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PEH LAI HUAT

v.

MBF FINANCE BHD

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COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL AZIZ MOHAMAD JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: W-02-356-2002]

C

30 APRIL 2009

LAND LAW: *Charge - Order for sale - Creditor's application to auction land charged by debtor as security for loan - Whether creditor's application an action to recover debt owed - Whether creditor's application*

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in exercise of its statutory remedy against the debtor - Whether statutory remedy arose due to debtor's failure to remedy default in Form 16D notice

WORDS AND PHRASES: *'mortgage' - Limitation Act 1953, s. 21*

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The appellant obtained a loan from the respondent's predecessor in 1984. The loan was secured by a charge over the appellant's land. The last repayment the appellant made towards the loan was on 28 January 1986. By a Form 16D notice dated 17 August 2000, the respondent demanded repayment of the loan and accrued interest. The appellant failed to respond and the

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respondent thus filed an originating summons on 6 April 2001 for an order for sale of the land. The appellant claimed that the foreclosure proceedings were barred by limitation since the loan had remained inactive for more than six years and the respondent had taken no proceedings to recover the same. The High Court ruled

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against the appellant and he appealed to the Court of Appeal.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA:

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(1) The respondent's application was to have the land sold by public auction was not an action to recover a debt owed. Section 21(1) and (2) of the Limitation Act 1953 did not apply to the facts in the instant case. In the instant case, the respondent's cause of action, *viz*, the right to exercise the

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statutory remedy of an order for sale did not arise until after the appellant had failed to remedy the default specified in the

Form 16D notice. The originating summons was filed on 6 April 2001, well within the 12-year period prescribed by s. 21(2) of the Limitation Act 1953. *Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd* (foll); *American International Assurance Co Ltd v. Union Builders (Malaysia) Sdn Bhd* (foll). (paras 3 & 4)

(2) The word 'mortgage' referred to in s. 21 of the Limitation Act means 'charge' as understood and provided for in Part 16 of the National Land Code. *Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd* (foll). (para 5)

Per Abdul Aziz Mohamad JCA:

(1) Section 21(1) of the Limitation Act 1953 did not apply in the instant case. (paras 12 & 13)

Bahasa Malaysia *Translation Of Headnotes*

Perayu memperoleh suatu pinjaman dari pemilik terdahulu responden pada tahun 1984. Pinjaman tersebut disandarkan kepada suatu pajakan terhadap tanah perayu. Bayaran terakhir yang dibuat perayu terhadap pinjaman adalah pada 28 Januari 1986. Melalui satu notis Borang D bertarikh 17 Ogos 2000, responden menuntut bayaran balik pinjaman serta faedah-faedahnya. Perayu tidak mengendahkan notis dan akibatnya responden memfailkan saman pemula pada 6 April 2001 untuk perintah penjualan tanah. Perayu berhujah bahawa prosiding halangtebus tersebut telah dihalang oleh had masa disebabkan pinjaman tidak aktif untuk tempoh melebihi enam tahun dan responden tidak memulakan apa-apa prosiding bagi menuntutnya. Mahkamah Tinggi membuat perintah yang memudaratkan perayu dan perayu merayu ke Mahkamah rayuan.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR:

(1) Permohonan responden adalah untuk menjual tanah melalui lelongan awam dan bukannya satu tindakan untuk mendapat kembali pinjaman yang terhutang. Seksyen 21(1) dan (2) Akta Had Masa 1953 tidak terpakai kepada fakta kes di sini. Dalam kes semasa, kausa tindakan responden, yakni hak untuk menguatkuasakan remedi statutori perintah jualan tidak berbangkit sehinggalah selepas perayu gagal menyembuhkan kemungkiran yang termaktub di notis Borang 16A. Saman

A pemula telah difailkan pada 6 April 2001, yang jelas di dalam tempoh 12 tahun yang ditetapkan oleh s. 21(2) Akta Had Masa 1953. *Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd* (diikuti); *American International Assurance Co Ltd v. Union Builders (Malaysia) Sdn Bhd* (diikuti).

B **(2)** Perkataan 'mortgage' yang dirujuk oleh s. 21 Akta Had Masa bererti 'charge' sepertimana yang difaham dan diperuntukkan oleh Bahagian 16 Kanun Tanah Negara. *Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd* (diikuti).

C **Oleh Abdul Aziz Mohamad HMR:**

(1) Seksyen 21(1) Akta Had Masa 1953 tidak terpakai kepada kes di sini.

D **Case(s) referred to:**

American International Assurance Co Ltd v. Union Builders (Malaysia) Sdn Bhd [1971] 1 LNS 2 ***(foll)***

Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd [1984] 1 CLJ 286; [1984] 1 CLJ (Rep) 230 FC ***(foll)***

Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd [1988]
E *1 CLJ 8; [1988] 1 CLJ (Rep) 193 SC* ***(foll)***

Legislation referred to:

Limitation Act 1953, s. 21(1), (2)

National Land Code, s. 256(3), Form 16D

F *For the appellant - Malik Imtiaz Sarwar; M/s CY Ngeow & Assoc*

For the respondent - Brian Foong Mun Loong; M/s Cheang & Arif

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S2-24-1105-2001]

G *Reported by Andrew Christopher Simon*

JUDGMENT

Gopal Sri Ram JCA:

H **[1]** The only issue in this case is whether the respondent's application for an order for sale is barred by limitation. The facts – about which there is no dispute – are as follows.

[2] In 1984, the respondent's predecessor in title lent a sum of
I about RM300,000 to the appellant. The loan was secured by a charge over the appellant's land. The last repayment that the

appellant made towards that loan was as long ago as 28 January 1986. By a notice dated 17 August 2000 in Form 16D of the National Land Code ("the Code"), the respondent made demand of the loan and accrued interest. Nothing was forthcoming from the appellant. So, the respondent took out an application under s. 256 of the Code seeking an order for sale of the subject land. It is the appellant's case that the foreclosure proceedings are barred by limitation since the loan had remained inactive for more than six years and the respondent had taken no proceedings to recover the same. The High Court ruled against the appellant and he appealed to this court which dismissed the appeal.

[3] In my judgment the appellant overlooks a point that is central to this case. He has treated the respondent's application to have the subject land sold in public auction as an action to recover the debt owed. That it certainly is not. The true nature of such a proceeding was described by Seah SCJ in *Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd* [1988] 1 CLJ 8; [1988] 1 CLJ (Rep) 193 as follows:

> The claim of the appellant in the court below was in exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code 1965. The appellant's claim was not under a covenant but under the registered charge.

American International Assurance Co Ltd v. Union Builders (Malaysia) Sdn Bhd [1971] 1 LNS 2, was prayed in aid of this conclusion. In that case, Ong CJ (Malaya) said:

> The chargees' claim herein was not on the covenant but in exercise of their statutory remedy against a chargor in default. Hence there could not have been any merger. In this connection I might add in parenthesis that, ordinarily, a chargee hardly ever has occasion to sue on the covenant, except where the moneys realised fall short of the amount needed to satisfy his claim for principal and interest.

Accordingly, s. 21(1) of the Limitation Act 1953 which provides that: "(1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued" has no application to this case. The

A proceeding in the court below was not – to quote the words of the subsection – "an action … brought to recover any principal sum of money secured by a mortgage".

[4] Similarly, s. 21(2) of the Limitation Act which reads:

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> (2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of twelve years from the date on which the right to foreclose accrued:
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> Provided that if, after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his possession discontinued.

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also has no application to this case. That is because the cause of D action here, that is to say, the right to exercise the statutory remedy of an order for sale did not arise until after the appellant had failed to remedy the default specified in the Form 16D notice. The originating summons was here filed on 6 April 2001, well within the 12 year period prescribed by s. 21(2) of the Limitation Act.

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[5] I have in this judgment, referred to s. 21 of the Limitation Act. That section speaks of a "mortgage", which is a type of security that the Code does not recognise. However, in *Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd* [1984] 1 CLJ 286; F [1984] 1 CLJ (Rep) 230, the former Federal Court speaking through Salleh Abas CJ (Malaya) held that: "when s. 21(1) of our Limitation Act speaks of a 'mortgage', it must mean a 'charge' as understood and provided for in Part Sixteen of our National Land Code". It is precisely for that reason that s. 21 is the relevant and applicable law.

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[6] In view of the foregoing this appeal was devoid of merit and was dismissed and the usual orders consequent upon a dismissal were made.

H **[7]** My learned brother Mohd Ghazali bin Mohd Yusoff, JCA (now FCJ) has seen this judgment in draft and has expressed his agreement with it.

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Abdul Aziz Mohamad FCJ:

[8] In 1984 the respondent bank's predecessor granted to the appellant a loan of RM300,000 which was secured by a charge over the appellant's land. The appellant defaulted in making repayment after the last repayment on 28 January 1986. On 6 April 2001 the respondent applied for an order for sale of the land under s. 256 of the National Land Code. The order for sale was granted by the High Court on 10 May 1992. This was an appeal from that order.

[9] The only issue that was raised before us was the issue of limitation. The appellant's counsel submitted that there was a "cause to the contrary" within the meaning of s. 256(3) against the making of the order for sale because the respondent's action was barred by limitation. He relied on s. 21(1) of the Limitation Act 1953. He took the stand that the respondent's action was an action to recover the principal sum of money secured by the charge. As far as relevant to that stand, s. 21(1) provides as follows:

> (1) No action shall be brought to recover any principal sum of money secured by a ... charge on land ... after the expiration of twelve years from the date when the right to receive the money accrued.

[10] Counsel argued that failure to make the next repayment on 28 February 1986 was a default and that, according to cl. 12 of the annexure to the charge, such a default gave the respondent-chargee a right of action. Therefore, counsel argued, to avoid the prohibition of s. 21(1) the action should have been brought by February 1998, since the right of action accrued in February 1986, whereas it was only brought on 6 April 2001.

[11] We dismissed the appeal without hearing the respondent's counsel.

[12] The only reason why I decided that the appeal should be dismissed was the reason that is stated in para 3 of the judgment of my learned brother Gopal Sri Ram FCJ, that is, that s. 21(1) of the Limitation Act 1953 did not apply to the respondent's action because it was not an action brought to recover any principal sum of money secured by a charge but was an action in exercise of the right to the statutory remedy of an order for sale.

A It was, however, not with the benefit of having read the two authorities cited by my learned brother in the said paragraph that I conceived that reason.

[13] I have, however, to state, after currently perusing the
B respondent's written outline submission that was available at the hearing of the appeal, that that was not the stand of the respondent. The outline submission indicates that the respondent accepted that s. 21(1) applied, but, disputing the appellant's accrual date 28 February 1986 and contending instead for an
C accrual date one month after a Form 16D Notice of 12 December 2000, maintained that the action was brought within the twelve years. But as I said, the only reason for my decision was that s. 21(1) did not apply.

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