay Say Geok and Others v. H.G. Warren (5), a case which arose in the State of Malacca where the rules of the English Law of Contract apply. The purchaser in that case had paid a sum of $90,000/- which represented approximately 10% of the agreed purchase price under a contract for the sale of certain pieces of land. Clause 3 of the contract recited that this sum was paid by way of deposit and in part payment of the purchase price. The purchase was to be completed and the balance of the purchase price paid on or before a certain date. Clause 8 provided that if the purchaser should fail to complete the purchase in accordance with the agreement, the deposit of $90,000/- would be considered as liquidated damages and forfeited to the vendors. The purchaser was unable to complete the purchase within the stipulated period and brought an action for the return of the deposit of $90,000. It was held by the Court of Appeal that he was not entitled to the return of the money. On appeal to the Privy Council it was held that as on the

(5) (1963) M.L.J. 179.

In the High Court in Malaya at Kuala Lumpur

No. 5

Judgment of Gill J.

25th November 1966 (continued)

the facts the purchaser had repudicated the contract the vendor was entitled to accept the repudiation and claim the forfeiture of the deposit (see H.G. Warren v. Tay Say Geok and Others)(6).

I have endeavoured thus far to set out the position under the English law, which, that an action for the return of a deposit made under a contract of sale is essentially a claim at common law, that at common law a plaintiff has no right to the return of the deposit but that equity may relieve him from forfeiture of the whole or a part of his deposit if the sum forfeited is out of all proportion to the damage or if it would be unconscionable for the seller to retain the money.

The question which I have to consider next is whether the plaintiff can establish that the provisions of the Contracts (Malay States) Ordinance, 1950 give him a right to recover the deposit. This question was considered in relation to the Indian Contract Act, on which our Contracts Ordinance is based, in the case of Natesa Aiyar v. Appavu Padayachi (7), in which White, C.J. had this to say at page 897:-

> "I agree that the question must be determined with reference to the provisions of the Contract Act and that if they are in conflict with the English law as laid down in the English authorities, we must follow the statute.
>
> I think, however, it may safely be promised ("promised" is obviously a mis-print and should read "premised") that in a question such as this, it was not the intention of the Legislature to depart from what was understood to be the English law at the time the Indian Contract Act was passed. It is also to be observed, as Wallis, J. points out, that though several cases as to the right to recover deposits have been decided in India since the Contract Act was passed, in none of these has it been suggested that under the provisions of that enactment the law of India differed from that of England with reference to this question."

The plaintiff's which contention in the present case is that the defendants are entitled to retain

(6) (1965) 1 M.L.J. 44
(7) A.I.R. (1915) Madras 896.

the deposit only to the extent to which they have suffered damages in consequence of the plaintiff's breach of agreement. For this contention he relies on Section 75 of the Contracts Ordinance which is the same as Section 74 of the Indian Contract Act, and reads as follows:-

> "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case maybe, the penalty stipulated for."

It was also contended on behalf of the plaintiff, although this contention was not seriously pursued, that the deposit made is caught under Section 65 of the Contracts Ordinance (Section 64 of the Indian Contract Act) which reads as follows:-

> "When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received."

As regards these contentions, it has been held in the Indian Courts again and again that Sections 64 and 74 of the Indian Contract Act (Sections 65 and 75 respectively of our Ordinance) do not apply to such deposits.

In the case of Manian Pattar v. The Madras Railway Company (8) the appellant had contracted to supply fuel to the respondent company subject to various stipulations contained in the contract and had deposited a sum of money to be forfeited if he failed to make delivery in accordance with the terms of the contract. He failed to supply in accordance with the terms of the contract and it was held that he was not entitled to recover his deposit. The

(8) I.L.R. (1906) 29 Madras 118.

In the High Court in Malaya at Kuala Lumpur

No. 5

Judgment of Gill J.

25th November 1966 (continued)

material passage of the judgment reads as follows:-

> "Neither section 74 of the Indian Contract Act nor the expositions of law in decisions English or Indian which were referred to in the argument, as to promises to pay specified sums in case of breach of contract are really in point, for the rule as to penalties dealt with in them has been uniformly held not to be applicable to cases of forfeiture of deposits for the breach of stipulations even where some of them are but trifling while others are not such (Wallis v. Smith (1)). In these cases the bargain of the parties is carried out except when the forfeiture is relieved against on terms which the Court imposes to meet the justice of the case where the circumstances warrant the grant of such equitable relief. In other words the rule governing the class of cases under consideration is that, where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with, if reasonable, in amount."

In the case of Natesa Aiyar v. Appavu Padayachi (7) it was held that the deposit made by the purchaser on the contract for the sale of land was not a benefit received under the contract within the meaning of Section 64 of the Indian Contract Act; it was a security that the purchaser would fulfil his contract and was ancillary to the contract for the sale of the land. Miller, J. said in that case at page 901:

> "It is as a forfeited security for the performance of the contract and not as part payment of the price that the defendant seeks to retain the deposit, and it will not be denied that a benefit which he has obtained by reason of a breach of the contract is not a benefit 'under' the contract."

The case of Manian Pattar v. The Madras Railway Company (8) was followed in the local case of S.S. Maniam v. The State of Perak (9). That was a case in which the plaintiff entered into an agreement in writing with the Government of the State of Perak in connection with the running of the Government Rice Mills at Bagan Serai, Parit Buntar and

(9) (1967) M.L.J. 75.

Teluk Anson, and in accordance with Clause 12(a) of the agreement deposited $5,000/- with the Government "as security for the peaceful and good performance of the said work, duties and things". Clause 12 (b) of the agreement provided that upon the breach, non-observance or non-performance by the Contractor of the provisions of the agreement, the agreement "shall absolutely cease and determine and the deposit of $5,000/- (Dollars Five thousand) shall be forfeited to and shall be retained by the Government as liquidated damages." On the failure of the plaintiff to fulfil the agreement the Government terminated the agreement and retained the deposit of $5,000/-, treating it as forfeited in terms of Clause 12 of the agreement. The plaintiff thereupon brought an action claiming the return of the deposit, and damages for wrongful termination of the contract. The action was dismissed. Thomson, J. (as he then was) said in that case:-

> "Having come to the conclusion that it is the plaintiff and not the defendant who was in breach of the contract and that the defendant was entitled to treat the contract as at an end the only question to be decided on the claim is whether or not the plaintiff is entitled to recover the $5,000/- which he deposited under Clause 12 of the Agreement. In that connection, I have listened to a great deal of argument as to whether that $5,000/- is to be regarded as a penalty or as liquidated damages.
>
> In my opinion all that argument is entirely beside the point and has nothing whatever to do with the case. I say so for two reasons.
>
> In the first place, in this country there is no difference between penalty and liquidated damages. ... In brief, in our law in every case if a sum is named in a contract as the amount to be paid in case of breach it is to be treated as a penalty.
>
> In the second place, however, this is not a case where the party who is not in breach is suing for the amount named in the contract. It is a case where the party who is in breach is suing for the return of a deposit which he

In the High Court in Malaya at Kuala Lumpur

No. 5

Judgment of Gill J.

25th November 1966 (continued)

has made by way of security for the proper performance of the contract.

The only question then that I have to consider in the present case is whether the amount of the deposit forfeited is reasonable. I am satisfied that it is."

That brings me to the last question which I have to consider in the present case, namely, whether the amount of the deposit forfeited is reasonable. In this connection in Natesa Aiyar v. Appavu Padayachi (7) Miller, J. at page 900 stated as follows:-

> "There may be cases where the Courts must find that the amount of the deposit or payment in advance is so great in comparison with the amount payable under the contract, that the parties cannot have intended it as a mere security for performance but rather as a punishment for non-performance of the contract, and in those cases the Court may doubtless refuse to allow the retention of the whole of the deposit; but where there is no such disproportion and nothing unreasonable in regarding the deposit as a security, then the defaulter will not be allowed to recover back what he has paid on an express stipulation that it shall be forfeited in the event of default."

White, C.J. in the same case and at the same page had this to say:-

> "If the question of reasonableness is a matter which can be taken into account, I am certainly prepared to hold that a 10 per cent deposit, as in the case on the purchase price (I do not overlook the fact that Rs. 20,000 was to remain on mortgage) is reasonable. In the case of In re Dagenham (Thames) Dock C. Ex parte Hulse (10), where it was held the vendor could not retain the deposit the deposit was half the purchase money. There as Wallis, J., points out, the amount was so large as to take it out of the ordinary class of deposits. There is certainly nothing extraordinary in a 10 per cent deposit under an agreement for the sale of land."

(10) (1873) 8 Ch. 1022.

Speaking of the deposit forfeited in the case of Tay Say Geok and Others v. H.G. Warren, (5) Thomson, C.J. (as he then was) stated at page 187 as follows:-

> "In all that I can find nothing to support the purchaser in the present case. The amount involved is not disproportionate. It is 10% of the purchase price which is the usual amount of the deposit in a contract for the sale of land. The purchaser knew he would lose it if he did not complete. There is no suggestion of any imposition or sharp practice or anything of the sort. In view of the purchaser's conduct it is difficult to see any ground on which it can be said that the vendor's action in retaining the money is unconscionable."

Thus, it is abundantly clear from the authorities that where in a contract between vendor and purchaser a sum is deposited by the purchaser by way of guarantee or security for the performance of the contract of sale and time is of the essence of the contract, the purchaser, if he fails to be ready with the purchase money at the essential time, cannot recover the deposit if it bears a reasonable proportion to the purchase price and there is a stipulation in the contract as regards forfeiture. It is immaterial whether the operative words as regards forfeiture are that the deposit "shall be retained by the vendor as liquidated damages" or that it "shall be considered as liquidated damages" or that it "shall be forfeited to the vendor to account of damages for breach of contract".

It therefore follows that the plaintiff in the present case is not entitled to any of the reliefs asked for. In an action by him it is not open to him to ask the Court to assess the damages in fact suffered by the defendants, nor is he entitled to recover from the defendants any part of the deposit made under the contract. It is true that the amount forfeited is enormous, but the enormity of the deposit is immaterial so long as it it not disproportionate to the amount of the purchase price. The deposit in fact was 10% of the purchase price, which the Courts have again and again approved as being reasonable in the case of contracts for the

In the High Court in Malaya at Kuala Lumpur

No. 5

Judgment of Gill J.

25th November 1966 (continued)

sale of land.

The action is dismissed with costs.

Kuala Lumpur

25th November, 1966.

(S.S. GILL)
JUDGE, HIGH COURT, MALAYA.

Inche Ng Ek Teong of Messrs. Braddell & Ramani, Kuala Lumpur, with Inche Rahim Noor for Plaintiff.

Inche D.G. Rawson of Messrs. Shearn, Delamore & Co., Kuala Lumpur, for Defendant. 10

Certified true copy
Sd: ?/
Secretary to Judge,
Kuala Lumpur.
26.11.1966.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 6

Notice of Appeal

24th December 1966

No. 6

NOTICE OF APPEAL

IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

CIVIL APPEAL NO. X.102 of 1966 20

Between:-

S.K. Jagatheesan ... APPELLANT

And

Linggi Plantations Ltd. ... RESPONDENT

(In the matter of Civil Suit No. 249 of 1963
In the High Court in Malaya at Kuala Lumpur

Between:

S.K. Jagatheesan ... PLAINTIFF

And

Linggi Plantations Limited .. DEFENDANTS) 30

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 6

Notice of Appeal

24th December 1966 (continued)

NOTICE OF APPEAL

TAKE NOTICE that S. K. Jagatheesan being dissatisfied with the decision of the Honourable Mr. Justice Gill given at Kuala Lumpur on the 25th day of November 1966 appeals to the Federal Court against the whole of the said decision.

Dated this 24th day of December, 1966.

Sd: Braddell & Ramani

Solicitors for the Appellant.

To:

The Registrar,
The Federal Court,
Kuala Lumpur.

and to The Registrar,
The High Court in Malaya at
Kuala Lumpur

and to Linggi Plantations Limited and/or
their Solicitors Messrs. Shearn,
Delamore & Co.,
The Eastern Bank Building,
Kuala Lumpur.

The Address for the service of the Appellant is Messrs. Braddell & Ramani, Advocates & Solicitors, Hongkong Bank Chambers, Kuala Lumpur.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 7

Memorandum of Change of Solicitors

14th January 1967

No. 7

MEMORANDUM OF CHANGE OF SOLICITORS

IN THE FEDERAL COURT OF APPEAL AT KUALA LUMPUR

CIVIL APPEAL NO. X.102 of 1966

Between:-

S.K. Jagatheesan ... APPELLANT

And

Linggi Plantations Ltd. ... RESPONDENT

(In the matter of Kuala Lumpur High Court Civil Suit No. 249 of 1963

Between:-

S.K. Jagatheesan ... PLAINTIFF

And

Linggi Plantations Ltd. ... DEFENDANT

MEMORANDUM OF CHANGE OF SOLICITORS

To:

The Senior Assistant Registrar,
High Court,
Kuala Lumpur.

Enter our names as Solicitors for S.K. Jagatheesan, the abovenamed Appellant, in this suit in place of M/s. Braddell & Ramani of Hongkong Bank Chambers, Kuala Lumpur.

Dated this 14th day of January, 1967.

Address for service:

M/s. Maxwell, Kenion, Cowdy & Jones,
Advocates & Solicitors
Mercantile Bank Building,
I P O H.

We consent,

Sd: Braddell & Ramani
.....
Solicitors on record.

Sd: Maxwell, Kenion, Cowdy & Jones.
.....
Solicitors for Appellant.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 8

Memorandum of Appeal

2nd February 1967

No. 8

MEMORANDUM OF APPEAL

IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. X.102 of 1966

Between:

S.K. Jagatheesan ... APPELLANT

And

Linggi Plantations Ltd. ... RESPONDENTS

(In the matter of Kuala Lumpur High Court Civil Suit No. 249 of 1963)

Between:

S.K. Jagatheesan ... PLAINTIFF

And

Linggi Plantations Ltd. ... DEFENDANTS

MEMORANDUM OF APPEAL

S.K. Jagatheesan, the Appellant above-named, appeals to the Federal Court against the whole of the decision of the Honourable Mr. Justice Gill given at Kuala Lumpur on the 25th day of November, 1966 on the following grounds:

1. That the learned Judge failed to appreciate the significance of the forfeiture clause in Clause 5 of the Agreement dated the 25th day of May, 1962, which provided for forfeiture of the sum of $377,500/- to the Respondents "to account of damages for breach of contract" and was wrong in saying that the operative words of forfeiture were immaterial and misdirected himself in fact in failing to consider whether the forfeiture clause was in fact a genuine covenanted pre-estimate of damage.

2. That the learned Judge failed to consider that the said sum of $377,500/- was paid and received under Clause 1 of the said Agreement not only by way of deposit but also as part payment of the

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 8

Memorandum of Appeal

2nd February 1967 (continued)

purchase price and should in any event have held that at least a part of the said sum was recoverable by the Appellant.

3. That the learned Judge should have held that the forfeiture of the said sum of $377,500/- was of a penal nature and operated in fact and was intended to operate as a penalty and was therefore void.

4. That the learned Judge should in any event have applied the equity of restitution of grant relief from forfeiture to meet the justice of the case as the circumstances of this case warranted the grant of such equitable relief.

5. That the learned Judge misdirected himself in failing to consider the vital fact that the Respondents throughout and at all times were and remained in possession of the estate during the subsistence of the said Agreement and had been in receipt of the income and profits therefrom and the further material and relevant fact that the Respondents had at all material times had the use of the said sum of $377,500/- and interest thereon of which the Appellant had been deprived.

6. That the learned Judge should have allowed the Appellant's claim and made an order for the assessment of damages as the damage suffered by the Respondents by reason of non-completion was minimal and certainly not to the extent of the amount forfeited. The learned Judge misdirected himself in failing to take into consideration the fact that the Respondents had not proved any significant damage as alleged in their Defence and that they had in fact abandoned their Counterclaim and should have held that the Respondents were entitled to retain the said sum of $377,500/- only to the extent to which they had suffered damage in consequence of the Appellant's breach of contract.

7. That the learned Judge failed to consider the evidence adduced by the Appellant that in negotiations for a resale of the estate to a third party after termination of the said Agreement the Respondents asked for a price considerably in excess of the purchase price stipulated in the said Agreement and that as a result the Respondents would have been entitled if at all to nominal damages only.

8. That the learned Judge was wrong in holding that the forfeiture of 10% of the purchase price was reasonable and should have held that the sum forfeited was not reasonable in amount and was out of proportion to the damage in this case and that it was unconscionable for the Respondents to retain the said sum.

9. That the learned Judge was wrong in holding that the enormity of the deposit forfeited was immaterial so long as it was not disproportionate to the amount of the purchase price and should have held the material consideration to be whether it was disproportionate to the damage incurred and not to the amount of the purchase price.

10. That the learned Judge misdirected himself in his consideration of the ratio decidendi in the Court of Appeal decision in Tay Say Geok and Others v. H.G. Warren (1963) M.L.J. 179 and the decision of the Judicial Committee in H.G. Warren v. Tay Say Geok and Others (1965) 1 M.L.J. 44 in that it was held therein that in all the circumstances of that case there was no equity to operate to give relief against forfeiture in view of the conduct of the purchaser therein and that further the forfeiture clause in that case stipulated that the deposit would be considered as liquidated damages and forfeited to the vendors, and in the light thereof the learned Judge should have distinguished this case therefrom.

11. That the learned Judge should in any event have awarded to the Appellant the costs of the Counterclaim.

Dated this 2nd day of February, 1967.

Sd: Maxwell, Kenion, Cowdy & Jones.
Solicitors for the Appellant.

To: The Registrar,
Federal Court,
Kuala Lumpur.

and to:

The Respondents abovenamed or their Solicitors,

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 8

Memorandum of Appeal

2nd February 1967 (continued)

Messrs. Shearn Delamore & Co., Advocates & Solicitors, The Eastern Bank Building, No. 2, Benteng, Kuala Lumpur.

The address for service of the Appellant is c/o Messrs. Maxwell, Kenion, Cowdy & Jones, Advocates & Solicitors, Mercantile Bank Building, Ipoh, Perak.

No. 9

Order of Federal Court

6th January 1969

No. 9

ORDER OF FEDERAL COURT

IN THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR
(APPELLATE JURISDICTION)
FEDERAL COURT CIVIL APPEAL NO. X.102 of 1966

Between

S.K. Jagatheesan ... Appellant

And

Linggi Plantations Ltd. ... Respondents

(In the Matter of Civil Suit No. 249 of 1963
in the High Court in Malaya at Kuala Lumpur

Between

S.K. Jagatheesan ... Plaintiff

And

Linggi Plantations Ltd. ... Defendants)

CORAM: AZMI, LORD PRESIDENT, FEDERAL COURT, MALAYSIA;
SUFFIAN, JUDGE, FEDERAL COURT, MALAYSIA;
GILL JUDGE, HIGH COURT, MALAYA.

IN OPEN COURT

THIS 6th DAY OF JANUARY, 1969

O R D E R

UPON MOTION made unto Court this day by Mr. A.R. Noor of Counsel for the abovenamed Appellant AND UPON READING the Notice of Motion dated the 17th day of December, 1968 and the Affidavit of T. Pasubathy Ammal sworn the 3rd day of December, 1968 and the exhibits thereto AND UPON HEARING Counsel for the Appellant as aforesaid:

IT IS ORDERED that further proceedings in this Appeal be carried on by T. Pasubathy Ammal also known as Mrs. Pasubathy Jagatheesan, as Appellant, against the Respondents.

GIVEN under my hand and the Seal of the Court this 6th day of January, 1969.

Sgd: AU AH WAH

Chief Registrar,
Federal Court,
Malaysia.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 10

Notes of Argument recorded by Ong Hock Thye, C.J.

29th April 1969

No. 10

NOTES OF ARGUMENT RECORDED BY ONG HOCK THYE C.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(Appellate Jurisdiction)

Federal Court Civil Appeal No. X-102 of 1966

Between

T. Pasubathy Ammal alias Pasubathy Jagatheesan, Executrix of the last will of S.K. Jagatheesan, deceased ... Appellant

And

Linggi Plantations Ltd. ... Respondents

(In the matter of Kuala Lumpur High Court Civil Suit No. 249 of 1963

Between

S.K. Jagatheesan ... Plaintiff

And

Linggi Plantations Ltd. ... Defendant

Cor: Ong Hock Thye, C.J.
Suffian, F.J.
Ali, F.J.

NOTES OF ARGUMENT RECORDED BY ONG HOCK THYE C.J.

Tuesday, 29th April 1969

E. Abdoolcader with R.A. Noor for applt.

D.G. Rawson for respts.

Abdoolcader: c - claim not pursued. Aplt was assignee.

Grd. 1 Cl. 5 - "to account of damages for breach of contract"

S.75 Contracts Ord. applies.

p. 44E "immaterial" (?)

Public Works Comm. v. Hills (1906) A.C. 368, 375

Dunlop Pneumatic Tyre Co. Ltd. v New Garage & Motor Co. (1915) A.C. 79, 86

Maniam v State of Perak (1957) M.L.J. 75, 76.

Pillay v Kampar Rubber & Tin Co. Ltd. (unreported)

Fateh Chand A.I.R. (1963) S.C. 1405 at 1410 (8), (11).

Grd. 2 "deposit" cf. "part payment".

p.49 - "deposit and part payment".

Goff & Jones Law of Restitution.

Stonham's Law of Vendor & Purchaser.

Mayson v Clouet (1924) A.C. 980, 986.

Dies v Br. & International Mining (1939) 1 K.B. 729 at 739, 40, 743, 744

Chiranjit Singh v Har Swarup A.I.R. (1926) P.C. 1.

Fateh Chand's case para 6 p. 1410

(applt. asks for an order for assessment of damages)

Grd. 4 Ed. relief.

applying s.75 - what is just and reasonable ?

p. 36

Kilmer v Br. Columbia Orchard Lands Ltd. (1913) A.C. 319, 322.

Steedman v Drinkle (1916) 1 A.C. 275

Stockloser v Johnson (1954) 1 Q.B. 476, 485, 487 (Somers), 489 (Denning) 491,

Warren v Tay Say Geok (1963) M.L.J. 179, 187

Circumstances entitling applt. to eq. relief:

applt. assignee (p.83)

p. 9 (para 3 of S/C)

p. 78E

p. 24D - evidence

p. 26E

Grd. 5 Circumstances to found eq. relief

Clauses 6, 11, 14, 16, 18 of agreement (pp.52-5) - here amount is substantial

loss of use of money or possession of land

In the Federal Court of Malaysia (Appellate Jurisdiction)

No.10

Notes of Argument recorded by Ong Hock Thye, C.J.

29th April 1969 (continued)

Grd. 6 minimal damage (?) - p.45A - see letter on p.75

para 2. see judgment p.42B (from Tay Say Geok).

Fateh Chand decides it's immaterial who is making the claim.

Respts. had not proved damage & extent thereof.

See para. 7 of S/Claim.

cf. (para. 8 of Defence
cf. (para. 9 of Defence
cf. (& c-claim

Reply - para 2 of p.15

p.26 - last line

p.74 - letter of 27.8.62

p.75 - reply to above

p.77 - treated as "deposit"

See Ng Ek Teong at p.190

Grd. 7 - this claim by applt. was not refuted.

pp.87 - 88

Jega's evidence - pp. 25 - 26

p. 89 (take sp. note)

p.26E (jega)

Grd. 8 was 10% reasonable?

pp.42 -43

no rule of thumb as to 10% (p.1012 of Fateh Chand).

Grd. 9 p.45B

Grd. 10 error of law

Grd. 11 costs (?)

Rawson: (reply)

Preliminary pt. of law - re

If held in affirmative, evidence wd have been called.

If "deposit" relief from forfeiture rests on equity.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No.10

Notes of Argument recorded by Ong Hock Thye, C.J.

29th April 1969 (continued)

Submit s.75 has no appln. to forfeiture of deposits

Reply to Grd. 1 wording of forfeiture clause.

Howe v Smith (1884) 27 Ch.D. 89, 101, 104

"deposit and part payment pf p.p.".

"to account of damages" is phrase declaratory only of the law

- this phrase frees the vendor from the limitation imposed by s.75 in event of claim for damages - again declaratory.

Grd.2 a deposit has 2 functions -

dual character as "security" and as "p.payment".

Soper v Arnold (1889) 14 A.C. at 435 per Macnaghten

Naresh Chandra v Ram Chandra A.I.R. (1952) Cal.93 para 9 on p. 96

Grd. 3 Is forfeiture of deposit a penalty?

Maniam's case (1957) M.L.J. at p.76

Wallis v Smith - "not a penalty" (1882) 21 Ch.D. p.243

see para (15) & (16) of Naresh Chandra (supra)

s.75 no appln. to forfeiture of deposit.

Submit: Fateh Chand does not refer to forfeiture of deposits as opposed to other moneys paid to a/c of purchase price. p.1410 para 6.

Gist of appeal - what rules of equity can appellant avail himself of? (Rawson hands up written submission)

No reported case here or in U.K. of relief against forfeiture of deposit - all Malayan cases failed.

English cases granted relief only against forfeiture of instalment of purchase price.

(1) Dagenham Dock ex parte Hulse

(2) Kilmer (N.B. in both above S.P. granted as relief)

(3) Steedman at (pp.499 - 500) special case.

As to remaining grds. of appeal -

respts remaining in possession is immaterial.

If s.75 does not apply, damages irrelevant

In the Federal Court of Malaysia (Appellate Jurisdiction)

No.10

Notes of Argument recorded by Ong Hock Thye, C.J.

29th April 1969 (continued)

10% - rely on Tay Say Goek case - affd. by P. Council

applt. cannot show inconscionable conduct on part of respot.

Abdoolcader:

Fateh Chand see p.1411

s.75 "reasonable" compensation

say the payment here was a composite sum - but don't claim earnest money (deposit) does not come within s.75

"to account of" damages - note this phrase

dual character of deposits - not disputed

here "deposit and part payment" phrase in Clause 1

Goff & Jones at p.349

applt is not asking for extension of equitable principles - but only the application.

What is the issue raised in the pleadings?

Clearly damage was in issue and cf Ek Toong at p.23

C.A.V.

Intld. O.H.T.

Saturday 26th July 1969

Rahim Noor for applt.

D.G. Rawson for respts.

I allow appeal - read judgment

Suffian reads judgment agreeing.

Ali.

Order: Appeal allowed - respt to refund $377,500/= with interest at 6% p.a. from date hereof, and costs throughout.

Refund of $500/= deposit to applt + additional security.

Intld. O.H.T.

True copy
Sgd: (Tneh Liang Peng)
Secretary to Chief Justice
High Court, Malaya

No. 11

In the Federal Court of Malaysia (Appellate Jurisdiction)

No.11

Notes of Argument recorded by Suffian F.J.

29th April 1969

NOTES OF ARGUMENT RECORDED BY SUFFIAN F.J.

IN THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR

(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. X.102 of 1966

Between

T. Pasubathy Ammal also known as Mrs. Pasubathy Jagatheesan the Executrix of the last will of S.K. Jagatheesan deceased ... Appellant

And

Linggi Plantations Ltd. ... Respondents

(In the Matter of Kuala Lumpur High Court Civil Suit No. 249 of 1963

Between

S.K. Jagatheesan ... Plaintiff

And

Linggi Plantations Ltd. ... Defendants

Coram: H.T. Ong, C.J., Malaya;
Suffian, F.J., Malaysia;
Ali, F.J., Malaysia.

NOTES OF SUFFIAN, F.J.

29th April 1969 In Open Court

Dato' Eusoffe Abdoolcader (Inche Abdul Rahim Noor with him) for appellant

D.G. Rawson, Esq., for respondents.

Eusoffee addresses:

Ground 1

Section 75, Contracts Ordinance, is the only section that applies. Alternatively common law or equity applies.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No.10

Notes of Argument recorded by Suffian F.J.

29th April 1969 (continued)

Refers to p.50 "shall be forfeited to account of damages for breach of contract".

Page 44E - Gill wrong. There is difference between penalty and liquidated damages.

Public Works Commissioner v Hills (1906) AC 368 (P.C.) at pp. 375 - 6.

Dunlop Pneumatic Tyre Co. Ltd. v New Garage and Motor Co. Ltd. (1915) A.C. 79 at p. 86 - 7 (House of Lords)

SS. Maniam v The State of Perak (1957) M.L.J. 75, 76

P.M. Pillay v Kampar Rubber & Tin Co. Ltd. - unreported decision of Azmi J. in Ipoh High Court Civil Suit 153 of 1959

I concede section 65, Contracts Ordinance, not relevant.

Today the leading case of the Supreme Court of India on section 74 (our section 75) is Fateh Chand v Balkishan Dass A.I.R. (1963) S.C. 1405. Refers to p.1410, paras (8), (11), (12), (13), (14). Not material who is the plaintiff and who defendant.

Ground 2

Refers to p.49D (money paid was by way of deposit and part payment).

Cases on difference between earnest money and part of sale price.

Goff v Jones on the Law of Restitution, p.346-8.

Stoneham's Law of Vendor & Purchaser, p.338-9.

Mayson v Clouet & Anor. (1924) A.C. 980, 986, a P.C. case. Appeal from Singapore. Earnest money is irrecoverable, but instalments of purchase price are recoverable.

Dies & Another v. British and International Mining and Finance Corporation Ltd. (1939) 1 K.B. 724 at p.739 - 40; 743; 744 - 5.

Kunwar Chiranjit Singh v Rai Bahadur Har Swarup A.I.R. 91926) P.C. 1 at pp.1-2 Lord Shaw.

Fateh Chand (supra) at p.1410, para (6)

Here respondents entitled only to reasonable damages.

Ground 3

Already covered under grounds 1 and 2 above.

Ground 4

Refers to p. 36A.

Kilmer v British Columbia Orchard Lands Ltd. (1913) A.C. 319 at p.322 (P.C.)

Steedman v Drinkle & anor (1916) 1 A.C.275 (P.C.)

Stockloser v Johnson (1954) 1 Q.B. 476 (C.A.) - 485, 487 (3rd line from the bottom), 489 (top of page), 490, 492 (top).

Tay Say Geok & Others v H.G. Warren (1963) M.L.J. 179 187 (1st para)

Purchaser's conduct important.

Here Court should give relief because appellant had in fact advanced money to buy the land.

Page 83 of record.

Original purchaser was in difficulties - Plaintiff stepped in.

p. 84
p. 9 para 3
p.78 line E
p. 24 D
p.26 E

Ground 5

Cl. 6 p.51
Cl.11 p.53
Cl.13 p.53
Cl.14 p.54
Cl.16 p.54
Cl.18 p.55

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 11

Notes of Argument recorded by Suffian F.J.

29th April 1969 (continued)

Ground 5 states one ground for equitable relief.

Ground 6

p. 45A

Letter p. 75

Gill p. 42

p. 88

p. 11E (para. 7, Statement of Claim)

p. 14 (para. 8) - defendants to prove damage

p. 15 (para. 9)

last para on p.15 shows how weak defence is.

p. 17C - plaintiff puts defendants to prove damage suffered by them.

p. 26G

p. 74

p. 75

p. 77

Even pre-litigation letters show that respondents entitled to reasonable compensation only.

p. 19C

Ground 7

pp. 87-8 unrefuted by respondents. Respondents have suffered no loss.

p. 26E

Appellant adduced evidence to show respondents suffered no damage.

Ground 8

42D to 45C - judge says 10% reasonable.

Natesa Ayar overruled by Fateh Chand

This 10% is part deposit and part purchase price.

Fateh Chand p. 1412 - no rule about 10% being necessarily reasonable.

Ground 9

p. 45D

I submit respondents entitled only to reasonable damage.

This is the largest amount of deposit in Malaya.

Ground 10

Here no fault on part of purchaser.

Ground 11

Counterclaim was abandoned - so appellant should get costs.

Rawson addresses:

Section 75 has no application to forfeiture of deposit. I contended then and I contend now.

Fateh Chand deals with instalments of purchase price.

In reply to Ground of Appeal No. 1

Description of money paid -

Howe v Smith L.R. 1887 27 Ch. D. 89 - "as a deposit and in part payment of the purchase money" p. 101.

If you claim more damages than the deposit, you have to credit deposit against damages - p. 104. This is so in England and here.

If you say deposit is forfeited as liquidated damages, then you cannot claim more than the deposit, section 75.

If you say "to a/c of damages", then you can claim more than the deposit - that is the reason for our stand - and it is only declaratory of the law.

In reply to Ground of Appeal No. 2

Deposit (a) is a security and also (b) part payment of purchase price - has dual characteristics.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 11

Notes of Argument recorded by Suffian F.J.

29th April 1969 (continued)

Soper v Arnold L.R. 1889 14 A.C. 429 - what is a deposit p. 435.

Naresh Chandra v Ramchandra 1952 A.I.R. Calcutta 93 para 9.

"By way of deposit and part payment" used in this agreement - have no significance.

In reply to Ground 3

S.S. Maniam v State of Perak (1957) M.L.J. 75 p. 76 "In the second place, etc."

Wallis v Smith L.R. (1882) 21 Ch. D. 243 10

A deposit with a forfeiture is separate from the contract of sale. The former is security. Chandra (supra) paras 15 and 16. Section 75 not applicable to deposits. Because they come under separate contract.

Fateh Chand does not refer to forfeiture of deposits - applies only to forfeiture of instalments - Page 1410, paras 6 and 7.

I now come to gist of appeal. What are the rules of equity that might help appellant. To help 20 court I hand in written submission.

Replying to other grounds

Fact that defendants remained on estate after agreement immaterial. Normal agreement.

Replying to grounds 6 and 7

If section 75 had applied, damages would have been relevant. Judge held section 75 not applicable and it is for appellant to show equitable grounds for relief.

10% of purchase price reasonably - I rely on 30 the Warren case decided by P.C.

Appellant has not shown unconscionable conduct on the part of respondents, therefore not entitled to relief.

No. 11

Notes of Argument recorded by Suffian F.J.

29th April 1969 (continued)

Eusoffee replies:

Fateh Chand p.1411 does not apply to forfeiture of instalments only, applies to deposit also.

The payment here was a composite sum - it embraces deposit and part purchase price.

This is a clear case for ascertainment of reasonable damages.

(sic) Cough & Jones at p. 439

I have shown respondents' conduct unconscionable.

C.A.V.

No. 12

No. 12

Notes of Argument recorded by Ali F.J.

29th April 1969

NOTES OF ARGUMENT RECORDED BY ALI, F.J.

IN THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR

(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. X.102 of 1966

Between

T. Pasubathy Ammal alias Pasubathy Jagatheesan, Executrix of the last Will of S.K. Jagatheesan, deceased ... Appellant

And

Linggi Plantations Ltd. ... Respondents

(In the Matter of Kuala Lumpur High Court Civil Suit No. 249 of 1963

Between

S. K. Jagatheesan ... Plaintiff

And

Linggi Plantations Ltd. ... Defendants

Cor: Ong Hock Thye, C.J.
Suffian, F.J.
Alia, F.J.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 12

Notes of Argument recorded by Ali F.J.

29th April 1969 (continued)

NOTES OF ARGUMENT RECORDED BY ALI, F.J.

29th April, 1969.

Eusoffee Abdoolcader with Rahim Noor for appellant.

D.G. Rawson for respondents.

Eusoffee addresses. Submits written submission.

On Ground 1. Section 75 of Contract Ordinance applies. page 50 - general clauses.

Judgment page 44 . No difference in Sec. 75. But there is difference in Common law and equity.

Refers to (1) Public Works Commissioner v Hills (1906) A.C. 368 - p.375.

(2) Dunlop Pneumatic Tyre Co. Ltd. v New Garage & Motor Co. Ltd. (1915) A.C. 79, reads from page 86.

(3) S.S. Maniam v The State of Perak (1957) M.L.J. 75.

(4) P.M. Pillay v Kampar Rubber & Tin Co. Ltd. (unreported) - copy produced.

Reads.

I am not relying on section 65 of Contract Ordinance. I am relying on section 75 Contract Ordinance.

(5) Fateh Chand v Balkishan Dass, A.I.R. (1963) S.C. 1405. Reads page 1410.

Submits there is difference.

Ground 2. Refers to clauses of agreement.

(a) Goff & Jones' Law of Restitution p.346-348.

(b) Stonham's Law of Vendor & Purchaser p. 338-9.

(c) Mayson v Clouet & Anor (1924) A.C. 980.

(d) Dies & Anor v British and International Mining and Finance Corporation (1939 1 K.B. p 739-40, 743, 744.

(e) Kunwar Chiranjit Singh v Rai Bahadur Har Swarup, A.I.R. (1926) P.C. 1.

(f) Fateh Chand (supra)

Ground 3 : same as 1 & 2

Ground 4 : Relief against forfeiture.

Submits inconsistency of this case.

No principle 10% is rule in Fateh Chand's - 1412

Ground 11: Costs of counter-claim.

Wheeler v Somerfield & Ors (1966) 2 Q.B. 94.

Rawson in reply :

Explains preliminary point if s.75 applied or not. If applicable then evidence will be taken.

Submits s. 75 of Contract Ordinance does not apply.

Clause II of contract. Difference clauses in different contracts.

Howe v Smith (1884) 27 Ch.D.89. Reads.

Head note.

In England and Malaysia the law is we have to give credit for the amount.

Nature of deposit: a security for performance and also a part payment of purchase price.

Soper v Arnold - (1889) 14 A.C. p.435 per Macnaghten.

Naresh Chandra v Ram Chandra - A.I.R. (1952) Cal. p.93 para 9.

Reply to 3rd Ground: Whether forfeiture of deposit was a penalty. Case of S.S. Manian v State

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 12

Notes of Argument recorded by Ali F.J.

29th April 1969 (continued)

of Perak (1957) M.L.J. Wallis v Smith (1882) 21 Ch. p. 243.

Forfeiture clause separate issue - not part of contract.

Submits written submission.

Law of equity applies. No reported Malayan cases for relief against forfeiture.

Reads from written submission. Extracts from judgment in Stockloser's case (1954) 1 Q.B. 476.

Straightforward sale agreement. Fact that respondents possession is immaterial. Normal arrangement. 10

On 10% rule : Warren's case

A test of consideration.

Eusoffee replies :

Payment a composite sum. Do not claim the earnest money - Sec. 75.

Goff & Jones.

Judgment reserved.

No. 13

JUDGMENT OF ONG HOCK THYE, C.J.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 13

Judgment of Ong Hock Thye C.J.

26th July 1969

IN THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR
(APPELLATE JURISDICTION)

Federal Court Civil Appeal No. X.102 of 1966

Between

T. Pasubathy Ammal alias Pasubathy Jagatheesan, Executrix of the last Will of S.K. Jagatheesan, deceased ... Appellant

And

Linggi Plantations Ltd. ... Respondents

(In the Matter of Kuala Lumpur High Court Civil suit No. 249 of 1963

Between

S.K. Jagatheesan ... Plaintiff

And

Linggi Plantations Ltd. ... Defendants

Cor: Ong Hock Thye, C.J.
Suffian, F.J.
Ali, F.J.

JUDGMENT OF ONG HOCK THYE, C.J.

"It is abundantly clear from the authorities that, where in a contract between vendor and purchaser a sum is deposited by the purchaser by way of guarantee or security for the performance of the contract of sale and time is of the essence of the contract, the purchaser, if he fails to be ready with the purchase money at the essential time, cannot recover the deposit if it bears a reasonable proportion to the purchase price and there is a stipulation in the contract as regards forfeiture". So said Gill J. (as he then was). This is an appeal against his decision dismissing the appellant's claim for the return of $377,500/00 which had been received by the respondents "by way of deposit and part payment" upon the execution of a

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26th July 1969 (continued)

contract for the sale of their rubber lands at the price of $3,775,000/=. The appellant was in fact the assignee of the original purchaser, but nothing turns on the assignment. He died while this appeal was pending and his representative has been substituted, but I shall refer to him as the appellant herein.

Time was of the essence of the contract and the sale was to be completed in 90 days. The appellant, being unable to pay the balance of the purchase price on due date, the respondents on August 27, 1962 rescinded the contract, as they were fully entitled to do, and forfeited the deposit "to account of damages for breach of contract".

On April 4, 1963 the appellant's solicitors wrote to the solicitors for the respondents requesting to be advised what those damages were, with particulars of how they were arrived at and how much was claimed by the respondents as deductible from the total sum of $377,500/= which had remained on deposit with them. The material portion of the reply dated April 9, 1963 was as follows:-

> "The sum of $377,500/= was the deposit and that deposit has been forfeited. It follows, therefore, that we do not agree that the sum of $377,500/- still remains in deposit with our clients. All our clients have to do is to give credit for this amount should they decide to claim for any additional sum".

On April 19, 1963 the appellant commenced action for a declaration that the forfeiture of the deposit was void as being a penalty, for assessment of the damages suffered in fact by the respondents and other reliefs. In his statement of claim the matters put in issue were as follows:-

> "7. The Plaintiff avers that the Defendants have not suffered damage as a result of the breach of contract to the extent of the amount of the deposit and puts the Defendants to proof of the damage that they have in fact suffered.
>
> 8. The Plaintiff further avers that the

forfeiture of the deposit operates in fact, and was intended to operate, as a penalty and is thus void".

The defence, besides traversing the above allegations, stated in paragraph 6:

"Alternatively, if (which is denied) the Defendants by reason of the Plaintiff's admitted breach of contract have not suffered damage to the extent of the amount of the said deposit as therein alleged, the Defendants will contend that they were nevertheless entitled under the terms of the said agreement to forfeit the said deposit the same being a reasonable amount".

In paragraph 8 of the respondents stated, further and in the alternative, that they had suffered damage in excess of $377,500/= and were thereby entitled to retain the said sum. Then followed the counterclaim, alleging damage suffered by them, as follows:-

" Particulars

Contract Price of the said land	$ 3,775,000
Market Price of the said land as at the date of the termination of the said Agreement	3,045,610
	$ 729,390

The Defendants will give credit against such amount for such sum as they may be held entitled to retain by way of deposit forfeited."

I take it that by the last paragraph the respondents meant that the deposit would have to be set off against whatever amount might be found to be the damages sustained.

By his reply and defence to counterclaim the appellant joined issue with the respondents on their defence and in answer to the counterclaim denied that the respondents had suffered damage in the sum of $729,390 as alleged or any damage at all and put them to strict proof thereof.

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I think the twin issues raised in the pleadings are clear enough. In opening his case counsel for the appellant said it had been agreed on both sides that the preliminary point of law should be decided first and thereafter the question whether any evidence should be led on the pleadings. The point of law, as he phrased it, was "whether the deposit was made by way of security for completion or by way of damages". In either case deposits were caught under sections 65 and 75 of the Contracts (Malay States) Ordinance.

On the question of fact Counsel submitted that (i) if the respondents contended that they were entitled to claim, by way of damages more than the amount of the deposit, as stated in their solicitors' letter of 9th April 1963, then the whole question of damages remained open; (ii) if the deposit was to be forfeited purely and simply as damages, then it was caught under section 75 and, even so, damages had to be assessed; (iii) the magnitude of the amount, rather than its relation to the purchase price, should be considered in assessing a reasonable sum for forfeiture.

Counsel for the respondents, on the other hand, contended that sections 65, 74 and 75 had no bearing on this case. It was not a case of the vendors suing the purchaser, but the purchaser asking for the return of moneys forfeited, as in Maniam v State of Perak (1). The appellant was seeking relief in equity against forfeiture, not the enforcement of a legal right, and courts would not interfere if the amount was reasonable: see Howe v Smith (2). Furthermore, the deposit was forfeited "to account of damages" as expressly stipulated in the contract. Using any other words would have limited damages to the amount forfeited, whereas the words used permitted the vendor to claim damages over and above the amount forfeited, in which case it was conceded, the additional damages would have to be proved. The words used were intended to preserve the vendor's right to sue for damages, should he consider the deposit insufficient. The deposit, being only 10 per cent of the Purchase price was the normal deposit in sales of land and so held in Warren v Tay Say Goek (3).

(1) (1957) M.L.J. 75
(2) (1884) 27 Ch.D.89
(3) (1963) M.L.J. 179,187.

At this stage of the arguments counsel for the appellant intimated that, whatever the answer to the point of law, he proposed to call evidence to show that the respondents in fact suffered no damage. He followed up by calling the appellant as witness. The testimony included a conversation with one Modliar Lingam (since deceased) of an estate agency firm in Singapore, who told the appellant some time after the rescission of this contract, that he was trying to purchase the same estate on behalf of a client, by the negotiations fell through because the respondents demanded a far higher price than the price at which the appellant himself had contracted to buy the estate from them. Such evidence of a statement by a deceased person, though of doubtful admissibility under section 32 of the Evidence Ordinance as to the substance thereof, would, however, properly be evidence that such a conversation did take place as alleged: see Subramaniam v P.P. (4). It led to the introduction of certain relevant letters in evidence, relating to the market value of the estate, which are reproduced below:

"EAP/H/BDS/32908 9th February, 1963.

The General Manager,
Messrs. Guthrie Agency (Malaya) Ltd.
No. 4 Jalan Mountbatten,
Kuala Lumpur.

Dear Sir,

re: Linggi Plantation - Haron Estate

We are acting on behalf of certain clients who are interested in the purchase of the above property.

We shall be obliged if you will let us know whether it is intended to sell the property and, if so, could you please advise us of the price required and also the terms of the sale.

Yours faithfully,

Sd: Donaldson & Burkinshaw"

(4) (1956) M.L.J. 220, 222.

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"GUTHRIE AGENCY (MALAYA) LTD.

4 Jalan Mountbatten,
Kuala Lumpur.

EAP/H/BDS/32908

P.S. 198

IVS/JKC P.4(a)

12th February, 1963.

Messrs. Donaldson & Burkinshaw,
Mercantile Bank Chambers,
Singapore 1.

Dear Sirs,

Linggi Plantations Ltd. - Haron Estate

We thank you for your letter of the 9th February, 1963. It is not in fact the intention of the Directors, to sell Haron Estate and we cannot, therefore, advise you of details relating to any price required or terms of sale.

Naturally should your clients wish to make an offer for the Estate we would provided the offer was of a sufficiently attractive nature, pass this on to our Principals. In this connection and for your guidance, we may say that the offer recently made and accepted (which fell through owing to non-compliance by the prospective purchaser) was for 3¾ million dollars, and since further areas have come into bearing since that offer was made and accepted, we feel that the Directors would certainly not consider any sum not appreciably higher than that quoted above.

Yours faithfully,

for Guthrie Agency (Malaya) Ltd.

Director

As Agents: Linggi Plantation Ltd."

The appellant closed his evidence with a statement that he had gone to London expressly to obtain an extension of time; he had been anxious to complete because he knew that the estate could be resold at a higher price.

No evidence was called on behalf of the respondents, counsel submitting that the appellant's evidence did not carry the matter any further. In the result the counterclaim was abandoned. No evidence of the market value of the estate at the date of the breach was produced and the nearest thing to it was the respondents' own valuation of their property on February 12, 1963, less than 6 months after the breach.

At the beginning of this judgment I have quoted the grounds of decision as summarised by the learned trial judge himself. In short, the purchaser in default cannot recover his deposit if it bears a reasonable proportion to the purchase price and there is a stipulation for its forfeiture. This is fully in accord with English authorities, as thus expressed earlier in his judgment -

> "In view of the nature of the plaintiff's case, the main question to be decided is whether, in all the circumstances of the case, he is entitled to any relief from forfeiture of his deposit. The answer to that question depends upon whether the deposit paid under the agreement is to be regarded as a penalty or liquidated damages".

He then proceeded to consider four English cases on the point: Wallis v Smith (5); Howe v Smith (6); Mussen v Van Diemen's Land Co. (7) and Stockloser v Johnson (8) followed in Tay Say Geok v Warren (9) the last-named being one in which the English law of contract also applied, as relating to land in the State (formerly Colony) of Malacca.

Referring next to Indian cases on section 74 of the Indian Contract Act he said: "It has been held in the Indian Courts again and again that sections 64 and 74 of the Indian Contract Act (Sections 65 and 75 respectively of our Ordinance) do not apply to such deposits". In support of this proposition he cited Natesa Aiyar v Appavu Padayachi (10) and Maniam Patter v The Madras Railway Company (11) which latter case was followed by Thomson J. (as he then was) in the Malayan case of Maniam v State of Perak (1).

(5) (1882) 21 Ch.D. 243, 258
(6) (1884) 27 Ch.D. 89
(7) (1938) 1 A.E.R. 210
(8) (1954) 1 A.E.R. 630
(9) (1963) M.L.J. 179; (1965) M.L.J. 45
(10) A.I.R. (1915) Mad. 896
(11) I.L.R. (1906) 29 Mad. 118.

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There the judge had said:

> "In the first place, in this country there is no difference between penalty and liquidated damages ..... As is said in Pollock & Mulla on the Indian Contract Act (7th Ed. p.410) 'This section (74) boldly cuts the most troublesome knot in the common Law doctrine of damages.' In brief, in our law in every case, if a sum is named in a contract as the amount to be paid in case of breach, it is to be treated as a penalty: see Bhai Panna Singh v Bhai Arjun Singh" (12)

Having held, however, that in the instant case sections 65 and 75 of the Contracts (Malay States) Ordinance had no application to deposits by way of guarantee or security the judge went on thus:

> "It is immaterial whether the operative words as regards forfeiture are that the deposit, 'shall be retained by the vendor as liquidated damages' or that it 'shall be considered as liquidated damages' or that it 'shall be forfeited to the vendor to account of damages for breach of contract'".

It will now be convenient to turn to the grounds of this appeal, of which the substantial ones are: (a) that since clause 5 provided for forfeiture of the $377,500/= to the vendors "to account of damages for breach of contract", the judges consequently should have considered whether that sum was in fact a genuine covenanted pre-estimate of damages; (b) that the $377,500/= having been expressed in clause 1 to have been paid, not only by way of deposit, but also in part payment of the purchase price, the proportion representing part payment should have been recoverable; (c) that forfeiture of this whole amount was of a penal nature, was intended to and did in fact operate, as a penalty, and was accordingly void; and (d) that, on the evidence, the respondents had suffered no damage, so that any award should have been only for a nominal sum and the appellant should have been granted equitable relief.

Rather than discuss any of the above grounds in particular, I think it is of first importance to consider the proper construction of the provisions

(12) A.I.R. (1929) P.C. 179, 180

under which the deposits were paid to the respondents and purported to be forfeited by them. The cardinal rule of construction of the terms of a written agreement is to discover therefrom the intention of the parties to such agreement. They are presumed to have intended what they said. "The common and universal principal is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent". See Ford v Beech (13) per Parke B.

With all respect to the learned trial judge, it would appear that the question of law had been over-emphasised. In the result preoccupation with the legal complexities had outweighed the proper construction of the contract. In clause 1 the purchase price was agreed at $3,775,000/= "whereof the vendor's agents ..... have prior to the execution of these presents received the sum of $377,500/= by way of deposit and part payment". It will be observed that, unlike Fateh Chand v Balkishen Dass (14) to which I shall refer in more detail later, there was no apportionment of any definite sum by way of deposit. The clause had to be read, of course, with clause 5 on forfeiture which is as follows:-

> "If due to any act or default of the Purchaser the said purchase shall not be completed as herein provided the vendor shall be entitled by notice in writing to the purchaser to declare this agreement at an end and thereupon this agreement shall cease to be of any force or effect and the sum of $377,500/= (Dollars Three hundred and seventy seven thousand five hundred) referred to in Clause 1 hereof shall be forfeited to the vendor to account of damages for breach of contract."

"On account" or "to account", according to Chambers Dictionary means "an instalment or interim payment". Clause 5 not only failed, again, to distinguish between deposit and part payment, but went further than providing merely that the sum named shall be forfeited. It was a stipulation

(13) (1848) 11 Q.B. 852, 856
(14) A.I.R. (1963) S.C. 1405

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that the sum named was not to limit the purchaser's liability for compensation in the event of his default. Not being a genuine covenanted pre-estimate, it could not, of course, be deemed liquidated damages. Therefore, the object and intention of clause 5 was clearly to reserve to the vendors the right to recover damages to any extent, over and above the sum actually received by them, in the event that it should turn out to be inadequate as compensation for their loss. That the natural meaning of these words expressed truly the intention of the contracting parties was supported by the letters of August 27, 1962 and April 9, 1963 from the respondents' solicitors as well as the counterclaim. This view was not disputed by the appellant. The expressed intention being thus the common intention of the parties, in my judgment effect must be given to it. Application of the contra proferentem rule is entirely superfluous.

Such being the case I cannot see how an assessment of damages could have been avoided, as it was avoided by the respondents. Since they were entitled to claim more than $377,500/= by providing that the quantum of damage should be left at large, the same synallagmatic provision ought to avail the appellant for claiming a refund of any sum in excess of such damage.

In my judgment the respondents in fact sustained no damage by reason of the appellant's breach of contract. Not only was their counterclaim in effect withdrawn, but there is also no doubt that it could hardly have been persisted in with any prospect of success, in the face of the admissions contained in their letter of February 12, 1963. In the absence of any evidence to the contrary, proving violent fluctuations during the relevant period in the value of real estate, the second paragraph of that letter can lead to only one conclusion, that the estate had risen appreciably in value. In the result, whether or not the respondents had gained anything by the appellant's breach of contract, it is at least clear that they suffered nothing by way of damage. Leaving aside the counterclaim, the issue of damage was expressly raised elsewhere by the pleadings, on which the evidence, such as it was, went all one way.

That there was no finding by the trial judge on the question of fact does not, of course, preclude this court from making such finding, where

it can readily do so on the evidence. There was no proof of damage. On this point I am entirely satisfied. Nevertheless the respondents were held entitled to retain as much as $377,500/- purely because as a deposit, it amounted to no more than 10 per cent of the purchase price, considered normal and reasonable in other cases of forfeiture of deposits where the purchaser was in default. I do not think that Tay Say Geok v Warren can be held up as an appropriate precedent. For one thing, it was the English common law which applied to the contract for sale of land in Malacca, where the distinction is recognised between a penalty and liquidated damages. That doctrine has no application in the instant case, where the contract was governed by our Ordinance and section 74 thereof applies principles wholly different from English law. Moreover, there is another distinction. While in both cases the deposit was similarly expressed to be made "by way of a deposit and in part payment of the purchase price", it was stipulated in the Malacca case that the amount paid "shall be considered as liquidated damages and shall be forfeited" in case of default, whereas, here, the parties were ad idem that the extent of the purchaser's liabilities remained to be ascertained according to the damage incurred.

Such being the case, where in fact the appellant owed no compensation to the respondents, was he, nevertheless disentitled by law from claiming any refund? The learned judge held, on the Indian authorities, that sections 65 and 75 of our Contracts Ordinance did not apply to deposits. Hence the cases referred to call for close scrutiny. In Manian Patter v The Madras Railway Company (11), a contract for the supply of fuel for a term of 12 months stipulated that the contractor should forfeit his deposit of Rs.350 upon the contract being rescinded by the Company for his default in punctual delivery. The relevant portion of the judgment, which draws a fine distinction between moneys paid and damages to be recovered, reads as follows:

> "Neither section 74 of the Indian Contract Act nor the expositions of law in decisions English or Indian which were referred to in the argument, as to promises to pay specified sums in case of breach of contract are really in point for the rule as to penalties dealt with in them has been uniformly held not to be applicable to cases of forfeiture of deposits for the breach of stipulations even where some of them are but trifling

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while others are not such (Wallis v Smith (5)). In these cases the bargain of the parties is carried out except when the forfeiture is relieved against on terms which the court imposes to meet the justice of the case where the circumstances warrant the grant of such equitable relief. In other words the rule governing the class of cases under consideration is that, where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with, if reasonable, in amount".

In Natesa Aiyar v Appavu Padayachi (10) where White C.J. and Miller J. held (Sadasiva Ayyar J. dissenting) that section 65 and 74 of the Indian Contract Act did not apply to deposits by way of guarantee or security, a contract for the sale of land at the price of Rs.41,000 had provided for the forfeiture of the deposit of Rs.4,000 upon default by the purchaser. The majority decision followed Howe v Smith (6), White C.J. expressing the view that, where provisions of the Indian Contract Act were in conflict with English Law as laid down in English authorities, the statute must be followed; nevertheless, the question then before the court was one in which it was not the intention of the Legislature to depart from what was understood to be English law at the time when the Indian Contract Act was passed. "Unless, therefore, the defaulting party can obtain relief on grounds of equity, or under some statutory enactment, he is bound by his bargain"; thus said the learned Chief Justice, relying strongly on Howe v Smith as authority. He continued:

> "As to the Contract Act I do not think S.64 helps the purchaser ..... I also think that S.74 Contract Act, does not apply. The sum of Rs.4,000 is named in the contract as an 'advance' not as the amount to be paid in case of breach. Why should it be assumed that it was paid with a different intention from that stated in the contract? Further, if, as seems to me to be the right view, it is paid partly by way of part payment of the purchase money and partly by way of security or guarantee for the performance of the contract, it cannot be regarded as a sum named in the contract as the amount to be paid in case of breach. Again, if we are to deal with this case according to the letter of the

section, this, as was pointed out by Miller, J., in the ccurse of the argument, is not a question of the amount of compensation which the vendor is entitled to receive by reason of the breac, but a question whether the vendee is entitled, under the contract to, recover an amount which has been already paid."

In Naresh Chandra v Ram Chandra (15) Mookerjee J. expressed his view as follows:-

> "It is necessary and useful to remember the above distinction and limitation when considering the ambit and scope of the particular sections, of the Indian Contract Act. In cases of contract, therefore, when any matter cannot be brought within particular provisions of the Indian Contract Act without doing some violence to the language used therein and/or without leading to strange and absurd results, that matter should, in my opinion, be left to be dealt with on established English principles, not inconsistent with justice, equity and good conscience".

He too, held that sections 64, 65 and 74 of the Indian Contract Act, had no application because -

> "forfeiture of earnest money is not in the nature of damages or compensation for breach of contract, (see Halsbury's Laws of England, Second Edition, Volume 29, p.378, Art.517)".

In the above case reference was made to the 1926 decision of the Privy Council in Chiranjit Singh v Har Swarup (16) where Lord Shaw said:

> "Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reasons of the fault or failure of the vendee".

That judgment, however, must be read as qualified by what their Lordships of the Privy Council stated subsequently in Bhai Panna Singh v Bhai Arjun Singh (12) as follows:

> "The effect of section 74, Contract Act 1872, is to disentitle the plaintiffs to recover simpliciter the sum of Rs. 10,000 whether penalty or liquidated damages. The plaintiffs

(15) A.I.R. (1952) Cal. 93
(16) A.I.R. (1926) P.C. 1.

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must prove the damages they have suffered. The only evidence of loss is that of the loss on resale by Rs. 1,000".

In 1947 an extensive review of relevant authorities on section 74 of the Indian Contract Act was made by Mohammed Sharif J. in Mool Chand Behari Lal v S.D. Chand & Co. (17) and the learned judge came to the same conclusion as Sadasiva Ayyar J. in Natesa Aiyar (10) as follows:

> "On a review of all these authorities, I think it is quite clear that, whether some amount is paid by way of earnest money or kept in deposit for the due performance of any obligation under the contract, it is always for the Court to determine what amount, if any, would be 'reasonable compensation' under the circumstances of a particular case. Section 74 is applicable in all cases where a sum is fixed as the amount payable in case of breach, regardless of the fact whether any actual loss was or was not caused. If the Court considers that the sum named is not excessive or unreasonable it shall allow it, or otherwise reduce it to the figure it considers reasonable to allow. In cases where there is no data to estimate the amount of damages actually caused, the discretion of the court is unfettered in allowing what it considers 'reasonable compensation', subject, of course, to the maximum fixed by the parties. Where a party asserts that the amount mentioned as payable in case of breach, is a 'genuine pre-estimate of damages', calculated by the contracting parties, and should not on that account be disturbed, it might be established that this is so and the court, if satisfied, will adopt it as 'reasonable compensation' to be awarded. But the final say is with the Court and not with the litigant".

Finally, high-water mark was reached in Fateh Chand v Balkishan Dass (14), a decision of the Supreme Court of India, comprising Sinha C.J. and Gajendragadkar, Wanchoo, Das Gupta and Shah J. The judgment of the Court on section 74 was as follows:

> "The section is clearly an attempt to eliminate the somewhat elaborate refinements

(17) A.I.R. (1947) Lahore 112

made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

Section 74 declares the law as to liability, upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that, notwithstanding any term in the contract pre-determining damages or providing for forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the Court is not determined by the accidental circumstances of the party in default being a plaintiff or a defendant in a suit. Use of the expression 'to receive from the party who has broken the contract' does not predicate that the jurisdiction of the Court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The Court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach".

Accordingly, Indian decisions to the contrary must now be considered as over-rules by the Supreme Court, including Natesa Aiyar, which was specifically

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 13

Judgment of Ong Hock Thye C.J.

26th July 1969 (continued)

referred to. In the instant case the Supreme Court decision would appear to have been overlooked.

As between the two Privy Council decisions in Charinjit Singh (16) and Bhai Panna Singh (12) of 1926 and 1929 respectively, I think the facts in the latter bear sufficient resemblance to provide a precedent for the instant case. It is, at any rate, more consistent with the decision of the Indian Supreme Court, which I would respectfully follow on the interpretation of section 75 of our Contracts Ordinance.

Apart from section 75, there is authority, in my view, for holding that the appellant should be entitled to recover the deposit on the further ground that it was a benefit received by the respondents under the contract, which they were bound to restore, by virtue of the second limb of section 65 of our Contracts Ordinance, which reads:

> "The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, as far as may be, to the person from whom it was received."

On the corresponding section 64 of the Indian Contract Act it has been held in Murlidhar Chatterjee v International Film Co. Ltd. (18) that the section applied, notwithstanding that it was the default of the party seeking recovery of his deposit which gave cause to the other party to rescind the contract. As Sir George Rankin said, delivering the judgment of their Lordships of the Privy Council:

> "Their Lordships are not concerned to make the Act agree in its results with the English law. It may be that in such a case as the present the defendants could not in England be made liable to refund any portion of the Rs.4000 paid on account, even upon proof that they had sustained no damage by the plaintiff's breaches. That the matter is not quite clear may be inferred from dicta in (1924) A.C. 980 at p. 987 and (1939) 1 K.B. 724. It is at least certain that if the party who rightfully rescinds a contract can recover damages from the party in default and is afforded proper

(18) L.R. 70 I.A.35, A.I.R. (1943) P.C. 34.

facilities of set-off, the Indian legislature may well have thought that his just claims have been met. The fact that a party to a contract is in default affords good reason why he should pay damages, but further exaction is not justified by his default. Where a payment has been made under a contract which has - for whatever reason - become void, the duty of restitution would seem to emerge. A cross claim for damages stands upon an independent footing, though it raises out of the same contract and can be set off".

Following that judgment, which is binding on this court, I would hold that section 65 of our Contracts Ordinance entitles the appellant to restitution, subject to a set-off for any damages which the respondents had sustained.

It follows, then, that the defence to the claim must fail, but to what extent? Should the respondents have to refund the whole amount, or a reasonable proportion thereof?, Section 75 entitles the party complaining of a breach to reasonable compensation, whether or not actual loss or damage is proved to have been caused thereby. I have accordingly considered the benefit the respondents received by having the use of $377,500/= for 7 years. At 6 per cent per annum the interest earned amounts to $158,550/=. Assuming, in the alternative, that they had agreed, in the first place, to accept $100,000/= as reasonable compensation, $277,500/= should have been refunded 7 years ago. At the same rate of interest, that lesser sum would have earned the appellant $116,550/= making a total of $394,050/= as the proper sum now repayable by the respondents. Fixing the amount of compensation at, say, $100,000/= may be open to the critisism that an assessment is made according to a mere whim or fancy which would be true. Therefore, after careful consideration, I would exercise my discretion with an even hand by ordering that the whole sum of $377,500/= be refunded, but without interest, except as from date of judgment at 6 per cent per annum. The appellant will have the costs throughout.

Sgd: H.T. Ong

Chief Justice
High Court, Malaya

Kuala Lumpur
26th July 1969.

In the Federal Court of Malaysia (Appellate Jurisdiction)

Dato' Eusoffe Abdoolcader (Enche A. Rahim Noor with him) for appellant.

D.G. Rawson Esq., for respondents.

No. 13

Judgment of Ong Hock Thye C.J.

26th July 1969 (continued)

True Copy

Sgd: Tneh Liang Peng

Secretary to Chief Justice, High Court, Malaya.

No. 14

Judgment of Suffian F.J.

26th July 1969

No.14

JUDGMENT OF SUFFIAN, F.J.

IN THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR

(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. X.102 of 1966

Between

T. Pasubathy Ammal also known as Mrs. Pasubathy Jagatheesan, the Executrix of the last Will of S.K. Jagatheesan deceased ... Appellant

And

Linggi Plantations Ltd. ... Respondents

(In the matter of Kuala Lumpur High Court Civil Suit No. 249 of 1963

Between

S.K. Jagatheesan ... Plaintiff

And

Linggi Plantations Ltd. ... Defendants

Coram: H.T. Ong, C.J., Malaya;
Suffian, F.J., Malaysia;
Ali, F.J., Malaysia.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 14

Judgment of Suffian F.J.

26th July 1969 (continued)

JUDGMENT OF SUFFIAN, F.J.

With respect I agree with my Lord Chief Justice that this appeal be allowed, but, in view of the importance of this case to both parties by virtue of the magnitude of the amount involved, and of the principle involved to members of the legal profession who have to adviser sellers and buyers of landed property, it is, I think desirable that I should state what I understand is the law on the question posed before us and my reasons for coming to the conclusion that the buyer in this case is entitled to recover his deposit.

My Lord Chief Justice has stated the facts so well that I am spared the labour of setting them out myself and I can straightaway deal with the law as I see it.

At the outset it is important to remember that the land concerned (Haron Estate) is within the Malay States where the Contracts Ordinance No. 14 of 1950 applies and that that law is not necessarily the same as the common law which applies to the law of contract in England which is followed in Malacca and Singapore which formed the old Straits Settlement.

The Contracts Ordinance is, however, the same as the Indian statute governing contracts in India, and it is fortunate that the point that has arisen here has been litigated twice in pre-independence India right up to the Privy Council, and I cannot do better than begin by dealing with these two decisions, and then deal with a recent decision of the Indian Supreme Court that was not cited before the learned trial judge.

In the first of these Privy Council decisions, (Kunwar) Chiranjit Singh v Har Swarup (1), property was sold on the following terms. The price was 476,000 rupees, the buyer was to pay Rs.20,000 earnest money and the balance in two equal instalments, the first payable on executing the conveyance and the last within six months. The buyer had financial difficulties in carrying out the contract, and so did not pay the earnest money as such, but on 28th August, 1914, he sent two cheques, amounting in all to Rs. 165,000, "towards the sale price ... out of the consideration of Rs. 476,000".

(1) A.I.R. 1926 P.C. 1.

In the Federal Court of Malaysia (Appellate Jurisdiction

No. 14

Judgment of Suffian F.J.

26th July 1969 (continued)

The High Court found that the buyer was unable or unwilling to complete the contract even in its modified form and decided that, as he had broken the contract, he was to lose his earnest money of Rs. 20,000 but must be repaid Rs. 145,000.

The buyer appealed to the Privy Council to obtain repayment of the earnest money. The Privy Council held that he could not recover. Lord Shaw stated at page 2:

> " Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee".

In the second Privy Council decision Bhai Panna Singh and others v Bhai Arjun Singh and others (2) property was sold for Rs. 105,000 by an agreement dated 19th February 1924. The buyers were to pay Rs. 500 earnest money and "The party retracting from the contract shall pay Rs.10,000 as damages". No time was fixed for completion, but on the same day the buyers paid the earnest money and were given a receipt which provided that the balance should be received before the Sub-Registrar and the deed registered within a month. On 26th April a conveyance was drawn up in the presence of the buyers but not of the sellers. On the same day there was a fight between a Sikh and a Mahomedan on the premises (which contained a mosque) and the buyers did not complete the purchase. On 9th June the sellers sold the property to another buyer for Rs. 104,000. On 1st October they issued a plaint claiming Rs. 10,000 and further damages.

The Privy Council agreed with the Subordinate Judge's finding that the buyers postponed completion from time to time for their convenience and eventually broke the contract. Lord Atkin, in giving the advice of the Privy Council, said at page 180:

> "..... The only question that remains is as to the amount of the damages.
>
> The effect of S. 74, Contract Act of 1872 /corresponding to Section 75 of our Contracts Ordinance/, is to disentitle the /sellers/ to

(2) A.I.R. 1929 P.C. 179.

recover simpliciter the sum of Rs.10,000 whether penalty or liquidated damages. The /sellers/ must prove the damages they have suffered. The only evidence of loss is that of the loss on re-sale by Rs. 1,000."

Coming now to the Indian Supreme Court decision, Fateh Chand v Balkishan Das (3) there a bungalow was sold by an agreement dated 21st March, 1949 providing that -

(a) Rs. 1,000 were to be paid to the seller as earnest money at the time of the execution of the agreement;

(b) the seller was to deliver complete vacant possession of the bungalow to the buyer on 30th March, 1949, and the buyer was to give the seller another cheque for Rs. 24,000 "out of the sale price"; and

(c) the seller was to get the deed registered by 1st June, 1949. If the seller failed to do so, the sum of Rs.25,000 was to be forfeited and the buyer was to return the bungalow to the seller, but if the registration was delayed because of the seller, then he was to pay a further sum of Rs. 25,000 as damages.

On 21st March, 1949, the buyer paid Rs. 1,000 "earnest money". On 25th March the seller received Rs. 24,000 and delivered possession of the property to the buyer, but the sale was not completed within the time stipulated.

The seller claimed that he was entitled to forfeit the Rs. 25,000. He also claimed possession of the property and a decree for Rs. 6,500 as compensation for use and occupation of the property by the buyer.

The Attorney-General, appearing on behalf of the buyer in the Supreme Court, did not challenge the seller's right to forfeit the earnest money of Rs. 1,000.

He however argued that the seller could not forfeit the Rs. 24,000 because the covenant which gave to the seller the right for forfeit this amount was "a stipulation in the nature of a penalty" within

(3) A.I.R. 1963 S.C. 1405

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No. 14

Judgment of Suffian F.J.

26th July 1969 (continued)

the meaning of section 74 of the Contract Act and the seller could retain that amount or part thereof, only if he established that in consequence of the breach by the buyer, he had suffered loss, and in the view of the Court the amount or part thereof was reasonable compensation for that loss.

The Supreme Court at page 1410 agreed with the Attorney-General that the amount of Rs. 24,000 was not earnest money and that under S. 74 the seller was only entitled to reasonable compensation, not exceeding the amount specified in the contract as liable to forfeiture.

The Supreme Court drew a distinction between earnest money and part payment of purchase price. At page 1410 Shah J., delivering the judgment of the court, said:

> "..... The agreement expressly provided for payment of Rs. 1,000 as earnest money, and that amount was paid by /the buyer/. The amount of Rs. 24,000 was to be paid when vacant possession of the land and building was delivered and it was expressly referred to as 'out of the sale price'. If this amount was also to be regarded as earnest money, there was no reason why the parties would not have so named it in the agreement of sale".

It is plain from the above three authorities that in India when money is paid by a buyer of property, it could be either earnest money or it could be part of the purchase price, that earnest money is to secure the completion of the bargain, that it forms part of the purchase price if the bargain goes through, but it is forfeited if the bargain does not go through by reason of the buyer's default. It will thus be seen that earnest money changes in character during the course of the transaction, whereas money paid as part of the purchase price always remains such throughout the transaction and that if the bargain falls through it may not be forfeited but is returned to the buyer.

So much for the law in India.

It is, however, said that the money paid by the buyer here was "by way of deposit and part payment", that these were the very words used to

describe the money paid in the English transaction in Howe v Smith (4) and in the Malacca transaction in H.G. Warren v Tay Say Geok and others (5) and that, like the payment in these two cases, the money paid in the instant case should also be forfeited.

The headnote of Howe v Smith (4) reads as follows:

> " On a sale of real estate the /buyer/ paid £500, which was stated in the contract to be paid 'as a deposit, and in part payment of the purchase money'. The contract provided that the purchase should be completed on a day named, and that if the /buyer/ should fail to comply with the agreement, the /seller/ should be at liberty to resell and to recover any deficiency in price as liquidated damages. The /buyer/ was not ready with the purchase money and after repeated delays the /seller/ resold the property for the same price.
>
> The original /buyer/ having brought an action for specific performance, it was held by the Court of Appeal affirming the decision of Kay J. that the /buyer/ had lost by his delay his right to enforce specific performance :-
>
> Held, also, that the deposit, although to be taken as part payment if the contract was completed, was also a guarantee for the performance of the contract, and that the /buyer/, having failed to perform his contract within a reasonable time, had no right to a return of the deposit."

In H.G. Warren (5) the buyer agreed to buy a rubber estate in Malacca and paid down $90,000 (approximately 10% of the purchase price) "by way of deposit and in part payment" which was to be considered "as liquidated damages and should be forfeited" by the seller in the event of failure by the buyer to pay the balance of the purchase price and when the buyer failed to complete the transaction within the stipulated time, it was held by the Privy Council that he could not recover the deposit.

(4) 27 Ch. D.89
(5) (1965) 1 M.L.J. 44

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26th July 1969 (continued)

I regret that I do not agree that the common law in this matter is different from the law in India and I find support for my view in the following case.

In Mayson v Clouet and Another (6) an appeal from Singapore, a contract for the sale of land provided that a deposit should be paid immediately, and that two instalments of cash (being 10% of the rest of the agreed price) should be paid at certain dates and that the balance of the price should be paid within ten days of a given time; if the buyer failed to comply with the conditions of the contract, his deposit might be forfeited and the land resold. The buyer paid the deposit and the two instalments, but failed to pay the balance of the price at the stipulated time. The seller rescinded the contract. It was held by the Privy Council, reversing the Supreme Court of Singapore, that there was distinction between deposits (which were forfeitable) and instalments (which were recoverable).

Lord Dunedin, who gave the advice of the Privy Council, first dealt with Howe v Smith (4) in words which clearly showed that in English law there is a distinction between deposit on the one hand and part payment of the purchase price on the other. He said at page 985:

> " In Howe v Smith (4a) £500 was paid as deposit and part payment of the purchase money. The contract was to be completed by a certain date, and it was not so completed and the /sellers/ sold to some one else. The /buyer/ sued for specific performance, which was refused, as he himself had been in default, and then, being allowed to amend his pleadings, he sued for return of the deposit. It was held that the deposit being of the nature of a guarantee that the contract should be performed, was forfeited and could not be returned. Cotton L.J. says 'the first thing one must look at is the contract', and Bowen L.J., 'the question as to the right of the /buyer/ to the return of the deposit money must, in each case, be a question of the conditions of the contract,' and Fry L.J. to the same effect ..... Howe v Smith (4b) clearly comes to this, that if the learned judges had held that the deposit was only part payment

(6) (1924) A.C. 980

and not a deposit proper, they would have ordered its return. Fry L.J. put this very simply: 'It (the deposit) is not merely a part payment, but is then also an earnest to bind the bargain'".

Then coming to the particular Singapore contract, he said at page 987:

> " [The contract] specially distinguishes in terms between deposits and instalments. It then specially deals in clause 13 with what is to happen if the [buyers] are in default. The deposit is forfeited, and that is all. It would seem to Their Lordships quite clear that the instalments are not to be forfeited. The truth is that the [seller's] contention really amounts to a claim to keep the instalments as liquidated damages for the breach of contract for which they are entitled to sue."

The law both in India and in England seems to be this, that where earnest money is paid by an intending purchaser of property there is thereby constituted a contract within a contract, there is, as it were, a minor contract within the main contract. The main contract relates to the whole transaction consisting of payments and leading ultimately to completion. The minor contract within that main contract is an agreement that the buyer is to pay something to show that he is in earnest about his bargain and that, while it is true that if the bargain goes through this payment is to go towards the purchase price, it is to be forfeited if the bargain falls through. There is nothing unfair to the buyer in this arrangement because once the agreement has been made and the seller has accepted payment of the earnest money the seller is precluded from accepting a higher offer from another buyer; the seller is held to his bargain even on a rising market for so long as the buyer is prepared to perform his part of the bargain. And to determine whether the money paid is earnest money or not, one must look at the agreement concerned.

On a proper construction of the agreement here, can it be said that the money paid by the buyer was earnest money to guarantee the completion of the bargain? It could have been earnest money if the parties had, in the words of Shah J. in the Indian Supreme Court decision cited, "so named it in the

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 14

Judgment of Suffian F.J.

26th July 1969 (continued)

agreement of sale", or used other words to make their intention clear beyond all doubt. But it had not been so named, and reading the agreement as a whole and considering the subsequent conduct of the seller as revealed by the correspondence and the turn of events at the trial in the lower court, I am of the opinion that there is an ambiguity as to the exact intention of the parties and in my view this ambiguity should be resolved in favour of the buyer and I accordingly hold that the money paid was not earnest money.

If it was not earnest money, then it must be recoverable unless excluded by Section 75 of the Contracts Ordinance. It is said that that section applies only where the party complaining of the breach seeks to recover, that the buyer in the instant case is not a person complaining of the breach and that in fact he it is who has broken the contract, that it is he who is suing for the return of money paid and that Section 75 precludes him from recovering.

In Natesa Aiyar v Appavu Padayashi (7), the Madras High Court held that Section 74 of the Indian Contract Ordinance only applies where the sum is named as a penalty to be paid in future in case of breach, and not in case where a sum has already been paid and by a covenant in the contract it is liable to forfeiture.

This has, however, been overruled by the Indian Supreme Court decision already cited. Shah J. said at page 1412:

> " But the application of the enactment is not restricted to cases where the aggreived party claims relief as the plaintiff. The section /74/ does not confer a special benefit upon any party: it merely declares the law that, notwithstanding any term in the contract pre-determining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the Court is not determined by the accidental circumstances of the party in default being a plaintiff or a defendant in a suit. Use of the expression 'to receive from the

(7) (1915) Mad. 986

party who has broken the contract' does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract."

With respect I agree with the principle enunciated in the above case and therefore I hold that the defendant seller is not entitled to forfeit the deposit but is only entitled to reasonable compensation not exceeding $377,500/=, the sum named in the agreement.

What is a reasonable amount? As has been said by my Lord Chief Justice, the seller has had the use of $377,500/= for seven years which, if invested at 6% per annum, would have brought him $158,550/= and this is sufficient compensation for him. For the reasons given by my Lord Chief Justice, I agree that justice will be served by ordering the seller to refund this money to the buyer without interest except that as from the date of this judgment he should pay interest at 6% per annum. The buyer will have the costs throughout.

I have not said anything as to the effect of Section 65 of the Contract Ordinance and I have not done so, because in the lower court the buyer relied on it only half-heartedly and before us he concedes that it does not apply at all.

Delivered in Kuala Lumpur
on 26th July, 1969.

(M. Suffian)
FEDERAL JUDGE
MALAYSIA

Counsel:

Dato' Eusoffe Abdoolcader (Inche' Abdul Rahim Noor with him) for appellant.

D.G. Rawson, Esq., for respondents.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 14

Judgment of Suffian F.J.

26th July 1969 (continued)

Authorities cited other than those mentioned in Judgment:

1. Public Works Commissioner v Hills (1906) A.C. 368 (P.C.) at pp. 375 - 6
2. Dunlop Pneumatic Tyre Co. Ltd. v New Garage and Motor Co. Ltd. (1915) A.C. 79 at pp. 86 - 7
3. S.S. Maniam v The State of Perak (1957) M.L.J. 75, 76.
4. P.M. Pillay v Kampar Rubber and Tin Co. Ltd. (unreported decision of Azmi J. in Ipoh High Court Civil Suit No. 153 of 1959)
5. Goff & Jones on The Law of Restitution pp.346-8
6. Stoneham's Law of Vendor and Purchaser pp.338-9
7. Dies and Another v British and International Mining and Finance Corporation Ltd. (1939) 1 K.B. 724 at pp. 739-40; 743; 744-5.
8. Kilmer v British Columbia Orchard Lands Ltd. (1913) A.C. 319 at p.322 (P.C.)
9. Steedman v Drinkle and Another (1916) 1 A.C. 275 (P.C.)
10. Stockloser v Johnson (1954) 1 Q.B. 476 (C.A.) pp. 485, 487, 489, 490, 491, 492.
11. Tay Say Geok and Others v H.G. Warren (1963) M.L.J. 179, 187
12. Soper v Arnold L.R. (1889) 14 A.C. 429, 435
13. Naresh Chandra v Ram Chandra (1952) A.I.R. Calcutta 93.
14. Wallis v Smith L.R. (1882) 21 Ch. D. 243.

Salinan yang di-akui benar,

Sgd: Illegible

Setia-Usaha kapada Hakim
Mahkamah Persekutuan
Malaysia
Kuala Lumpr.

26/7/1969

No. 15

ORDER OF FEDERAL COURT

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 15

Order of Federal Court

26th July 1969

IN THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR
(APPELLATE JURISDICTION)
FEDERAL COURT CIVIL APPEAL NO. X102 of 1966

Between

T. Pasubathy a/k as Pasubathy Jagatheesan, the Executrix of the last Will of S.K. Jagatheesan ... Appellant

And

Linggi Plantations Ltd. ... Respondents

(In the matter of Civil Suit No. 249 of 1963 in the High Court in Malaya at Kuala Lumpur

Between

S.K. Jagatheesan ... Plaintiff

And

Linggi Plantations Ltd. ... Defendants)

CORAM: ONG HOCK THYE, CHIEF JUSTICE, HIGH COURT IN MALAYA;
SUFFIAN, JUDGE, FEDERAL COURT, MALAYSIA;
ALI, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

THIS 26th DAY OF JULY, 1969

O R D E R

THIS APPEAL coming on for hearing on the 29th day of April, 1969 in the presence of Dato Eusoffe Abdoolcader (Mr. Abdul Rahim Noor with him) of Counsel for the above-named Appellant and Mr. D.G. Rawson for the abovenamed Respondents AND UPON READING the Record of Appeal filed herein AND UPON HEARING Counsel as aforesaid for the parties IT WAS ORDERED that this Appeal do stand adjourned for judgment:

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 15

Order of Federal Court

26th July 1969 (continued)

AND THIS APPEAL coming on for judgment this day in the presence of Mr. Abdul Rahim Noor of Counsel for the Appellant and Mr. D.G. Rawson of Counsel for the Respondent:

IT IS ORDERED that this Appeal be and is hereby allowed and the Judgment of the Honourable Mr. Justice Gill given on the 25th day of November, 1966 be and is hereby set aside AND IT IS ORDERED that the Respondents do pay to the Appellant the sum of $377,500/= (Dollars Three hundred and seventy-seven thousand and five hundred only) together with interest at 6% per annum from date hereof to date of satisfaction of this Order:

AND IT IS ORDERED that the abovenamed Respondents do pay to the abovenamed Appellant the costs of this Appeal and the Plaintiff's costs in the aforesaid Civil Suit as taxed by the proper officer of the Court:

AND IT IS LASTLY ORDERED that the total sum of $3,000/= (Dollars Three thousand only) lodged by the abovenamed Appellant in the High Court at Kuala Lumpur as securities for the costs of this Appeal be refunded to the abovenamed Appellant.

GIVEN under my hand and the seal of the Court this 26th day of July, 1969.

Sgd: Au Ah Wah

Chief Registrar
Federal Court,
Malaysia.

No. 16

ORDER OF FEDERAL COURT GIVING CONDITIONAL LEAVE TO APPEAL TO HIS MAJESTY THE YANG DI-PERTUAN AGONG

IN THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. X.102 of 1966

Between

T. Pasupathy a/k as Pasupathy Jagatheesan the Executrix of the last Will of S.K. Jagatheesan ... Appellant

And

Linggi Plantations Limited ... Respondents

(In the Matter of Civil Suit No. 249 of 1963 in the High Court of Malaya at Kuala Lumpur

Between

S.K. Jagatheesan ... Plaintiff

And

Linggi Plantations Limited ... Defendants)

CORAM: ONG HOCK THYE, CHIEF JUSTICE, HIGH COURT IN MALAYA;
GILL, JUDGE, FEDERAL COURT, MALAYSIA;
ALI, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

THIS 11th DAY OF NOVEMBER 1969

O R D E R

UPON MOTION made unto the Court this day by Mr. RONALD KHOO TENG SWEE of Counsel for the Respondents abovenamed in the presence of Mr. A. RAHIM NOOR of Counsel for the Appellant abovenamed AND UPON READING the Notice of Motion dated the 22nd day of August 1969 and the Affidavit of David Stringer Hilton affirmed on the 22nd of August 1969 and filed herein AND UPON HEARING the submissions of Counsel aforesaid:

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 16

Order of Federal Court giving Conditional Leave to Appeal to His Majesty the Yang di-Pertuan Agong.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 16

Order of Federal Court giving Conditional Leave to Appeal to His Majesty the Yang di-Pertuan Agong

11th November 1969 (continued)

IT IS ORDERED BY CONSENT that leave be and is hereby granted to Linggi Plantations Limited the Respondents to appeal to His Majesty the Yang di-Pertuan Agong from the judgment of the Federal Court dated the 26th day of July 1969 upon the following conditions:

(1) That the Respondents do within three (3) months from the date hereof enter into good and sufficient security to the satisfaction of the Chief Registrar Federal Court Malaysia in the sum of $5,000/= (Dollars Five thousand) only for the due prosecution of the appeal and the payment of all such costs as may become payable to the Appellant abovenamed in the event of the Respondents not obtaining an Order granting them final leave to appear or of His Majesty the Yang di-Pertuan Agong ordering the Respondents to pay to the Appellant abovenamed the costs of the appeal as the case may be; and

(2) that the Respondents do within the said period of 3 months from the date hereof take the necessary steps for the purpose of procuring the preparation of the Record and for the despatch thereof to England.

AND IT IS FURTHER ORDERED that execution of the aforesaid judgment of the Federal Court be suspended pending the disposal of the appeal to His Majesty the Yang di-Pertuan Agong.

AND IT IS LASTLY ORDERED that the costs of and incidental to this application be costs in the cause.

GIVEN under my hand and the Seal of the Court this 11th day of November, 1969.

CHIEF REGISTRAR
FEDERAL COURT
MALAYSIA.

No. 17

ORDER OF FEDERAL COURT GIVING FINAL LEAVE TO APPEAL TO HIS MAJESTY THE YANG DI-PERTUAN AGONG

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 17

Order of Federal Court giving Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong

23rd February 1970

IN THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR

(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. X.102 of 1966

Between

T. Pasupathy a/k as Pasubathy Jagatheesan the Executrix of the last Will of S.K.Jagatheesan, deceased ... Appellant

And

Linggi Plantations Limited ... Respondents

(In the Matter of Civil Suit No. 249 of 1963 in the High Court in Malaya at Kuala Lumpur

Between

S.K. Jagatheesan ... Plaintiff

And

Linggi Plantations Ltd. ... Defendants)

CORAM: AZMI, LORD PRESIDENT, FEDERAL COURT, MALAYSIA;
ALI, JUDGE, FEDERAL COURT, MALAYSIA;
SYED OTHMAN, JUDGE, HIGH COURT IN MALAYA.

IN OPEN COURT

This 23rd day of February, 1970

O R D E R

UPON MOTION made unto this Court this day by Mr. Mahadev Shankar of Counsel for the Respondents abovenamed in the presence of Inche Abdul Rahim Noor of Counsel for the Appellant abovenamed AND UPON READING the Notice of Motion dated the 13th of February 1970 and the Affidavit of Mahadev Shankar affirmed on the 5th day of February 1970 and filed herein AND UPON HEARING the submissions of Counsel aforesaid IT IS ORDERED that final leave to appeal

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 17

Order of Federal Court giving Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong

23rd February 1970 (continued)

to His Majesty the Yang di-Pertuan Agong be and is hereby granted to the respondents and that the costs of this application be costs in the cause.

GIVEN under my hand and the Seal of the Court this 23rd day of February, 1970.

DEPUTY REGISTRAR
FEDERAL COURT
MALAYSIA

Exhibits

"P.1"

Agreed Bundle of Documents

(i) Agreement

25th May 1962

E X H I B I T S

"P.1" - AGREED BUNDLE OF DOCUMENTS

(i) AGREEMENT

THIS AGREEMENT is made the 25th day of May 1962 Between LINGGI PLANTATIONS LIMITED a Company incorporated in England and having an office or place of business at 4 Mountbatten Road, Kuala Lumpur in the State of Selangor (hereinafter called "the Vendor") of the one part and AN. KARUTHAN CHETTIAR of 32 Ampang Street Kuala Lumpur (hereinafter called "the Purchaser") of the other part.

WHEREAS the Vendor is the registered proprietor of the lands specified in the First and Second Parts of the Schedule hereto containing an area of 1871 acres 0 roods 16 poles more or less (hereinafter called "the said lands").

AND WHEREAS the Vendor has sold an area of approximately 383.3 acres of the lands held under Selangor Grant for Land No. 1994, Certificate of Title No. 7615 and E.M.Rs. Nos. 2287, 8178 and 8179 for Lot Nos. 16, 5933, 835, 813 and 814 respectively and more particularly described in the second part of the Schedule hereto and edged blue

on the plan annexed hereto (hereinafter called "the areas sold").

AND WHEREAS application has been made for the subdivision of the lands so sold and the issue of separate documents of title to the areas sold and the areas retained by the Vendor but such separate titles have not yet been issued.

AND WHEREAS the Vendor has agreed to sell to the Purchaser and the Purchaser has agreed to purchase the said lands excluding the areas sold for the consideration and subject to the terms and conditions hereinafter appearing.

NOW THIS AGREEMENT WITNESSETH as follows:-

1. Subject always to Clause 2 hereof the Vendor shall sell and the Purchaser shall purchase the said lands excluding the areas sold upon and subject to the terms and conditions and to the rights hereinafter set forth free from encumbrances and with vacant possession at the price of Dollars Three Million seven hundred and seventy five thousand ($3,775,000/-) whereof the Vendor's agents Guthrie Agency (Malaya) Limited of 4 Mountbatten Road, Kuala Lumpur have prior to the execution of these presents received the sum of Dollars Three hundred and seventy seven thousand five hundred ($377,500/-) by way of deposit and part payment.

2. This Agreement is subject to the Vendor obtaining from Her Majesty's Treasury all such consents to this sale as shall be necessary under the provisions of the United Kingdom Income Tax Act 1952 or any other legislation effecting the Vendor. In the event of such consents being refused the Vendor shall refund to the Purchaser the deposit of Dollars Three hundred and seventy seven thousand five hundred ($377,500/-) paid under the provisions of Clause 1 hereof and upon such refund being made this Agreement shall cease to have any further force or effect and neither party shall have any claim thereunder against the other.

3. Completion of the said purchase shall take place on or before the expiry of ninety days from the date hereof or in the event that the consents referred to in Clause 2 hereof shall not have been obtained then within thirty days of the receipt by the Purchaser of a notice that the consents referred

Exhibits

"P.1"

Agreed Bundle of Documents

(i) Agreement

25th May 1962 (continued)

Exhibits

"P.1"

Agreed Bundle of Documents

(i) Agreement

25th May 1962 (continued)

to in Clause 2 hereof had been obtained by the Vendor and in the interpretation of this Clause time shall be deemed to be of the essence. The said sale and purchase shall be completed at the offices of Messrs. Shearn Delamore & Co. and Drew & Napier the Vendor's Solicitors at 2, The Embankment, Kuala Lumpur.

4. It is hereby agreed between the parties hereto that the said purchase price of Dollars Three million seven hundred and seventy five thousand ($3,775,000/-) shall be apportioned as to Dollars Three million six hundred and ninety-eight thousand ($3,698,000/-) in respect of the said lands excluding the areas sold and Dollars Seventy-seven thousand only ($77,000/-) in respect of the buildings and machinery included in this sale.

5. If due to any act or default of the Purchaser the said purchase shall not be completed as herein provided the Vendor shall be entitled by notice in writing to the Purchaser to declare this agreement at an end and thereupon this agreement shall cease to be of any force or effect and the sum of $377,500/- (Dollars Three hundred and seventy seven thousand five hundred) referred to in Clause 1 hereof shall be forfeited to the Vendor to account of damages for breach of contract.

6. At the time of completion of the said purchase the Purchaser shall pay to the Vendor the sum of Dollars Three Million Three hundred and ninety seven thousand five hundred ($3,397,500) being the balance of the said purchase price and upon such payment the Purchaser shall be entitled to immediate vacant possession of the said lands excluding the areas sold.

7. On completion the Vendor shall deliver to the Purchaser the documents of title specified in the First Part of the Schedule hereto together with valid and registrable transfers thereof in favour of the Purchaser or his nominee or nominees free from all encumbrances.

8. If separate documents of title to those portions of the lands specified in the Second Part of the Schedule hereto hereby agreed to be sold have not been issued at the date of completion the Vendor hereby covenants with the Purchaser to deliver such documents of title together with a

valid and registrable transfer thereof in favour of the Purchaser or his nominee or nominees within one month of the issue to the Vendor of such separate documents of title. If such documents of title shall have been issued to the Vendor prior to the date of completion the Vendor shall deliver the same to the Purchaser on completion together with a valid and registrable transfer thereof. PROVIDED ALWAYS that the Vendor shall if so required by the Purchaser on or after completion procure the registration of the Purchaser or his nominees as the proprietor of an undivided share of the lands specified in the Second Part of the Schedule hereto, other than Grant 1994, pending the issue of separate documents of title. Such undivided shares shall be in the same proportions as the areas hereby agreed to be sold bear to the total area of each lot. If the Purchaser requires to be so registered with undivided shares then the Purchaser hereby covenants that upon the issue of separate documents of title he or his nominees will execute a valid and registrable transfer or transfers in respect of his undivided shares of the areas sold as directed by the Vendors. All stamp duty registration fees and solicitors costs of and incidental to the registration of the Purchaser and or his nominees as proprietors of an undivided share of the lands specified in the Second Part of the Schedule hereto shall be for the Purchaser's account. The cost of and incidental to the subdivision and the issue of separate documents of title shall be paid by the Vendor.

9. All movable stores, plant, equipment and motor vehicles specified in the Third Part of the Schedule hereto, the coffee processing machinery and stocks of rubber manufactured or in the course of manufacture at the date of completion are excluded from the sale.

10. If the Purchasers wishes to take over the furniture and equipment more specifically described in the Fourth Part of the Schedule hereto, the same shall be sold to him for the sum of Dollars Five thousand ($5,000/-).

11. The Vendor shall on completion deliver up vacant possession of the 46.53 acres more or less held under Temporary Occupation Licences and shall support any application by the Purchaser for the issue of licences over the said land in his own name

Exhibits

"P.1"

Agreed Bundle of Documents

(i) Agreement

25th May 1962 (continued)

or that of his nominees. On completion the Vendors shall have no further right or interest in the said lands and any compensation paid to the Vendors in respect thereof in the event of the licences being revoked shall be paid forthwith by the Vendor to the Purchaser.

12. There shall be no adjustment of the purchase price referred to in Clause 1 hereof if as a result of subdivision the titles to be transferred to the Purchaser under Clause 8 hereof shall comprise an area of less than 129.9 acres.

13. All quit rent, education rate, water rate and drainage assessment and other outgoings (if any) payable in respect of the said lands shall be apportioned as at the date of completion and any sum or sums due by virtue of such apportionment shall be paid or allowed as the case may be on such date.

14. The Vendor covenants that until the date of completion it will in every respect maintain the planted area of the said lands in accordance with the accepted principles of good husbandry. The Vendor shall give statutory notice to all workers employed on the said estate to expire on or before the completion date, and shall use their best endeavours to find them alternative employment. The Purchaser, on his part, undertakes to engage all such workers who are willing to be employed by the Purchaser and who as at the date of completion shall not have been found other employment by the Vendor, but without prejudice to the Purchaser's right subsequently to terminate their services as and when he so desires.

15. All monetary credits arisen or that shall subsequently arise in respect of the Replanting Cesses and any other refundable cesses levied or to be levied in respect of rubber produced from the Estate up and inclusive of the date of completion shall belong to the Vendor and if payment of any such sum or sums or the allowance of any such credit or credits is made to or in favour of the Purchaser then the Purchaser shall immediately pay or cause to be paid to the Vendor any such sum or sums of an equivalent of any such credit or credits.

16. Notwithstanding the sale of the Estate to the

Exhibits

"P.1"

Agreed Bundle of Documents

(i) Agreement

25th May 1962 (continued)

Purchaser the Vendor shall be and remain entitled to any moneys payable under the provisions of the Rubber Industry (Replanting) Scheme for Estate or any amendment thereof or any new scheme made pursuant to the provisions of the Rubber Industry (Replanting) (Amendment) Ordinance 1955 in respect of all replanting or new planting works undertaken on the said lands prior to the date of completion and if paid or payable to the Purchaser shall on receipt be refunded by the Purchaser to the Vendor.

17. All stamp and registration fees on this agreement and the transfer or transfers relating to the said lands together with the Purchaser's own Solicitors costs shall be paid by the Purchaser. The Vendor shall pay its own Solicitors costs.

18. The Purchaser his agent or agents shall be permitted within reasonable hours to inspect the estate and all buildings between the date of this agreement and the date of completion upon giving notice to the Vendor's manager or agent.

19. Any notice required by the provisions of this agreement to be given by either of the parties hereto to the other may be delivered or sent by registered post to such other party at its address written above and any notice so sent by registered post shall be deemed to have been delivered at the time when in the ordinary course of post it would have been so delivered.

20. This agreement shall be binding on the Vendor and their successors in title and upon the Purchaser and his heirs successors and assigns.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first before written.

SIGNED by TREVOR MALCOLM WALKER for and on behalf of LINGGI PLANTATIONS LIMITED in the presence of:-

sd: T.M. Walker

Attorney of Linggi Plantations Limited vide KL.P/A.8/61

Sd: R.H.V. Rintoul
Advocate & Solicitor,
Kuala Lumpur.

Exhibits

"P.1"

Agreed Bundle of Documents

(i) Agreement

25th May 1962 (continued)

SIGNED by the said AN. KARUTHAN CHETTIAR in the presence of:-) Sd: AN. Karuthan Chettiar

Sd: G. Tara Singh
Advocate & Solicitor,
Kuala Lumpur.

(ii) Letter Defendants Solicitors to Plaintiffs Solicitors

27th August 1962

also "P.3"

(ii) and also "P.3" - LETTER DEFENDANTS SOLICITORS TO PLAINTIFFS SOLICITORS

SHEARN DELAMORE & CO.
Eastern Bank Building,
2, Benteng, Kuala Lumpur.
Malaya.

2959/62/NET/RL
S.D. 14552 (BK)

27th August, 1962.

Messrs. Braddell & Ramani,
Advocates & Solicitors,
Chan Wing Building,
Kuala Lumpur.

Dear Sirs,

Re: Sale of Haron Estate

In accordance with Clause 5 of the Agreement dated the 25th day of May, 1962 and made between Linggi Plantations Limited and AN. Karuthan Chettiar of which your client S.K. Jagatheesan is the Assignee, we hereby give you notice on behalf of our clients that the Agreement is at an end and that the sum of $377,500/- being the deposit paid, is forfeited to our clients to account of damages for breach of contract.

We also hereby give you notice that our clients reserve to themselves any right of action arising out of your breach of the aforesaid agreement.

Yours faithfully,

Sd: Shearn, Delamore & Co.

Exhibits

"P.1"

Agreed Bundle of Documents

(ii) Letter Defendants Solicitors to Plaintiffs Solicitors

27th August 1962 (continued)

c.c. Messrs. Murphy & Dunbar,
38, Mountbatten Road,
Kuala Lumpur

c.c. S.K. Jagatheesan, Esq.,
35, Station Road,
Ipoh.

c.c. AN. Karuthan Chettiar,
32, Ampang Street,
Kuala Lumpur.

(iii) LETTER PLAINTIFFS SOLICITORS TO DEFENDANTS SOLICITORS

(iii) Letter Plaintiffs Solicitors to Defendants Solicitors

4th April 1963

BRADDELL & RAMANI
Advocates & Solicitors

Our Ref: 1063/63/RR/K

Room 201-Second Floor,
Chan Wing Building,
Kuala Lumpur.

4th April, 1963.

Messrs. Shearn, Delamore & Co.,
Advocates & Solicitors,
Kuala Lumpur.

Dear Sirs,

Re: Sale of Haron Estate

We write to refer to your letter of the 27th August 1962 notifying us that your clients' Agreement with AN. Karuppan Chettiar, of which our client S.K. Jagatheesan is the assignee was at an end and, also notifying him through us that the deposit of $377,500/- was forfeited to your clients to account of damages for breach of contract. This would appear to assume that your clients have suffered damages in a sum in excess of $377,500/-.

Upto the date of this letter, however, neither you nor your clients have formulated or quantified those damages for breach of contract, and what is forfeitable under the terms of Clause 5 of the

Exhibits

"P.1"

Agreed Bundle of Documents

(iii) Letter Plaintiffs Solicitors to Defendants Solicitors

4th April 1963 (continued)

Agreement is a sum of money which is to be ascertained as the actual damages suffered and not the deposit as such.

Our client will be glad to be advised what these damages are, with particulars of how they are arrived at; and how much is claimed by your clients as deductible from the total sum of $377,500/- which has remained in deposit with your clients.

We shall be glad to hear from you within the next seven days.

Yours faithfully,

Sgd: Braddell & Ramani.

(iv) Letter Defendants Solicitors to Plaintiffs Solicitors

9th April 1963

(iv) LETTER DEFENDANTS SOLICITORS TO PLAINTIFFS SOLICITORS

SHEARN, DELAMORE & CO.
Advocates & Solicitors

The Eastern Bank Building
2, Benteng, Kuala Lumpur
Malaya.

Reference
Yours 1063/63/RR/K.
Ours S.D.(RN/Ri) 14552

9th April, 1963.

Messrs. Braddell & Ramani
Room 201 - 2nd Floor,
Chan Wing Building,
Kuala Lumpur.

Dear Sirs,

re: Sale of Haron Estate

We thank you for your letter of the 4th inst.

The sum of $377,500/- was the deposit and that deposit has been forfeited.

It follows, therefore, that we do not agree that the sum of $377,500/- still remains in deposit with our clients.

All that our clients have to do is to give

credit for this amount should they decide to claim for any additional sum.

Yours faithfully,

Sgd: Shearn, Delamore & Co.

Exhibits

"P.1"

Agreed Bundle of Documents

(iv) Letter Defendants Solicitors to Plaintiffs Solicitors

9th April 1963 (continued)

"P.2" - DEED OF ASSIGNMENT

"P.2"

Deed of Assignment

17th July 1962

Stamp

THIS DEED OF ASSIGNMENT is made the 17th day of July, 1962 Between A.N. Karuthan Chettiar of 32 Ampang Street, Kuala Lumpur (hereinafter called the Assignor) of the one part and S.K. Jagatheesan of No. 35 Station Road, Ipoh (hereinafter called the Assignee) of the other part.

WHEREAS by an Agreement dated the 25th day of May, 1962 (hereinafter referred to as the Principal Agreement) and made between Linggi Plantations Ltd., having its place of business at No. 4 Mountbatten Road, Kuala Lumpur of the one part and the said A.N. Karuthan Chettiar of the other part the said Linggi Plantations Ltd. for the considerations therein mentioned agreed to sell to the said A.N. Karuthan Chettiar all the land known as Haron Estate more particularly described in the schedule to the Principal Agreement.

AND WHEREAS the Assignor together with others borrowed a sum of $377,500/- from the Assignee and paid the said sum as a deposit under the Principal Agreement.

AND WHEREAS the said A.N. Karuthan Chettiar has agreed with the said S.K. Jagatheesan for the Assignment to him of the benefit of the said Principal Agreement subject to the liability thereunder and upon the terms and conditions hereinafter mentioned.

Exhibits

"P.2"

Deed of Assignment

17th July 1962 (continued)

NOW THIS DEED WITNESSETH as follows:-

1. In consideration of the Assignee doing the acts and paying the sums of monies hereinafter mentioned the said Assignor as beneficial owner assigns unto the said assignee ALL THAT the said recited Principal Agreement and all the estate right title benefit advantage property claim and demand whatsoever of the assignor of in or to the same and the property comprised therein To Hold the said premises unto the said assignee absolutely subject nevertheless as hereinafter mentioned.

2. The Assignee hereby covenants and declares the agreement dated the 17th day of April, 1962 and made between S.K. Jagatheesan of the one part and A.N. Karuthan Chettiar, K.V. Danushkody, M. Palaniappa Chettiar, Seow Meow Sang and S. Sathappan to be null and void and deemed to have been revoked in consideration of this Assignment and the parties hereto to be hereafter free from all liability whatsoever.

3. The whole survey fees to M/s. Valentine & Dunne of Kuala Lumpur and the solicitors fees up to the limit of $2,000/- shall be paid by the Assignee.

4. The Assignee hereby covenants and agrees to take over all the rights and liabilities under an Agreement dated the 15th day of June, 1962 and made between A.N. Karuthan Chettiar of the one part and Chew Onn of the other part for the subsale of 35 acres 2 roods 30 poles of the said Haron Estate.

5. The Assignee hereby covenants with the Assignor that the Assignee will perform and observe all and every the sum or sums of money stipulations agreements provisos and conditions respectively which are mentioned or contained in the said recited Principal Agreement and the agreement dated the 15th of June, 1962 and on the part of the Assignor are hereby agreed to be paid performed and observed AND WILL keep the Assignor indemnified against all actions proceedings claims demands damages penalties costs charges and expenses by reason of the non observance of the said Agreements or otherwise in relation thereto.

The terms "Assignor" and "Assignee" shall mean

Exhibits

"P.2"

Deed of Assignment

17th July 1962 (continued)

and include where the context so admits their respective personal representatives.

IN WITNESS WHEREOF the Parties hereto have hereunto set their hands the day and year above written.

Signed sealed and delivered by A.N. Karuthan Chettiar in the presence of:) Sd: A.N. Karuthan Chettiar

Sd: ?
Advocate & Solicitor,
Kuala Lumpur.

Signed sealed and delivered by S.K. Jagatheesan in the presence of:-) Sd: S.K. Jagatheesan

Sd: ?
Advocate & Solicitor,
Kuala Lumpur.

"P.4"(a)

Letter Donaldson & Burkinshaw to Guthrie Agency (Malaya) Ltd.

9th February 1963

"P.4" (a) LETTER DONALDSON & BURKINSHAW TO GUTHRIE AGENCY (MALAYA) LTD.

EAP/H/BDS/32908 9th February, 1963

The General Manager,
Messrs. Guthrie Agency (Malaya) Ltd.,
No. 4, Jalan Mountbatten,
Kuala Lumpur.

Dear Sir,

Re: Linggi Plantation - Haron Estate

We are acting on behalf of certain clients who are interested in the purchase of the above property.

We shall be obliged if you will let us know whether it is intended to sell the property and, if so, could you please advise us of the price required and also the terms for the sale.

Yours faithfully,

Sd: Donaldson & Burkinshaw.

Exhibits

"P.4"(b)

"P.4" (b) LETTER GUTHRIE AGENCY (MALAYA) LTD. TO DONALDSON & BURKINSHAW

Letter Guthrie Agency (Malaya) Ltd. to Donaldson & Burkinshaw

12th February 1963

GUTHRIE AGENCY (MALAYA) LTD. 4 Jalan Mountbatten, Kuala Lumpur.

EAP/H/BDS/32908
IVS/JKC P.4(a)

P.S.198

12th February, 1963

Messrs. Donaldson & Burkinshaw,
Mercantile Bank Chambers,
Singapore, 1.

Dear Sirs,

Linggi Plantations Ltd. - Haron Estate

We thank you for your letter of the 9th February, 1963. It is not in fact the intention of the Directors to sell Haron Estate and we cannot, therefore, advise you of details relating to any price required or terms of sale.

Naturally should your clients wish to make an offer for the Estate we would provided the offer was of a sufficiently attractive nature, pass this on to our Principals. In this connection and for your guidance, we may say that the offer recently made and accepted (which fell through owing to non-compliance by the prospective purchaser) was for 3¾ million dollars, and since further areas have come into bearing since that offer was made and accepted, we feel that the Directors would certainly not consider any sum not appreciably higher than that quoted above.

Yours faithfully,
for Guthrie Agency (Malaya) Ltd.

Director
As Agents: Linggi Plantations Ltd.

"P.5" - LETTER DEFENDANTS SOLICITORS TO PLAINTIFFS SOLICITORS

Exhibits

"P.5"

Letter Defendants Solicitors to Plaintiffs Solicitors

11th June 1966

SHEARN DEMAMORE & CO.

P.O. Box 138,
The Eastern Bank Building,
2, Benteng, Kuala Lumpur,
Malaysia.

Your Reference: 2417/66/NET/SK

Our Reference: S.D.(RN) 14552 11th June, 1966.

Messrs. Braddell & Ramani,
Advocates & Solicitors,
Hongkong Bank Chambers,
Kuala Lumpur.

Dear Sirs,

Kuala Lumpur High Court Civil Suit
No. 294 of 1963
S.K. Jagatheesan vs. Linggi
Plantations Limited.

We have for acknowledgment your letter of the 2nd instant.

We do not consider that we are under any obligation to make any such discovery of documents to you as suggested and in any event, any such offers (if there were any) are entirely irrelevant to the issue raised.

We should be obliged if you would arrange for an early date for the disposal of this Suit.

Yours faithfully,

Sd: Shearn Delamore & Co.

Exhibits

"D.6"

Letter Plaintiffs Solicitors to Defendants Solicitors

19th July 1962

"D.6" - LETTER PLAINTIFFS SOLICITORS TO DEFENDANTS SOLICITORS

LOVELACE & HASTINGS
Advocates & Solicitors

No.57, Klyne Street,
Kuala Lumpur.

NAM/CAK/408/62

19th July, 1962.

Messrs. Shearn Delamore & Co.,
Advocates & Solicitors,
Kuala Lumpur.

Dear Sirs,

Haron Estate

We understand that you are acting for Messrs. Linggi Plantations Limited in connection with the sale of the above estate to AN. Karuthan Chettiar.

We are acting for Mr. S.K. Jagatheesan who has taken an assignment of the agreement dated 25th May 1962 and we enclose herewith a copy of the deed of assignment for inspection and return.

Yours faithfully,

Sd: Lovelace & Hastings.

Encl:

"D.7"

Letter Defendants Solicitors to Plaintiffs Solicitors

26th July 1962

"D.7" - LETTER DEFENDANTS SOLICITORS TO PLAINTIFFS SOLICITORS

SHEARN, DELAMORE & CO.,
Advocates & Solicitors.

The Eastern Bank Building,
2, Benteng,
Kuala Lumpur,
Malaya.

Reference:-

Yours:- NAM/CAK/408/62
Ours:- S.D.14552 (RN/BK)

26th July, 1962.

Messrs. Lovelace & Hastings,
Advocates & Solicitors,
57, Klyne Street,
Kuala Lumpur.

Dear Sirs,

Re:- Sale of Haron Estate

Further to our letter of 20th July, 1962 we now return herewith the Deed of Assignment, the receipt of which please acknowledge.

Exhibits

"D.7"

Letter Defendants Solicitors to Plaintiffs Solicitors

26th July 1962 (continued)

We take this opportunity to draw your attention to the date of completion of sale, and have to advise that our clients have given notice to the workers in accordance with Clause 14 of the Sale Agreement.

We understand that Messrs Murphy & Dunbar have referred to you our letter to them of 3rd July, 1962 with reference to the shop on the Estate, and we shall be glad to hear from you on this point as soon as possible.

Please let us know if you wish to inspect the Documents of Title at any time.

Yours faithfully,

Sd: SHEARN, DELAMORE & CO.

enc.

"D.8" - LETTER PLAINTIFFS SOLICITORS TO DEFENDANTS SOLICITORS

"D.8"

Letter Plaintiffs Solicitors to Defendants Solicitors

27th July 1962

2873/62/RR/SK

Messrs. Shearn Delamore & Co., 27th July, 1962
Advocates & Solicitors,
Kuala Lumpur. Attention Mr. Rintoul

Dear Sirs,

Linggi Plantations Ltd.,
Haron Estate.

We have been consulted by Mr. S.K. Jagatheesan of Ipoh in connection with the Agreement of the 25th May, 1962 prepared and completed by you between a Mr. Walker on behalf of the above company and one AN. Karuthan Chettiar of Kuala Lumpur for the purchase of the property comprised in the above estate and containing an area of over 1800 acres.

To enable him to pay the initial deposit of $377,500/- Karuthan Chettiar obtained the whole of that sum from our client under the terms of an agreement of the 17th April, 1962 between him and his associates of the one part and our client of the other part. The purchaser having come up

Exhibits

"D.8"

Letter Plaintiffs Solicitors to Defendants Solicitors

27th July 1962 (continued)

against unexpected difficulties in the completion of his purchase, has asked our client to release him from his obligation to repay the said sum in accordance with the agreement in consideration of his assigning to him his entire rights in the agreement of the 25th May, 1962. This Deed of Assignment was only completed on the 17th of July, i.e. precisely ten days ago.

The Agreement of the 25th May, 1962 provided a period of 90 days for the completion of the purchase and more than two thirds of that period has already run out. Our client would therefore be grateful for an extension of the period of completion by a further period of 90 days on such fair and reasonable terms as may be suggested by you, after consultation with your clients. Our client asked that in considering his request, you will bear in mind that he has got into this situation as the only way of saving the large sum of money that he has already paid out.

We shall be grateful if you will consult with your clients and let us hear from you, at your earliest convenience.

Yours faithfully,

Sd: Braddell & Ramani.

"D.9" - LETTER DEFENDANTS SOLICITORS TO PLAINTIFFS SOLICITORS

Exhibits

"D.9"

Letter Defendants Solicitors to Plaintiffs Solicitors

1st August 1962

SHEARN, DELAMORE & CO.
Advocates & Solicitors

The Eastern Bank Building,
2, Benteng, Kuala Lumpur,
Malaya.

Reference

1st August, 1962.

Yours 2873/62/RR/SK
Ours S.D.14552 (RN/SK)

Urgent

Confidential

Messrs. Braddell & Ramani
Advocates & Solicitors,
Chan Wing Building,
Kuala Lumpur.

Dear Sirs,

Re: Linggi Plantations Limited
Haron Estate

Further to our letter of the 30th July 1962, we have now heard from our clients with reference to your letter of the 27th July 1962, and they have instructed us to advise you that your clients' request has been referred to the Board of Linggi Plantations Ltd. who after due consideration, have instructed their agents in unequivocal terms that they are not prepared to consent to any modification of the Agreement of the 25th May for the sale of Haron Estate.

Our clients in fact, have already taken certain steps in connection with completion of the sale, including the service of Notice on the employees.

We trust therefore, that your clients will be able to complete in accordance with the Agreement.

Yours faithfully,

Sgd: Shearn, Delamore & Co.

P.S.

Our clients have instructed us to draw your attention to Clause 18 of the Sale Agreement and wish you to advise your client that visits of approved persons should be arranged between yourselves and ourselves so that the visitors may be properly identified.

No. 22 of 1970

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR
(APPELLATE JURISDICTION)

BETWEEN :

LINGGI PLANTATIONS LIMITED — Appellants (Defendants)

- and -

T. PASUBATHY AMMAL alias Pasubathy Jagatheesan, Executrix of the last Will of S.K. Jagatheesan deceased — Respondent (Plaintiff)

(IN THE MATTER OF KUALA LUMPUR HIGH COURT CIVIL SUIT NO. 249 of 1963

BETWEEN :

S.K. JAGATHEESAN — Plaintiff

- and -

LINGGI PLANTATIONS LIMITED — Defendants)

RECORD OF PROCEEDINGS

E.F. TURNER & SONS,
66 Queen Street,
London, EC4R 1AS.

Solicitors for the
Appellants.