22,1971

No.27 of 1970

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR (APPELLATE

BETWEEN

SAW CHOO THENG and KHYE SENG LIM alias LIM KHYE SENG — Appellants

- and -

SUNGEI BIAK TIN MINES LIMITED — Respondents

CASE FOR THE RESPONDENTS

Record

1. This is an appeal from a Judgment of the Federal Court of Malaysia (Ong Hock Thye, C.J., Gill, F.J., and Ali, F.J.) dated the 9th day of December 1969, allowing an appeal by the Respondents herein from a Judgment of the High Court in Malaya at Ipoh (Chang Min Tat, J.) dated the 17th day of July 1969, which ordered the cancellation of a mining sub-lease made in August 1965 between the Appellants (sub-lessors) and the Respondents (sub-lessees) — pp.28-37, pp.7-23

2. The principal question for determination in this appeal is whether the use of part of the land by the Respondents for planting tapioca constituted such a breach of Clause 4 of the sub-lease as to entitle the Appellants to its cancellation under Clause 12(b) of the said sub-lease.

3. The Memorandum of Sub-lease is set out at pp.42 to 45 of the Record. Certain provisions of the Mining Enactment (Cap.147) are relevant to this appeal and are annexed hereto. — pp.42-45

4. The action arose out of an application made

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pp.1-2 originally in the Court of the Senior Inspector of Mines at Ipoh which was transferred for adjudication to the High Court in Ipoh at the instance of the Appellants for cancellation of a mining sub-lease on the ground of a breach of condition thereof by the Respondents. The breach complained of was that the Respondents, their servants or agents or persons with their consent, permission or knowledge had in September 1967 cut down the rubber trees on approximately 60 acres of the mining land and planted tapioca thereon without the consent and permission of the Appellants (paragraph 3, Statement of Claim). The Appellants averred (paragraph 4, Statement of Claim) that by reason of this the Respondents were in breach of Clause 4 of the said sub-lease in that they have contravened the provisions of the Mining Enactment thereby rendering themselves liable to a cancellation of the said sub-lease under Clause 12 of the same.

p.3 ls.21-29

p.3 ls.30-35

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p.28 l.35-p. 29.l.19 5. The facts as found by the trial Judge are not challenged in this appeal and were summarised by the Federal Court as follows:-

> "The sub-lessors, now respondents, had, on August 7, 1965 subleased approximately 188 acres of mining land to the appellants. Part of the land, comprised in Lots 2312 and 2311, was under young rubber still not ripe for tapping. While carrying on mining operations elsewhere on the sub-leased land, the appellants caused or permitted the felling of about 60 acres of this rubber for the planting of tapioca, without the respondents' knowledge or consent. This occurred between September 1967 and February 1968. Complaint was first made to the Senior Inspector of Mines on June 17, 1968 followed by an application to the Mines Court on July 16, 1968 for cancellation of the sub-lease. The statement of claim was filed in the High Court on November 16, 1968 and judgment given for cancellation of the sub-lease on July 17, 1969. Evidence adduced at the trial showed that the total value of tin-ore won in 1967 by the Appellants' mining operations was $1,297,826.71

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on which the tribute paid to the respondents, at the rate of 15 per cent, was $192,638.74. The total value of tin-ore won in 1968 was $1,071,644/-. The gross profits from the tapioca crop - without allowing for expenses incurred - which the appellants would have stood to gain by their default was, according to conflicting estimates, as high as $72,000/- or as low as $24,000/- In the judge's view, even the lesser figure was "not inconsiderable". "

6. On the question of law raised in this appeal, the learned trial Judge, held, it is submitted wrongly, as follows :-

"Mr.Lim Kean Chye pointed out, I think, quite rightly, that forfeiture of the land arose only in the case of a breach of one of the conditions (i), (iii) and (v) of S.16 as provided for in Section 21, and that not one of these conditions was complained of as being broken. He therefore suggested that all that the Defendants had rendered themselves liable to was a fine under S.120. pp.21. 1.26- p.22 1.42

With respect, it seems to me that on a proper interpretation, S.97(ii)(b) is in two limbs which are not together cumulative but disjunctive. In my view the language is sufficiently clear as to admit no other interpretation. Where a sub-lease has not worked the land in accordance with Clause 4 of the sub-lease in Schedule X, in the words of this clause, in an orderly, skilful and workmanlike manner and subject to the provisions of the Mining Enactment, he renders himself liable to a cancellation of his sub-lessee, even though his breach, being neither of conditions (i), or (iii), or (v) of S.16 did not render the land liable to forfeiture under the Enactment. Ex hypothesi, forfeiture of the land is at the instance of the Government, whereas cancellation of the sub-lease is generally on the application of the

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lessee. Where, therefore, a sub-lessee is in breach of any of the other conditions, he may be liable to a fine under S.120 but he also puts himself into a position whereby his sub-lease can be cancelled and he will find himself in this position when by reason of his breach, the lessee applies for a cancellation.

In this case, the sub-lessee had been in breach of S.16(vii), since the planting of the tapioca either by them or by their licensee could not be said to be in the exercise of the right given in S.14(iii). Mr.Lim Kean Chye conceded that in a mining certificate the lessee had no surface rights at all but suggested that Clause 4 in Schedule X referred to the working of the mine which must be skilful, orderly and workmanlike and which must be subject to the provisions of the Mining Enactment and that a user which might be a breach of a condition did not detract from the manner in which the mine was worked and was not, per se, a breach of the provisions of the Mining Enactment. With respect, the interpretation sought by Mr.Lim Kean Chye on this Clause 4 in Schedule X seems to me to put an unnatural strain on the meaning of the words. That this is so, is in my view, apparent in the concession that a leasee has no rights whatsoever to the surface, except in so far as is necessary for his mining purposes and as is permitted by S.14(iii). It follows therefore that a user not otherwise permitted could not be said to be in accordance with the provisions of the Mining Enactment. It further follows that the sub-lessees, whether they had planted the tapioca or had permitted the planting were in breach of S.16 (vii) and therefore caught by the first limb of S.97(ii)(b) and they had thereby, as claimed by the plaintiffs rendered themselves liable to a cancellation of their sub-lease, at the instance of the plaintiffs."

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7. The learned Chief Justice, delivering the Judgment of the Federal Court, took the view that the common factor in both limbs of S.97(ii)(b) was "working the land" and in his judgment the crux of the matter was the meaning of this term. Did the term in the context of the Mining Enactment mean "getting or mining ore from the land" or "carrying out mining operations", or did it also include user of the land for agricultural purposes? After reviewing certain authorities on the meaning of terms, the learned Chief Justice, it is submitted rightly, came to the following conclusion:-

> "Reverting to the majority view expressed in the Hardwick Game Farm case, I think I am on safe ground in holding that, in common parlance, "user" of land means its user in general terms, including user for the specific purposes described in sub-sections (i) to (v) of Section 14; whereas, again in common parlance, "working" mining land should be given a more restricted meaning as confined to mining operations and ancillary activities. p.35 l.40- p.37 l.8
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> If this is the true view, as I think it is, it follows that Clause 4 of Schedule X - whether dichotomous, as the learned Judge construed it, or otherwise - confers cancellation powers on the Senior Inspector of Mines, or the Court, in his place, only where the sub-lessee's liability thereto arises by reason of his default in working the land either "in an orderly skilful and workmanlike manner" or default in working it "subject to the provisions of the Mining Enactment". In either case, "work" relates primarily to mining - certainly not agricultural user. In the words of Lord Reid then, I would apply this criterion: as far as my knowledge of usage of the English language extends to its application to the ordinary affairs of miners, I think a miner "works" land when he mines it. When he uses it for some other purpose he does not do so

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qua miner - as the facts clearly show in this case. Consequential on this view, and again following their Lordships of the Courts in England, I would hold that, when Clause 4 speaks of the sub-lessee working the land "subject to the provisions of the Mining Enactment", the provisions understood as so referred to would, in common parlance, be those set out in considerable detail under the heading of Regulation of Mining Operations in Part IX of the Enactment, Sections 77 to 94.

While on the subject of the wording of Clause 4 and its application to the facts of this case, it is significant to observe that the sub-lessees - insofar as the primary object and purpose of the sub-lease is concerned, as well as the primary interests of sub-lessors - were to all intents and purposes devoting their undivided attention to the task of mining, with creditable results and strictly in compliance with mining regulations and the terms and conditions of their sub-lease. That they erred by an infringement of Section 16 (vii) alone, in no way, even remotely, affected their mining operations elsewhere upon the sub-leased land. The penalty for infringement of Section 16 (vii) is expressly provided: it does not include cancellation of a sub-lease. For the latter remedy the respondents had to rely on Clause 12 of the sub-lease which merely was a reproduction of Section 97(ii)(b), which in turn falls back on Clause 4 of Schedule X. For the reasons above stated it is my view that an infringement of Section 16(viii) does not in law constitute a breach of Clause 4. There is consequently no call for the exercise of discretion: on this point I think any expression of my views would be supererogatory."

8. Accordingly, the appeal was allowed with costs together with costs in the Court below at 50% of the amount taxed.

9. The Respondents respectfully submit that the Judgment of the Federal Court is right and that this appeal should be dismissed with costs for the following among other

R E A S O N S

(1) BECAUSE the user of the land by the Respondents for planting tapioca did not constitute a breach of Clause 4 of the sub-lease as to entitle the Appellants to its cancellation;

(2) BECAUSE the term "work" in the context of the Mining Enactment relates to mining and not to agricultural user;

(3) BECAUSE Clause 4 confers cancellation powers only where the sub-lessee's liability thereto arises by reason of his default in "working" the land;

(4) BECAUSE an infringement of Section 16(vii) of the Mining Enactment does not in law constitute a breach of Clause 4;

(5) BECAUSE the Judgment of the High Court is wrong;

(6) BECAUSE the Judgment of the Federal Court is right for the reasons stated therein.

E.F.N. GRATIAEN

EUGENE COTRAN

A P P E N D I X

MINING ENACTMENT (Cap.147)

Section 14

PROVISIONS AS TO MINING LEASES

14. Every mining lease other than a mining lease expressed to be for working mineral oil and oil shales only shall vest in the lessee thereof in the absence of any express condition to the contrary the following rights, and such other rights, if any, as may be expressly set forth therein:

(i) The right to win and get all metals and minerals other than mineral oil and oil shales found upon or beneath the land and, subject to the provisions of sub-section (iv), to remove, dispose of, and dress the same during such term as may be mentioned in the mining lease;

(ii) The right to roast and calcine (but not to smelt) all such metals or minerals found upon or beneath the land without obtaining a licence under the Mineral Ores Enactment, but subject to the provisions of any other Enactment by which such right is affected;

(iii) The right to use such portions of the land as may be required for the purpose of erecting such houses, lines, sheds, or other buildings, or for growing such plants and vegetables, or of keeping such animals and poultry, as may in the opinion of the Warden be reasonable for the purposes of the mine or for the use of the labourers;

(iv) The exclusive right, subject to the provisions of Section 16, sub-section (x), to all timber and other forest produce upon the land, but no right to remove beyond the boundaries of the land for any purpose (excepting only for the extraction therefrom of any metal or mineral ore) any timber or other forest produce or any

gravel, stone, coral, shell, guano, sand loam or clay obtained from the said land, or any bricks, lime, cement or other commodities manufactured from the materials aforesaid, except under licence granted under the provisions of the Land Code, or any Rules made thereunder.

Section 16(vii)

16. There shall be implied in every mining lease, other than a mining lease expressed to be for working mineral oil and oil shales only, in the absence of any express condition to the contrary the following covenants and conditions on the part of the lessee:

(vii) That the lessee will not use or permit to be used any portion of the land for any purposes other than those mentioned in Section 14 without the written authority of the Collector.

WARDEN OF MINES

Section 97(ii)(b)

97. (ii) The Warden shall have power in his discretion to cancel a sub-lease upon proof to his satisfaction that -

(b) the sub-lessee has not worked the land in accordance with clause 4 of the sub-lease in Schedule X, or has by his default rendered the land liable to forfeiture under this Enactment.

TRESPASSES AND PENALTIES

Section 120.

120. (i) Any person who shall make default in observing any of the covenants and conditions of his document of title to any mining land as prescribed by this Enactment shall be liable to a fine of two hundred and fifty dollars, and where such default is a continuing one, he shall be additionally liable to a fine of

five dollars for every day during which such default shall be continued.

(ii) Any person who shall, without permission in writing from the Collector, erect or permit to be erected upon mining land any house or other building for purposes other than those mentioned in Section 14(iii) shall be liable to a fine of two hundred and fifty dollars, and the Collector may cause such house or other building to be destroyed

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CASE FOR THE RESPONDENTS

MESSRS. GASTER, VOWLES, TURNER,
& LOEFFLER,
Fenwick House,
292, High Holborn,
London WC1V 7JN

Solicitors for the Respondent