

47/84

No. 18 of 1983

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

LIM YOKE FOO @ LIM YAP KWEE Appellant
(Plaintiff)

- and -

EU FINANCE BERHAD Respondents
(Defendants)

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CASE FOR THE APPELLANT

RECORD

1. This is an Appeal by the Appellant, Lim Yoke Foo, from an Order dated the 25th day of March 1982 made by the Federal Court of Malaysia (Lee Hun Hoe C.J., Borneo, Hashim Yeop A. Sani J., E. Abdoolcader J.):

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(i) Setting aside the Judgment and Order of Razak J. dated the 10th day of December 1980 whereby it was ordered:

(a) that the Respondents release and hand over to the Appellant the issue document of titles to 20 lands;

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(b) that the Respondents execute in favour of the Appellant a valid and registrable memorandum of discharge of the said lands and/or alternatively that the Senior Assistant Registrar execute in favour of the Appellant a valid and registrable memorandum of discharge of the said lands so that these documents be effective to discharge the said lands;

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(c) that the Respondents' Counterclaim be dismissed with costs.

(ii) dismissing the Appellant's claim and granting to the Respondents a declaration that the first order of the Collector of Land Revenue dated 15 June 1976 was still subsisting and of full effect;

(iii) ordering that the moneys lodged on fixed deposit by the Appellant's Solicitors in satisfaction of the Respondents' claim together with the accrued interest thereon be paid out to the Respondents in satisfaction of the claim under their charge on the said lands;

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(iv) ordering that the costs of the Appeal to the Federal Court and in the Court below in respect of the claim and counterclaim be awarded to the Respondents.

THE FACTS

2. (1) The Appellant is and was at all material times the registered owner of 20 lots of land situated in the Mukim of Kuala Kuantan (hereinafter referred to as "the lands"). The Respondents were the chargees of the lands under a Deed of Charge made on 10 October 1974 to secure repayment of a loan of \$350,000 granted by the Respondents to the Appellant, trading as Syarikat Puchong Industrial and Development. The said charge was created under the provisions of Part 16 of the Malaysian National Land Code (Act 56 of 1965) (hereinafter referred to as "the Code") and was registered with the Land Office at Kuantan on 8 November 1974.

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(2) On 29 April 1975 the Respondents served on the Appellant a Notice of Default in Form 16D under Section 254 of the Code and thereafter on 9 October 1975 made application to the Collector of Land Revenue, Kuantan ("the Collector") under section 260 of the Code for an order for sale of the properties charged.

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(3) On 15 June 1976, having concluded an enquiry held under section 261 of the Code, the Collector made an order of sale under section 263 of the Code in Form 16H in respect of 12 out of the 20 lots of land which were the subject of the charge. In the said Form 16H, the Collector further ordered

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(a) that the sale should be by way of public auction to be held on 5 August 1976 in the Land Office, Kuantan;

(b) that the reserve price for the purposes of the sale should be \$507,000.00. The Collector further found that the total sum payable to the chargee on 15 June 1976 was \$443,624.52.

10 (4) On 18 June 1976 the Appellant filed a Notice of Appeal against the order for sale. P.22

(5) By letter dated 22 June 1976, the Respondents requested the Collector to amend Form 16H to include the 20 titles which were the subject of the charge. In a letter of reply dated 30 June 1976, the Collector confirmed that 20 titles were included in the order for sale. P.60
P.61

20 (6) In a further letter of 30 June 1976 addressed to the Legal Adviser of the State of Pahang and copied to other parties including the Respondents' Solicitors, the Collector advised that a letter of objection had been received from the Appellant in respect of the said order of sale and stated that Form 'H' dated 15 June 1976 should accordingly be treated as cancelled.

(7) On 8 June 1978, the Appellant's Notice of Motion (which had been Issued on 15 October 1977 in substitution for the said Notice of Appeal) was withdrawn.

30 (8) By letter dated 20 December 1978, the Solicitors for the Respondents advised the Collector that the Appellant's objection to the order of sale had been withdrawn and requested the Collector's "approval so that sale of the land could be commenced as soon as possible". On 21 February 1979, the Respondents' Solicitors again wrote to the Collector enclosing a copy of the Court Order withdrawing the Notice of Motion "for your further action and fixing the date of public Auction Sale of the property concerned." P.63
P.64

40 (9) Thereafter, the Collector obtained a current valuation of the lands from the State Valuation Director and issued Form 16H dated 26 December 1979 whereby he ordered the sale of the lands and further ordered that P.48

(i) the sale should be by way of public auction to be held on 31 January 1980 and

RECORD

- (ii) the reserve price for the purpose of the sale should be \$562,000.00.

The Collector further stated that he found the total sum payable to the Respondents on 26 December 1979 to be \$443,694.52.

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(10) On 25 January 1980, the Appellant tendered to the Collector, pursuant to section 266 of the Code,

- (i) the sum of \$443,694.00 representing the sum found to be due to the Respondents on 26 December 1979 in the said Form 16H; 10
- (ii) the sum of \$5,367.25 in respect of interest on the said sum between 26 December 1979 and 25 January 1980;
- (iii) the sum of \$10.00 specified by the Collector as an amount sufficient to cover all expenses incurred in connection with the making and carrying into effect of the order for sale.

On 16 April 1980, the Appellant paid the further sum of \$2,000.00 representing the expenses incurred by the Respondents in connection with the order for sale, such amount having been notified to the Appellant in a letter from the Collector to the Appellant's Solicitors dated 7 April, 1980. 20

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(11) By reason of the tender of the said sums, the order for sale of the said lots ceased to have effect and the public auction of the lands which had been fixed for 31 January 1980 was accordingly cancelled by the Collector. 30

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(12) The Respondents took no steps to appeal against the order for sale made by the Collector on 26 December 1979 or against the cancellation by the Collector of the sale of the lands at the public auction on 31 January 1980. Notwithstanding the tender and payment by the Appellant of the said sums in accordance with the terms of the said order, the Respondents refused to discharge and release the documents of title to the lands.

3. By a Writ issued on 16 April 1980, the Appellant claimed orders, inter alia, requiring the Respondents to release the said documents of title and to execute in favour of the Appellant a valid and registrable memorandum of discharge in respect of the lands. 40

4. In their Amended Statement of Defence,
(originally filed on 24 May 1980 and amended on
28 July 1980) the Respondents pleaded, inter alia:

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(i) that the Form 16H dated 26 December 1979
had been wrongfully issued by the
Collector (para. 6 (a));

10 (ii) that the order of sale made thereby was
wrongful and/or void in that it did not
take into account further sums which the
Respondents were entitled to recover
from the Appellant (para. 6 (c));

(iii) that the order of sale dated 15 June, P.46
1976 was valid and still subsisting and
that the order of sale dated 26 December P.48
1979 was void and of no legal effect as
being contrary to the provisions of the
Code (para. 6 (d)).

In their Amended Counterclaim the Respondents
sought, inter alia,

20 (a) a declaration that the order of sale
dated 15 June 1976 was still subsisting
and of full legal effect.
(para. ii(a));

(b) judgment for the sums alleged to be due
under the charge as at 26 December, 1979
totalling \$680,095.69.

30 5. The Appellant issued a Summons-in-Chambers
under Order 14 but this was not proceeded with, it
being agreed between the parties that the matter
should be tried without affidavit or oral evidence
on the basis of Counsel's submissions.

6. The matter was heard by Razak J. who, on 10
December 1980, gave judgment for the Appellant P.14
and made Orders in terms of the prayer in the Writ.
In his judgment, the learned Judge held, inter
alia:

40 (i) that in order to challenge the validity
of the Collector's order of 26 December,
1979 the Respondents ought to have
appealed against the order pursuant to
Section 418 of the Code;

(ii) that by failing to challenge the validity
of the order, the Respondents must be

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deemed to have accepted the Collector's order and were bound by it and could not be heard to challenge its validity in the present proceedings;

(iii) that the Appellant had done all that was required of him by the Code by tendering the sum found to be due by the Collector and interest thereon and by paying the sum demanded in respect of legal expenses;

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(iv) that, in these circumstances, the Appellant was entitled to the relief claimed in the Writ.

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7. On 18th December 1980, the Respondents filed a Notice of Appeal against the decision of Razak J. and on 27 January 1981 filed a Memorandum of Appeal setting out the grounds thereof.

8. On an application by the Respondents for a stay of execution pending the determination of the appeal, it was ordered by consent that the Respondents' charge over the said lands should be released on payment to the Respondents of the sums not in dispute and on the Appellant's lodging the disputed sum on fixed deposit in the name of the Appellant's Solicitors to abide the result of the appeal.

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9. The Respondents' appeal was heard on 25 March 1982 by the Federal Court of Malaysia (Lee Hun Hoe C.J., Borneo, Hashim Yeop A. Sani J., E. Abdoolcader J.) The Federal Court allowed the Respondents' appeal with costs and ordered inter alia:

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(i) that the Judgment and Order of Razak J. be set aside;

(ii) that the moneys lodged on fixed deposit be paid out to the Respondents in satisfaction of the claim under their Charge.

10. In its Judgment the Federal Court held, inter alia:

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(i) that the sole issue in the appeal was the validity or otherwise of the order of sale of the Collector made on 26 December 1979, following the making of a similar order by another Collector on 15 June 1976;

- (ii) that there was no power in the Collector to cancel an order made under section 263 of the Code or the sale to be effected thereby and that, when the Collector purported to do this, he was, in effect, postponing the sale by virtue of section 264 (3) of the Code which was the only power he had; RECORD
- 10 (iii) that, subject to the power to postpone a sale, an order of sale once made had to be implemented in accordance with the provisions of section 265 unless it ceased to have effect on tender by the chargor of the amounts specified in section 266 (2);
- 20 (iv) that, as soon as the Collector made the order on 15 June 1976, he was functus officio save as to his power to postpone the sale ordered or to make formal corrections to the order under section 33 of the Code and that the Collector had no power to make another or subsequent order of sale under section 263 of the Code;
- 30 (v) that the Collector had no power to make the order of 26 December 1979, such order being made without holding any inquiry under sections 261 and 262 of the Code and not being merely a corrective order under section 33;
- (vi) that the Order of 26 December 1979 was accordingly no order at all within and for the purposes of Section 263 and was a nullity and devoid of any effect; P.48
- 40 (vii) that, the Order of 26 December 1979 being null by reason of want of jurisdiction, it was unnecessary for the Respondents to appeal under Section 418 to challenge its validity: the Order could be impugned in collateral proceedings,
- (viii) that the Collector's order of 15 June 1976 was still subsisting and of full legal effect and that a declaration should be granted accordingly. P.46
11. By Order dated 6 December 1982, the Federal Court of Malaysia (Raja Azlan Shah L.P., Malaysia, Salleh Abas J., E. Abdoolcader J.) granted final P.36

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leave to the Appellant to appeal to His Majesty, the Yang Di-Pertuan Agong against the Judgment of the Federal Court delivered on 25 March 1982.

THE ISSUES

12. The following are the principal questions raised in the Appeal:

- (1) whether, following the making of an Order of sale of land under section 263 of the Code, a Collector has power to make any further order in relation to the same land other than to correct verbal errors or remedy accidental defects or omissions in the said order pursuant to section 33 of the Code; 10
- P.48 (2) whether, in making the further order on 26 December 1979, the Collector acted within his jurisdiction and in accordance with the procedural requirements of the Code;
- (3) whether, assuming that in making the said order of 26 December 1979 the Collector exceeded his jurisdiction or failed to act in accordance with the said procedural requirements, such order was a nullity and of no legal effect or merely voidable at the instance of the Respondents in appeal proceedings under section 418 of the Code; 20
- (4) whether, no appeal having been lodged by the Respondents against the said order within the period prescribed by section 418 of the Code, and the Appellant having tendered the sum found to be due in the said order and other sums due on the basis of the order in accordance with section 266 of the Code, the Respondents were entitled by way of defence to proceedings for the release of the charge to impugn the validity of the said order of the Collector. 30

13. In its Judgment the Federal Court held that, once having issued an order of sale in Form 16H, a Collector was functus officio save as to his power under section 264 (3) to postpone the sale or to correct formal errors and omissions in the order. In reaching this conclusion the Federal Court placed reliance on the provisions of sections 33 and 36 of the Code. Section 33 provides: 40

"Save in the special circumstances specified in section 34, a decision or order of the Collector in any enquiry shall not be altered or added to except for the purpose of correcting verbal errors or remedying some accidental defect or omission not affecting a material part of the enquiry."

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Section 36 provides:

10 "Except as provided in Section 34, no Collector shall hold any enquiry in which the matter directly and substantially in issue has been directly and substantially in issue in a former enquiry relating to the same parties or their predecessors in title, and which has been heard and finally decided either by himself or any other Collector."

20 It is apparent from the Judgment that the Federal Court interpreted these provisions as precluding a Collector who has once made an order for sale of land under section 263 of the Code from making any further "order" or "decision" or holding any further enquiry in relation to such land, save in the limited (and, in the present case, immaterial) circumstances defined in section 34. The Federal Court accordingly concluded that, in purporting to make a further "order" on 26 December 1979, the Collector acted without jurisdiction and that the "order" was void and of no effect.

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30 14. It is respectfully submitted that, on its true construction, section 33 of the Code does not preclude a Collector, once having made an order for sale of land under section 263, from making any further "order" or from taking any further "decision" in relation to the sale of such land and that, in making the further "order" on 26 December 1979, the Collector acted within his jurisdiction.

15. Section 263 of the Code provides, so far as is material, as follows:

40 "(1) At the conclusion of any enquiry under section 261, the Collector shall order the sale of the land or lease to which the charge in question relates unless he is satisfied of the existence of cause to the contrary

(2) Every such order shall be in Form 16H, and shall:-

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- (a) provide for the sale to be by public auction;
- (b) specify the date on which the sale is to be held, being a date not less than one month after the date on which the order is made;
- (c) specify the amount due to the chargee at the date on which the order is made; and
- (d) fix a reserve price for the purpose of the sale, being a price equal to the market value of the land or lease in question as estimated by the Collector."

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16. As is apparent from the terms of Form 16H, the Collector not merely orders the sale of the land in question but also "orders"

- (a) that the sale should be by public auction to be held on a specified date; and
- (b) that the reserve price for the purpose of the sale should be a specified sum.

In addition the Collector is required in Form 16H to set out his "finding" as to the amount due to the chargee at the date of making the order.

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17. By section 264 (3) of the Code, power is conferred on the Collector to postpone a sale of land ordered by him in accordance with section 263:

"The Collector may, if he thinks it expedient to do so, from time to time postpone any sale ordered under section 263."

18. The Code confers no express power on the Collector to cancel or revoke any "orders" or "decisions" made under section 263 of the Code. However, it is submitted that such a power is clearly to be implied as being necessarily incidental to the power of the Collector to postpone a sale: in postponing a sale, the Collector necessarily revokes the orders in Form 16H relating to the date of the public auction and the reserve price at such auction. The Code, likewise, confers no express power on the Collector, having once postponed a sale of land under section 263 (3), to restore the order for sale or to make any consequential orders or decisions in relation to the sale of the land. However, it is similarly submitted that such a

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10 power is to be implied as being necessary to give effect to the purposes of the sale provisions of the Code: the Collector must have power to order the land to be sold on a new date and to order that a new reserve price should apply at the sale. It is further submitted that the Collector has the power to decide on the sum due to the chargee as at the date of the new order. Moreover such power to issue new orders and decisions may be exercised (and, by virtue of section 36 of the Code, must be exercised) without holding a further enquiry.

20 19. Accordingly, in the submission of the Appellant, section 33 of the Code cannot, consistently with the purpose of the Code, be interpreted as rendering the Collector functus officio once an order for sale has been made under section 263; nor is the section to be interpreted as precluding a Collector from cancelling or revoking orders made by the Collector in Form 16H or from making fresh orders or decisions in relation to the same land, even though such fresh orders or decisions may have the effect of "altering" orders or decisions previously made.

20. In the present case, it is submitted that the Collector acted within his jurisdiction in

30 (i) postponing the sale fixed by the order of 15 June 1976 and cancelling the orders made in Form 16H fixing the date of sale and the reserve price; P.46

(ii) issuing a fresh order for sale in Form 16H dated 26 December 1979, after the Appellant's appeal was withdrawn, in which he ordered a new date for sale and a new reserve price and in which he stated his finding as to the sum due to the chargee at the date of the order. P.48

40 21. Accordingly, if contrary to the Appellant's contention, the Collector was in error in finding that the total sum due to the chargee as at 26 December 1979 was \$443,694.52, such a finding was at most an error made within jurisdiction or a wrong exercise of jurisdiction. Such an error would not render the decision void but merely voidable at the instance of the Respondents in appeal proceedings under section 418 of the Code - see e.g. Director of Public Prosecutions v. Head [1959] A.C. 83 at p. 112 per Lord Denning. The Collector's decision was not capable of being

impugned otherwise than in appeal proceedings brought under the Code and within the time limit set by the Code, which proceedings constitute an exclusive remedy. This was so held by the Federal Court in the case of Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Berhad [1981] 1 M.L.J. 234:

".... If the relevant authority commits an error in the interpretation of the section than an aggrieved party has a right of appeal to the High Court under section 418 of the Code. Parliament has on the ground of public policy found that that is a just and necessary right. But in the same section Parliament has also enacted a special procedure of enforcing that right. If the right had been simply created and no specific method of enforcing it had been provided for, the existing law itself would have provided a method through the Court already invested with jurisdiction to determine a claim of that nature. But a specific method having been created by providing a time-limit within which the right may be pursued, it becomes a question whether that method is exclusive or not. That depends, not upon any rigid rule, but upon the intention of Parliament appearing from the Code....
... (at p.237 C-E).

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Section 418 of the Code must now be looked at. If on a proper reading of it [it] leads one to the conclusion that it is the intention of Parliament to create the right absolutely and independently of any specific form or remedy, the respondent's action is well maintained. If on the other hand the proper interpretation is that the right and the remedy are uno flatu, that they are not mutually exclusive, that they are part and parcel of the remedy, then the action is misconceived.

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Reading section 418 of the Code, we are satisfied that the latter is the correct interpretation. Having regard to the special provision for limiting the time within which to enforce the right, the indications are that Parliament has by using plain and unambiguous language intended the right to be exclusive of any other mode of enforcing it. The time-limit is the foundation of the right given in the section. It is in the highest degree improbable that the period of three months as a limitation would have been inserted if an indefinite period were intended to be given. The period of three months is obviously for the purpose of preventing stale

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claims. If the contrary is sustainable, then the respondents are allowed to seek to enforce their statutory right by a method other than that prescribed by the Code creating it. RECORD

For these reasons we are of the view that the Court has no jurisdiction to entertain the claim sought by the declaration and the appeal must be allowed with costs here and below." (at p.237 B-F).

10 22. Even if, contrary to the primary contention of the Appellant, the Collector exceeded his jurisdiction in making the further order on 26 December 1979, it is submitted that the Federal Court erred in holding P.48

(i) that the said order was no order at all within and for the purposes of section 263 and that the order was a nullity and devoid of legal effect. P.32

20 (ii) that no appeal against the said order was essential or necessary to impugn its validity and that the order could be subject to collateral attack in the instant proceedings. P.34

30 23. It is clear that, even where a decision or order is properly to be treated as void, it may nevertheless have some effect or existence in law unless and until it is so declared by a competent body or court - see Calvin v. Carr [1980] A.C. 574 at pp. 589G - 596H. In London & Clydesdale Estates Ltd. v. Aberdeen District Council and Another [1980] 1 W.L.R. 182 to which reference was made by the Federal Court, Lord Hailsham of St. Marylebone L.C. cited with approval the opinion of the Privy Council in Calvin v. Carr and likewise concluded that the certificate of alternative development issued by the Respondent authority, although vitiated by a failure to comply with mandatory requirements, nevertheless had some legal effect until struck down by a competent authority:

40 "The certificate was vitiated in the sense that it failed to comply with a mandatory requirement. But the subject could not safely disregard it as not having been issued. Had he done so, he might well have fallen into the very trap of losing his right to complain of the vitiating factor which has caught other subjects in reported decisions, and, in my view, he was not only wise but bound to seek a decree of

RECORD

reduction or some other appropriate remedy striking down the offending certificate" (at p. 187 F-G).

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24. In the submission of the Appellant, even if the Collector's order of 26 December 1979, or the Collector's finding contained in that order as to the sum due to the chargee as at that date, are to be treated as void as being made in excess of jurisdiction, the order and the finding were nevertheless not nullities and were of legal effect unless and until set aside by the Court in appeal proceedings under section 418 of the Code. In this regard, the Appellant places reliance on the decision of the Court of Appeal of the Federated Malay States in A. Subramaniam v. S.M. R.M. Muthiah Chetty [1934] M.L.J. 222 which was cited by the Federal Court but to which the Court made no reference. In that case the Court dismissed an appeal from a decree of Thomas C.J. refusing a declaration that the sale of the plaintiff's lands which took place at the instance of the defendant as chargee was a nullity and vested no rights in the defendant, on the grounds that it was held under two orders made by the Collector which were made in excess of jurisdiction and were void. The Court of Appeal observed that there was no doubt that both the Collector's orders were bad and would have been set aside if an appeal had been lodged against them (p.222). The Court nevertheless concluded that the appellant was debarred from obtaining the declaration sought because he had failed to appeal against the orders directing the sale within the time set by section 237 of the Land Code 1926 (p.223). The Court further considered and rejected the appellant's argument that, since the Collector's orders were made without jurisdiction, they were of no legal effect and no appeal was necessary:

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"But it was also argued that these orders were nullities, as made without jurisdiction, and that consequently it is not necessary to set them aside. There is no doubt that in the case of inferior jurisdictions unless sufficient appears on the face of the proceedings themselves to show that the jurisdiction exists, the proceedings are void On the other hand where an order, on the face of it good, is made by a competent authority, it must be deemed to be good until it is set aside by whatever procedure may be prescribed or allowed by law." (at p. 223).

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25. In the present case the Respondents took no steps to appeal under section 418 of the Code, either within the period specified in that section or at all, against the Collector's order of 26 December 1979 or against the finding in that order as to the sum due to the Respondents on that date. In accordance with the provisions of the Code, the Appellant tendered to the Collector such sum as was found by the Collector to be due and further sums in respect of interest between the date of the order and the date of tender and in respect of expenses incurred in relation to the sale. In these circumstances, it is submitted that Razak J. correctly held that it was not open to the Respondents, by way of defence to proceedings for an order that the Respondents execute a memorandum of discharge, to impugn the validity of the Collector's order dated 26 December 1979.

CONCLUSION

26. In the premises, the Appellant respectfully submits that the Judgment of the Federal Court was wrong and ought to be reversed and that this Appeal ought to be allowed with costs and that it should be ordered that the sum presently lodged on fixed deposit in the name of the Appellant's Solicitors be released to the Appellant for the following among other

R E A S O N S

- (1) BECAUSE the Collector's order made on 26 December 1979 and the findings contained therein were made within the jurisdiction conferred on the Collector by the National Land Code 1965 and complied with the provisions of the Code; P.48
- (2) BECAUSE in any event the said order and findings were of full legal effect unless and until set aside by the Court in appeal proceedings brought under section 418 of the Code within the period specified in that section;
- (3) BECAUSE, no such appeal proceedings having been instituted by the Respondents and the Appellant having tendered to the Collector the sum found to be due in the said order and all such other sums as are specified in section 266 of the Code, the Respondents are precluded from impugning the validity of the said order

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or findings by way of defence to the proceedings herein or by way of counterclaim for a declaration in such proceedings.

DAVID WIDDICOMB Q.C.

M. ANAD KRISHNAN

No. 18 of 1983

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

LIM YOKE FOO @ LIM YAP KWEE

Appellant
(Plaintiff)

- and -

EU FINANCE BERHAD

Respondents
(Defendants)

CASE FOR THE APPELLANT

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