

12/82

No. 27 of 1980

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

ZAIBUN SA BINTI SYED AHMAD

Appellant
(Defendant)

- and -

1. LOH KOON MOY (F)

Respondents
(Plaintiffs)

2. LAM WAI KEE

RECORD OF PROCEEDINGS

Coward Chance,
Royex House,
Aldermanbury Square,
London EC2V 7LD

Solicitors for the
Appellant

Parker Garrett & Co.,
St. Michaels Rectory,
Cornhill,
London EC3V 9DU.

Solicitors for the
Respondents

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RECORD OF PROCEEDINGS

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

ZAIBUN SA BINTI SYED AHMAD Appellant
(Defendant)

- and -

10 1. LOH KOON MOY (F) Respondents
(Plaintiffs)
2. LAM WAI KEE

RECORD OF PROCEEDINGS

No. 1

Writ dated 13th May 1974

IN THE HIGH COURT IN MALAYA AT ALOR STAR

CIVIL SUIT 1974 NO. 100

BETWEEN:

20 1. Loh Koon Moy (f)
2. Lam Wai Kee Plaintiffs

AND

Zaibun Sa binti Syed Ahmad Defendant

TAN SRI SARWAN SINGH GILL, P.S.M. Chief
Justice of the High Court in Malaya, in the name
and on behalf of His Majesty the Yang di-Pertuan
Agung.

To:-

Zaibun Sa binti Syed Ahmad,
29, Trang Road, Penang.

30 WE COMMAND you, that within twelve (12) days
after the service of this Writ on you, inclusive

In the High
Court
No. 1
Writ
13th May 1974

In the High Court
No. 1
Writ
13th May 1974
(cont'd)

of the day of such service, you do cause an appearance to be entered for you in an action at the suit of Loh Koon Moy (f) and Lam Wai Kee.

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

WITNESS Mohamed bin Jaafar Sidik Assistant Registrar of the High Court in Malaya, the 13th day of May, 1974.

Sgd: Thevin, Chandran & Siva Sgd: 10
Plaintiffs' Solicitors Assistant Registrar,
High Court,
Alor Star.

N.B. - This writ is to be served within twelve months from the 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 High Court at Alor Star. 20

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 High Court at Alor Star.

The Plaintiff's claim is for:-

(1) Specific performance of an agreement between the Plaintiffs and the Defendants made on the 11th day of December 1973 for the sale by the Defendant to the Plaintiffs of land held under Surat Putus Nos. 43332, 43333, 43335, Surat Putus Kechik Nos. 869, 870, 872, 1080, 1343 & 1344 respectively in the Mukim of Serdang in the District of Bandar Bahru. 30

(2) An injunction restraining the Defendant whether by herself or by her servants or otherwise howsoever, from doing the following acts or any of them, that is to say transferring or disposing of any of the said lands otherwise than to the Plaintiff. 40

(3) Further or alternatively damages for breach of contract.

(4) Further or other relief.

(5) Costs.

Dated this 10th day of May, 1974.

In the High Court

No. 1

Writ

13th May 1974

(cont'd)

Sgd: Thevin, Chandran & Siva

.....

Plaintiffs Solicitors

This writ was issued by Messrs. Thevin, Chandran & Siva of Ipoh whose address for service is No. 2, Station Road, Ipoh, solicitors for the said Plaintiff who resides at No. 14 Horley Street, Ipoh.

10

This writ was served by me at on the Defendant on the day of 19 at the hour of

Indorsed this day of 19

(Signed)

No. 2

Statement of Claim dated 21st June, 1974

No. 2

Statement of

Claim - 21st

June 1974

STATEMENT OF CLAIM

1. By an Agreement in writing made between the 1st Plaintiff and the 2nd Plaintiff acting as the agent of the 1st Plaintiff and with her knowledge and consent of the one part and the Defendant of the other part (hereinafter called the said Agreement) the Defendant agreed to sell the pieces of land held under Surat Putus Nos. 43332, 43333 and 43335 for Lots 869, 870 and 872 and Surat Putus Kechil Nos. 2316, 2583 and 2584 for Lots 1080 1343 and 1344 respectively (hereinafter called the said lands) to the 1st Plaintiff at a price of \$11,000/- per relong totalling \$74,711.36.

20

30

2. On the same date and time and pursuant to Clause 2 of the said Agreement the 2nd Plaintiff handed to the Defendant a cheque for a sum of \$5,000/- as deposit for the purchase of the said lands and the Defendant duly acknowledged receipt thereof.

3. In accordance with the said agreement the transfer was to be completed within one month from date of execution thereof and on the 5th day of

In the High
Court

No. 2
Statement of
Claim - 21st
June 1974
(cont'd)

January, 1974 2nd Plaintiff gave notice to the Defendant that the transfer could be completed at the Land Office, Bandar Bharu. On the 9th day of January, 1974 the Defendant and/or her agent however requested for a postponement of the date of completion of sale to the 13th day of January, 1974 which was duly confirmed by the Plaintiffs.

4. On the 13th day of January, 1974 the Plaintiffs called at the Land Office, Bandar Bharu, together with a Bank Draft for the balance of the purchase price and in breach of the said Agreement the Defendant has wrongfully failed and/or refused to complete the sale. 10

5. Notwithstanding repeated requests by the Plaintiffs the last of which was by a Notice dated the 14th day of January, 1974 issued by Messrs. Thevin, Chandran & Siva, Advocates & Solicitors, the Defendant has neglected and refused and continues to neglect and refuse to take any steps towards completion of the said Agreement. 20

6. The 1st Plaintiff has at all material times been and is now ready and willing to perform her obligations under the said agreement.

And the Plaintiffs claim:-

1. Specific performance of an agreement between the Plaintiffs and the Defendant made on the 11th day of December, 1973 for the sale by the Defendant to the Plaintiffs of land held under Surat Putus Nos. 43332, 43333, 43335, Surat Putus Kechik Nos. 2316, 2583 & 2584 for Lot Nos. 869, 870, 872, 1080, 1343 & 1344 respectively in the Mukim of Serdang in the District of Bandar Bharu. 30
2. An injunction restraining the Defendant whether by herself or by her servants or agents or otherwise howsoever, from doing the following acts or any of them, that is to say transferring or disposing of any of the said lands otherwise than to the Plaintiffs. 40
3. Further or alternatively damages for breach of contract.
4. Further or other relief.

5. Costs.

Dated this 21st day of June, 1974

Sgd. Thevin, Chandran & Siva

In the High
Court

No. 2
Statement of
Claim - 21st
June 1974
(cont'd)

No. 3

Defence dated 5th September 1974

No. 3
Defence
5th September
1974

IN THE HIGH COURT IN MALAYA AT ALOR STAR

CIVIL SUIT NO. 100 OF 1974

Between:

1. Loh Koon Moy (f) Plaintiffs
2. Lam Wai Kee

10

And

Zaibun Sa binti Syed Ahmad Defendant

D E F E N C E

1. Save and except that the Defendant was made to sign a purported agreement dated 11th December, 1973 the Defendant denies the rest of the averments in paragraph 1 of the Statement of Claim herein and makes no admission thereof.

20

2. The Defendant denies having seen the 1st Plaintiff to date hereof and is not aware of the relationship between the 1st and 2nd Plaintiffs herein.

3. To the best of the knowledge of the Defendant the 2nd Plaintiff herein was acting as her broker.

4. The said agreement was neither witnessed nor stamped.

30

5. The Defendant admits paragraph 2 of the Statement of Claim herein but avers that the cheque which was crossed with account payee was not accepted by the Banker since the Defendant does not operate any Bank account in her name.

6. When the Defendant approached the 2nd Plaintiff and requested him to have the "A/C Payee" deleted from the said cheque so that the said cheque could be presented for payment, so

In the High Court

No. 3
Defence
5th September
1974.
(cont'd)

he refused to do so saying that he was not interested in purchasing the said property.

7. The Defendant denies paragraph 3 thereof and requires strict proof of the same.

8. The Defendant has no knowledge of paragraph 4 of the Statement of Claim herein and makes no admission, thereof.

9. The Defendant avers that no consideration has been paid for execution of the said Agreement and as such the same is bad in law.

10

10. The Defendant therefore prays that the claim herein be dismissed with costs.

Dated this 5th day of September, 1974.

Sgd: Messrs. Subbiah and Company
.....
Solicitors for the Defendant

No. 4
Notes of
Evidence
14th May 1975
Plaintiffs'
evidence

No. 4

Notes of Evidence

IN THE HIGH COURT IN MALAYA AT ALOR STAR

CIVIL SUIT NO. 100 OF 1974

Between

20

1. Loh Koon Moy (f) Plaintiffs
2. Lam Wai Kee

And

Zaibun Sa binti Syed Ahmad Defendant

Coram: Syed Agil Barakbah IN OPEN COURT

14th May, 1975

NOTES OF EVIDENCE

Both parties present.

Chandran G. Nair for Plaintiffs.

T. Subbiah for Defendant.

30

Agreed Bundle of Documents including pages 2 and 3 of Bundle Not Agreed Upon, now amended as Agreed and marked Ex. "A" and Ex. "A1".

Issues involved:-

- (1) Whether agreement between first plaintiff and Defendant dated 11.12.73 is valid.
- (2) Whether specific performance ought to be granted in the circumstances.

Intd. S.A.B.

In the High Court

No. 4
Notes of Evidence
14th May 1975
Plaintiffs' evidence
(cont'd)

2nd PLAINTIFF: LAM WAI KEE (54): a/s in Cantonese:-

Lam Wai Kee Examination

10 Residing at 54B, Jalan Raya, Selama, Kedah;
a rubber dealer.

I know the first plaintiff. Have known her for about 8 years. The first plaintiff is a miner. She came to Selama to look for mining and came to see me. That was how I came to know her about 8 years ago. The first plaintiff has bought 200 over relongs of rubber lands in Selama through me. Presently I managed all her lands in Selama. I have been doing that ever since in
20 Selama. I call myself agent for the first plaintiff.

The defendant's husband Gohar Iman used to sell rubber to me in Selama. One day he told me he wanted to sell his rubber land in Mukim of Serdang because the yield was very poor. The land was adjacent to the first plaintiff's land just on the opposite side of the road. The first plaintiff holds the land in Selama under the name of Tok Sim Tin Mine Sdn. Berhad.

30 When the defendant's husband told me he wanted to sell the land I asked for an option because the first plaintiff had told me to look for land adjoining hers. So on 1.11.1973 the defendant gave me a written option through her husband. (pg. 1 of Ex. "A" id.). It was handed to me by the defendant's husband. There are 6 pieces of lands mentioned in the option. The price was at \$1,100/- per relong. Altogether the area was 67 to 68 relongs. I then forwarded
40 the option to the first plaintiff. After many consultations we agreed to the price of \$1,100/- per relong. On expiry of the option we went to get an extension which was given up to 10.12.73 (pg.2 of Ex. "A" at bottom id.). Before the extension I telephoned the defendant's husband requesting him to come to the Land Office, Bandar Bahru, to effect a transfer. He said he could not make it and told me it did not matter whether the option expired.

In the High
Court

No. 4

Notes of
Evidence
14th May 1975
Plaintiffs'
evidence
Lam Wai Kee
Examination
(cont'd)

We entered into an agreement for the purchase of the said lands after expiry of the option.

On 11.12.73 I went to the defendant's house at 29, Trang Road, Penang, where I met the defendant's husband. After some bargain we agreed to the price of \$1,100/- per relong and so we both signed the agreement. (pp. 3 and 4 of Ex. "A" referred). The defendant signed as land owner and I signed on behalf of the first plaintiff. The defendant, her husband and her younger brother were present. The agreement was typed out by the defendant's younger brother in our presence. Paragraph 1, lines 3 to 5 were deleted and replaced at the bottom of page 4 because the amount stated in the former was wrong. The actual amount was \$74,711.36. The defendant's husband witnessed the signature of the defendant and also my signature. He signed in my presence as a witness. (Witness asked to look at the agreement). He did not sign on the agreement as a witness. As soon as I received a copy of the agreement I forwarded it to the first plaintiff.

10

20

A sum of \$5,000/- was paid as deposit on that day to the defendant by cheque and I obtained an acknowledgement. The cheque was issued from my personal bank account. The cheque was dated 11.12.73 in the name of the defendant for \$5,000/-. I did not cross the cheque as "A/C Payee Only". I issued a cash cheque. The word "ORDER" was not stamped on the cheque. (p.5 of Ex."A" referred to by witness). I issued the cheque in favour of the defendant because she is the administratrix of the estate. She did not ask me to make out a cheque in her name. This is the receipt showing acknowledgement by the defendant. (p.6 of Ex. "A"). I asked for a receipt because there is no mention of the defendant having received the deposit of \$5,000/- in the agreement. It was written out by the defendant's younger brother and signed by the defendant.

30

40

The defendant's husband told me that the defendant as administratrix had power to transfer the land as she had obtained a court order. I did not see the court order because previously I had negotiated with the defendant for another piece of land and she had the power to transfer. I believed in the present case she had the power to transfer.

50

I have known the defendant's husband for over ten years.

The agreement was not done in a solicitor's office because the defendant's husband and I are close friends and he told me his younger brother could do it. I do not know at all about stamping of the agreement because I sent it to the first plaintiff immediately on receiving it. (Plaintiffs' counsel informs Court agreement had since been stamped in appropriate department). The sale of land was to be completed within one month and the balance of purchase money be paid fully.

In the High Court
No. 4
Notes of Evidence
14th May 1975
Plaintiff's evidence
Lam Wai Kee Examination
(cont'd)

Between 11.1.73 and 4.1.74 I had telephoned to Gohar Iman to make appointment to effect a transfer. He told me his brother-in-law did not agree to the purchase price and he was trying to get some elders to advise him to agree. I contacted the defendant's husband on many occasions reminding him as to the date of expiry of the agreement. He told me that did not matter. I don't remember receiving any letters from the defendant or her husband on the agreement.

(Pg.7 of Ex. "A"). That is a letter sent by me to the defendant's husband requesting the transfer be done on 9.1.74. The purpose of having particulars typewritten on the top is for Gohar Iman to prepare the transfer form.

(Pg. 8 of Ex. "A"). The next day I had another letter prepared to be sent to the defendant. I had sent the first letter on page 7 by ordinary post. I was afraid that might not have reached the defendant so I sent the second letter by A.R. post. About two days later i.e. 7.1.74 Gohar Iman telephoned me saying he was busy and would inform me when everything was ready. He did not give me an alternative date. After that he did not contact me.

(Pg. 9 of Ex. "A"). This is a letter I sent to the defendant subsequently confirming the meeting on 13.1.74 at the Land Office, Bandar Bahru.

On 13.1.74 the first plaintiff and I waited at Bandar Bahru Land Office but both the defendant and her husband did not turn up. Subsequently neither of them contacted me.

(Ex. "A1" - pp. 2 and 3 referred). Before I informed Gohar Iman of the date of the transfer on 13.1.74 he came to my shop in Selama. He brought this agreement to me and requested me to consult with the first plaintiff to agree to the new price, i.e. at \$1,200/- per relong and

In the High Court

No. 4

Notes of Evidence

14th May 1975

Plaintiffs Evidence

Lam Wai Kee Examination (cont'd)

extending the date of full payment. The agreement was signed by the defendant and witnessed by Gohar Iman.

(1st agreement produced and marked Ex. P1).

(2nd proposed agreement undated, produced and marked Ex. P2).

The first plaintiff did not agree to the second proposed agreement and did not sign it.

As a-rubber dealer I know values of rubber lands in Selama now. The price has now increased up to \$1,600/- a relong because of demand for planting oil palm.

10

The defendant and her husband did not contact me. Through the telephone he told me his brother-in-law did not agree to the original price. Since then the defendant's husband had stopped selling rubber to me.

Intd. S.A.B.

Adjourned to 27.5.75.

27th May 1975

27th May 1975 (Continuation).

20

Both parties present.

As before.

2nd Plaintiff called to witness box.

Subbiah for defendant applies for amendment by inserting paragraph 9A after paragraph 9 of the Statement of Defence:- "In the alternative the defendant avers that the said agreement has been treated as cancelled by the parties".

No objection by Nair for plaintiffs.

30

Amendment allowed.

Intd. S.A.B.

2ND PLAINTIFF: re-a/s in Cantonese:-

Cross-examination

XXN: Subbiah:-

I don't agree I had acted as a broker for the first plaintiff in purchasing about 200 relongs of land in Selama but I acted as her agent.

Whenever there was a suitable and

appropriate land the first plaintiff asked me to buy for her. In the purchase of the 200 relongs I have signed agreements on behalf of the first plaintiff as purchaser in some purchases. I don't remember how many. I also don't remember the names of the vendors as it happened about 3 years ago. Put to me I signed only the agreement with the defendant on behalf of the first plaintiff, I say that is not correct. No power of attorney was given to me by the first plaintiff.

In the High Court

No. 4
Notes of
Evidence
27th May 1975
Plaintiffs
Evidence
Lam Wai Kee
Cross-
Examination
(cont'd)

I have no power to fix the purchase price but have to consult the first plaintiff on any purchase. If the deposit for the purchase is a big sum, then the first plaintiff pays direct to the vendor. For small considerations I advance my money first and the first plaintiff will return me the money. I will not get anything from the sale. I am only paid by the first plaintiff for looking after the land.

I consulted the first plaintiff before I obtained option from the defendant in respect of the land in dispute. The first plaintiff at first offered \$900/- per relong. When I obtained the option (p.1 of Ex. "A") the price had not yet been fixed. The option was prepared in Penang by the defendant's husband and handed to me at Selama. I used to meet Gohar Iman sometimes once and sometimes twice a month when he came to sell rubber to me. The option expired on 10th December, 1973 and an agreement entered into on 11th December, 1973. At the time of signing the agreement I knew the defendant was administratrix of the estate. Yes, I also knew there were a number of beneficiaries to the estate concerning the said land. I did not find out from the beneficiaries whether they agreed. I did not meet them as Gohar Iman told me he had to consult the beneficiaries. After he had told me all the beneficiaries agreed, I paid the defendant the deposit. No other people were present when the agreement was signed except Gohar Iman's brother-in-law, Gohar Iman and the defendant. (Abdul Rashid bin Syed Ahmad called in). He is the brother-in-law I meant. There were some ladies in the house but I don't know who they were. They were not present when the agreement and deposit was made. The agreement was prepared by Abdul Rashid who conversed in Bengali with the defendant.

I deny the agreement was prepared by me and brought to the defendant.

In the High
Court

No. 4
Notes of
Evidence
27th May 1975
Plaintiffs
Evidence
Lam Wai Kee
Cross-
Examination
(cont'd)

Put to me, I deny the option was also prepared by me and brought to the house. I went through the agreement.

(Pg. 6 of Ex. "A"). The receipt was not brought by me. The blank receipt was taken out by Abdul Rashid who filled in the words and the defendant signed it.

I did not see the draft agreement before it was prepared. The agreement was typed in my presence. I cannot remember whether it was copies from any agreement.

10

I don't know Abdul Rashid had passed only L.C.E. Put to me, I cannot say whether he was incapable of preparing such an agreement.

Put to me he cannot type, I saw the defendant's younger brother type. The defendant has many younger brothers. I cannot say definitely whether he was Abdul Rashid as they look alike. I believe the one who was present was Abdul Rashid.

20

I agree that there is no mention in the agreement if either the purchaser does not pay the balance of the purchase price or the vendor should refuse to sell, what should the consequence be. As a businessman I agree if the purchaser fails to pay the balance of the purchase price the deposit will be forfeited. There was such understanding to the said agreement. There was no undertaking that the vendor has to pay double the amount of deposit if she fails to abide by the agreement. But she has to pay all the damages. The \$5,000/- deposit would also be refunded. These undertakings are not incorporated in the agreement. It is not mentioned in the agreement that the Vendor must sell and the purchaser must buy.

30

I brought along my personal cheque book and wrote the cheque myself. Put to me, I don't agree the "A/C Payee" crossing and the "ORDER" were put in by me. I issued a cash cheque. I checked with the bank and found the cheque has not been cleared. I checked every month. I checked at the end of December, 1973. The defendant's husband told me he did not want to cash the cheque and then put into account of the estate. He would only cash whenever the money was needed. He did not mention at all about the cheque when he came to see me later.

40

(Pg. 1 of Ex. "A1"). No. I did not receive a letter dated 24.12.73 from the defendant. Put to me, it was not handed to me personally by the defendant's husband.

In the High Court

No. 4
Notes of Evidence
27th May 1975
Plaintiffs Evidence
Lam Wai Kee
Cross-Examination
(cont'd)

10

(Ex. P2, second agreement). About two weeks after 13.1.74 it was handed to me by Gohar Iman in my shop. It was about two weeks after the expiry of the first agreement. He handed two copies. I sent them to the first plaintiff. I did not sign the agreement because the sale price was increased to \$1,200/- per relong. I disagreed to increase but Gohar Iman told me to consult the first plaintiff. I did not return the copy of the agreement. It was kept by the first plaintiff.

Intd. S.A.B.

Adjourned to 23.7.75 for continuation.

Intd. S.A.B.

23rd July, 1975 (Continuation)

23rd July 1975

20

Both parties present.

Chandran for Plaintiffs.

Subbiah for Defendant.

2ND PLAINTIFF: re-a/s in Cantonese:-

XXN: Subbiah (continues):-

On 2.12.1971 I negotiated for the sale of the said lands with two other Chinese gentlemen. After boring they concluded it was not worthwhile buying the lands. I did not keep details of this property.

30

I remember the second agreement (Ex. P2) was handed to me two weeks after 13.1.74 i.e. 27th or 28th January, 1974. The first plaintiff refused to sign the second agreement (P2) because the price was increased to \$1,200/- per relong. As on 13.1.74 the price of the said lands per relong was worth about \$1,500/- per relong. The reason for the increase was because during that month there was a rush to turn rubber land to oil palm which was allowed. The price of rubber land has now come down. I cannot say the value per relong.

40

Apart from this land I had acted on behalf of the first plaintiff as her agent.

The cheque for \$5,000/- has not been cashed up to date by the defendant. (p.6 of Ex. "A").

In the High Court

No. 4
Notes of
Evidence
23rd July 1975
Plaintiffs
Evidence
Lam Wai Kee
Cross-
Examination
(cont'd)

Re-
Examination

I have not been reimbursed; money is still in the bank.

(Ex. P2). The second agreement was not prepared by me. The sum of \$1,200/- per relong was not stated at my request.

Intd. S.A.B.

RXN: Chandran:-

The lands in question were offered through me for sale by the defendant. In the option it was \$1,100/- per relong. Earlier, there was an offer for \$1,000/- per relong from the defendant.

10

On boring they found little tin ore so it was not worthwhile buying.

There are tin mines in the area surrounding the lands. The first plaintiff has a company which is about to mine 200 relongs in area. The first plaintiff wants to purchase the land in dispute because she wants to make use of the land for dumping tailings as the land is adjoining mining area.

20

It is not true I prepared the agreement (Ex. P1) and certain other documents. Other than the letters I sent to the defendant, the rest were not prepared by me. When I signed the agreement (Ex. P1) in Penang, I acted as agent for the first plaintiff. The first plaintiff was busy and requested me by telephone to proceed to Penang to act for her.

I signed Ex. P1 on behalf of the first plaintiff. The first plaintiff empowered me to sign on her behalf. She said so by telephone two days earlier. She confirmed the agreement after I posted the agreement and receipt (Ex. P1 and p.6 of Ex. "A") to her. She sent me a telegraph transfer for \$5,000/- after receipt of the above.

30

Subsequently the first plaintiff and I went to the Land Office, Bandar Bahru, to execute the transfer. The defendant did not turn up.

Intd. S.A.B.

40

To Court: No question

Intd. S.A.B.

1ST PLAINTIFF: LOH KOON MOY (56): a/s in Hakka:- In the High Court

Residing at 199 Hussain Road, Batu Gajah, Perak; a tin miner.

No. 4
Notes of
Evidence
23rd July 1975
Plaintiffs
Evidence
Loh Koon Moy
Examination

I know the second plaintiff since childhood. I have bought 200 relongs of land in Serdang, Kedah, for the purpose of mining. It is still rubber land. The second plaintiff is managing the said land. He is my agent in Kedah. I intended to turn the land into mining.

10 I instructed the second plaintiff to look for land adjoining the first land, if the land contains tin ore. There was no other purpose. The reason I asked the second plaintiff to negotiate for the purchase of the land in dispute is to carry out mining on it. I found there was tin deposit after boring it. I would not buy if there was no tin deposit. I was satisfied there was deposit.

20 I offered \$1,100/- per relong for the said land. I was busy so I asked the second plaintiff to act for me in all respects pertaining to the purchase. I contacted the second plaintiff mostly by telephone. Subsequently the second plaintiff sent an agreement signed by the defendant and the second plaintiff, to me, through my secretary as I am illiterate. I was informed by the second plaintiff by telephone that he had paid a deposit of \$5,000/-. I refunded him the money by postal order. My secretary did it. Subsequently
30 I learnt that the price had been increased to \$1,200/- per relong. I cannot remember whether it was the second plaintiff or my secretary who informed me. I did not agree to the increased price because it was earlier agreed at \$1,100/-.

40 All the dealings were done between my secretary and the second plaintiff and only important matters were referred to me. After that the second plaintiff asked me to come down to Bandar Bahru to execute a transfer. I went with the second plaintiff and my secretary. I brought with me a bank draft balance of the purchase price. I do not remember the exact amount but it was about \$60,000/-. We waited till about 3.00 p.m. at the Land Office from morning but the defendant did not turn up. I instructed the second plaintiff to look for the defendant. Later I found out she refused to sell.

50 Later I asked my solicitor to pursue the matter because the defendant refused to transfer the said land. The defendant did not give any

In the High Court

No. 4
Notes of Evidence
23rd July 1975
Plaintiffs Evidence
Loh Koon Moy
Examination
(cont'd)

alternative offer. After that I did not hear anything from the defendant. I instructed my solicitors to commence court proceedings.

I would suffer damage if I fail to acquire the land in question. It is adjoining my land and I lose the opportunity of mining and dumping earth from the palong.

The land in question is a rubber plantation. Before I offered to buy it I saw Indians tapping rubber. Now I cannot say.

10

At that time in 1973 I did not hear of any other piece of land for sale. The land in question was the only piece for sale. Presently no other lands are available.

I remember buying a piece of land previously from the defendant, in the same area a few years ago.

I am still ready and willing to purchase the said land in accordance with the agreement.

I am now claiming for specific performance of the agreement, further, or alternatively, damages for breach of contract and costs.

20

(Counsel informs Court first plaintiff abandons the second prayer for injunction).

Cross-Examination

XXN: Subbiah:-

I bought 200 relongs sometime in 1969 or 1970. I bought the land piece by piece and not 200 relongs at once. Mostly the rubber was old. The price per relong ranged from \$900/- to \$1,500/-.

In 1970 the defendant offered to sell the said land to me at \$1,000/- per relong. The offer of \$1,400/- per relong by the defendants was made to my husband and not to me. I never dealt direct with the defendant but through the second plaintiff. At that time I did not know the condition of the land and how far it was from my land. I did not base the land in question with the land adjoining it, i.e. my land. I know the said land in question contained tin ore.

30

Put to me in 1971 the said land was bored and found not to contain sufficient tin ore for mining purposes, I do not know. I want to use it for dumping. The other land contains tin ore. I have started a scheme to do mining.

40

In 1973 I considered \$1,100/- per relong was a fair price.

On 13.1.74 when I went to Bandar Bahru to execute a transfer I cannot say how much the land was worth. The price agreed was \$1,100/-.

In the High Court

No. 4
Notes of Evidence
23rd July 1975
Plaintiffs Evidence
Loh Koon Moy
Cross-Examination
(cont'd)

I have authorised the second plaintiff to deal in lands on my behalf. He has signed other agreements in small dealings. I cannot remember how much.

10

Prior to the execution of the agreement (Ex. P1) the second plaintiff told me the contents of the agreement. I don't remember how many days before 11.12.1973. He read to me all the terms of the agreement which I agreed. I live in Batu Gajah and the defendant lives in Penang so I did not go to sign the agreement myself. I don't remember whether the second plaintiff came to my office to read over the agreement to me or when I came to Selama.

20

(2nd agreement, Ex. P2). I don't remember the price was increased to \$1,200/- before or after I went to Bandar Bahru. (Letter dated 1.4.71 shown). (Will be produced by defendant later).

Intd. S.A.B.

RXN:

Re-Examination

30

During the period 1970-1973 there was some offer regarding the said land between my husband and the defendant. (Letter dated 1.4.71 referred). I don't know about this particular letter. I am only aware of some negotiations. I was aware there was an offer for \$1,000/- per relong for the said land. I don't know in what year. I have not put up a scheme because I want to incorporate this land in question into the scheme.

The second plaintiff signed the agreements on my behalf in the purchase of land forming the 200 relongs.

Intd. S.A.B.

To Court:

40

My husband did not inform me about his negotiation with the defendant. He was doing on behalf of the company.

The arrangement I made with the second plaintiff was that he would be paid commission of 3% should the deal go through and he would manage the land in question. He would be in charge of tapping rubber and collection of revenue and

In the High Court
No. 4
Notes of Evidence
23rd July 1975
Plaintiffs Evidence
Loh Koon Moy
Re-Examination
(cont'd)

payment of assessment and other expenses as done in the 200 relongs. He would keep the balance of the income. So far I have never checked his accounts as the trees are old. I left everything to the second plaintiff to do what he likes.

I have not decided yet with the second plaintiff when the 200 relongs land is to be mined.

Plaintiffs rest.

Intd. S.A.B.

Time 1.00 p.m.

10

Adjourned to 2.30 p.m.

Hearing resumes.

As before.

Defendants Evidence
Gohar Iman Bin Abdul Rahim Mog Hal Examination

D.W.1. GOHAR IMAN BIN ABDUL RAHIM MOGHAL (45):-
a/s in Punjabi:-

Residing at 29 Trang Road, Penang; a businessman. The defendant is my wife. She is the administratrix of the estate of her father Syed Ahmad (deceased). There are seven other beneficiaries to the estate besides the defendant. The lands in dispute form part of the estate.

20

I know the second plaintiff for the last twenty years. I sell rubber from my estate to him at Selama. His firm's name is Lean Tang & Co. In a month I used to see him 3 or 4 times. I last met him on 11.4.74 at his place of business.

About 8 years ago the price of land that was sold was in respect of the estate of my mother-in-law i.e. the defendant's mother. The second plaintiff was the broker and paid 2% commission.

30

The property in dispute forms part of the estate of the defendant's father. Sometime in 1971 my wife had the intention of selling the land. Sometime in 1971 an offer was made to one Lee Lian You, the husband of the first plaintiff, for \$1,400/- per relong. The second plaintiff was also the broker. This is a copy of the letter sent by me to Lee Lian You. (Admitted by consent, Ex. D3). It is in respect of the land in dispute. I received no reply to that letter.

40

On 2.12.71 an agreement was prepared by the second plaintiff as a result of him acting as broker for the sale of the said piece of land between my wife and two Chinese gentlemen. The transaction did not go through because there was

no tin ore on the land. My wife was permitted to forfeit the deposit made.

In the High Court

Late in 1973 I indicated to the second plaintiff I wished to sell the said land because the land was far away from where we live and production was not so good. The total area of land in dispute is about 68 relongs.

No. 4
Notes of
Evidence
23rd July 1975
Defendants
Evidence
Gohar Iman Bin
Abdul Rahim
Mog Hal
Examination
(cont'd)

10

On 1.11.1973 the second plaintiff brought an option to me (pg. 1 of Ex. "A") to my house; he brought two copies. There were three of us in the house, i.e. myself, my wife and my younger brother-in-law, Abdul Rashid. The option was signed by my wife after it was read and explained to her. In the option it is stated 2% commission would be paid to the second plaintiff on sale.

20

On 11.12.73 the second plaintiff came to my house with two copies of an agreement. The terms were explained to the defendant. She and the second plaintiff signed it in my presence and Abdul Rashid. (Ex. Pl id.). The agreement does not contain any terms if either party does not fulfil the contract. There was an understanding should the second plaintiff fail to abide by the said agreement the \$5,000/- would be forfeited, plus damages, and if the defendant refused to sell, she has to refund the \$5,000/- already paid plus an additional \$5,000/-.

30

A cheque for \$5,000/- was given to the defendant that day. (p.5 of Ex. "A"). After giving the cheque the second plaintiff went away. I kept the cheque. Thereafter when I had a look at the cheque I discovered it bore "A/C Payee". I took it for banking at Kulim and was told I could not cash it. I saw the second plaintiff to ask him to delete "A/C Payee" and make it a cash cheque. The second plaintiff did not agree. He told me the person who was going to purchase the land had still not made payment and he asked me to keep the cheque. That was about 18.12.73 at the second plaintiff's shop.

40

50

On 24.12.73 I met the second plaintiff again in connection with the same cheque and rubber transaction. I also handed the second plaintiff the letter dated 24.12.73. I produce the letter. (marked Ex. D4). The second plaintiff kept the letter. Subsequently I received a letter dated 4.1.74 from the second plaintiff (p.7 of Ex. "A") and also another letter dated 5.1.74 (p.8 of Ex. "A"). I then went and saw the second plaintiff on 10.1.74. I asked him about the cheque and also sold some rubber to him. He still gave the same

In the High Court

No. 4
Notes of
Evidence
23rd July 1975
Defendants
Evidence
Gohar Iman Bin
Abdul Rahim
Mog Hal
Examination
(cont'd)

answer of not having received money from the buyer and asked me to keep it. Subsequently I received a letter dated 9.1.74 (pg.9 of Ex. "A") asking me to go to Bandar Bahru Land Office. We spoke about going to Bandar Bharu when we met on the 10th. I said I would be willing to go to Bandar Bahru after I had received payment of the cheque for \$5,000/- deposit. The second plaintiff gave the same reply.

Subsequently the defendant received a letter from the plaintiffs' solicitors, dated 14.1.74 (p.10 of Ex. "A"). I went to see the second plaintiff on 17.1.74 and asked him about the letters. The second plaintiff did not reply. I sold the rubber to him and I returned.

10

On 2.2.74 I went to his shop to sell rubber again. I had a talk with the second plaintiff. He said the earlier agreement was no longer in force and he suggested we enter into a new agreement. He was willing to pay \$100/- more per relong on the said land. I agreed. I met him again about a week after 2.2.74. The second plaintiff brought in a new agreement. That was about 9.2.74 (Ex. P2 id.). The following day the second plaintiff came to my house with Ex. P2. The defendant signed the agreement after being explained. I signed as a witness. The second agreement was valid till 5.4.74. The second plaintiff did not sign the agreement. He told us he would take the document back and have it signed by the buyer and then come back and make payment of \$5,000/-.

20

30

The \$5,000/- cheque (pg. 5 of Ex. "A") was still in our possession on that day. It was agreed that the "old"cheque would be returned to the second plaintiff after he had brought a new cheque. Eventually I saw him on 11.4.74 and handed the "old" cheque to the second plaintiff. I did so because the second agreement had expired. The second agreement was not returned to us by the second plaintiff. I also sold rubber to the second plaintiff on 11.4.74. After that day I severed business dealings with the second plaintiff.

40

On 13.5.74 the defendant agreed to sell the said land to one Chinese gentleman for the sum of \$1,280/- per relong and received full purchase price amounting to \$87,040/-. A caveat has been lodged in the Land Office, Bandar Bahru by both plaintiffs so no registration of transfer could be made. That Chinese gentleman has filed a civil suit in this Court No. 229/1974 against the defendant. My wife has returned the money and the case was settled.

50

When the second agreement was signed by the defendant the land was worth about \$1,200/- per relong. On 13.5.74 the highest price she could get was \$1,280/- per relong.

In the High Court

Intd. S.A.B.

No. 4
Notes of
Evidence
23rd July 1975
Defendants
Evidence
Gohar Iman Bin
Abdul Rahim
Mog Hal
Cross-
Examination

XXN: Chandran:-.

10 I have been trying to sell the land in question on behalf of the defendant since 1970. I cannot recollect whether I had offered different prices at different times. (Ex. D3). Yes, in the letter I offered to one Lee Lian You about \$1,400/- per relong. Yes, sometime in 1972 I wrote another letter to the same gentleman offering at \$1,000/- per relong. I admit this letter. (produced and marked Ex. P5 by consent). Subsequently in November 1973 I gave an option to the second plaintiff at \$1,100/- per relong.

20 In December 1971 I agreed to sell the said land in two portions to two Chinese purchasers at \$1,500/- and \$2,000/- respectively. The deal fell off because there was not sufficient ore for mining purpose. The second plaintiff told me so. Yes, because of that I agreed to offer for sale in 1972 at \$1,100/- per relong.

30 I deal in cloth business. I have a person doing correspondence for me in Urdu. (Ex. D4 and P5 referred). The two were written by a petition writer. I don't know where the petition writer is now as he goes from one place to another.

(Pg. 12 of Ex. "A" letter dated 19.1.74 referred). Some other petition writer wrote it.

(Pg. 14 of Ex. "A" referred). A different petition writer wrote the letter.

I am sure I went to different petition writers.

40 When I went to see the petition writer on 28.2.78 I showed him a letter which I had received. (Ex. D4). I have noted the points to be written in Urdu which I told the petition writer.

It is correct that the option, the first agreement and the second "agreement" were prepared at the instance of the second plaintiff.

Beside what was explained by the second plaintiff in the first agreement (Ex. P1) I did not know the contents.

In the High
Court

No. 4
Notes of
Evidence
23rd July 1975
Defendants
Evidence
Gohar Iman Bin
Abdul Rahim
Mog Hal
Cross-
Examination
(Cont'd)

I remember the receipt issued by my wife. It was written by Abdul Rashid. The cheque for \$5,000/- was placed before Rashid. After the second plaintiff had left I looked at the cheque. That was when I discovered "A/C Payee Only" and "ORDER". I agree I am a businessman. If I have an account in the bank in my own name, I can bank the cheque in my account, or it can be paid into account of the payee whose name is endorsed.

10

The defendant has no bank account. She has no money. Yes, she is administratrix of Syed Ahmad's estate. Whatever income is derived from the rubber estate, about \$200/- or \$300/- a month is utilised for the education and maintenance of her brothers and sisters. Other item in the estate is the house in which we live. There is no other property.

Q. You could have gone to a bank and opened an account in the defendant's name with the cheque?

20

A. There was not sufficient money in the house to go and open an account in her name.

Yes, I have an account of my own in the bank.

There was no need for me to open a bank account in the defendant's name as I am her power of attorney. I tried to bank the cheque at the United Asian Bank in Penang where I have an account, but I was not successful because of the words "A/C Payee" and "ORDER". I was not told of a savings account. I agree it was a big problem to cash the said cheque.

30

(Ex. D4 referred). I did not make any mention of it in D4 and saw the second plaintiff personally about it.

I agree in D4 the defendant is terminating the first agreement. I agree I did not mention the difficulty about the cheque.

(Ex. P1 referred). After Ex. P1 was signed the second plaintiff and my wife each kept a copy.

40

IN THE HIGH COURT IN MALAYA AT ALOR STAR

CIVIL SUIT NO. 100 OF 1974

Between

1. Loh Koon Moy (f) Plaintiffs
2. Lam Wai Kee

And

Zaibun Sa binti Syed Ahmad Defendant

Coram: Syed Agil Barakbah, J.

IN OPEN COURT

In the High Court

No. 4
Notes of
Evidence
11th August 1975
Defendants
Evidence
Gohar Iman Bin
Abdul Rahim
Mog Hal
Cross-
Examination
(cont'd)

10

11th August, 1975

NOTES OF EVIDENCE

Both parties present.
As before.

D.W.1. re-a/s in Punjabi:-

XXN: Chandran (continues):-

(Paragraph 6 of Statement of Defence referred):-

20

"he refused to do so saying that he was not interested in purchasing the said property". The second plaintiff did say so. He said he was no longer interested in purchasing the property as he had no money. The person who wanted to purchase the land had no money to do so. The second plaintiff and I had a talk at Selama and then I returned.

30

What the second plaintiff said was he was merely a broker. Since he had not received any money from the buyer, therefore he could not purchase the property. That took place after the second proposed agreement was given to me by the second plaintiff.

(Ex. D4 referred. Also page 14 of Ex. "A" another letter dated 28.2.74). I remember both letters sent by the defendant. (Reason - last paragraph "... the deposit received by way of cheque was not cashed").

40

After the cheque had been cashed, I told the second plaintiff I would agree to go to Bandar Bahru to effect a transfer. I met him on several occasions. The second plaintiff told me he did not want to purchase the land. That was on 10.1.74 and on several other occasions. Yes, I cancelled

In the High
Court

No. 4

Notes of

Evidence

11th August 1975

Defendants

Evidence

Gohar Iman Bin

Abdul Rahim

Mog Hal

Cross-

Examination

(cont'd)

the agreement on 10.12.73. (Ex. D4). In spite of Ex. D4 I was still willing to go on with the agreement if the cheque could be cashed. I was still prepared to effect a transfer on that condition.

(Pages 8 and 9 of Ex. "A", two letters from second plaintiff). I did go to the Land Office, Bandar Bahru, on 13.1.74 in compliance with the second letter. I did not say this earlier as I was not asked about it. I did not meet either of the plaintiffs there. I was there at 12.00 noon and waited till 1.00 p.m. I only took the grant along with me.

10

(Pages 10 and 11 of Ex. "A", 5th paragraph referred - letter from plaintiffs solicitors). I did not reply to the plaintiffs' solicitors because I received the letter on 16.1.74. The next day I went to see the second plaintiff personally and sold rubber to him. I told him I was at the Land Office, Bandar Bahru on the 13th.

20

(Page 12 of Ex. "A" defendant's reply to plaintiffs' solicitors). I did not mention about my being in Land Office, Bandar Bahru on the 13th in the said letter because I had already informed the second plaintiff on the 17th January. The second plaintiff that day told me he was not interested in buying the property.

(Page 14 of Ex. "A" referred). I did not give that reason, i.e. second plaintiff having told me he was no more interested in purchasing the property because I am illiterate in English. The subsequent purchaser met me after 11.4.74. I was aware of the caveat lodged by both plaintiffs earlier than 13.5.74. I had the caveat removed earlier, i.e. prior to 13.5.74. When I went on 13.5.74 I discovered another caveat had been lodged.

30

There was no other offer from any one other than the one stated above.

Put to me that I have not been telling the truth, I say I am.

40

Put to me the cheque given to me was a cash cheque and not crossed or "Order", I say it is not correct. It is not true that I put the chop "A/C Payee Only" and "Order" subsequently. It was not possible for me to cash the cheque.

I deny that I refused to sell the property to the plaintiffs because there was another bigger offer.

It is not true that I have put all the blame on the second plaintiff in order to avoid compliance with the agreement. It is not because there was a higher offer of \$1,280/- per relong. I deny subsequently I offered \$1,150/- per relong to the plaintiffs. That is not correct.

In the High Court
No. 4
Notes of Evidence
11th August 1975
Defendants Evidence
Gohar Iman Bin Abdul Rahim Mog Hal
Cross-Examination
(cont'd)

10

The lands are now registered in the defendant's name as administratrix of her father's estate. We have made an application to the Court to sell the property.

Intd. S.A.B.

RXN: No question.

To Court: No question.

Intd. S.A.B.

DEFENDANT: ZAIBUN NISA BTE SYED AHMAD (45)
a/s in Punjabi.

Zaibun Nisa
Bte Syed Ahmad
Examination

Residing at 29 Trang Road, Penang; a housewife. D.W.l. is my husband.

20

On 1.11.73 I signed an option agreeing to sell certain land.

(Page 1 of Ex. "A" id.) I am registered as administratrix of the estate of my late father and also in the title deed of the property. The second plaintiff brought to me the option in my house in Penang.

On 11.12.73 I also signed an agreement. (p.3 of Ex. "A"). The second plaintiff also brought the agreement to me.

30

Apart from what is written in the agreement, there was a verbal agreement to the effect that should the purchaser not wish to buy the property in question the amount deposited i.e. \$5,000/- would be forfeited. Should the vendor not sell the property then he will have to repay double the amount, i.e. \$10,000/-. The vendor has to return the \$5,000/- and pay me another \$5,000/-.

40

I remember signing another agreement to sell the same property at \$1,200/- per relong. (Ex. P2 referred). The second plaintiff brought it along. D.W.l. signed as a witness. The second plaintiff left a copy with D.W.l. and took the other for signature. It had not been signed by either of the plaintiffs nor subsequently returned to me.

Intd. S.A.B.

XXN: Chandran:-

Besides the property in question, the other property is the house that we now live in. My husband looks after the accounts of the estate. I have given him a power of attorney to look after the estate. My husband and I decide regarding the property and inform the other beneficiaries. They can give their views if they wish to.

Before signing the option in this case, I never consulted the other beneficiaries. We told them we had to sell the land in question and they said "sell it". There was no objection by any of them regarding the price.

10

The terms of the agreement on 11.12.73 were explained to me by D.W.l. I don't know how he knew about the contents. All the three of us, i.e. second plaintiff, D.W.l and myself were there; also my brother. When I signed the agreement I knew at that time that the purchaser was someone else because the second plaintiff told me so. I saw him signing the agreement. He told me he was a broker. I knew the agreement was between the purchaser and myself. Payment was made by cheque to my husband. I saw the second plaintiff handing the cheque to my husband and kept by him. I did not see the face of the cheque. A receipt was given in return because the second plaintiff wanted it. I don't know who wrote it out but I was given a receipt to sign which I did. (Pg. 6 of Ex. "A"). Later I learnt from D.W.l. he had difficulty in cashing it at the bank. I know D.W.l. subsequently went to see the second plaintiff in respect of cashing the cheque. It was not cashed at all. I asked my husband who told me the cheque could not be paid into the bank. I learned from my husband that the second plaintiff said to him purchase would be made when the purchaser came.

20

30

My husband informed me about going to the Bandar Bharu Land Office on 13.1.74. We both went to the Land Office, Bandar Bahru on 13.1.74. Yes, my husband could have gone himself as he has a power of attorney but I went with him. We did not see the plaintiffs there. I don't know about an order of court to transfer the said land on 13.1.74. I don't know the purpose of going to the Land Office, Bandar Bahru. D.W.l. merely told me the purchaser was coming there and we were to execute a transfer.

40

50

I don't know how the second agreement came about. D.W.l. knows all. I don't know for what

reason it was not signed by the second plaintiff.

In the High Court

I came to know of the case on receipt of a summons. I was not aware of any notices.

No. 4
Notes of
Evidence - 11th
August 1975
Defendants
Evidence
Zaibun Nisa
Bte Syed Ahmad
Cross-
Examination

Intd. S.A.B.

RXN: No question.

To Court: No question.

Intd. S.A.B.

D.W.2. ABDUL RASHID BIN SYED AHMAD (22):
a/s in Malay:

Abdul Rashid
Bin Syed Ahmad
Examination

Residing at 29 Trang Road, Penang;
assisting D.W.1.

I passed L.C.E. in secondary school. The defendant is my elder sister.

I remember an option being signed by her son on 1.11.73. It was brought by a broker (second plaintiff) to our house. (Pg. 1 of Ex. "A").

On 11.12.73 my sister also signed an agreement (pg. 3 of Ex. "A") brought by the second plaintiff. The defendant also signed another agreement to sell the same land at \$1,200/- per relong. It was also brought by the second plaintiff. (Ex. P2). All the three were brought to our house in Penang.

Intd. S.A.B.

XXN: Chandran:-

Cross-
Examination

I was present when the first agreement was signed. The second plaintiff, the defendant and D.W.1. were there. I read the agreement. I explained the contents to the defendant and D.W.1. Earlier the second plaintiff explained the contents. After that I also read and explained it. There was also a verbal agreement between them that if we refused to sell the land, we have to pay double amount of deposit to the purchaser and when the purchaser refused to buy, the deposit would be forfeited. \$5,000/- was paid that day as deposit by cheque. I had a look at the cheque. It was crossed. I knew at that time it was "Crossed" and "A/C Payee Only". D.W.1. kept the cheque. He also looked at the cheque. I informed the defendant and D.W.1 that the cheque was "Crossed" and "A/C Payee Only" then and there. I don't remember whether they said anything because I went out after that. I wrote out the receipt.

In the High
Court

No. 4
Notes of
Evidence - 11th
August 1975
Defendants
Evidence
Abdul Rashid
Bin Syed Ahmad
Cross-
Examination
Re-Examination

I am one of the beneficiaries of the estate of my father forming the property in question. I was interested in the agreement. I only came to know from D.W.1 about three months later that the transaction did not go through. I and the other beneficiaries agreed to the sale price of the land in question at \$1,100/- per relong.

The second agreement was not signed because we wanted to ask for a higher price.

Intd. S.A.B.

10

RXN:-

The second agreement was signed after the expiry of the first agreement.

Intd. S.A.B.

To Court:-

No question.

Intd. S.A.B.

Defendant rests.

Both Counsel to file written submissions on or before 25th August, 1975. To 25.8.75 for mention.

20

Both parties and Counsel are excused from further attendances unless called for.

Sgd. Syed Agil Barakbah, J.

Certified true copy.

.....
D.C. Haslam

Sec. to Judge - 12.8.75

IN THE HIGH COURT IN MALAYA AT ALOR STAR

CIVIL SUIT NO. 100 OF 1974

Between:

1. Loh Koon Moy (f)
2. Lam Wai Kee

Plaintiffs

And

Zaibun Sa binti Syed Ahmad

Defendant

J U D G M E N T

This is a claim for specific performance of an agreement between the Plaintiffs and the Defendant made on 11th December, 1973 for the sale of six pieces of land about 68 acres in area in the Mukim of Serdang in the District of Bandar Bharu, Kedah, and further or alternatively for damages for breach of contract.

Mr. Chandran G. Nair appears for both the Plaintiffs and Mr. T. Subbiah for the Defendant.

Two Agreed Bundles of Documents are put in and marked Ex. "A" and "A1".

These are only two issues involved:-

- (1) Whether the agreement between the first plaintiff and the defendant is valid.
- (2) Whether specific performance ought to be granted in the circumstances.

In determining the first issue three questions arise:-

- (a) whether the second plaintiff was the agent of the first plaintiff with legal authority to sign the agreement (Ex. P1) on her behalf;
- (b) whether there was any valuable consideration for the agreement entered into; and
- (c) if so, whether the said agreement had been mutually terminated by the parties.

The following facts are not disputed:-

The defendant is the administratrix of her

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father's estate which comprises the rubber land in dispute. Her husband, Gohar Iman (D.W.1) looks after the estate on her behalf and often visits Selama where he used to sell rubber to the second plaintiff, a licensed rubber dealer and a justice of the peace. Both the second plaintiff and the defendant's husband have known each other since the last twenty years through dealings in rubber. The second plaintiff also manages land belonging to the first plaintiff in Selama. He came to know her since the last eight years when the first plaintiff, a miner, came to see him for the purchase of certain lands for mining purposes. He had purchased for her over 200 relongs of rubber land. The land in dispute is adjacent to the first plaintiff's land. As a result of an approach made by Gohar Iman who wanted to dispose of the land in dispute, the second plaintiff obtained an option from the defendant on 1st November, 1973. (p.1 of Ex. "A"). The price and rate of sale per relong was agreed at \$1,100/-. The option was for a period of one month but was subsequently extended to 10th December, 1973 on the same terms and conditions (p.2 of Ex. "A"). When the first plaintiff agreed to purchase the land the option had expired. However, on 11th December, 1973 the second plaintiff went to see the Defendant and her husband in their house at No. 29, Trang Road, Penang. They finally entered into a written agreement (Ex. P1) at the price as stated in the option, i.e. at \$1,100/- per relong and on the terms and conditions as stated therein.

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The defendant signed as landowner and the second plaintiff signed on behalf of the first plaintiff as purchaser. The agreed price was \$74,711.30. In accordance with paragraph 2 of the agreement, a cheque for \$5,000/- was issued by the second plaintiff to the defendant. (see p.5 of Ex. "A") The balance sum was to be paid within one month from 11th December, 1973. A receipt for the payment of \$5,000/- was issued by the defendant. (p.6 of Ex. "A"). Thereafter until 4th January, 1974 the parties could not proceed to finalise the sale in accordance with the agreement. According to the second plaintiff he sent three letters dated 4th, 5th and 9th January, 1974, respectively (pp.7, 8 and 9 of Ex."A") requesting the defendant to attend at the Land Office, Bandar Bharu, for the transfer of the said land to the first plaintiff, at first on 9th January but subsequently as in the third letter, on 13th January, 1974. But no transfer took place on the appointed day or subsequently. Finally notice was sent to the defendant by the solicitors for the first plaintiff under A.R. register, requesting her compliance with the terms

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of the agreement and threatening legal action in default thereof. (p.10 of EX. "A"). There being no compliance the plaintiffs filed the present action against the defendant.

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(cont'd)

10 With regard to the first question, the Court has to consider whether the second plaintiff was agent to the first plaintiff in signing the agreement (Ex. P1) or whether he was merely a broker as contended by the defence. Section 135 of the Contracts (Malay States) Ordinance, 1950, defines an agent as being a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the principal. The qualifications to be an agent or a principal are provided in sections 136 and 137. The authority to employ an agent may be expressed or implied (section 139) i.e. either by words written or spoken, or may be inferred from the circumstances of the case. Things spoken or written, or the ordinary course of dealing may be accounted circumstances of the case (section 140). "The test of agency is whether the person is purporting to enter into the transaction on behalf of the principal or not. In order to constitute an agency, it is not necessary to have a formal agreement. Mere use of the word 'commission' in the contract does not convert a relationship of vendor and purchaser into one of agency". (Pollock and Mulla Indian Contract and Specific Relief Acts, 9th ed., p.707). "An agent's function is to enter into contract relations on behalf of his principal with third persons. He acts at his discretion and judgment but within the limits of his authority." (p.709).

40 The distinction between an agent and a broker is well discussed by the Supreme Court of India in M/s. Laxmi Grinding and Oil Mills v. M/s. Amrit Banaspati Co. Ltd., (1) which in my view is in point with the present case:-

50 "Brokers are of two kinds; those authorised simply to secure customers for their principals, the resulting contract being made by the principal parties themselves; and those who are authorised to effect contracts. When a broker acts in the former capacity he is merely a negotiator between the parties and by his intervention he brings the two principals together in order to enable them to enter into a contract. So far he acts merely

(1) (1962) 49 A.I.R. Punjab 56 at p.58

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as an intermediary, the principal purpose of his employment being to find a purchaser or a seller. But a broker need not necessarily be a negotiator as, his principal by the terms of the contract of agency may confer upon him the power to buy or sell on his behalf. In the latter capacity the contract is completed by the broker himself and the contract is binding on the principal if the limits of the authority conferred are not transgressed. In the former capacity of a negotiator or intermediary, the broker acts for both the buyer and the seller of the goods and he is not incompetent to act as the agent of the other party because he is employed by his first principal to find someone with whom he may enter into contract."

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Thus, a broker may act as agent for his principal by not merely being a middleman but also by undertaking to buy or sell for his employer within the limits of the authority conferred by the latter. When he concludes a contract on behalf of his principal acting as the latter's representative, he does so in the capacity of an agent. In the present case, my considered judgment is that the second plaintiff was a broker in the negotiation for the purchase of the land in dispute since there is evidence on either side as shown in the option and the testimony of the first plaintiff that he would get a commission of 2% of the proceeds of sale from the defendant and 3% from the first plaintiff should the negotiation succeed. Nevertheless he signed the agreement on behalf of the first plaintiff to the knowledge of the defendant and her husband (D.W.1) and with the consent of the first plaintiff. He issued the cheque of \$5,000/- by way of deposit to the defendant also on her behalf and in accordance with the understanding between them.

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According to the first plaintiff the second plaintiff had negotiated for purchases of lands, e.g. the 200 acres in Selama previously and had signed agreements on her behalf for small holdings for which he would issue his own cheques first and subsequently reimbursed by her. In case of the purchase of large holdings she would do the payment direct. At the same time the second plaintiff is managing her estate in Selama, i.e. to be responsible for tapping of rubber, collection of revenue, payment of assessment rates and other expenses and is empowered to keep the balance of the proceeds for his own. She intended to do the same after the purchase of the land in dispute. She left everything to the second plaintiff to

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do what he liked and never checked his accounts. In short, she testified that the second plaintiff was her agent in Kedah. The main reason according to her was that she is living in Batu Gajah, Perak, doing other business and was too busy to attend to her business in Kedah. Her intention for purchasing the said land was to mine for tin ore and also to use it for depositing tailings from her adjacent mining lands. Taking the above into consideration, it is clear that the second plaintiff was acting as agent for the first plaintiff in signing the agreement (Ex. P1) for the purchase of the land from the defendant. He acted within the scope of the expressed authority given by his principal. He had in that capacity concluded a bargain on behalf of his principal by which according to the rules of principal and agent is sufficient to bind the principal to the terms of the agreement.

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It was also contended by the defendant that in the absence of a power of attorney, the action of the second plaintiff as agent cannot be valid. With respect I do not agree. The law does not ordinarily require a contract of agency to be created in writing unless that is specifically required by statute. The Powers of Attorney Ordinance, 1949, does not stipulate that all acts of an agent must be authorised by a principal by giving the agent a registered power of attorney. The provisions of the Contracts Ordinance do not have that requirement. On the contrary, sections 139 and 140 provide otherwise.

The next point is whether there was any valuable consideration. It was admitted that the cheque for \$5,000/- was issued by the second plaintiff and handed over to the defendant on the execution of the agreement. A written acknowledgement was written by D.W.2., the defendant's nephew, and handed over to the second plaintiff. The second plaintiff said he wrote an open cheque in the name of the defendant who, on the other hand, maintained it was crossed with 'A/C Payee Only' and by 'Order'. This is purely a question of facts deducible from the evidence adduced. It is for the Court to consider and decide on the balance of probabilities. A cheque under the Bills of Exchange Ordinance, 1949, is a bill of exchange drawn on a banker payable on demand and is a negotiable instrument. Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value. Let me now consider the points deducible from the facts relevant to the issue. The cheque was written and signed by the second plaintiff dated 11th December, 1973 i.e. the same day as

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the agreement was executed. Both the crossed 'A/C Payee Only' and 'Order' appear to have been stamped. D.W.1's evidence that he discovered it was crossed etc., only after the second plaintiff had left his house is substantially contradicted by his nephew (D.W.2) when he testified that he examined the cheque before writing out the receipt, saw it was crossed and informed D.W.1 immediately. In the letter dated 24th December, 1973 (Ex. D4) the defendant gives three main reasons for the request to treat the agreement as null and void. At the close, she wrote the following:-

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"thus, because of the above reasons the deposit received by way of cheque was not cashed. However, if Madam Lok Kan Moy is willing to purchase the said lands, we would request you to meet me personally and discuss the matter further."

It is pertinent to note that no mention is made of her inability to cash the cheque nor a request for cancellation of the 'cross' and 'order' particularly when the defendant still shows willingness for further negotiation. D.W.1 maintained that the second plaintiff refused to alter the cheque after several requests by him explaining that he had not yet received payment from Madam Loh. That appears to contradict paragraph 6 of the statement of defence wherein the alleged reason is "he was not interested in purchasing the said property." The second plaintiff, on the other hand, testified he had requested the defendant through D.W.1. repeatedly to cash the cheque so that they could complete the transaction.

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That both the plaintiffs had every intention to finalise the transaction is substantiated by their letters to the defendant (pp. 7, 8 and 9 of Ex. "A") requesting the defendant to attend at the Land Office, Bandar Bharu, in order to execute a transfer. The original date 9th January, 1974 was extended to 13th January, 1974 at the suggestion of the defendant was agreed upon and confirmed by the plaintiffs. According to the plaintiffs they waited at the said Land Office but the defendant did not turn up. The defendant and D.W.1, on the other hand, maintained they were there but did not see the plaintiffs. However, at paragraph 8 of her defence, she denied knowledge of the proposed meeting at the Land Office Bandar Bharu (including the plaintiffs' presence there) and makes no admission of it. She admitted receiving the three letters. To my mind, it is strange that she did not meet the plaintiffs there had she in fact gone to the place herself.

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The defence also raised a dispute as to who prepared the agreement. (Ex. P1). According to the defendant and her witness it was the second plaintiff who brought the agreement to their house on the day in question. The second plaintiff, however, stated it was prepared by D.W.2 in the house. In my view whoever prepared the agreement is immaterial when considering the present issue.

10 Nevertheless, the point raised by the defence is that the second plaintiff lied on the matter for otherwise he could not have read and explained the contents of the agreement to the first plaintiff prior to coming to the defendant's house (which was confirmed by the first plaintiff) unless the said agreement had already been prepared. Hence he could have lied about the cheque. In their attempt to discredit the second plaintiff, the defence was not in a position to say whether it was a draft or a fully prepared agreement that the second plaintiff had read to the first plaintiff. Both plaintiffs spoke on the telephone. Secondly, the parties had not yet met to discuss and agree on terms. It would appear probable in the circumstances that the second plaintiff must have discussed with the first plaintiff the terms he intended to propose to the defendant. It is a simple and straight forward agreement which does not require preparation by any expert and could have been typewritten by D.W.2 who knows English. In the circumstances, I do not with respect agree with the defendant's counsel that the second plaintiff had lied. Even if I were to agree, that alone does not entitle the Court to disregard his entire evidence. On the other hand, the defendant did not know much as she left the negotiations entirely to her husband (D.W.1). The latter is undoubtedly an experienced businessman in Penang and admits having a bank account of his own. Yet he has not taken any step to have the cheque banked or to open a savings account for the defendant. I cannot help observing his demeanour while in the witness box. On a number of occasions he refused to give direct answers to straight forward questions and attempted to forestall by giving anticipatory answers. He had to be warned several times by the Court. Taking all the above into consideration not to mention other inconsistencies, I cannot but conclude on the balance of probabilities that the cheque was an open cheque made payable by cash and there was in the circumstances valuable consideration.

Regarding the third question, it is contended by Mr. Subbiah that the agreement (Ex. P1) was cancelled by the parties on the ground that the

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31st March
1976.
(cont'd)

proposed agreement (Ex. P2) was alleged to have been brought by the second plaintiff to the defendant's house on 9th February, 1974 and he having told them the former agreement was no longer valid, allegedly suggested the parties should enter into a new agreement for consideration of a higher price and thereby obtained the defendant's signature to it. Taking into account the fact that a solicitor's notice dated 14th January, 1974, giving the defendant further time to execute the transfer of the land in dispute and threatening legal action should the defendant refuse to comply had by then been sent to the defendant by registered post (p.10 of Ex. "A"), the defendant's version seemed to be too far fetched. It was obvious that she and her husband were eager to get a higher price by adopting a delaying tactic. In the circumstances it was probable that the proposed agreement (Ex. P2) was prepared at the instance of the defendant for otherwise her signature would not have appeared thereon. Indeed, there was a contradiction in the evidence of both plaintiffs as to the supply of the two copies of the proposed agreement to the first plaintiff by the second plaintiff after he had received them from the defendant in her house as alleged and to which the first plaintiff denied. For that matter, the second plaintiff could have agreed to approach the first plaintiff considering the friendly relationship existing between him and the defendant's husband for an increased price. The fact still reminded, however that unlike the first agreement, the proposed agreement was still in a stage where the consent of the first plaintiff had yet to be obtained and her signature to be written thereon in order to complete the contract. The contention of a verbal agreement by mutual consent prior to the preparation of Ex. P2 cannot in the circumstances be probable in the absence of any clear intention to do so. For, although he was an agent, it did not appear that the second plaintiff had authority to negotiate a fresh agreement on a higher price unless the first plaintiff's consent was first obtained nor the authority to rescind or vary the contract. Further, I do not agree with Mr. Subbiah's contention that the payment of \$5,000/- deposit as stated in the agreement (Ex. P1) was a condition precedent to the defendant fulfilling the obligation to transfer the land in dispute. Paragraph 3 of the said agreement states otherwise; the first plaintiff as purchaser is entitled to vacant possession thereof on payment of the balance of the purchase price. If at all, the plaintiffs have shown their readiness to such condition which the defendant rejected, apart

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from their willingness to fulfill the other terms of the agreement. In my considered judgment, the facts and circumstances of the case, particularly the sequence of events that followed after the execution of the agreement (Ex. P1) leads to the irresistible conclusion of the probability that the defendant through her husband (D.W.1) was attempting to get a higher value for the land and had done all they could to frustrate the contract. It was contended that it had been "treated as cancelled", breach of contract committed", "varied", and lastly "rescinded" by the plaintiffs. That did not appear to be so. It was the defendant who has committed a breach of its terms and conditions. I hold the agreement (Ex. P1) has not been terminated and is valid.

In the High Court

No. 5
Judgment
31st March
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(cont'd)

The plaintiffs pray for specific performance of the agreement and/or alternatively damages for breach of contract. The discretion of the Court to order specific performance is governed by section 11 of the Specific Relief Act, 1950, subject to the provisions under sub-section (1)(b) and (c) which are relevant to the present case and the presumption under sub-section (2) thereof. In my considered judgment the presumption that the breach of an agreement to transfer the land in dispute cannot be relieved by compensation in money is proven to the contrary by the contemporaneous oral agreement between the parties which are not embodied in the agreement itself. The oral agreement is admissible under section 92(b) of the Evidence Act, 1950. The defendant's evidence in this regard is not only corroborated by her husband (D.W.1) but is also substantiated by the second plaintiff. The oral agreement was that in the event of the purchaser failing to abide by the written agreement, the \$5,000/- deposit would be forfeited, plus damages. In the event the vendor refused to sell, she has to refund the \$5,000/- deposit plus payment of an additional \$5,000/-. The only difference in the second plaintiff's version is that in the latter case the Vendor had to refund the deposit and pay all the damages. Taking into consideration the alternative prayers of the plaintiffs in their pleadings, and the provision of section 75 of the Contracts (Malay States) Ordinance, 1950 I am of the opinion by virtue of section 18 of the Specific Relief Act that specific performance ought not to be granted in the circumstances. I hold that the defendant has to pay the plaintiffs the sum of \$10,000/- as orally agreed, but since the \$5,000/- paid by the plaintiffs by cheque had not been cashed, she has to pay the balance of \$5,000/- as compensation.

In the High Court

No. 5
Judgment
31st March
1976.
(cont'd)

As regards the second prayer for damages I also hold that the plaintiffs are entitled thereto. The principle is as stated in Chitty on Contracts, 23rd Ed., paragraph 1477. A vendor who commits a breach of contract relating to sale of land by failing to convey it to the purchaser as agreed must pay damages calculated at the market value of the property at the fixed time for completion, less the contract price. It is reasonable to accept the fixed time for completion being 13th January, 1974, according to the letter sent by the second plaintiff to the defendant dated 9th January, 1974, requesting her to attend at the Land Office, Bandar Bharu, to execute the transfer of the said land to the first plaintiff. From evidence adduced the value per relong can be reasonably assessed as \$1,200/- in late January and early February, 1974 \$1,280/- per relong in May 1974 being the highest offer and between \$1,500/- and \$1,600/- per relong during the date of the proceeding. The nearest market value at the fixed time for completion would be \$1,200/- per relong which I think is fair and reasonable. The total area of all the pieces of land in dispute is slightly over 67 relongs. That will total up to \$80,400/- as market value, less the contract price of \$74,711.36; that leaves the balance of \$5,688.64. I would therefore assess the damages at a round figure of \$5,700/-. I think the amount is fair and reasonable as the first plaintiff intended to use the land which is adjacent to her tin mines for dumping ore tailings. I therefore order the defendant to pay the plaintiffs the total sum of \$10,700/- as damages.

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The plaintiffs are also entitled to costs.

Sgd: SYED AGIL BARAKBAH
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Judge
High Court, Malaya

Alor Star,
31st March, 1976

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Chandran G. Nair for Plaintiffs.
T. Subbiah for Defendant.

No. 6

Order dated 31st March
1976

In the High
Court

No. 6
Order
31st March
1976.

IN THE HIGH COURT IN MALAYA AT ALOR STAR

CIVIL SUIT NO. 100 OF 1974

Between:

- 1. Loh Koon Moy (f)
 - 2. Lam Wai Kee
- Plaintiffs.

And:

10 Zaibun Sa Binti Syed Ahmad Defendant

BEFORE THE HONOURABLE MR. JUSTICE
SYED, AGIL BARAKBAH.
HIGH COURT,
ALOR STAR.

THIS 31ST DAY OF MARCH, 1976. IN OPEN COURT.

O R D E R

20 THIS SUIT coming on this day for hearing
in the presence of Mr. Chandran G. Nair of Counsel
for the Plaintiffs and Mr. T. Subbiah of Counsel
for the Defendant AND UPON READING the pleadings
AND UPON HEARING evidence of the parties and
submission of the Counsels aforesaid.

IT IS ORDERED that the Defendant do pay to
the Plaintiffs the sum of \$5,000/- as compensation
and the sum of \$5,700/- as damages.

30 AND IT IS ORDERED that the Defendant do pay
to the Plaintiffs the costs of this suit to be
taxed on Higher Scale by a proper officer of the
Court as between party and party and be paid by
the Defendant to the Plaintiffs abovenamed.

GIVEN under my hand and the Seal of the
Court this 31st day of March, 1976.

L.S.

Sgd:.....
SENIOR ASSISTANT REGISTRAR,
HIGH COURT,
ALOR STAR.

In the Federal
Court

No. 7

No. 7
Notice of
Appeal - 22nd
April 1976

Notice of Appeal dated 22nd
April 1976

IN THE FEDERAL COURT OF MALAYSIA

CIVIL APPEAL NO. OF 1976

Between:

1. Loh Koon Moy (f)
 2. Lam Wai Kee
- Appellants

And:

Zaibun Sa Binti Syed Ahmad Respondent

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(In the matter of Civil Suit No. 100/74)
in the High Court at Alor Star

Between:

1. Loh Koon Moy (f)
 2. Lam Wai Kee
- Plaintiffs

And:

Zaibun Sa Binti Syed Ahmad Defendant

NOTICE OF APPEAL

TAKE NOTICE that Loh Koon Moy (f) and Lam
Wai Kee being dissatisfied with the decision of
the Honourable Datuk Justice Syed Agil Barakbah
given at Alor Star on the 31st day of March,
1976 appeal to the Federal Court against the
whole of the said decision.

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Dated this 22 day of April, 1976.

Sgd. Thevin Chandran Siva & Chong
.....

Solicitors for the Appellants

To The Assistant Registrar,
High Court,
Alor Star.

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Zaibun Sa binti Syed Ahmad,
or her Solicitors,
M/s. Subbiah & Co.,
No. 111 Penang Street,
Penang.

The address for service of the Appellant is
c/o Messrs. Thevin, Chandran, Siva & Chong,
Advocates & Solicitors, No. 2, Station Road,
Ipoh.

Memorandum of Appeal dated 3rd
January, 1977

In the Federal
Court

No. 8
Memorandum of
Appeal - 3rd
January 1977

IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

CIVIL APPEAL NO. 54 OF 1976

Between

1. Loh Koon Moy (f)
 2. Lam Wai Kee
- Appellants

10 And
Zaibun Sa Binti Syed Ahmad Respondent
(In the matter of Civil Suit No. 100/74)
In the High Court at Alor Star)

Between

1. Loh Koon Moy (f)
 2. Lam Wai Kee
- Plaintiffs

And
Zaibun Sa Binti Syed Ahmad Defendant

MEMORANDUM OF APPEAL

20 LOH KOON MOY (F) and LAM WAI KEE the
Appellants abovenamed appeal to the Federal
Court against part of the decision of the
Honourable Justice Dato' Syed Agil Barakbah given
at Alor Star on the 31st day of March, 1976 on
the following grounds:-

- 30 1. The learned Judge erred in law and in fact
when having found that the agreement dated
11th December, 1973 (Ex. P.1) between the
1st Plaintiff and the Defendant was valid
failed to order specific performance of the
said agreement.
2. The learned Judge erred in law and in fact
in admitting the evidence pertaining to the
alleged contemporaneous agreement made orally.
3. The learned Judge having admitted such
inadmissible evidence erred in law and in
fact in holding that the said evidence
established a valid binding contemporaneous
oral agreement.
- 40 4. The learned Judge in any event erred in law
and in fact in failing to hold that the said
alleged contemporaneous oral agreement was
void for uncertainty.

In the Federal Court

No. 8
Memorandum of Appeal - 3rd January 1977 (cont'd)

5. The learned Judge in any event erred in law and in fact in holding that the said evidence pertaining to the alleged contemporaneous agreement was sufficient proof to the contrary to rebutt the presumption that breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money as embodied in the explanation to Section 11 of the Specific Relief Act 1950.

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6. The learned Judge in holding that he ought not to grant specific performance failed to consider sufficiently or at all -

(a) all the evidence adduced,

(b) his considered judgment that the Defendant through her husband was attempting to get a higher value for the land and had done all they could to frustrate the contract, and

(c) the fact that the 1st Plaintiff had intended the land as a dumping area for the mining scheme on her adjoining lands.

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Dated this 3rd day of January, 1977.

Sgd: M/s. Thevin Chandran Siva & Chong

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Solicitors for Appellants

To: The Registrar,
Federal Court of Malaysia,
Kuala Lumpur.

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and to:

M/s. Subbiah & Co.,
Advocates & Solicitors,
No. 111 Penang Street,
Penang.

Judgment dated 18th February
1978

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT
ALOR STAR
(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. 54 OF 1976

Between

10	1. Loh Koon Moy (f)	
	2. Lam Wai Kee	Appellants
	And	
	Zaibun Sa binti Syed Ahmad	Respondent

(In the matter of Civil Suit No. 100/74
in the High Court at Alor Star

Between

20	1. Loh Koon Moy (f)	
	2. Lam Wai Kee	Plaintiffs
	And	
	Zaibun Sa binti Syed Ahmad	Defendant)
	Coram: H.S. Ong, F.J.	
	Raja Azlan Shah, F.J.,	
	Chang Min Tat, F.J.	

JUDGMENT OF THE COURT

This appeal is from the refusal of the learned Judge to order specific performance of an agreement to sell land and his decision to award damages instead.

30 The agreement was in writing made on 11 December 1973, and was made between the respondent and the first appellant. The recital described the respondent thus "... the vendor herself and as administratrix is the owner" of the lands agreed to be sold. The agreed price was \$1100 per relong nett. A deposit of \$5000 was agreed to be made on the signing of the agreement and the balance was to be paid within one month from the date of the agreement. Time was not made of the essence. The purchaser was to be entitled to vacant possession.

40 The word "herself" is curious. But from the fact that the purchaser was also said to be acting for herself and as purchaser, it is possibly tautologous and without any significant meaning.

In the Federal
Court

No. 9
Judgment - 18th
February 1978.
(cont'd)

This agreement (Ex. P.1 which appears in pp.99-100 of the Record of Appeal) is the one sued on. But there appears to be another agreement, Ex. P.2, appearing in pp.111-113 of the Record, which is identical with P.1 except that it is undated and the price had increased to \$1200 per relog. It was signed by the respondent but not by the purchaser.

The agreement P.1 was executed not by the first appellant but by the second appellant on her behalf. A point was taken at the hearing that the agreement had not been executed by the purchaser and therefore there was no concluded agreement of sale between them. The learned Judge found, with respect, quite correctly, that the 2nd appellant was not merely a broker but an agent as well, even though not armed with a valid power of attorney. No point was, however, taken whether he should join in the action. Under s.183 Contracts Act, he as agent could not sue or be sued.

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On the evidence, the learned trial Judge found that the deposit of \$5000 made by a crossed cheque was a valid tender, that the agreement had not been terminated and was valid and that at all times it was the respondent who had refused to carry out the sale. Against these findings, counsel for the respondent did not contend at the hearing of the appeal. The learned Judge also came to the conclusion that the reason for the refusal of the respondent was the not uncommon one of asking at every stage for a higher price. Besides Ex. P.2, there were several other letters from the respondent agreeing to sell if only the price would be increased. The conduct of the respondent could hardly be commended. It was not to the learned Judge.

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Now there was no difficulty in the way for the Respondent to carry out the sale. Though an administratrix, she was empowered with a valid Order of Court, made on 27 March 1970, empowering her to sell as such administratrix the lands, inter alia, in question, at prices rather lower than what she had bargained for and obtained in this sale. She had done well for the estate and the other beneficiaries as well as for herself. But her desire to do better even if it was not merely for herself should not be considered, at least not by a Court of law and equity, when it clashes with her solemn undertaking.

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On the evidence therefore and the submissions made, the learned trial Judge found against the

respondent and in favour of the first appellant. But he also found on the evidence the existence of a separate oral agreement which was not incorporated into the written agreement for the payment of damages in the event of failure to complete by either party.

In the Federal
Court

No. 9
Judgment - 18th
February 1978
(cont'd)

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The learned Judge held this evidence admissible under s.92(b) Evidence Act 1950 and made it the reason for refusing specific performance. He thought that the provision for an alternative remedy displaced the presumption under s.11(2) Specific Relief Act in favour of specific performance, especially as there was an alternative prayer for damages in the appellant's action.

20

As to the existence of this separate oral agreement, he considered that the evidence of the respondent and her husband who had at all times acted for her, was substantiated by the second appellant. He had however noted that the versions were different. According to the respondent and her husband, she had to refund the \$5000 deposit and pay an additional \$5000. The second appellant's version was that the respondent had to refund the deposit and pay all the damages. The short answer to the learned Judge's finding therefore is that if there was no consensus there was no agreement. But there is, apart from the question of admissibility under s.92 Evidence Act, another objection to his finding, in which from the order to pay an additional \$5700, he appeared to have accepted the evidence of the defence. He had all along the line clearly disbelieved the respondent and her witness, but now under a mistaken belief of substantiation, of which there was in fact none, he accepted her evidence. With respect, the inconsistency must bear on the validity of his finding.

30

40

Next, the learned Judge thought this separate oral agreement for damages good or sufficient enough for him to exercise his discretion to award damages rather than to order specific performance. But it was not the stand taken by the respondent in her pleadings that she would pay damages. S.18 of the Specific Relief Act provides for a prayer for compensation. Further, s.19 provides that though a sum be named in the contract as liquidated damages and the party in default is willing to pay the same, a contract may be enforced by an order for specific performance. No case has been cited to the effect, and we have not been able to advise ourselves of any, that an alternative

50

In the Federal
Court

No. 9
Judgment - 18th
February 1978
(cont'd)

prayer for damages, per se, absolves the party in breach from having to perform or the Court from its duty to consider in the circumstances of the case before it decides whether it would order specific performance or not. As their Lordships of the Privy Council declared in Oxford & Ors. v. Provan & Anor. (1) at p.151,

"It is clear that the Court may exercise a discretion in granting or withholding a decree for specific performance; and in the exercise of that discretion, the circumstances of the case, and the conduct of the parties and their respective interests under the contract, are to be remembered".

10

There is something more, a presumption in favour of specific performance of a contract to sell land, which is statutorily provided in s.11(2) Specific Relief Act which reads as follows:-

(2) Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money.

20

The burden of rebutting this presumption lay on the respondent. Suffice it to say that the respondent had not in any way rebutted it. She had not even sought to rebut it. There existed therefore no grounds for the exercise by the learned Judge of his discretion.

30

On the other hand, there was evidence that the first appellant owned the adjoining lands which were being mined for tin and that she needed the lands in question for the continuation of her mining operations. There is therefore here the element of public policy which operates in favour of an order for specific performance. In our view, the evidence was in favour of specific performance.

There was a cross-appeal which we allowed out of time. It was argued that the action was incompetent since the respondent who was sued in respect of a contract entered into by her as the administratrix was not shown either in the writ or the indorsement thereto or in the statement of claim to have been sued in her representative capacity. Though no objection was taken at any stage prior to the cross-appeal,

40

(1) (1868) L.R. 2 P.C. 135.

10 it was however contended that it was not too late to object on this ground. But it was also argued on behalf of the respondent that it was too late for the appellant to object to the evidence of the separate oral agreement for damages at the hearing of the appeal. We have considered the appeal on the basis that this oral agreement was an issue and on the basis, but without deciding, that it was adducible and admissible in evidence and we have discussed the effect of it. We propose to give further consideration to the respondent's point.

In the Federal
Court
No. 9
Judgment - 18th
February 1978
(cont'd)

20 We agree that under Order 3 rule 4 Rules of the Supreme Court the representative capacity of the respondent should have been shown in the endorsement on the writ. No case has however been cited to us and we ourselves are unable to find any to support the proposition that the omission made the action incompetent. Neither did Mr. Lim for the respondent contend that the writ was a nullity. If so, the defect is curable under Order 70 rule 1, and having regard to the stage in the proceedings, we would give leave to amend to cure any irregularity there might be.

30 The appeal is allowed and the cross-appeal is dismissed both with costs. There will be an order that the respondent as administratrix specifically perform the agreement to sell by executing proper and valid transfers of the lands in question upon payment of the full purchase money and a further order that if she defaults, the Senior Assistant Registrar be empowered to execute the relevant documents on her behalf. The 2nd appellant should be struck out from the action and we so order. He will however not be entitled to any costs.

40 Kuala Lumpur,
18 February 1978

Sd: CHANG MIN TAT
(CHANG MIN TAT)
JUDGE,
FEDERAL COURT, MALAYSIA.

Date of Hearing: 3rd December, 1977.

Encik S. Jeya Palan for Appellants.
Solicitors: Messrs. Maxwell, Kenion, Cowdy & Jones.

Encik Lim Kean Chye for Respondent.
Solicitors: Messrs. Subbiah & Co.

Salinan yang diakui benar
Sgd: Illegible
Setiausaha Hakim
Kuala Lumpur.

50 18/4/78

In the Federal
Court

No. 10

No. 10
Order dated 18th
February 1978

Order dated 18th February
1978

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT
ALOR SETAR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 54 OF 1976

Between

1. Loh Koon Moy (f)
2. Lam Wai Kee Appellants 10

And

Zaibun Sa Binti Syed Ahmad Respondent

(In the matter of Civil Suit No. 100/74
In the High Court at Alor Star

Between

1. Loh Koon Moy (f)
2. Lam Wai Kee Plaintiffs

And

Zaibun Sa Binti Syed Ahmad Defendant)

CORAM: ONG HOCK SIM, JUDGE, FEDERAL COURT, 20
MALAYSIA;
RAJA AZLAN SHAH, JUDGE, FEDERAL COURT,
MALAYSIA;
CHANG MIN TAT, JUDGE, FEDERAL COURT,
MALAYSIA.

IN OPEN COURT

THIS 18TH DAY OF FEBRUARY 1978

O R D E R

THIS APPEAL AND CROSS-APPEAL coming on for 30
hearing on the 3rd day of December, 1977 in the
presence of Mr. S. Jeya Palan of Counsel for the
Appellants and Mr. Lim Kean Chye of Counsel for
the Respondent AND UPON READING the Record of
Appeal filed herein AND UPON HEARING Counsel
aforesaid IT WAS ORDERED that this Appeal and
Cross-Appeal do stand adjourned AND the same
coming on for Judgment this day in the presence
of Mr. S. Jeya Palan of Counsel for the Appellants
and Mr. Cecil Rajendra of Counsel for the
Respondent: 40

IT IS ORDERED that the Appeal be and is

hereby allowed and the Cross-Appeal be and is hereby dismissed both with costs:

In the Federal Court

AND IT IS ORDERED that the Respondent as administratrix specifically perform the agreement of 11th December, 1973 to sell by executing proper and valid transfers of the following lands in question upon payment of the full purchase money:-

No. 10
Order dated
18th February
1978.
(cont'd)

- 10 (a) Land held under Grant - Surat Putus No. 43332 Portion No. 869 in area 13 relongs 276 Jembas 00 square feet.
- (b) Land held under Grant - Surat Putus No. 43333 Portion No. 870 in area 12 relongs 221 Jembas 40 Square feet.
- (c) Land held under Grant - Surat Putus No. 43335 Portion No. 872 in area 11 relongs 228 Jembas 20 square feet.
- 20 (d) Land held under Grant - Surat Putus Kechil No. 2316 (former title Surat Akuan 159/72) Portion No. 1080 in area 10 relongs 422 Jembas 00 square feet.
- (e) Land held under Grant - Surat Putus Kechil No. 2583 Portion No. 1343 in area 14 relongs 60 Jembas 00 square feet.
- (f) Land held under Grant - Surat Putus Kechil No. 2584 Portion No. 1344 in area 5 relongs 205 Jembas 00 square feet.

30 all situated in the Mukim of Serdang, District of Bandar Bahru, Sub-division Sungei Trap, Kedah.

AND IT IS FURTHER ORDERED that in the event the Respondent defaults in executing proper and valid transfers of the said lands in question the Senior Assistant Registrar be and is hereby empowered to execute the relevant documents on her behalf:

AND IT IS ALSO ORDERED that the 2nd Appellant be and is hereby struck out from the action:

40 AND IT IS ALSO ORDERED that the Respondent do pay the 1st Appellant the costs both of the Appeal and the Cross-Appeal:

AND IT IS LASTLY ORDERED that the sum of \$500/- deposited in Court by the Appellants be refunded to the 1st Appellant.

In the Federal Court

No. 10
Order dated
18th February
1978.
(cont'd)

GIVEN under my hand and the Seal of the Court this 18th day of February, 1978.

Sd: Illegible
.....
CHIEF REGISTRAR,
FEDERAL COURT, MALAYSIA,
KUALA LUMPUR.

L.S.

No. 11
Order granting
Final Leave to
Appeal to His
Majesty the
Yang di-Pertuan
Agong dated 9th
July, 1979.

No. 11

Order granting Final Leave to Appeal
to His Majesty the Yang di-Pertuan
Agong dated 9th July, 1979

10

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

CIVIL APPEAL NO. 54 OF 1976

Between

1. Loh Koon Moy (f)
2. Lam Wai Kee Appellants

And

Zaibun Sa Binti Syed Ahmad Respondent

(In the matter of Civil Suit No. 100/74
In the High Court at Alor Star 20

Between

1. Loh Koon Moy (f)
2. Lam Wai Kee Plaintiffs

And

Zaibun Sa Binti Syed Ahmad Defendant)

CORAM: RAJA AZLAN SHAH, JUDGE, FEDERAL COURT,
MALAYSIA;
SALLEH ABAS, JUDGE, FEDERAL COURT, MALAYSIA;
EUSOFFE ABDOLCADER, JUDGE, HIGH COURT,
MALAYA. 30

IN OPEN COURT

THIS 9TH DAY OF JULY, 1979

O R D E R

UPON MOTION made unto Court this day by Mr. Harcharan Singh of Counsel for the Respondent abovenamed in the presence of Mr. S. Jeya Palan of Counsel for the Appellant abovenamed AND UPON READING the Notice of Motion dated the 13th day of June, 1979 and the Affidavit of Zaibun Sa 40

10 Binti Syed Ahmad affirmed at Penang on the 20th day of March, 1979 and filed herein AND UPON HEARING Counsel for the Appellant and for the Respondent as aforesaid IT IS ORDERED that final leave be and is hereby granted to the Respondent abovenamed to appeal to His Majesty the Yang di-Pertuan Agong against the whole of the Judgment and Order of the Federal Court of Malaysia given on the 18th day of February, 1978 subject to the condition that the Order of the Honourable Mr. Justice H.S. Ong dated the 27th day of March, 1970 be included in the Record of Appeal AND IT IS LASTLY ORDERED that the Costs of this Motion be costs in the cause.

In the Federal Court

No. 11
Order granting Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong dated 9th July, 1979.
(cont'd)

GIVEN under my hand and the seal of the Court this 9th day of July, 1979.

Sgd.

Deputy Registrar,
Federal Court, Malaysia.

20

EXHIBITS

Exhibit A

(a) Option for sale to Second Plaintiff
1st November 1973

EXHIBITS

A

(a) Option for sale to Second Plaintiff
1st November 1973.

O P T I O N

30 I, the undersigned owner of the pieces of rubber lands held under Grants - Surat Putus No. 43332 Portion No. 869 in area of 13 relongs 276 Jembas 00 square feet, Surat Putus, No. 43333 Portion No. 870 in area 12 relongs 221 Jembas 40 square feet, Surat Putus No. 43335 Portion 872 in area 11 relongs 228 Jembas 20 square feet, and Surat Putus Kechik No. 2316 (former title Surat Akuan 159/72) Portion No. 1080 in area 10 relongs 422 Jembas 00 square feet, Surat Putus Kechik 2583 Portion No. 1343 in area 14 relongs 60 Jembas 00 square feet, Surat Putus Kechik No. 2584 Portion No. 1344 in area 5 relongs 205 Jembas 00 square feet - situated in the Mukim of Serdang District of Bandar Bahru, Sub-division Sungei Trap, Kedah am hereby acknowledged to grant an option for Sale to Mr. Lam Wei Kee, 54-B, Jalan Raya, Selama, Kedah for a period of one month commencing from 3rd November 1973 to 3rd December, 1973. The deposit of option \$1/- is hereby acknowledge receipt.

40

EXHIBITS

A
(a) Option for
sale to Second
Plaintiff
1st November
1973.
(cont'd)

Price and rate of sale per relong being
Malaysian Ringgit One thousand One Hundred Only
(\$1,100/-).

On sale of the above lands a commission of
2% on the total amount received from the selling
of the lands will be granted to him.

Sgd: (in Jawi - illegible)
.....

Dated 1st November, 1973.

(b) Letter:
Defendant to
2nd Plaintiff
22nd November
1973

Exhibit A

(b) Letter: Defendant to 2nd Plaintiff
22nd November 1973

10

Zaibun Sa Bte Syed Ahmad
29 Trang Road,
Pulau Pinang.
22nd Nov. 1973.

Encik Lam Wai Kee,
Selama.

Sir,

With reference to your letter dated 16th
inst. I would like to confirm that I agreed to
extend my option to you for the sale of my
rubber plantation under Title Nos. S.P. 43332,
S.P. 43333, S.P. 43335, s.p.k. 2316 s.p.k. 2583
and s.p.k. 2584 in the Mukim of Serdang, District
of Bandar Bahru in the State of Kedah to the 30th
November, 1973 with the same terms and conditions.

20

Thank you.

Yours faithfully,

Sgd: in Jawi - illegible
.....

* At the request of the buyer I hereby
extend the said option up to the 10th
December, 1973.

30

Sgd. Illegible

Mr. Chung,

For your consideration please.

Sgd. Illegible
23.11.73

Exhibit A

EXHIBITS

(c) Copy Agreement between Defendant
and 1st Plaintiff - 11th December
1973

A
(c) Copy
Agreement
between
Defendant and
1st Plaintiff
11th December
1973.

10 An agreement made the 11th day of December,
1973 between Zaibun Sa Binti Syed Ahmad (I.C.
No. 3773734) of 29 Trang Road, Penang
(hereinafter called the Vendor) of the one part
and Madam Loh Koon Moy of 14 Horley Street, Ipoh
(hereinafter called the Purchaser) of the other
part.

20 WHEREAS the Vendor herself and as administratrix
is the owner of lands held under Grants - Surat
Putus No. 43332 Portion No. 869 in area 13 relongs
276 Jembas 00 square feet surat Putus No. 43333
Portion No. 870 in area 12 relongs 221 Jembas 40
square feet, Surat Putus No. 43335 Portion No. 872
in area 11 relongs 228 Jembas 20 square feet and
Surat Putus Kechik no. 2316 (former title Surat
Akuan 159/72) Portion No. 1080 in area 10 relongs
422 Jembas 00 square feet, Surat Putus Kechik No.
2583 Portion No. 1343 in area 14 relongs 60 Jembas 00
square feet and Surat Putus Kechik No. 2584 Portion
No. 1344 in area 5 relongs 205 Jembas 00 square
feet - situated in the Mukim of Serdang, District of
Bandar Bahru, Sub-Division Sungei Trap,

30 AND WHEREAS the Purchaser is desirous to purchase
the said lands free from any encumbrances at an
agreed rate of Malaysian Ringgit One thousand One
hundred only (\$1,100/-) per relong nett.

NOW IT IS HEREBY AGREED AS FOLLOWS:-

1. The Vendor will sell the said lands at the
rate of Malaysian Ringgit One thousand One hundred
(\$1,100/-) only per relong making a total of *
Malaysian Ringgit Seventy Four thousand five hundred
Twenty five only (\$74,525/-)

40 2. The Purchaser shall on the date hereof pay
the Vendor a sum of Malaysian Ringgit Five thousand
only (\$5,000/-) being deposit and the balance shall
be paid by the Purchaser to the Vendor within one
month of the date hereof.

3. On payment of the balance of the purchase money
the Purchaser shall be entitled to vacant possession
of the said land and the receipt of rents and
profits thereof as from the completion date and
shall be liable to all outgoings to be apportioned
if necessary.

EXHIBITS

A
(c) Copy Agreement between Defendant and 1st Plaintiff 11th December 1973.
(cont'd)

4. As from the date hereof the Purchaser shall be liable for any quit rents of the said lands and shall be paid by the Purchaser.

5. All legal charges in respect of this agreement and of the transfer of the said lands to the Purchaser by the Vendor at the time of sale shall be borne and paid by the Purchaser.

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

10

Signed and delivered by the said ZAIBUN SA BINTI SYED AHMAD for herself and as administratrix of the said lands in presence of:-) Sgd: in Jawi - illegible

Signed by the said MADAM LOH KOON MOY for herself and as Purchaser of the said lands in the presence of:-) Sgd. on behalf of Madam Loh Koon Moy Illegible

* Malaysian Ringgit Seventy Four thousand Seven Hundred Eleven & Cents Thirty-six Only (\$74,711.36). 20

(d) M.B.B. Cheque No. 104901 for \$5000 in favour of Defendant 11th December 1973

Exhibit A

(d) M.B.B. Cheque No. 104901 for \$5000 in favour of Defendant 11th December 1973

No. Kira2 68-02-03
A/C No. 1 - 459 11.12.1973

MALAYAN BANKING BERHAD
INCORPORATED IN MALAYSIA HEAD OFFICE KUALA LUMPUR KULIM 30

BAYAR ATAU PEMBAWA
PAY Madam Zaibun Sa Bte. OR BEARER
Syed Ahmad

RINGGIT
DOLLARS Five Thousand only _____ . \$5,000/XX

A.C. PAYEE ONLY Sgd: Illegible

"104901" 68"0203"

Exhibit A

(e) Receipt from Defendant to 1st
Plaintiff dated 11th December
1973

EXHIBITS

A
(e) Receipt from
Defendant to
1st Plaintiff
11th December
1973.

No.

11th December, 1973.

Received from Madam Loh Koon Moy
Terima daripada
the sum of dollars Five Thousand Only
Banyak-nya Ringgit
being payment of deposit for purchase of
kerana bayaran lands

\$5000/-

Sgd. in Jawi

MBB

Kulim Cheque 104901

Stamp 10 cts.

Exhibit A

(f) Letter: 2nd Plaintiff to Mr & Mrs.
Gohar Iman dated 4th January 1974

(f) Letter: 2nd
Plaintiff to
Mr. & Mrs.
Gohar Iman
4th January
1974.

Buyer: Madam Loh Kon Moi
K/P No. 0383653
Address:- 199 Pusing Road, Batu Gajah,
Perak.
Witness: Lam Wai Kee k/p 0803420
Address:- 54-B, Jalan Raya, Selama, Kedah.

Lam Wai Kee
54-B Jalan Raya,
Selama, Kedah
4th Jan. 74

Mr. & Mrs. Gohar Iman
Penang.

Dear Sir & Madam,

I would like to suggest that the transfer
will be made at Bandar Bahru on the 9th Jan. 74
(Wednesday). I hope you will agree with my
suggestion. Any how I will phone to you again
when I obtain the confirmation from the buyer.

I enclosed herein the name and I/C No. of
buyer in order that you may able to fill in the
transfer form. Thank you.

Yours faithfully,

Sgd. Lam Wai Kee

I had advised the buyer to prepare a bank draft
payable to Penang Bankers for you.

Exhibit A

(g) Letter: 2nd
Plaintiff to
Defendant - 5th
January 1974.

Exhibit A

(g) Letter: 2nd Plaintiff to Defendant
5th January 1974

A.R. REGISTERED

Lam Wai Kee,
54-B Jalan Raya,
Selama, Kedah.
5th January 1974.

Madam Zaibun Sa Bte Syed Ahmad,
29 Trang Road, Pulau Pinang.

10

Dear Madam,

re: Execution of Transfer

As instructed by the buyer Madam Loh Koon
Moi it is to inform you that she propose to make
the transfer of your rubber lands at the Bandar
Bahru Land Office at about 10.00 A.M. on the 9th
January, 1974 (Wednesday).

I hope that the said time and date will be
agreeable to you. Please confirm the appointment
by phone and oblige.

20

Awaiting for your confirmation.

Yours faithfully,

Sgd: Illegible
.....

Lam Wai Kee

c.c. Madam Loh Kon Moi,
14 Horley Street, Ipoh.

Exhibit A

(h) Letter: 2nd
Plaintiff to
Defendant - 9th
January 1974.

Exhibit A

(h) Letter: 2nd Plaintiff to Defendant
9th January 1974

A.R. REGISTERED

Lam Wai Kee,
54-B Jalan Raya,
Selama, Kedah,
9th January, 1974.

Madam Zaibun Sa Bti Syed Ahmad
29 Trang Road,
Pulau Pinang.

30

Dear Madam,

re: Execution of Transfer

Exhibit A

10 With reference to my letter dated 5th January, '74 under registered cover No. 268 (Selama) and a telephone conversation between Encik Gohar Iman and I, that you propose to meet at the land office of Bandar Bahru during forenoon on the 13th January, 1974 to execute the transfer of your rubber lands to Madam Loh Kon Moi. I would like to give you the confirmation that the buyer Madam Loh Kon Moi had agreed to your proposal. She will attend to the Land Office of Bandar Bahru at forenoon on the 13th Jan. 1974.

(h) Letter: 2nd Plaintiff to Defendant - 9th January 1974 (cont'd)

I hope you will turn up at the appointed date and time without fail.

Thank you.

Yours faithfully,

Sgd: Illegible
.....

Lam Wai Kee

20 c.c. Madam Loh Kon Moi
14 Horley Street, Ipoh.

Exhibit A

(i) Letter: Plaintiffs' Solicitors to Defendant - 14th January 1974

(i) Letter: Plaintiffs' Solicitors to Defendant - 14th January 1974

THEVIN, CHANDRAN & SIVA
Advocates & Solicitors

2 Station Road,
P.O. Box 117,
IPOH MALAYSIA

Our ref: CGN/PW/C18-73(244)

14th January, 74

30 Madam Zaibun Sa bti Syed Ahmad
29 Trang Road,
PENANG.

A.R. REGISTERED

Dear Madam,

Re: Agreement for the purchase of lands held under title Nos. SP 4332, SP 4333, SP 4335, SPK 2316 SPK 2583, SPK 2584 for Lots Nos. 869, 870, 1080 1343, 1344 Mukim of Serdang, District of Bandar Bahru.

40 We act on behalf of Madam Loh Koon Moy the

Exhibit A

(i) Letter:
Plaintiffs'
Solicitors to
Defendant -
14th January
1974.
(cont'd)

purchaser in respect of the above agreement who has instructed us to write to you as follows:-

Our client states that the above agreement was entered into on the 11th of December, 1973 and a deposit of \$5,000/- was received by you and a receipt issued by you accordingly.

By clause 2 of the said agreement, the purchase was to be completed within (1) one month from the date thereof being on or before 10th January, 1974.

10

Mr. Lam Wai Kee, J.P. our client's agent has on the 5th January 1974 and again on the 9th January 1974 informed you of the dates on which you may call at the Land Office Bandar Bahru so as to execute the transfer and receive payment in accordance with the agreement.

Our client informs us that on the 13th January, 1974 you failed to present yourself at the Bandar Bahru Land Office as requested by her agent. Our client will assume therefrom that you are not prepared to go ahead with the sale.

20

Our client is prepared to give you a further opportunity to execute the transfer either at a Solicitor's office in Penang or at the Bandar Bahru Land Office or in Ipoh within the next seven (7) days.

If within this period you fail to communicate with our client and execute the transfer, our client will assume that you are not prepared to go ahead with the transaction and in such event, we have our client's firm instructions to institute legal proceedings for specific performance of the said agreement.

30

We trust, however that this cause of action need not be resorted to by our client and that you would execute the transfer in accordance with the said agreement.

Yours faithfully,

Sgd: Thevin Chandran & Siva
.....

c.c. Client

40

Mr. Lam Wai Kee,
54-B, Jalan Raya,
Selama, Kedah.

Exhibit A

(j) Letter: Defendant to Plaintiffs'
Solicitors dated 19th January 1974

Exhibit A

(j) Letter:
Defendant to
Plaintiffs'
Solicitors
19th January
1974.

REGISTERED

Zaibun Sa Binti Syed Ahmad,
29 Trang Road,
PULAU PINANG.

19th January, 1974.

10

Messrs. Thevin Chandran & Siva,
Advocates & Solicitors,
2 Station Road,
IPOH (Malaysia)

Dear Sirs,

I am in receipt of your letter No. CGN/PW/C18-73
(244) dated 14th January, 1974 contents of which have
been carefully noted.

In the meantime I enclose herewith a photocopy
of the said agreement for your reference.

Thanking you, I remain,

20

Yours faithfully,

Sgd: in Jawi - illegible

.....
Zaibun Sa Binti Syed Ahmad

Enc:

Exhibit A

(k) Letter: Plaintiffs' Solicitors to
Defendant dated 22nd February 1974

(k) Letter:
Plaintiffs'
Solicitors to
Defendant -
22nd February
1974

THEVIN CHANDRAN & SIVA
Advocates & Solicitors

2 Station Road,
P.O. Box 117,
Ipoh Malaysia.

30

Our ref: CGN/NKW/MC/L134-74

22nd February, 74.

Che Zaibun Sa bti. Syed Ahmad,
29 Trang Road,
PULAU PINANG.

CERTIFICATE OF POSTING

Dear Madam,

Exhibit A

(k) Letter:
Plaintiffs'
Solicitors to
Defendant -
22nd February
1974.
(cont'd)

Re: Agreement for the purchase of lands
held under title Nos. S.P. 4332, S.P.
4333, S.P. 4335 S.P.K. 2316 S.P.K.
2583 S.P.K. 2584 for Lots 869 870
872, 1080, 1343, 1344 Mukim of Serdang
District of Bandar Bahru

We acknowledge receipt of your letter of the
19th January, 1974 and regret that we are unable
to appreciate the contents therein.

TAKE NOTICE that if you fail to comply with our
letter addressed to you dated 14th January, 1974
within seven (7) days from date of receipt
hereof we have definite instructions to institute
legal proceedings against you for specific
performance of the above agreement.

10

Yours faithfully,

Sgd: Thevin Chandran & Siva
.....

c.c. Client
c.c. Mr. Lam Wai Kee
54-b, Jalan Raya,
Selama, KEDAH.

20

Exhibit A

(l) Letter:
Defendant to
Plaintiffs'
solicitors
28th February
1974.

(1) Letter: Defendant to Plaintiffs'
solicitors - 28th February 1974

REGISTERED

Zaibun Sa Binti Syed Ahmad,
29 Trang Road,
PULAU PINANG.

28th February, 1974.

Messrs.Thevin Chandran & Siva,
Advocates & Solicitors,
2 Station Road,
IPOH, (Malaysia).

30

Dear Sir,

I am in receipt of your letter No. CGN/NKW/MC/
L134-74 dated 22nd February 1974 contents of
which have been noted.

With reference to the agreement, I would like
to inform you that the agreement be treated as
null and void because of the following reasons:-

40

1. The agreement does not bear the identity of the said Madam Loh Kon Moy and thus her identity cannot be verified and furthermore, I have not met Madam Loh Kon Moy personally.
2. The agreement was not signed by the said Madam Loh Kon Moy.
3. The agreement did not bear the official stamps to make the agreement binding.

Exhibit A
 (1) Letter:
 Defendant to
 Plaintiffs'
 solicitors
 28th February
 1974.
 (cont'd)

10 Thus, because of the above reasons the deposit received by way of cheque was not cashed. However, if Madam Loh Kon Moy is willing to purchase the said lands we would request you to meet me personally and discuss the matter further.

Thanking you.

Yours faithfully,

Sgd: in Jawi (illegible)

Zaibun Sa binti Syed Ahmad.

Exhibit A1

Copy Agreement executed by Defendant
 Undated

Exhibit A1
 Copy Agreement
 executed by
 Defendant
 Undated

20 AN AGREEMENT made the _____ day of 1974 between Madam Zaibun Sa binti Syed Ahmad (I.C. No. 3773734) of 29 Trang Road, Penang (hereinafter called the "Vendor") of the one part and Madam Loh Kon Moi (I.C. No. 0383653) of 199 Pusing Road, Batu Gajah, Perak (hereinafter called the "Purchaser") of the other part.

30 WHEREAS the Vendor herself and as administratrix is the owner of lands held under Grants - Surat Putus No. 43332 Portion of No. 869 in areas 13 relongs 276 Jembas 00 square feet, Surat Putus No. 43333 Portion No. 870 in area 12 relongs 221 Jembas 40 square feet, Surat Putus No. 43335 Portion No. 872 in area 11 relongs 228 Jembas 20 square feet and Surat Putus Kechik No. 2316 (former title Surat Akuan No. 159/72) Portion No. 1080 in area 10 relongs 422 Jembas 00 square feet Surat Putus Kechik No. 2583 Portion No. 1343 in area 14 relongs 60 Jembas 00 square feet and
 40 Surat Putus Kechik No. 2584 Portion No. 1344 in area 5 relongs 205 Jembas 00 square feet - situated in the Mukim of Serdang, District of

Exhibit A1
Copy Agreement
executed by
Defendant
Undated
(cont'd)

Bandar Bharu Sub-Division Sungei Trap, Kedah
(hereinafter called the "said lands").

AND WHEREAS the Purchaser is desirous to purchase the said lands free from any encumbrances at an agreed rate of Ringgit One thousand Two Hundred (\$1,200/-) per relong nett.

NOW IT IS HEREBY AGREED AS FOLLOWS:-

1. The Vendor will sell the said lands at the rate of Ringgit One thousand Two hundred (\$1,200/-) per relong making a total of Ringgit Eighty One thousand Five hundred and Three and Cents Twenty Eight only. (\$81,503.28). 10
2. The Purchaser shall on the date hereof pay the Vendor a sum of Ringgit Five thousand (\$5,000/-) being deposit which the Vendor confirmed receipt and the balance shall be paid by the Purchaser to the Vendor before March 31st, 1974.
3. On payment of the balance of the purchase money the Purchaser shall be entitled to vacant possession of the said lands and the receipt of rents and profit thereof as from the completion date shall be liable to all outgoings to be apportioned if necessary. 20
4. As from the date hereof the Purchaser shall be liable for any quit rents of the said lands and shall be paid by the Purchaser.
5. All legal charges in respect of this Agreement and of the transfer of the said lands to the Purchaser by the Vendor at the time of Sale shall be borne and paid by the Purchaser. 30
6. This agreement is valid till the 5th of April, 1974.

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

Signed and delivered by the said)
Madam Zaibun Sa Binti Syed Ahmad) Sgd. Zaibun Sa
for herself and as administratrix) Binti Syed Ahmad
of the said lands in presence of:) (in Jawi - illegible)

Witness: Manager, 40
Gohar Iman Bros., Penang.

Signed by the said Madam Loh Kon)
Moi for herself and as Purchaser)
of the said lands in the presence)
of:-)

This is the copy of the Exhibit marked " " referred to in the filed on the day of 197 .

Exhibit P1

Original of Agreement - see Exhibit
A(c)

Exhibit P1

Original of
Agreement -
see Exhibit
A(c)

Exhibit P2

Original of
Agreement -
see Exhibit
A1

Exhibit P2

Original of Agreement - see Exhibit A1

Exhibit D3

Letter: Defendant to Lee Lian Yew dated
1st April 1971

Exhibit D3

Letter:
Defendant to
Lee Lian Yew
dated 1st
April 1971.

Zaibun Sa bte Syed Ahmad,
29 Trang Road,
Penang.

1st April, 1971.

Mr. Lee Lian Yew,
199 Main Road,
Batu Gajah,

Dear Sir,

We wish to inform you that we are desirous of selling our lands at the fixed price of \$1,400/- per relong. This is a very reasonable price we are offering you and we cannot possibly reduce any further.

If you are interested in purchasing same kindly confirm by letter soonest possible stating the day and date you wish to settle the sale and transfer the said lands to you.

Together with your confirmation letter kindly send us your deposit payment of \$50,000/- by way of cheque or banker's draft.

The balance amount will be paid at the time of sale and transfer of the said land.

We will be pleased to issue a receipt for payment.

Your early reply would oblige.

Yours faithfully,

Sgd.

(Gohar Iman)

For Zaibun Sa Binti Syed Ahmad)
Sole Administratrix.

c.c. Mr. Lam Wai Kee (JP),
54B Jalan Raya,
Selama,
Kedah.

Exhibit D4

Exhibit D4

Letter:
Defendant to
2nd Plaintiff
24th December
1973.

Letter: Defendant to 2nd Plaintiff dated
24th December 1973

Zaibun Sa Binti Syed Ahmad,
29 Trang Road,
PULAU PINANG.

24th December 1973.

Mr. Lam Wai Kee,
54-B Jalan Raya,
SELAMA (Kedah).

10

Dear Sir,

re: Agreement between Madam Loh Kon Moy and myself

With reference to the above, I would like to inform you that the agreement be treated as null and void because of the following reasons:-

1. The agreement does not bear the identity of the said Madam Loh Kon Moy and thus her identity cannot be verified and furthermore, I have not met Madam Loh Kon Moy personally.
2. The agreement was not signed by the said Madam Loh Kon Moy.
3. The agreement did not bear the official stamps to make it binding.

20

Thus, because of the above reasons the deposit received by way of cheque was not cashed. However, if Madam Loh Kon Moy is willing to purchase the said lands, we would request you to meet me personally and discuss the matter further.

Thanking you.

30

Yours faithfully,

Sgd: Illegible

.....

Exhibit P5

Letter: Defendant to Lee Lian Yew
14th September 1972

Exhibit P5

Letter:
Defendant to
Lee Lian Yew
14th September
1972.

Zaibun Sa Binti Syed Ahmed,
29 Trang Road,
PULAU PINANG.

14.9.1972

Mr. Lee Lian Yew,
199 Main Road,
Batu Gajah (Perak).

10

Dear Sir,

This is to inform you that we have decided
to sell our lands at the agreed price of \$1,000/-
nett per relong.

We would be grateful if you will kindly
confirm purchasing same in writing and let us
know precisely the day and date you would like
us to settle the matter and transfer the said
lands to you.

20

Upon confirmation we would be pleased if
you will make a deposit payment of Dollars Thirty
Thousand (\$30,000/-) by Banker's Cheque.

We will be pleased to issue a receipt for
the above sum.

Thanking you.

Yours faithfully,

Sgd: (in English)
.....

(Zaibun Sa Bte Syed Ahmed)
Sole Administratrix

30

Za/ar.

Order of
The Honourable
Mr. Justice
H.S. Ong
27th March
1970

Order of The Honourable Mr. Justice H.S.Ong
27th March 1970

IN THE HIGH COURT IN MALAYA AT PENANG

ORIGINATING SUMMONS NO: 48 OF 1970

In the Matter of the Estate of Syed Ahmad bin Murasalin deceased Vide Petition No. 103 of 1953, in the High Court at Penang.

AND

In the Matter of Surat Putus No. 43335 Portion No. 872, Surat Putus No. 43332 Portion No. 869 Mukim of Serdang, Subdivision Sungei Trap, District of Bandar Bahru, Kedah and Surat Putus Kechil 2583 and 2584 Portion No. 1343 and Portion 1344 respectively Mukim of Serdang, District of Bandar Bahru, Kedah, Holding No. 122 (1) Town Subdivision 10 North East District of Penang together with building erected thereon No. 29 Trang Road, Penang.

10

AND

In the Matter of $\frac{1}{4}$ und. share in Surat Putus Kechil No. 2316 Portion No. 1080, Surat Putus No. 48026 Portion No. 915 and Surat Putus No. 43333 Portion No. 870 Mukim of Serdang Sub-division Sungei Trap, District of Bandar Bahru, Kedah.

20

AND

In the Matter of Probate and Administration Ordinance 1959.

AND

In the Matter of National Land Code 1965.

AND

In the Matter of Rules of the Supreme Court 1957.

AND

30

Zaibun Sa Binti Syed Ahmad (m.w.)

APPLICANT

Order BEFORE THE HONOURABLE MR. JUSTICE H.S. ONG
THIS 27TH DAY OF MARCH, 1970

IN-CHAMBERS

Upon the Application of Zaibun Sa Binti Syed Ahmad the Applicant abovenamed made exparte by way of

10 Originating Summons on this day, upon reading the
Affidavit of Zaibun Sa Binti Syed Ahmad affirmed
on the 26th day of February, 1970 and filed herein
on the 27th day of February 1970 and the exhibits
therein referred to and the Supplemental Affidavit
of Zaibun Sa Binti Syed Ahmad affirmed on the
17th day of March, 1970 and the exhibits therein
referred to and upon hearing Counsel for the Applicant
IT IS ORDERED as follows:-

Order of
The Honourable
Mr. Justice
H.S. Ong
27th March
1970

20 (a) That Zaibun Sa Binti Syed Ahmad the
Applicant abovenamed as Administratrix de
bonis non of the Estate of Syed Ahmad
bin Murasalin deceased be at liberty to
sell the following properties at a price
not less than that set out immediately after
each of the respective lots:-

(i) Surat Putus No. 43335 Portion
No. 872 Mukim of Serdang,
sub-division Sungei Trap,
District of Bandar Bahru, Kedah,
at a price of not less than \$3,450/-.

30 (ii) Surat Putus No. 43332 Portion No. 869
Mukim of Serdang Sub-division Sungei
Trap, District of Bandar Bahru, Kedah,
at a price of not less than \$4,320/-

(iii) Surat Putus Kechil 2583 and 2584
Portion No. 1343 and Portion No. 1344,
respectively Mukim of Serdang, District
of Bandar Bahru, Kedah at a price of
not less than \$5,850/-.

40 (iv) Holding No. 122 (1) Town Sub-division 10
North East District of Penang together
with building erected thereon No. 29
Trang Road, Penang at a price of not
less than \$12,000/-.

(v) 1/4 und. share Surat Putus Kechil No. 2316
Portion No. 1080 Mukim of Serdang sub-
division Sungei Trap, District of Bandar
Bahru, Kedah at a price of not less than
\$840/-.

50 (vi) 1/4 und. share in Surat Putus No. 43333
Portion No. 870 Mk. of Serdang Sub-
division Sungei Trap, District of
Bandar Bahru, Kedah, at a price of
not less than \$937.50.

(vii) And 1/4 und. share in Surat Putus No. 48026
Portion No. 915 Mukim of Serdang, sub-
division Sungei Trap, District of Bandar
Bahru, Kedah, at a price of not less
than \$887.50

(b) That the receipt/s of the Applicant for the

Order of
The Honourable
Mr. Justice
H.S. Ong
27th March
1970

Purchase money arising from such sale shall be valid, effective good and sufficient discharge to the Purchaser or Purchasers thereof.

10

- (c) That the cost of this Application be paid out of the proceeds of the sale.
- (d) That the money representing the share of the following minor beneficiaries be deposited with the Public Trustee, Penang to their credit:-
- (i) Abdul Kayum bin Syed Ahamed - Son - 20 yrs. 10 mths.
 - (ii) Rohila Bte. Syed Admad - Daughter - 19 yrs. 8 mths.
 - (iii) Washida bte. Syed Ahmed - Daughter - 18 yrs. 2 mths.
 - (iv) Abdul Rashid bin Syed Ahmed - Son - 16 yrs. 10 mths.

Dated at Penang this 27th day of March 1970.

20

By Order,

Sgd.

SENIOR ASSISTANT REGISTRAR.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

ZAIBUN SA BINTI SYED AHMAD Appellant
(Defendant)

- and -

1. LOH KOON MOY (F) Respondents
(Plaintiffs)

2. LAM WAI KEE

RECORD OF PROCEEDINGS

Coward Chance,
Royex House,
Aldermanbury Square,
London EC2V 7LD

Solicitors for the
Appellant

Parker Garrett & Co.,
St. Michaels Rectory,
Cornhill,
London EC3V 9DU.

Solicitors for the
Respondents