

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No.21 of 1975

O N A P P E A L
 FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT PENANG
 (ORIGINAL JURISDICTION)

B E T W E E N

PHILIP HOALIM Jr and
 WEMBLEY ALEXANDRA GOH (Married Woman) Appellants

AND

THE STATE COMMISSIONER, PENANG Respondent

10 CASE FOR THE RESPONDENT Record

1. This is an appeal from an Order of the Federal Court of Malaysia holden at Penang, Original Jurisdiction (Azmi L.P., Ali and Raja Azlan Shah F.JJ) dated 10th June 1974. By its Order, the Federal Court answered four questions transmitted for its opinion by way of a Special Case under section 48 of the Courts of Judicature Act 1964 by H.S. Ong J., sitting in the High Court, Penang, and directed that the case be sent back to the High Court for the Appellants' Motion to be dismissed with costs. The Federal Court's reasons are contained in the judgment of Ali F.J. Azmi L.P. and Raja Azlan Shah F.J. concurred in Ali F.J.'s judgment, and neither delivered a separate judgment. pp.21-23
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2. This appeal is concerned with the constitutional validity of certain legislation relating to land in Penang, which is now one of the States comprised in the Federation of Malaysia. The legislation which is challenged is certain provisions of the National Land Code, No.56 of 1965, and subsidiary legislation thereunder, which have the effect of imposing quit rents on the Appellants' lands, which had previously been held by them free of rent. By their Originating Motion in the High Court, the Appellants' claim was for "a Declaration that the legislation attempting to impose quit rent on [their lands] is null and void and of no effect and is contrary to the Constitution". When the Motion came before H.S. Ong J., he considered that it raised and turned on questions of the effect of the Constitution, as to which the Federal Court has exclusive jurisdiction. pp.10-12
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- pp.13-20
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3. The Appellants derive title to their lands from an original grant by the East India Company on behalf of Her Majesty Queen Victoria dated the 30th August 1858 (No.18 of 1858/59). The grant was made in fee simple, and did not impose any quit or other rent. At that time, Penang was a settlement and, as such, part of the British Dominions, and grants of land were made and titles issued by the East India Company, which exercised full political and legal powers on behalf of the Crown. A system of land tenure grew up based on the English law of real property. 10

4. By the National Land Code (Penang and Malacca Titles) Act, No.2 of 1963, enacted by the Federal Parliament pursuant to Article 76 (4) of the Constitution, and brought into force on the 1st January 1966, a system of registration of land in Penang and Malacca was introduced. The purpose of this was to convert the systems of land tenure in Penang and Malacca to the Torrens system used in the other nine states of Malaysia, so that a uniform National Land Code could be introduced for all the States of Malaysia. Existing titles were extinguished, but were replaced by a right to registration with an equivalent title, initially on an Interim Register. The Appellants' lands are now on the Interim Register, the replacement title being "grant (first grade)". The provisions of the National Land Code, No.56 of 1965, which was also brought into force on the 1st January 1966, therefore apply to the Appellants' lands. 20

5. All legislative powers in Malaysia are derived from 30 the Federal Constitution, and are divided between the Federal Parliament and the State Legislatures. The Constitution is, however, expressly declared by Article 4 thereof to be its supreme law. The National Land Code, No.56 of 1965, is an Act of the Federal Parliament. By section 439 (1) thereof it is provided as follows:-

"439 (1). With the concurrence of the State Authority, the Yang di-Pertuan Agong may by order under this section provide for the application of this Act in the States of Penang and Malacca subject to such modifications as he may consider necessary or desirable". 40

pp.43-45

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6. In exercise of the above power, the National Land Code was applied to Penang with the modifications set out in the Schedule to the National Land Code (Penang and Malacca) Order 1965 (L.N.478/65), as subsequently amended by the National Land Code (Penang and Malacca) (Amendment) Order 1969 (P.U.(A) 526/69). The effect

of the amendment was to bring into operation in Penang sections 101 and 102 of the National Land Code. Under section 101, the "State Authority" is empowered to revise "rents payable in respect of alienated lands within the State". Under section 102, the State Authority is empowered "with respect to any class or description of lands alienated before the commencement of this Act" to impose rents. By the National Land Code (Standard Rate Rent) Direction 1969 (Pg P.U. 39/69), made in exercise of section 102, rents at standard rates were imposed upon (inter alia) the Appellants' lands. It is these enactments in particular which are challenged by the Appellants, and are in issue in this Appeal. In addition, by the National Land Code (Periodical Revision of Rent under Section 101) Direction 1970 (Pg.P.U.4/70), the standard rates were revised; however the revisions did not affect the Appellants' lands, and the Respondent submits that, although it is referred to in the Questions raised in the Special Case, Pg P.U.4/70 is accordingly not material to this Appeal.

pp.52-61

pp.47-51

7. Question 1 for the decision of the Federal Court raised by the Special Case was as follows:-

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

(In the course of argument before the Federal Court it was accepted by both parties that the question should be read as referring to "the Government of the State of Penang" in lieu of the reference to "the Governor of the State of Penang".)

This question was answered by the Federal Court in the negative. Article 167(2)(a) was repealed by the Constitution (Amendment) Act No.25 of 1963. It formerly provided as follows:-

"167. (2) Subject to the provisions of this Article, all rights, liabilities and obligations of -

(a) Her Majesty in respect of the government of Malacca or the government of Penang

 shall on and after Merdeka Day be the rights, liabilities and obligations of the respective States".

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8. The Respondent submits that Question 1 is framed in unduly wide and general terms, and is not capable of an unqualified answer. However, the Respondent further submits that Article 167 (2) (a) has no relevance to the issues in the present case, for the following reasons:-

(1) It had been repealed before the passing of any of the legislation which is challenged by the Appellants.

(2) The Article affected only the existing rights, 10 liabilities and obligations of Her Majesty, and there were no such "liabilities" or "obligations" of Her Majesty in relation to the Appellants' lands. The Appellants had merely obtained title to the lands free of quit rent. There was no covenant, express or implied, by the East India Company or any subsequent Ruler of the State of Penang that no quit rent would ever be imposed upon the lands. Article 167 (2) (a) dealt only with contractual rights, liabilities or obligations existing on Merdeka Day. 20

9. Question 2 raised by the Special Case was as follows:-

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

This question was answered by the Federal Court in the negative. Article 13 (1) provides as follows:- 30

"No person shall be deprived of property save in accordance with law".

10. The Respondent submits that the legislation mentioned in Question 2 is not contrary to Article 167 (2) (a), for the reasons given above, and does not contravene Article 13 (1). As to the latter, the Respondent submits:-

(1) The right to enjoy land without payment of a quit rent does not amount to "property" within the meaning of Article 13 (1). 40

(2) In any event, the imposition of a quit rent on land is not such a deprivation of an interest in property (if it be such) as would fall within Article 13 (1).

(3) The imposition of a quit rent on land payable to the State is no different in its nature from the imposition of rates or taxes on land; it merely imposes a financial obligation as an incident of ownership of the land.

In support of the above submissions the Respondent will refer to the judgments of the Court in Girijananda v. State of Assam (1956) 43 All India Reporter (Ass) 33.

10 (4) Nothing in Article 13 (1) prohibits legislation affecting a person's right to use property or even depriving him of his property. The purpose of Article 13 (1) was correctly summarised by Ali F.J. as follows: "The said Article clearly does not restrict legislative powers but merely declares unconstitutional or prohibits any illegal executive acts of depriving property". p.19 ll.8-12

11. Question 3 raised by the Special Case was as follows:-

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

20 This question was answered in the negative by the Federal Court, but the Court went on to express the opinion that the Appellants' lands were nevertheless "lands alienated before the commencement of this Act" within section 102 of the National Land Code. The matters raised in this Question turn on the following definitions in section 5 of the National Land Code:-

30 "alienate" means to dispose of State land in perpetuity or for a term of years, in consideration of the payment of rent, and otherwise in accordance with the provisions of section 76 or, when used in relation to the period before the commencement of this Act, to dispose of State land in perpetuity or for a term of years under a previous land law (not being a law relating to mining);

40 "alienated land" means any land (including any parcel of a sub-divided building) in respect of which a registered title for the time being subsists, whether final or qualified, whether in perpetuity or for a term of years and whether granted by the State Authority under this Act or in the exercise of powers conferred by any previous land law, but does not include mining land;

"State Authority" means the Ruler or Governor of the State, as the case may be;

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"State land" means all land in the State (including so much of the bed of any river, and of the fore-shore and bed of the sea, as is within the territories of the State or the limits of territorial waters) other than -

- (a) alienated land;
- (b) reserved land;
- (c) mining land;
- (d) any land which, under the provisions of any law relating to forests (whether passed before or after the commencement of this Act) is for the time being reserved forest". 10

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12. The Federal Court held that the Appellants' lands were not "alienated land" within the above definition, because (to quote ali F.J.) "the words 'and whether granted by the State Authority under this Act or in the exercise of powers conferred by any previous land law' properly construed would refer only to land granted by the State Authority which as defined in the Code means the Ruler or Governor of a State". The Court therefore held that it did not include land granted by the Crown before the commencement of the Code, now held under a replacement title. 20

13. The Respondent submits that the Federal Court was wrong on this point, and that Question 3 should have been answered in the affirmative, for the following reasons:-

(1) The reasoning of the Federal Court turns on the expression "the State Authority" being confined to the Ruler or Governor of the State under the present Constitution. The Respondent submits that this construction of the definition of "the State Authority" is, in the context, too narrow, and that the expression properly includes also all Rulers or Governors of Penang prior to the Federation, including the East India Company in the right of the British Crown. 30

(2) The expression "alienate", when used in relation to the period before the commencement of the National Land Code, is defined to mean "dispose of state land in perpetuity or for a term of years under a previous land law". The Respondent submits that (as the Federal Court in effect held) the expression "alienate" therefore includes a grant by 40

10 the East India Company. As Ali F.J. put it: "Simply stated, 'alienate' means to dispose of State land or to dispose of land in the State. See definition of 'state land' in section 5 of the Code. The applicants' argument that the word 'alienate' cannot be used in respect of land granted or disposed of before Penang became a State is therefore devoid of any merit". But if the construction of "alienated land" adopted by the Federal Court be correct, it leads to the anomalous result that although the Appellants' lands were "alienated" they are nevertheless not "alienated land".

(3) The definition of "alienated land" is intended simply to refer to land in Penang which has been disposed of by the ruler for the time being of Penang, i.e. to land no longer vested in the State.

20 14. The Respondent submits, in the alternative, that even if (contrary to his submission above) the Appellants' lands are not "alienated land" by virtue of the definition in section 5 of the National Land Code, they are nevertheless brought within the definition of "alienated land" by paragraph 2 of the Schedule to the National Land Code (Penang and Malacca) Order 1965 (LN. 478/65) which provides:-

"Subject to this Schedule and where the context does not otherwise require -

30 (a) land held under interim title or final replacement title shall be deemed to be land alienated before the commencement of the Code; and references to alienated land shall be construed accordingly".

It was held in Oriental Holdings Sdn. Bhd. v. Government of the State of Penang and Government of Malaysia [1972] 2 M.L.J. 248 that this provision was a valid exercise of the power of modification contained in section 439 of the National Land Code. The Respondent submits that that decision was correct.

15. Question 4 raised by the Special Case was as follows:

40 "4. Whether it is within the competency of the State Authority for the State of Penang to enact laws, namely Pg. P.U. 39/69 and Pg. P.U. 4/70 affecting the rights previously enjoyed by its subjects and for the purpose of this motion, whether those rights are to be deemed 'vested rights'."

This question was answered by the Federal Court in the

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affirmative. The Respondent submits that this answer was intended to refer only to the first part of the Question, and that it necessarily follows from the answers to the previous Questions. As to the second part of the Question, the Respondent submits that the phrase "vested rights" is not in any relevant sense a term of art. If the phrase is intended to refer to a right to enjoy land free of quit rent, then the Respondent submits that the answer to this part of the Question is No, and also necessarily follows from the answers to the previous Questions. 10

16. The Respondent humbly submits that this Appeal should be dismissed and that the Appellants should be ordered to pay the costs thereof for the following among other

R E A S O N S

- (1) BECAUSE the grant by the East India Company to the Appellants' predecessors in title did not impose any liabilities or obligations within the meaning of Article 167 (2) (a) of the Constitution, and accordingly the legislation imposing quit rents on the Appellants' lands does not contravene that Article. 20
- (2) BECAUSE Article 167 (2) (a) was repealed prior to the passing of the legislation.
- (3) BECAUSE the legislation does not "deprive" the Appellants of any property within the meaning of Article 13 (1) of the Constitution.
- (4) BECAUSE nothing in Article 13 (1) restricts legislative powers or renders the legislation unconstitutional. 30
- (5) BECAUSE the expression "the State Authority" in the definition of "alienated land" in section 5 of the National Land Code (No.56 of 1965) on its true construction includes (inter alia) the East India Company, and the Appellants' lands are accordingly within that definition.
- (6) BECAUSE in any event the definition of "alienated land" in paragraph 2 of the Schedule to the National Land Code (Penang and Malacca) Order 1965 (L.N. 478/65) was a valid modification of the definition in section 5 of the National Land Code, and the 40

Appellants' lands are accordingly within that definition.

- (7) BECAUSE the Federal Court were wrong in answering Question 3 of the Special Case in the negative, and that the said Question should be answered in the affirmative.
- (8) BECAUSE the Federal Court were right in holding that the Appellants' lands fell within the expression "lands alienated before the commencement of this Act" within section 102 of the National Land Code.
- (9) BECAUSE except in relation to the answer to Question 3 the judgment of Ali F.J. in the Federal Court was right for the reasons given therein.

A.J. BALCOMBE Q.C.

N.T. HAGUE

MOHAMAD NOOR BIN HAJI AHMAD.

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CASE FOR THE RESPONDENT

STEPHENSON HARWOOD TATHAM,
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