

PERWIRA AFFIN BANK BHD*a*

v.

LIM WEOW

COURT OF APPEAL, KUALA LUMPUR

b

SITI NORMA YAAKOB JCA

MAHADEV SHANKAR JCA

DENIS ONG JCA

[CIVIL APPEAL NO: W-02-463-1995]

13 MAY 1998

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LAND LAW: *Land Administrator - Order for sale - Whether Land Administrator functus officio after making order for sale - Whether land enquiry can be reopened - National Land Code 1965, s. 34(2) - Whether subsequent order for sale rendered a nullity*

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LIMITATION: *Recovery of moneys secured by charge over land - Whether different from actions for recovery of land - Limitation Act 1953, s. 9(1) - Applicability - Whether order for sale barred by limitation*

LAND LAW: *Charge - Recovery of moneys secured by charge over land - Order for sale - Limitation Act 1953, s. 9(1) - Whether applicable - Limitation Act 1953, s. 21(1) - Date when the right to receive the money accrued - Whether order for sale barred by limitation - Distinction with actions for recovery of land*

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The respondent was the registered and beneficial owner of a piece of land ('the property'). She created a charge over the property in favour of the appellant ('the bank') as security for a loan granted by the bank to one Tan Realty Development Sdn Bhd ('the borrower'). The borrower defaulted in its repayment and the bank commenced foreclosure proceedings against the respondent with the issue of a Form 16E notice. An order for sale was applied for from the Land Administrator and obtained on 2 June 1981 ('the first order for sale'). The auction date was fixed but was subsequently called off by the Land Administrator on the basis of irregularities in the land enquiry preceding the first order for sale.

*f**g*

The Land Administrator then commenced a fresh enquiry on 24 November 1982 and made an order for sale on 16 July 1984 ('the second order for sale') and fixed an auction date. At about the same time the respondent filed a civil suit ('the civil suit') against the bank seeking redemption of the property and an injunction to restrain the bank from proceeding with the sale. The Land Administrator then called off the sale citing non-compliance with s. 263 of the National Land Code 1965 ('the Code') as the reason and ordered a fresh enquiry to be held.

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- a* Between March 1988 and March 1994, several notices were sent from the Land Administrator to the respondent informing her of new dates of enquiry but on each occasion the enquiry was adjourned at the request of the respondent on the basis of the pending civil suit. The respondent then filed an application against the bank and the Land Administrator to preclude the former from carrying on with the sale on the ground that: (a) the second order for sale was a nullity as the Land Administrator was *functus officio* after 2 June 1981; and (b) the bank's action to proceed with the sale under the first order for sale was barred by s. 9(1) of the Limitation Act 1953 ('the Act').

c The trial judge found in favour of the respondent and hence the instant appeal.

Held:

Per Siti Norma Yaakob JCA

- d* [1] The trial judge was correct in finding that the Land Administrator had become *functus officio* upon making the first order for sale and he could not reopen the enquiry in the circumstances stated in s. 34(2) of the Code.

e [2] Section 9(1) of the Act deals with limitation in actions for the recovery of land. As the instant appeal was concerned only with the enforcement of a charge to recover money due to the bank which took the form of a sale of the charged property under the provisions of the Code and under the supervision of the Land Administrator, s. 9(1) of the Act was irrelevant. The learned trial judge had erred when she decided that s. 9(1) of the Act applied so as to render the first order for sale unenforceable by reason of limitation.

f [3] "The right to receive the money accrued" in s. 21(1) of the Act must refer to the time when the respondent defaulted in her obligations to make payment after being served with the Form 16E notice. The notice was served on the respondent on 2 November 1979 and the respondent had one month from that date within which to make payment. (One month plus twelve years from 2 November 1979 would be 1 December 1991.) It was not clear from the appeal records when the foreclosure proceedings were instituted in court but even taking the first order for sale that was made on 2 June 1981, it was clear that limitation had not set in as to render the first order for sale unenforceable.

h [Appeal allowed with costs.]

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[Bahasa Malaysia Translation Of Headnotes]

Responden adalah tuanpunya berdaftar dan benefisial sebidang tanah ('hartanah tersebut'). Beliau telah mewujudkan satu gadaian ke atas hartanah tersebut atas nama perayu ('bank tersebut') sebagai jaminan bagi kemudahan pinjaman yang diberikan oleh bank tersebut kepada sebuah syarikat yang dikenali sebagai Tan Realty Development Sdn Bhd ('peminjam tersebut'). Peminjam telah mungkir dalam tanggungjawab mereka untuk membayar balik dan bank tersebut telah memulakan prosiding halangtebus terhadap responden dengan mengeluarkan notis Borang 16E. Satu perintah jualan telah dipohon daripada Pentadbir Tanah dan telah diperolehi pada 2 Jun 1981 ('perintah jualan pertama'). Tarikh perlelongan telah ditetapkan tetapi kemudiannya telah dibatalkan oleh Pentadbir Tanah atas sebab beberapa luar aturan dalam siasatan tanah tersebut sebelum perintah jualan pertama.

Pentadbir Tanah kemudiannya telah memulakan satu siasatan baru pada 24 November 1982 dan membuat satu perintah jualan pada 16 Julai 1984 ('perintah jualan kedua') dan menetapkan tarikh perlelongan. Pada masa yang sama, responden telah memfailkan satu guaman sivil ('guaman sivil tersebut') terhadap bank tersebut sebagai usaha untuk menebus hartanah tersebut dan untuk mendapatkan satu injunksi bagi menghalang bank tersebut daripada meneruskan penjualan. Pentadbir Tanah kemudian telah membatalkan jualan dengan menyebut sebagai alasan ketidakpatuhan akan s. 263 Kanun Tanah Negara 1965 ('Kanun tersebut') dan telah memerintah supaya satu siasatan baru diadakan.

Antara bulan Mac 1988 hingga Mac 1994, beberapa notis telah dikirimkan daripada Pentadbir Tanah kepada responden memaklukkannya mengenai tarikh-tarikh siasatan yang baru tetapi pada setiap kali siasatan tersebut telah ditangguhkan atas permintaan responden atas sebab guaman sivil yang menantikan penyelesaian. Responden kemudiannya telah memfailkan satu permohonan terhadap bank dan Pentadbir Tanah bagi menghalang bank daripada menjalankan penjualan atas alasan bahawa: (a) perintah jualan yang kedua adalah tak sah sebab Pentadbir Tanah telah *functus officio* selepas 2 Jun 1981; dan (b) tuntutan bank untuk meneruskan jualan di bawah perintah pertama telah disekat oleh s. 9(1) Akta Penghadan 1953 ('Akta tersebut').

Hakim perbicaraan telah membuat keputusan yang memihak kepada responden dan dengan itu menyebabkan rayuan semasa ini oleh perayu.

*a**b**c**d**e**f**g**h**i*

a **Diputuskan:****Oleh Siti Norma Yaakob HMR**

b [1] Hakim perbicaraan membuat keputusan yang betul bahawa Pentadbir Tanah telah menjadi *functus officio* setelah membuat perintahnya pada 2 Jun 1981 dan beliau tidak dapat membuka semula siasatan tersebut dalam keadaan-keadaan yang dinyatakan dalam s. 34(2) Kanun tersebut.

c [2] Seksyen 9(1) Akta tersebut berurusan dengan penghadan dalam tindakan-tindakan bagi penzahiran tanah. Oleh kerana rayuan semasa ini hanya berkaitan dengan penguatkuasaan suatu gadaian bagi mendapatkan semula wang yang kena dibayarkan kepada bank sebagai pemegang gadaian yang mempunyai bentuk penjualan hartanah yang telah digadaikan di bawah peruntukan-peruntukan Kanun tersebut dan dibawah penyeliaan Pentadbir Tanah, s. 9(1) Akta tersebut adalah tak relevan kepada fakta-fakta rayuan. Hakim perbicaraan telah tersalah pertimbangan ketika beliau memutuskan bahawa s. 9(1) Akta tersebut terpakai yang dengan itu menjadikan perintah jualan pertama tidak boleh dikuatkuasakan akibat penghadan.

d [3] “Hak untuk menerima wang yang terakru” dalam s. 21(1) Akta tersebut seharusnya merujuk kepada masa ketika responden mungkir dalam kewajipannya untuk membuat pembayaran selepas disampaikan dengan notis Borang 16E. Notis tersebut telah disampaikan ke atas responden pada 2 November 1979 dan responden mempunyai masa selama satu bulan daripada tarikh itu untuk membuat pembayaran. Ini membawa kita kepada tarikh 2 Disember 1979 dan mengira dua belas tahun daripada tarikh itu membawa kita kepada 1 Disember 1991. Adalah tidak jelas daripada rekod-rekod rayuan bilakah prosiding halangtebus dimulakan dalam mahkamah tetapi sungguhpun mengandaikan perintah jualan pertama dibuat pada 2 Jun 1981, ianya jelas bawa penghadan masih belum bermula bagi menjadikan perintah jualan pertama tersebut tidak boleh dikuatkuasakan.

e **f** **g** [Rayuan dibenarkan dengan kos.]

Case referred to:

Eu Finance Bhd v. Lim Yoke Foo [1982] 2 MLJ 37 (cit)

Legislation referred to:

h Limitation Act 1953, ss. 9(1), 21(1)
National Land Code 1965, ss. 34(2), 255, 260(2), 263

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For the appellant - Khoo Guan Huat (Leong Wai Hong with him); M/s Skrine & Co **a**
For the respondent - Malik Imtiaz Sarwar (Karina Yong with him); M/s Vazeer Akbar
Majid & Co

[Appeal from High Court, Kuala Lumpur; Originating Motion No: S4-21-124-1994]

Reported by Ling Hea Hoon **b**

JUDGMENT

Siti Norma Yaakob JCA:

The hearing of this appeal was preceded by a notice of motion filed by the appellant (the Bank) to include a Supplementary Memorandum of Appeal as part of the appeal records. The application became necessary as the judgment of the trial judge was only made available four days before the hearing of the appeal itself and upon perusal of it, the Bank was advised that it was necessary to add further grounds of appeal to their original Memorandum drafted without the benefit of the judgment. **c**
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Encik Malik Imtiaz Sarwar, Counsel for the respondent, objected to the application on the ground that the additional grounds should have been obvious from the terms of the order appealed against. But without the benefit of the judgment, the Bank could not reasonably be expected to formulate all its grounds of appeal. In any event in their original Memorandum of Appeal, the respondent had been put on notice of the bank's intention to adduce further grounds after the judgment was made available. So we allowed the application, but gave Counsel for the respondent time to consider his arguments in reply. **e**

The appeal itself, is founded on the following facts. **f**

The respondent is the registered and beneficial owner of two pieces of property held under GM Nos. 156 and 161 for Lot Nos. 16398 and 16403, Mukim of Batu, Wilayah Persekutuan (the property). She created a third party first legal charge over the property in favour of the bank, as the security for a loan facility of RM300,000 granted by the bank to a company known as Tan Realty Development Sdn. Bhd. (the borrowers). The charge was created on 14 February 1977 and registered on 9 March 1977. **g**

The borrowers defaulted in their obligation to repay the loan and on 2 November 1979, the bank as the chargee, commenced foreclosure proceedings against the respondent, the chargor, with the issue of a Form 16E notice under s. 255 of the National Land Code 1965 (the Code). When the amount demanded was not paid within the one month stipulated in the notice, the bank applied for an order for sale from the Land Administrator, Kuala **h**

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a Lumpur who held an enquiry, and made an order for sale on 2 June 1981 (the first order) and fixed 29 July 1981 as the auction date. That auction was called off and in his letter dated 17 August 1981 addressed to the bank's solicitors, the Land Administrator indicated irregularities in the enquiry as the reasons for calling off the sale. He identified the irregularities to be:

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- (1) notis tidak dapat disampaikan dengan sempurna, and
 - (2) there was no independent valuation of the forced value of the property.

c It is not too clear from the records of appeal what notice the Land Administrator was referring to in his letter. Suffice it is to say that whatever irregularities that had occurred relate only to the holding of the auction and not with the order for sale. Both counsel argued the appeal on the premise that the first order for sale was a valid order.

d In an effort to resolve the whole matter, the bank by their letter dated 4 September 1981 addressed to the borrowers, agreed to withhold the foreclosure proceedings on the undertaking that a sum of RM400,000 be transferred from the credit facilities granted to a company, Asialand Housing Development Sdn. Bhd., to off set the borrowers' outstanding liability and the further fulfillment of the following two conditions:

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- (1) That the borrowers pay RM39,179.47, this being the difference between the sum owed by them and the RM400,000 credited from Asialand's accounts.
 - (2) That the borrowers execute a further charge over the properties held under
- f* EMR 2683 and EMR 2264 to secure the excess on the overdraft facility.

The borrowers were not able to comply with condition (2) as the registration of a further charge on the properties in question was blocked by several caveats lodged by other interested third parties.

g As the loan was still outstanding, the bank continued with their foreclosure proceedings. The Land Administrator then commenced a fresh enquiry (the second enquiry) on 24 November 1982, made an order for sale on 16 July 1984 (the second order) and fixed 12 September 1984 as the auction date. At about the same time, the respondent filed Civil Suit, F 353/84, on 15 August 1984 against the bank, primarily seeking redemption of the property and for an injunction to restrain the bank from proceeding with the sale. The respondent's application for an interim injunction came to a premature end when the Land Administrator acting on the advice of the Attorney-General called off the sale. That course of action was notified to the respondent by letter dated 22 August 1984, wherein non-compliance of s. 263 of the Code

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i was given as the reason for not proceeding with the sale and that a fresh enquiry will have to be held.

Between March 1988 to March 1994, the respondent received three notices from the Land Administrator informing her of new dates of enquiry to be held to consider the bank's application under s. 260(2) of the Code but on each occasion, the enquiry was adjourned at the request of the respondent pending the outcome of her Civil Suit, F.353/84, and her appeal in the same proceedings following the dismissal of her suit on 8 September 1968. The result of this appeal has not been made known to us.

The respondent received the last notice of the Land Administrator's dated 14 July 1994 informing her that a new enquiry date had been fixed for 13 September 1994. In a desperate attempt to prevent the Land Administrator from proceeding, the respondent filed the application leading to this appeal in Originating Summons S4-21-124-94 on 24 August 1994 against the bank and the Land Administrator to preclude the bank from carrying on with the sale on the ground that the second order made by the Land Administrator was a nullity and that the bank's claim to proceed with the sale under the first order is barred by limitation.

The learned trial judge agreed with the respondent and found that:

- (1) after 2 June 1981, the Land Administrator was *functus officio* and that the second order was invalid.
- (2) the only valid order for sale was the first order but the bank could not enforce it as it is barred by limitation under s. 9(1) of the Limitation Act 1953, (Act 254).

Pursuant to these findings, the learned trial judge made the following orders:

- (1) The bank is statute barred from continuing with the foreclosure proceedings against the respondent.
- (2) The first order is unenforceable as it statute barred.
- (3) All orders made and enquiries held by the Land Administrator after 2 June 1981 are null and void.
- (4) The Land Administrator is statute barred or estopped from holding any further enquiry or making any further order for sale on the property.
- (5) Costs to the respondent.

- a* Arguments before us proceeded on the premise that the only valid order for sale is the first order as that is a final order. In this respect we consider that the learned trial judge correctly found that the Land Administrator had become *functus officio* upon making his order on 2 June 1981 and he could only re-open the enquiry in the circumstances stated in s. 34(2) of the Code. (See *b* the Federal Court decision in *Eu Finance Berhad v. Lim Yoke Foo* [1982] 2 MLJ 37, which was affirmed by the Privy Council and reported at [1985] 1 MLJ 17.)

- c* Since both parties have accepted that s. 34(2) of the Code does not apply to this case, we were left to consider whether the learned trial judge was correct when she ruled that by s. 9(1) of Act 254 the first order could no longer be enforced by reason of limitation.

Section 9(1) reads as follows:

- d* No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

- e* Section 9(1) speaks of limitation in actions for the recovery of land. This appeal is concerned with the enforcement of a charge to recover money due to the bank as chargee. That enforcement takes the form of a sale or the charged property under the provisions of the Code and under the supervision of the Land Administrator. As such the appeal has nothing to do with the recovery of the lands charged and to that extent, s. 9(1) is irrelevant to the facts of the appeal. The learned trial judge erred when she decided that *f* s. 9(1) applies so as to render the first order unenforceable by reason of limitation.

- g* Counsel for the respondent nonetheless maintained that a parallel can be drawn from s. 21(1) of the same Act and submitted that limitation had set in. The relevant provisions of sub-s. (1) of s. 21 read as follows:

21(1). No action shall be brought to recover any principal sum of money secured by a ... charge on land ... or to enforce such ... charge, ... after the expiration of twelve years from the date when the right to receive the money accrued.

- h* “The right to receive the money accrued” in s. 21(1) must refer to the time when the respondent defaulted in her obligation to make payment after being served with the Form 16E notice. Time then starts to run. Since the notice was served on the respondent on the same date it was issued ie, 2 November 1979, the respondent had one month from that date within which to make *i*

payment. That brings us to 2 December 1979 and counting twelve years from that date takes us to 1 December 1991. It is not clear from the appeal records when the foreclosure proceedings were instituted in court but even taking the first order that was made on 2 June 1981, it is clear that limitation has not set in as to render the first order unenforceable.

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As the first order is still enforceable, the only matter left to be completed is the auction as the property. In this instance the respondent cannot complain of the long delay in affecting the sale as by her own actions in filing Civil Suit F.353/84 and the Originating Summons leading to this appeal, not to mention her many requests to postpone the sale, she had prevented the Land Administrator from fixing a new date for auction after the first two dates of auction in 1981 and 1984 were vacated. On the facts of this case the Land Administrator can still do so as there is no bar as to when an auction can be conducted following an order for sale although prudence dictates that such an auction should follow immediately so as to lessen the respondent's burden of satisfying not only the principal sum due but also the accrued interest.

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For the above reasons we had allowed this appeal with costs here and below. We also allowed the deposit to be refunded to the appellant.

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