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1967/22

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 6 of 1965

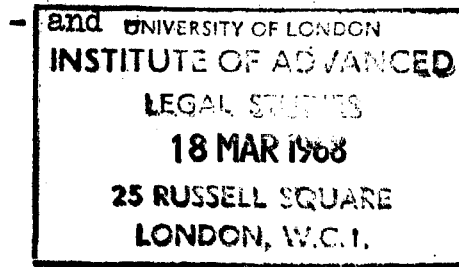
ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

B E T W E E N :-

KEPONG PROSPECTING LIMITED

Appellants

10 S. K. JAGATHEESAN
 TSANG TAK CHUEN
 K. W. LIU
 CH'NG KEE HUAT
 PASUBATHY JAGATHEESAN
 LIU WAI SIONG
 C. K. LIU
 S. Y. TSANG



Third Party
Appellants

- and -

A. E. SCHMIDT (Since deceased)
 and MARJORIE SCHMIDT (Widow)
 substituted for A. E. SCHMIDT deceased

Respondent

TO HIS MAJESTY THE YANG DI-PERTUAN AGONG

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C A S E FOR THE THIRD PARTY APPELLANTS

Record

1. This is an appeal by order granting final leave to appeal to His Majesty the Yang di-Pertuan Agong from the judgment of the Federal Court of Malaysia delivered on the 1st day of June 1964.

30 2. At some time in 1953 one Tan Chew Seah (hereinafter called "Tan") applied for a prospecting permit for iron ore at Bukit Kepong Muar Johore. Tan called in A.E. Schmidt a consulting engineer (who died on the 1st day of January 1965 and is hereinafter called "A.E. Schmidt") to assist him in obtaining a permit.

p.161

p. 164

91445

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Record

p.17 A permit was subsequently granted and by letter dated the 2nd December 1953 Tan wrote to A.E. Schmidt as follows:-

"Having received on 25.11.53 my Prospecting Permit No. 10/53 over 1000 acres of State Land at Bukit Kepong, Johore I hereby agree to ensure that you are paid one per cent (1%) of the selling price of all ore that may be sold from any portion of the said land. This is in payment for the work you have done in assisting to obtain the Prospecting Permit and any work you may do in assisting to have mining operations started up. Please note my change of address".

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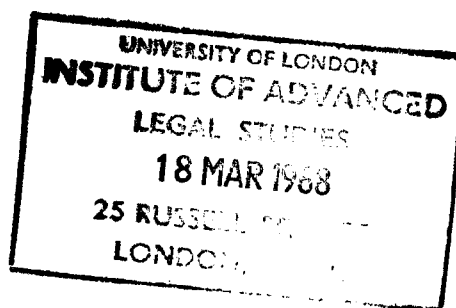
p.166-171 3. On the 11th July 1954 Tan executed a comprehensive Power of Attorney in Kota Bharu Kelantan in favour of A.E. Schmidt, which was duly registered.

p.52 4. On the 27th July 1954 the Appellant Company was incorporated and at the first meeting of the Board of Directors on the 31st July 1954 the following directors were appointed:-

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p.217

1. A. E. Schmidt, Chairman of the Board of Directors;
2. Tan;
3. Lee Kok Peng;
4. N. A. Marjoribanks;
5. Chua Kwang Song;
6. Chan Cheow Kiat;
7. Gwee Yam Keng.



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p.9 5. On the 31st July 1954 an agreement (hereinafter called "the 1954 Agreement") was executed between Tan and the Appellant Company. Tan did not sign the agreement in person but A.E. Schmidt signed for him under the Power of Attorney. The 1954 Agreement contained, amongst others, the following provisions:-

10 "AND WHEREAS the Permit Holder (namely Tan) has agreed with his attorney A.E. Schmidt that in consideration of his services rendered in the past, the present and to be rendered in the future he will insure that the said A.E. Schmidt is paid one per cent (1%) of the selling price of all ore that may be sold from any portion of the 1000 acres of States Land at Bukit Kepong already referred to above.

AND WHEREAS the Company has agreed to take over the obligation of the Permit Holder to A.E. Schmidt in consideration of this Agreement with such modifications as appear hereinafter.

NOW THEREFORE IT IS HEREBY AGREED as follows:

20 4. The Company shall take over the obligation of the Permit Holder to pay A.E. Schmidt 1 per cent of the selling price of all ore that may be sold from any portion of the 1000 acres of State Land at Bukit Kepong with the following modifications:-

- 30 (1) the obligation shall be extended so as to include the said land as defined in this Agreement, and
- (2) the tribute of 1 per cent shall be payable on the selling price of the ore as shown in the Company's records".

40 6. On the 26th September 1955 the seventh meeting of the Board of Directors was held at Kuala Lumpur, by which time no mining had taken place due to lack of capital. At this meeting an agreement (hereinafter called "the 1955 Agreement") was made between the Appellant Company and A.E. Schmidt. After exhibiting a copy of the 1954 Agreement and making express reference to clause 4, the 1955 Agreement contained the following provisions:-

p.179

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p.12

"AND WHEREAS it is deemed advisable that the Company should enter into this supplementary agreement with the Consulting Engineer.

Record

NOW THEREFORE IT IS HEREBY AGREED that in consideration hereof and for the consideration hereinafter set out.

- I. The Company shall in consideration of the services rendered by the Consulting Engineer for and on behalf of the Company prior to its formation, after incorporation, and for future services pay to the Consulting Engineer 1% (one per cent) of all ore that may be won from any portion of the said land (which expression shall bear the same meaning as given in the said Agreement) by way of tribute which said tribute of 1% being calculated on the selling price of the ore as shown in the Company's records. 10
- II. The Company's obligation as aforesaid shall in any event continue until the said land is worked out and shall not cease in the event of the death or retirement of the Consulting Engineer before that happening. 20
- III. The obligations herein contained shall be binding on the successors in title assigns and personal representatives of the parties hereto as the case may be".

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7. In December 1955 a further property permit was granted to Tan in respect of 1200 acres of land at Bukit Pasol.

p.182

8. On the 1st January 1956 at the eighth meeting of the Board of Directors A.E. Schmidt informed the meeting that he would accept 1 per cent tribute on the F.O.B. price of the ore less export duty and the barge contract rate in settlement of the Appellant Company's obligation under the 1955 Agreement. At this meeting it was resolved that the Appellant Company should proceed with mining operations. The Appellant Company tried to find ways and means to raise capital and eventually invited a group of persons then represented by the First Third Party Appellant (S.K.Jagatheesan) to attend a meeting of the Board of Directors on the 4th August 1956. At the conclusion of this meeting it was unanimously 30 40

p.186

resolved that a substantial number of share allotments to the First Third Party Appellant and his associates be approved.

9. There was then a struggle to control the Appellant Company between the group represented by the original directors and the new group represented by the Third Party Appellants. On the 5th September 1956 there was an extraordinary general meeting of the Appellant Company and both groups attended. The result of the meeting appeared to show that the new group had gained control and on the 1st October 1956 the Second Third Party Appellant Tsang Tak Chuen was appointed chairman of the Board of Directors.

10. A few days earlier, on the 25th September, 1956, one Lim Ngian Cher, a shareholder in the Appellant Company, filed an Originating Motion in the Kuala Lumpur High Court and cited the Appellant Company and the Third Party Appellants and one L.A.J. Smith as respondents. By this Originating Motion Lim Ngian Cher applied for the names of the new group of directors to be deleted as holders of ordinary shares with the object of preventing the Third Party Appellants from gaining control of the Appellant Company.

11. On the 27th March 1957 the Originating Motion was before The Honourable Mr. Justice Sutherland Judge of the Federation of Malaya and was settled by the consent of the parties. The effect of the settlement contained in the Order was (i) to replace the control of the Appellant Company in the original group of directors and which still included Tan and (ii) the Appellant Company were to grant a sub-lease to the Third Party Appellants of the lands the subject of the mining permit, and the consent Order also contained the following paragraphs:-

"9. The tribute payable to Kepong Prospecting Limited under any Mining Sub-leases registered pursuant to this Order shall be at the rate of \$2.70 per ton of ore removed from and sold off the mining land according to shipping or other sale documents.

10. The agreement between Kepong Prospecting Limited and Tan Chew Seah dated the 31st

Record

- day of July 1954 whereby 1 per cent of the value of all ore sold from the mining land is to be paid over by the Company to Mr. A.E. Schmidt shall be taken over by the Respondents numbered 1 to 7 and 9 but not 8 (namely the Third Party Appellants) or their nominees and the Respondents numbered 1 to 7 and 9 but not 8 shall indemnify Kepong Prospecting Limited against all claims which may be made against Kepong Prospecting Limited thereunder". 10
- p.227 12. On the 29th April 1957 at the sixteenth meeting of the Board of Directors of the Appellant Company attended (amongst others) by A.E. Schmidt, Tan and an advocate and solicitor, the Court Order was tabled and minor amendments discussed and approved.
- p.228 13. On the 27th May 1957 at the seventeenth meeting of the Board of Directors of the Appellant Company attended (amongst others) by A.E. Schmidt and Tan the final draft of the Court Order was approved, the same having been submitted for that purpose by Messrs. Bannon & Bailey Advocates and Solicitors of Kuala Lumpur. 20
- p.111 14. In about 1959 Kepong Mines Limited were incorporated and the Third Party Appellant Tsang Tak Chuen became in control of that company which started to operate the mining concession and in May 1958 produced the first ore from the mines.
- p.5 15. By a specially indorsed writ issued the 24th day of July 1959 and amended the 28th day of June 1960 A.E. Schmidt claimed from the Appellant Company under the 1954 Agreement and the 1955 Agreement that an account should be taken of all moneys payable by the Appellant Company, payment of moneys found due to him, and that a receiver should be appointed. 30
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- p.34 16. By an amended Defence and Counterclaim the Appellant Company denied liability to A.E. Schmidt on various grounds including:- 40
- p.9 (i) A.E. Schmidt did not have authority to

execute the 1954 Agreement;

(ii) A. E. Schmidt was not a party to the 1954 Agreement;

(iii) A. E. Schmidt's remedy was against Tan or the Third Party Appellants;

(iv) the 1954 Agreement and the 1955 Agreement were discharged by the Order of the 27th March 1957.

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p.213

10 17. By a Third Party Notice issued the 2nd day of September 1959 the Appellant Company claimed from the Third Party Appellants.

18. By their Defence delivered the 6th day of August 1962 the 2nd 3rd 6th and 8th Third Party Appellants denied liability to the Appellant Company on the grounds that the Order of the 27th March 1957 did not and could not require them to indemnify the Appellant Company against the claim of A.E. Schmidt and they further contended that A.E. Schmidt had no right of action against the Appellant Company and that they would rely on the Appellant Company's matters of defence in resisting the claim of A.E. Schmidt.

p.31

19. The Action and the Third Party proceedings were heard before The Honourable Dato' Justice Hashim and on the 14th day of October 1963 it was ordered that the claim and counterclaim should be dismissed, that the Third Party Appellants' costs be taxed and be paid in the first instance by the Appellant Company. The learned judge did not adjudicate on the matters raised in the Third Party proceedings because he adjudged:-

p.127

(i) A.E. Schmidt exceeded his authority in executing the 1954 Agreement on behalf of Tan and accordingly the 1954 Agreement was void;

p.124

(ii) the 1955 Agreement was not executed in accordance with Article 101 of the Articles of Association of the Appellant Company.

p.126

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Record

20. The appeal of A.E. Schmidt was heard by The Honourable Dato' Sir James Thomson, Lord President of the Federal Court of Malaysia; The Honourable Dato' Syed Sheh Barakbah, Chief Justice High Court in Malaya and The Honourable Mr. Justice Tan Ah Tah Judge of the Federal Court Malaysia between the 2nd and 5th days of March 1964. The Third Party Appellants appeared on the appeal and argued that A.E. Schmidt was not entitled to succeed against the Appellant Company and, in the alternative, that the Appellant Company were not entitled to be indemnified by the Third Party Appellants. 10

p.140 21. By a reserved judgment pronounced on the 1st day of June 1964 the Lord President, giving the judgment of the court and allowing the appeal of A.E. Schmidt held:-

p.149 (i) A.E. Schmidt had authority to execute the 1954 Agreement;

p.152 (ii) A.E. Schmidt could not enforce the 1954 Agreement against the Appellant Company because he was not a party to it; 20

p.152 (iii) the 1955 Agreement could not be regarded as a novation of the 1954 Agreement because Tan was not a party to it;

p.156 (iv) A.E. Schmidt was entitled to enforce the 1955 Agreement.

22. The Lord President in adjudicating on the Third Party proceedings gave no reasons for allowing relief to the Appellant Company but merely said:- 30

p.156 "In the circumstances the Company is clearly entitled to indemnity as claimed by them at the hands of the third parties by reason of the Consent Order of the 27th March, 1957".

p.157 23. By the Order of the Court dated the 1st day of June 1964 it was ordered, inter alia, that an account be taken by the Registrar of the Court, that the Appellant Company were entitled to be indemnified by the Third Party Appellants against all 40

liability under the judgment and that the Appellant Company should recover from the Third Party Appellants their costs of the trial and the appeal.

24. By a certificate dated the 24th day of December 1964 the Senior Assistant Registrar of the High Court Kuala Lumpur certified that the result of the Account taken was as follows:-

p.159

- 10 "(i) The Third Parties have received sums to the amount of \$25,666,274.00 in respect of the selling price of shipments of ore sold from the Defendants mining land at Bukit Kepong.
- (ii) The Plaintiff is entitled under the terms of the Order of the Court of Appeal dated the 2nd day of June 1964 to one per cent of the said figure. This sum allowing two per cent allowance for exchange fluctuation amounts to
- 20 \$251,529.50".

25. By Order dated the 15th day of December 1964 the Third Party Appellants were granted final leave to appeal to his Majesty the Yang di-Pertuan Agong.

26. The Third Party Appellants submit that the decision of the Federal Court of Malaysia should be reversed and the Third Party proceedings dismissed for the following among other

R E A S O N S

- 30 (1) BECAUSE the Order dated the 27th March 1957 required an indemnity only in respect of the 1954 Agreement;
- (2) BECAUSE the 1954 Agreement was not enforceable and could not be enforced by A.E. Schmidt;
- (3) BECAUSE all the learned judges were correct in holding that A.E. Schmidt could not enforce the 1954 Agreement;
- 40 (4) BECAUSE an indemnity under the Order dated the 27th March 1957 could only

Record

have been claimed if Tan had made a claim against the Appellant Company under the 1954 Agreement;

- (5) BECAUSE Tan has made no claim against the Appellant Company under the 1954 Agreement;
- (6) BECAUSE the Appellant Company were under no liability to Tan under the 1954 Agreement;
- (7) BECAUSE the Order of the 27th March 1957 did not require indemnity in respect of the Appellant Company's liability to A.E. Schmidt (if any) under the 1955 Agreement; 10
- (8) BECAUSE in so far as the Appellant Company were liable to A.E. Schmidt under the 1955 Agreement the Appellant Company had no claim to indemnity under the Order of the 27th March 1957;
- (9) BECAUSE Mr. Justice Hashim was correct in holding that A.E. Schmidt exceeded his authority in executing the 1954 Agreement; 20
- (10) BECAUSE the Third Party Appellants support and adopt each and every REASON advanced by the Appellant Company in support of their appeal herein.

WHEREFORE THE THIRD PARTY APPELLANTS HUMBLY PRAY YOUR MAJESTY THAT THE JUDGMENT AND ORDER OF THE FEDERAL COURT OF MALAYSIA DATED THE 1st DAY OF JUNE 1964 BE REVERSED AND THAT YOUR MAJESTY MAY BE GRACIOUSLY PLEASED TO MAKE SUCH FURTHER OR OTHER ORDER INCLUDING ORDERS AS TO COSTS AS TO YOUR MAJESTY MAY APPEAR FIT AND PROPER. 30

THE HON. H. A. P. FISHER Q.C.

M. ANWL-DAVIES Q.C.

No. 6 of 1965
IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L
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B E T W E E N:

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Third Part
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substituted for A.E. SCHMIDT
deceased

Respondent

C A S E FOR THE THIRD PARTY APPELLANTS

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Solicitors for the Third Party Appellants