

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

TEOH CHAI SIOK

Appellant

- and -

DIRECTOR GENERAL OF INLAND REVENUE

Respondent

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- 10 1. This is an Appeal brought pursuant to final leave to the Appellant to appeal to His Majesty The Yang Di-Pertuan Agong granted by the Federal Court of Malaysia Holden at Kuala Lumpur by an Order dated April 3rd, 1978 (Gill, C.J. Malaya, Ong Hock Sim, F.J., and Chang Min Tat, F.J.). This is an appeal from a judgment and an order dated June 25th, 1977 of the Federal Court of Malaysia (Gill, C.J., Malaya, Ong Hock Sim, F.J., and Raja Azlan Shah, F.J.) dismissing an appeal from a judgment and an order dated July 10th, 1976 of the High Court of Malaya at Alor Star (Syed Agil Barakbah J.) whereby an appeal by the Appellant by way of Cast Stated from the determination of Special Commissioners of Income Tax made on September 30th, 1975 was dismissed.
 - p.50
 - p.49
 - p.34
- 20 2(a). The question that arose before the Special Commissioners and the High Court and Federal Court below was whether in law a purchase of a piece of land by the Appellant (comprised in Grant for Land, i.e., Surat Putus Kechik No. 14750 Mukim Alor Malai, Alor Setar District, Kedah, and shown on the survey plan as Lot 336 hereinafter called the said), by initially entering into an Agreement of Sale on September 3rd, 1961 (hereinafter called the First Agreement of Sale) with the Vendor of the said land and ultimately causing the same to be transferred to him (after 9 years 10 months approximately) under an order of the High Court made on July 11th, 1971 (in Civil Suit No. 114 of 1968 in the High Court in Malaya at Alor Star) enforcing terms of subsequent Agreement of Sale dated March 9th, 1966 (hereinafter called the Second Agreement of Sale) made between the Appellant and the same Vendor in respect of the said land and thereafter transferring the said land by a Memorandum of Transfer dated December 29th, 1973 to Chai Hup & Sons Sendirian
 - p.6
 - p.52
 - p.114
 - pp. 66-68
 - p. 182
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p. 133 Berhad, a company incorporated (under the Companies Act of
p. 182 Malaysia hereinafter called the family company), by the
p. 172 Appellant's Wife Tan Siew Kia @ Tan Su Kiew (f) and daughter
p. 5 Tech Kim Heoh (f), who subscribed to take \$1/- share each in
the family company (of the same address as that of the
Appellant) for the purported consideration of cash \$580,000/-
pursuant to Agreement dated April 15th, 1973 when, in fact,
the Appellant was issued certain number of shares in the said
family company, which said shares wholly in turn were transferred 10
to his wife and five children, although he, the Appellant
himself became a non-shareholder Director of the Company under
Article 71 of the Articles of Association of the family
company, was a transaction which could be truly termed an
adventure or concern in the nature of trade so as to render
gain or profit therefrom derived (being the difference between
the cost price of the said land and the purported price of the
said shares in the family company) i.e., equivalent to \$538,790.00
(which the Appellant is deemed to have made or received) liable
to tax under Section 4(a) of the Income Tax Act, 1967. 20

2(b). The Special Commissioners and the Courts below decided the
aforesaid question in favour of the Respondent and the question
in the present appeal is whether that determination was erroneous
in Law.

3. The statutory provisions relevant to the Appeal and
considered in the Courts below are as follows:-

INCOME TAX ACT 1967 (hereinafter called the said Act)

Section 4(a)

"4. Subject to this Act, the income upon which tax is chargeable
under this Act is income in respect of: 30

- (a) gains or profits from the business for whatever
period of time carried on"

and Section 2(1)

The definition of the business provided in the said Act is as
under:-

"business" includes profession, vocation and trade and
every manufacture, adventure or concern in the nature of
trade, but excludes employment"

4. The Relevant Primary Facts are not in dispute (except
inferences drawn therefrom by the Special Commissioners and the
Courts below which alone are in dispute) and are contained:- 40

- (a) in the finding of Primary Facts by the Special
Commissioners (excluding inference of facts therefrom)
- (b) the agreed documentary exhibits establishing facts
therein the agreed exhibits contained.

Accordingly the relevant facts before the Special
Commissioners and Courts below were as under:-

- (1) the Appellant's primary/principal business was that of a sundry shopkeeper and the Appellant also carried on business of a licensed moneylender, p. 3
- (2) on September 3rd, 1961 the Vendor and the Appellant entered into the First Agreement of Sale of the said land pursuant to Clauses appearing in the First Agreement of Sale at a stipulated purchase price of \$31,500/-, p. 52
p. 53
p. 54
- 10 (3) on March 9th, 1966 a second Agreement of Sale of the said land was entered into by the same Vendor and the Appellant on practically similar terms except the following:- pp. 66-68
- (a) a period of time for removal of existing houses on the said land was stipulated as three (3) months and p. 9
- (b) the Vendor in the events inter alia of abortive sale was to refund \$13,309.45 by then received by her. p. 10
- 20 (4) it was expressly provided in the First and Second Agreements of Sale of the said land that it was a condition of sale that the Vendor will take certain steps in compliance with her obligations contained in the said Agreements so that the said land may be used for the purposes of erecting dwelling houses thereon exclusively (in contradistinction to erecting dwelling-houses for sale thereon since no such words appear in the said Agreements of Sale of the said land). p. 52
- 30 (5) to comply with her obligations the Vendor after entering into the First Agreement of Sale but before executing Memorandum of Transfer of the said land to the Appellant caused certain sums of monies to be further advanced to her account of purchase price of the said land in order to fulfil her obligations to effect the removal of four existing houses on the said land in compliance with Clause 6 of the First Agreement of Sale. The said further advances were acknowledged by the Vendor by receipt contained in Clause 2 of the Second Agreement of Sale. pp. 59-60
p. 66
- 40 (6) to comply with further terms (obligatory on her part) under the First Agreement of Sale the Vendor also applied for conversion of the said land from its then agricultural condition of user to a condition that houses may be erected thereon but the Vendor's effort for the said conversion was unsuccessful. p. 56
- (7) the terms contained in the First and Second Agreements of Sale clearly stipulated the quality of tenure and user of land required by the Appellant i.e.,
- (a) nature of its user to conform to conditions p. 52

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and
p.67

permitting erection of dwelling houses thereon,

p. 53 and
P. 67

(b) the land to be left vacant after removal of
houses therefrom,

hence the Appellant had set specific limits as to the
quality and tenure of land which he contracted to
purchase from the said Vendor.

p. 16
p. 59

(8) the Appellant knew in his mind that the said land
has great development potential as early as September
30th, 1961 (as found by the Special Commissioners)
and as such the Appellant was prepared to wait till
his wishes of the aforesaid stipulated quality and
nature of tenure pursuant to the terms of the First
Agreement of Sale were complied with by the Vendor
or alternatively he himself was ready to make an
application for change of tenure of the said land
from agriculture to housing development on behalf of
the Vendor.

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p. 59

(9) as the Vendor was unable to comply with the
conditions of user as stipulated in the First
Agreement of Sale, she by her Solicitor's letter
dated July 4th, 1963 offered to return the initial
deposit of \$9,000/- initially received pursuant to the
First Agreement of Sale (in contradistinction to
the total sum of \$12,309.45 paid to account as on
June 27th, 1963) and treat the Agreement as null
and void but the Appellant refused to return the
Title Deeds to the said land which the Appellant had
received from the Vendor on entering into the First
Agreement of Sale and requested the Vendor to
transfer the said land to him (by in effect
waiving the aforesaid requirements of tenure of
the said land).

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p. 56

pp. 59-60

(10) on March 9th, 1966 the Vendor entered into a
Second Agreement of Sale for the purchase of the
said land for the same price of \$31,500/- without
any recitals as to the previous First Agreement
of Sale (which must have been superseded) although
by the said Second Agreement of Sale the Vendor
confirmed that the Appellant has paid a sum of
\$13,309.45 in part payment of the purchase price
(against \$9,000/- paid under the First Agreement
of Sale to account of the purchase price)

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(11) a Civil Suit No. 133 of 1966 was filed by the
Appellant against the Vendor of the said land
claiming inter alia specific performance of the
Second Agreement of Sale and alternatively
recession of the said contract and repayment
of deposit of \$13,309.45. The said suit was
withdrawn with liberty to file fresh Suit owing
to events that transpired appearing in the Notes
of Evidence of the learned Judge in Civil Suit

133 of 1966 and a second Suit was filed in the High Court at Alor Star being Civil Suit No. 114 of 1968 claiming inter alia:-

- (a) specific performance of the Second Agreement of Sale,
- (b) or in the alternative rectification of the said Agreement and
- (c) further or in the alternative damages for breach of contract and other consequential reliefs

The second Suit resulted inter alia in an order to transfer the said land to the Appellant which was done by executing a Memorandum of Transfer dated July 27th, 1971 in favour of the Appellant

p. 114
p. 115
pp. 118-
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- (12) the instrument of Transfer of the said land was sent for adjudication to the Government Valuation Department which valued the said land at \$113,000/- which in effect showed the natural appreciation in the value of the said land (stipulated purchase price being \$40,809.45) by the passage of time stretched over approximately ten (10) years i.e., from the date of First Agreement of Sale up to date of Transfer being a period commencing from September 3rd, 1961 to July 27th, 1971. In short, the said land had appreciated in value approximately 177% by then without any effort whatsoever on the part of the Appellant or any other person to mature it, i.e., the said land still remained as agricultural land.

p. 116

- (13) on February 2nd, 1973 the Appellant obtained a Valuation Report (as found by the Special Commissioners) which valued the said land at \$455,968.50. In the meantime on September 13th, 1971 the Appellant applied for and did in fact on February 18th, 1973 receive an approval of change of tenure of the said land. Hence, the valuation obtained by the Appellant was based on the premises that the said land required conversion and the application of the Appellant has no effect whatsoever on the natural appreciation in value of the agricultural land qua agricultural land. In other words the said land valued at \$113,000/- became worth \$455,968.50 which reflected an appreciation in value of the said land qua land valued at \$342,968.50 within a period commencing from July 27th, 1971 to February 2nd, 1973, an appreciation of over 300% within a period of just over one-and-a-half ($1\frac{1}{2}$) years since it was then not known if pending application for conversion will be approved.

p. 16

p. 167

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- p. 172 (14) on April 15th, 1973 the Appellant made a formal Agreement with the family company and obtained ₦10,000/- by way of deposit beaving a balance of ₦570,000/- to be paid within two (2) weeks after notice of the fact that the Charge on the said land was discharged.
- p. 182 (15) on December 29th, 1973, the Appellant, by an instrument of Transfer conveyed the said land to the family company for the stated consideration of cash sum of ₦580,000/- and also acknowledged receipt thereof embodied therein. The Special Commissioners found that the Appellant was paid the price of the said land in terms of 580,000 shares of ₦1/- each in the family company which said shares (as again found by the Special Commissioners), were wholly transferred by the Appellant to his Wife and five children (implicity concluding at least the fact that the Memorandum of Transfer transferring the said land to the family company for cash sum of ₦580,000/- was at variance with the true consideration (being transfer of shares).
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SPECIAL COMMISSIONERS' APPROACH

5. The Special Commissioners approached the question before them on the basis of interences drawn by them from the aforesaid facts as to what was in the mind of the Appellant at the time when he entered into two Agreements of Sale of the said land and ascertained the Appellant's intention on the touch-stone of his subsequent conduct after September 3rd, 1961 and found that the Appellant :-
- p. 17 (i) was very keen to buy the said property (i.e., the said land) and re-sell it as soon as he could at a great profit right from the year 1961 (in contradistinction to
- p. 52 and p. 66 a. express stipulations in the two Agreements of Sale stating clearly that as a condition of sale the Vendor shall apply for and obtain Government permission for alteration of condition of tenure of the said land so that the said land be used for the exclusive purpose of erecting dwelling houses thereon and
- p. 12 b. Appellant's intention to keep the property for his old age and for family)
- p. 17 (ii) pursued doggedly on with his intention to develop the property by erecting houses on it until it culminated in the order of the High Court at Alor Star directing
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the Vendor to transfer the said land to the Appellant.

6. The Special Commissioners further held that it was not the intention of the Appellant to purchase the said land and keep it for his old age and in the meantime collect whatever rents or income from the said land until the Appellant has enough funds of his own to develop. p. 16
7. Accordingly, the Special Commissioners found that the share price in excess of purchase price of the said land paid by the Appellant was taxable being profits of a single adventure or concern in the nature of trade. p. 18
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8. Further the Special Commissioners found that the Appellant took accelerated steps towards the development and was successful in his application for alteration of tenure of the said land notwithstanding the Vendor having failed in his attempt therefor. p. 17
p. 9
9. The Special Commissioners also drew the inferences that had the Vendor succeeded in altering the condition of tenure in 1963 the Appellant would have made the same moves in 1963 as the Appellant did in 1973 to immediately develop the said land and realise a substantial profit. p. 17
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10. In the final analysis the Special Commissioners held that the Appellants' purchase of the said land though an isolated transaction of purchase of land was intended to be a transaction under the aforesaid circumstances as an adventure or concern in the nature of trade and as such monies deemed to have been received on valuation of the shares were liable to tax to the extent they exceeded in value the purchase price paid by the Appellant for the said land. p. 18
11. On appeal the learned Judge in the High Court at Alor Star upheld the decisions of the Special Commissioners but amplified his reasoning by considering various authorities and held that:- p. 33
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- (a) the Appellant's activities in paying compensation to get out all the occupants from the four houses on the said land,
 - (b) his request for valuation,
 - (c) his successful application for conversion of the said land,
- is sufficient activity to lead to the maturing of assets to be sold although he further held that the Appellant:- p. 33
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- "did nothing on his own to improve the said land"
- and the said land being near town and surrounded by a newly developed housing area should be itself without conversion be sufficient evidence to lend itself to commercial transaction. p. 33
12. The learned Judge in the High Court at Alor Star also held that the Appellant in transferring shares to his wife and

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p. 33 children was in effect transferring the profit made from the said land in the form of shares.

13. In the Federal Court of Malaysia, on appeal, Gill, C.J., Malaya (with whom Ong Hock Sim, F.J. and Raja Azlan Shah, F.J. concurred), delivered Judgment of the Federal Court and upheld the decision of the Special Commissioners and the learned Judge of the High Court.

Gill, C.J. Malaya, also held that:-

- p. 40 (1) the Appellant took no steps to treat the Agreement (the First Agreement of Sale) as void and to take back his deposit. 10
- p. 41 (2) the Appellant sued the Vendor at the High Court at Alor Star for specific performance.
- p. 41 (3) the Vendor being unable to fulfil her undertakings under both Agreements (the First and Second Agreements of Sale) the Appellant did not choose to treat the Agreements as null and void.
- p. 41 (4) the Appellant sued for specific performance of the Second Agreement of Sale and accepted a transfer of property to himself notwithstanding the non-fulfilment of those undertakings. 20
- p. 48 (5) the Appellant made the purchase for no purposes except for re-sale of the property (i.e., said land).
- p. 48 (6) the only reasonable inference from facts and surrounding circumstances of the case was that the Appellant bought the said land and its sale not long afterwards was an adventure or concern in the nature of trade.

14. The learned Chief Justice adopted:- 30

- (a) the reasoning and inferences drawn from the findings of primary facts by the Special Commissioners,
- (b) the reasoning and inferences drawn by the Special Commissioners from their findings of primary facts upheld by the learned Judge in the High Court at Alor Star,

and ultimately in effect appeared to conclude that:-

- p. 40 (i) events leading to the Appellant's purchase of the said land and stipulations of Clauses 4 & 5 of the first two Agreements of Sale and Clauses 6 & 8 of the first two Agreements of Sale (notwithstanding modification of time and price therein respectively mentioned) coupled with evidence of surrounding circumstances, failure of Appellant to treat the two Agreements of Sale as null and void, suing for specific performance, accepting transfer of the said 40
- p. 48
- p. 41

land notwithstanding non-fulfilment of the Vendor's undertaking, there being no necessity for the Appellant to set up separate organisation for the purposes of trading in land, evidence leading to maturing of assets to be sold and the nature of the assets (the said land) lend itself to commercial transaction and hence it was not an investment but adventure in the nature of trade.

p. 46
p. 47

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APPELLANT'S CASE

15. The Appellant's case is that:-

(a) he invested in land by entering into a First Agreement of Purchase of the said land with a view exclusively to erect dwelling houses on the said land. p. 15

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(b) in order to fully and effectually bind the Vendor for the aforesaid purpose caused terms to be stipulated as contained in Clauses 1 to 11 both inclusive of the Agreement. The said terms included a Clause for damages of \$9,000/- to be paid together with the deposit of \$9,000/- making a total sum of \$18,000/- if the Vendor refuses to complete the purchase pursuant to the terms of the said Agreement of Sale. p. 54

(c) at the instance and on account of the Vendor the Appellant advanced further sums to account of purchase price as an indulgence which as on July 18th, 1963 amounted to \$3,309.45 whereby the Vendor caused the tenants occupying the houses on the said land to vacate the same. p. 59
p. 60

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(d) the Vendor pursuant to her obligations under the said First Agreement of Sale applied for conversion through her Solicitors which such application was unsuccessful.

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(e) by a letter dated July 4th, 1963 the Vendor through her Solicitors offered to return \$9,000/- to the Appellant in return for the Grant of the said land which was in possession of the Appellant. The said land has great potential for building houses thereon subject to conversion of the land tenure and the Appellant did not accept the mere return of \$9,000/- (which must have been contrary to common prudence in view of appreciation of land price). p. 56

(f) the intention of the Appellant had been to invest in such type of land whereon dwelling houses could be exclusively erected so that the same could enure for his old age and his family in support of which he gave oral evidence before the Special Commissioners. p. 12

(g) the Appellant intended his investment in the said land to be a long term investment being obvious from the fact

(i) that he did not have sufficient funds for building

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dwelling houses although he intended to build the same in future evident from accounts produced.

- p. 31 (ii) that he did not have necessary government permission which may not be forthcoming if at all it did materialise favourably as it is common knowledge that the conversion of land must take a long period of time before it is approved or rejected. 10
- p. 59 (iii) that he was prepared to wait for a further period of time to enable the Government to consider or reconsider her application for change of condition of tenure. Further, the Appellant offered to make such application on behalf of the Vendor. The Appellant also made known in the said letter that he is prepared to purchase the land even if there was no change of condition of tenure (implicitly relying on the circumstances of capital appreciation in price of the said land as prudent investment). 20
- p. 62 (h) Again by a letter dated July 29th, 1963 the Appellant through his Solicitors made known to the Vendor through her Solicitors that they have an option to complete the sale and will ask for specific performance if the Vendor refuses to execute a conveyance of the property to the Appellant.
- (i) subsequently the Appellant and the Vendor came to a compromise and entered into a Second Agreement dated March 9th, 1966 which did contain similar terms as that of the First Agreement except for the deposit acknowledged in the Second Agreement of Sale was \$13,309.45 and the period of time to affect removal of the four houses existing on the said land was stipulated as three months. 30
- p. 66 (j) on the same day the Appellant through his Solicitors wrote a letter to Director of Lands enquiring if the Vendor has made any application for conversion of the said land to a tenure suitable for exclusive purpose of erection of dwelling houses thereon to which the Commissioner for Lands and Mines replied in the negative. 40
- p. 70 (k) by a letter dated September 15th, 1966 consistent with the Appellant's earlier intention to erect dwelling houses on the said land the Appellant reapplied for conversion of the condition of title.
- (l) in the event that transpired the Appellant filed a Civil Suit No. 133 of 1966 in the High Court at Alor Star inter alia claiming :-
- p. 74 (1) Specific performance of the Second written Agreement of Sale of the said land 50

- (2) Further or alternatively, damages for breach of contract.
- (3) Alternatively, rescission of the said contract and repayment to the Appellant of the deposit of \$13,309.45 paid thereunder with interest at 4% per annum from the June 9th, 1966.
- 10 (4) A declaration that the Appellant was entitled to a lien on the said land for his deposit together with interest thereon and (any) damages and costs of the action.
- (m) owing to departure from pleadings and late discovery of the error in Clauses 4, 5 and 6 of the Second Agreement of Sale the action was discontinued by the Appellant subject to payment of costs and liberty to file fresh action.
- 20 (n) on May 28th, 1968 second action was filed in the High Court at Alor Star by the Appellant against the Vendor which was registered as Civil Suit No. 114 of 1968 claiming inter alia:-
- (1) Specific performance limited to executing a registrable conveyance of the said land in favour of the Appellant with power to the Assistant Registrar of the High Court to execute the conveyance should the Vendor fail to do so. p. 95
- (2) In the alternative rectification of the Second Agreement of Sale by deleting Clauses 4, 5, 6 and 8 thereof and specific performance of the Agreement after rectification thereof with necessary consequential orders. 30
- (3) Further or in the alternative, damages for breach of contract.
- (4) A declaration of the Appellant's lien in respect of deposit not re-paid by the Vendor together with interest and damages and costs of the action.
- (5) An Interim Injunction.
- (6) Further or other relief.
- 40 (o) the action was settled amicably and the said land was conveyed by paying extra price than the price stipulated in Second Agreement of Sale (which must have been due to natural appreciation of the price of the land). p. 114
p. 115
- (p) for the purposes of stamp duty the said land was on August 8th, 1971 valued at \$113,000/- by the Valuation Officer. p. 116

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- p. 167
p.4 (q) after a lapse of nearly 1½ years (September 15th, 1971 to February 18th, 1973) the Appellant's application for conversion of the said land was approved.
- p. 167 (r) in the meantime, a valuation report obtained by the Appellant (as found by the Special Commissioners) valued the said land at \$455,968.50 without conversion (the same being consistent with the intention of the Appellant to keep the land for his old age and family) and the Appellant's wife and daughter incorporated the said family company by subscribing \$1/- share each in the said company. 10
- p. 133
- p. 172 (s) an Agreement dated April 15th, 1973 was drawn up between the Appellant and the family company for purchase of the said land for a sum of \$580,000/- of which \$10,000/- was acknowledged by the Appellant as having been received leaving a balance sum of \$570,000/- to be paid to the Appellant.
- p. 183 (t) by an instrument of Transfer dated December 29th, 1973 for cash consideration of \$580,000/- the said land 20
- p. 11 was conveyed to the company and the Special Commissioners found that the Appellant was paid in shares of the family company of \$1/- each number 580,000 which said shares he wholly transferred to his wife and children in the following proportion, that is to say, 290,000 to his wife and total balance 290,000 to his five children (obviously the intention being to retain land in form of shares in the family company).
- (u) under the above circumstances, the Appellant 30
contended that his investment in the purchase of land led to capital appreciation and not liable to tax as such notwithstanding his having taken some steps otherwise fulfilling his intention to erect dwelling houses on the said land for his old age and family.

RESPONDENT'S CASE

16. The Respondent contended before the Special Commissioners that:-

- p. 13 (a) sale of the said land to the family company was an adventure or concern in the nature of trade and as such taxable. 40
- (b) even though the intention to make a profit was immaterial in deciding whether the transaction was an adventure or concern in the nature of trade it was very relevant.
- (c) isolated transaction did not preclude the possibility of it being an adventure in the nature of trade.

- (d) on factual evidence and documents produced and the conduct of the Appellant there were sufficient grounds to find the transaction (purchase and conveyance of the said land) by the Appellant an adventure in the nature of trade.
- (e) the Appellant would have sold the property in the year 1963 if the Vendor had been successful in her application for alteration of condition of tenure of the property.

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Similar contention was put forward before the High Court at Alor Star and the Federal Court of Malaysia.

17. The Appellant, now, respectfully submits that from the primary finding of facts by the Special Commissioners they were not entitled to come to further conclusion that they did and that both the High Court below were wrong in upholding their determination. Hence, the Appellant submits that:-

- (1) in the first instance the intention of the Appellant must be gathered from the terms of the two Agreements of Sale which were neutral and consistent with the Appellant's intention to purchase the said land for keeping it for his old age i.e., a long term investment view taken by the Appellant of the said purchase and not for resale. Hence, to read the terms of the Agreements as expressing an intention to resell, when such words do not appear there, would be adding words to the terms of the documents evidencing sale. Had the Appellant any intention of resale it would not be at all difficult to say so or to draft such terms which will reflect such intention.

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- (2) even the subsequent conduct of the Appellant only justifies one conclusion that the said land was purchased for erecting dwelling houses thereon at a future date and not a conclusion that it was purchased for resale at a profit at the first opportunity. In particular the Special Commissioners' inference that the Appellant was very keen to buy property and resell it as soon as he could at a great profit right from 1961 is erroneous in view of the fact that the Appellant knew that the land purchased by him has become worth \$113,000/- on August 8th, 1971 and worth \$455,968.50 on February 2nd, 1973 and yet he did not sell the same which obviously negatives the inference of quick profit taking attitude and substitutes the same with intention of retention of ownership of property for a long period of time which is consistent with investment and not trading. Further the Appellant's assertion through his Solicitors that he was prepared to wait is conclusive proof of intent to invest over a long period of time in contradistinction to quickly selling at a profit at first opportunity available for sale.

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- (3) the Appellant having advanced \$12,309.45 to account of

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the purchase price by June 27th, 1963 could not have accepted the return of \$9,000/- by the Vendor and treat the Agreement as void. There was no offer by the Vendor to return the \$12,309.45 but on the contrary the actions filed by the Appellant did contain alternative reliefs such as rescission of the contract and damages. The Special Commissioners nor the Courts below took those alternative reliefs into consideration while erroneously holding against the Appellant their findings that the Appellant took no steps to treat the Agreement as void and take back his deposit but sued for specific performance. The Courts below should have taken cognizance of the fact that the Appellant was exercising his legal right against the Vendor intending to unjustly enrich herself.

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(4) the Special Commissioners and the Courts below should have considered the documentary evidence contained in the Writ and Pleadings in the First and Second Suits with regard to alternative reliefs particularly in respect of rescission and/or damages which would have thrown light on the fact that there was no real dogged intention at all to obtain or develop the said land inferable from such circumstances but only an irresistible inference that the Appellant tried to cling to a prudent investment in land which was appreciating capital-wise under the Income Tax laws.

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(5) it was erroneous to hold that the Appellant was so to say under a duty to treat the Agreements of Sale as null and void when he was not being paid back in full let alone damages for breach of contract.

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(6) the Appellant had made payments to the Vendor to account of purchase price which resulted in the Vendor being able to vacate the houses erected on the said land. Those payments by the Appellant are mere neutral acts and are not steps that could be deemed to be taken by the Appellant on his own behalf (as payments therefor were acknowledged by the Vendor as payments to account of purchase price to do such acts which in law are not deemed to be maturing of assets specially in view of the fact that there is no evidence whether the houses were in fact removed or not from the said land). To rent out old houses would lead to saddling the same with depreciation in value thereof. The Vendor had confirmed the said payments in her Second Agreement of Sale thereby adopting her obligations in that respect contained in terms relative thereto in the First and Second Agreements of Sale.

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(7) the documents relating to sale and transfer of the said land from the Appellant to his family company were certainly not reflecting a commercial transaction

as would purport to give the transaction a true nature of sale at arm's length. It was stipulated in the Agreement of Sale dated April 15th, 1973 that \$10,000/- have been received by the Appellant and there was only a balance of \$570,000/- due to be paid yet the shares of the family company received and transferred by the Appellant to his wife and children number 580,000 equivalent to full purchase price (although the Appellant was alleged to have received cash (dollars) consideration pursuant to Form of Transfer 14A) stipulated under the said Agreement dated April 15th, 1973. The said discrepancy clearly establishes that the Appellant had intention to benefit his wife and children and the Form of Transfer whether it be land transferred or the transfer of the family company's shares did not matter as equity would have looked to the intention and not to the form of action adopted by the Appellant. This vital circumstance was not at all considered by the Special Commissioners or the Courts below which was particularly important since the Appellant's wife and daughter had only subscribed to \$1/- share each in the family company which had then \$2/- paid-up capital.

(8) the conclusion that the Appellant had taken steps to mature the assets, i.e., the said land, is erroneous in view of clear finding by Syed Agil Barakbah, J. that he (Appellant) did nothing on his own to improve the land'. Even the action of the Appellant to apply for conversion is an action within the original limits set out in the Agreements of Sale as to quality of tenure and it does not go beyond an intention to invest in land capable of user of the nature that dwelling houses could be built thereon in future. The Appellant took no steps even to remove the buildings on the said land nor was the Appellant in any hurry for conversion since he could indefinitely wait which conclusively affirmed that the Appellant was not conducting an exercise in quick profit or returns from purchase of the said land like a trader but was an investor who intended to hold the investment at least for a long duration which in fact he did notwithstanding the fact that the purchase of the said land was a single transaction.

(9) even investment in land which will take years to build dwelling houses thereon is a neutral transaction let alone the period of time for years that will take in a very uncertain event of conversion of tenure of the said land

(10) there was no iota evidence to find that the Appellant could not have sold the said land (which over several years have manifold appreciated in price) at a profit without first having the conversion of the said land approved by the Authorities immediately after his entering into the First Agreement of Sale with the Vendor.

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18. The Appellant submits that the decision of the Special Commissioners and the Courts below which was based on identical reasoning and conclusions be reversed and the Appellant be granted costs of all proceedings herein and the Courts below for the following amongst other

REASONS

- (1) Because the Appellant stood by and allowed the opportunity to pass by to sell the land on its estimated price of \$113,000/- as on July 27th, 1971 (a profit of 177%) and had not made any efforts to sell the said land after he for the first time became aware of the true value of the agricultural land purchased by him pursuant to valuation of the Government Department. 10
- (2) Because the Appellant further stood by and allowed the second opportunity to pass by without selling the said land or taking any steps whatsoever anyway in that direction when the said land had further appreciated by 300% or so i.e., according to valuation report as on February 2nd, 1973 the said agricultural land was worth \$455,968.50. In short the total gains in appreciation of the value of agricultural land stood at around 477% of the sum of money invested by the Appellant and yet the Appellant was not tempted to sell the said land nor was he contemplating to make a quick good profit otherwise he would certainly have enriched himself by the golden opportunity that then offered to the Appellant whose capital in his business of sundry-shop and money-lending was relatively a very small amount inclusive of his investment in one other piece of agricultural land as shown by the accounts submitted. 20 30
- (3) Because there was no law prohibiting a quick profit minded purchaser (Appellant) if any, to sell the said land without conversion of tenure by assigning the benefit of the contract of purchase.
- (4) Because the act of transfer of the land to his family company which then had \$2/- paid-up capital owned by his wife and daughter could not be considered a commercial transaction as there was no evidence either the family company had the balance sum of \$570,000/- or his wife and daughter had any such sum to pay to the Appellant as the price of the said land. 40
- (5) Because the acts of the Appellant in transferring the said land to his family company and all the shares to his family as aforesaid were not intended towards profit making but were consistent with keeping the said land with the family company to ensure for the benefit of the Appellant's wife and children (since a corporation never dies) particularly when the Appellant did not even hold one share in the

family company although he became a non-shareholding Director thereof. The said transaction reflected outright intention to keep all the said land in family domain for ever.

- 10
- (6) Because there were alternative reliefs claimed in the actions filed by the Appellant such as rescission or damages for breach of contract, no inferences could properly be drawn by the Courts below that the Appellant wanted to buy the land for resale although it is conceded that the Appellant wanted if the Honourable Court allowed him to keep the said land (by order of specific performance) for himself and his family in view of the fact that specific performance is an equitable remedy within the discretion of the Court and as such there could not have been any certainty of the order that the Honourable Court would make particularly when alternative reliefs are claimed by the Appellant in the said Suits as to damages.
- 20
- (7) Because the Special Commissioners and the Courts below were wrong in their findings that the Appellant took no steps to treat the Agreement as void and to take back his deposit (as the Appellant was under no such legal duty). Further it would be denial of common prudence to the Appellant if it is held that he was under a duty to forego a sum of ₱3,309.45 which he had paid in addition to the initial deposit of ₱9,000/- at the request of the Vendor specially when the said land was a sound investment appreciating everyday capital-wise as it is clear from the steep rise in the price of land as aforesaid.
- 30
- (8) Because the payment to account of purchase price of the said sum of ₱3,309.45 can only be attributed to the Vendor attempting to fulfil her obligations under the First Agreement of Sale of the said land no such acts can constitute acts relating to maturing of assets.
- 40
- (9) Because the Appellant was prepared to wait for his wishes regarding conversion to be fulfilled it was very obvious that his acts were consistent with his intention to invest over a long period of time and not to make quick turn-over at a profit as a businessman or a trader would normally do with his wares and hence the Special Commissioners and the Courts below erred in drawing adverse inferences from relevant facts proved herein that they did against the Appellant e.g.,
- (a) "He (Appellant) did not treat the First Agreement as null and void" when in fact the Appellant did seek alternative reliefs as to damages and rescission of contract of sale of the said land.
- 50
- (b) "He (Appellant) was not willing to refund the deposit but was prepared to complete the purchase"

RECORD

when the Appellant was under no legal duty to do so merely to unjustly enrich the Vendor showing affront to common prudence to the capital invested by the Appellant.

- (c) "He (Appellant) was prepared to wait for a further period" when in fact he waited ten (10) years to see the successful completion of purchase of the said land.
- (d) "He (Appellant) was even ready to make such an application himself" when in fact the Appellant knew or ought to have known that the Vendor was depriving him of good investment in land by relying on untenable excuse under the circumstances when capital appreciation in land price has taken place. 10
- (10) Because the Appellant knew that the application for conversion was in fact rejected and yet he was prepared to invest in the said land as agricultural land knowing fully well that should his application for conversion be disapproved (since there was no certainty of its approval being granted) he will have to own a second piece of agricultural land. 20
- (11) Because the Courts below failed to distinguish between acts done within the framework of the original objective relating to quality and nature of the tenure of the said land which the Appellant intended to purchase for building dwelling houses thereon and acts which had been held in law to constitute maturing of assets in a trading adventure with land after it is purchased. 30
- (12) Because the Courts below erred virtually in holding that land qua land by itself is of the nature that the purchase thereof tantamounts to trading venture.
- (13) Because the Special Commissioners and the Courts below were wrong in their inferences drawn by them from undisputed facts (i.e., documentary evidence and primary finding of facts) the conclusion arrived at by the Special Commissioners and the Courts below was wrong in law. 40
- (14) Because on proper assessment of the primary finding of facts and documentary evidence before the Special Commissioners it could not be truly construed that the purchase of the said piece of land by the Appellant would constitute an adventure in the nature of trade and as such liable to tax.

RAJ KUMAR SHARMA

