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1967/22

IN THE PRIVY COUNCILNo. 6 of 1965

ON APPEAL FROM

THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

18 MAR 1968

25 RUSSELL SQUARE,
LONDON, W.C.1.B E T W E E N:KEPONG PROSPECTING LIMITED Appellant

- and -

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

- and -

A.E. SCHMIDT (since deceased)
and MARJORIE SCHMIDT (Widow)
substituted for A.E. SCHMIDT
deceasedRespondentCASE FOR THE RESPONDENTRecord

1. These are two appeals from the judgment of the Federal Court of Malaysia (Thomson P., Barakbah C.J. Malaya and Tom F.J.) dated the 1st June 1964, which allowed the appeal of A.E. Schmidt deceased from a judgment of the High Court at Kuala Lumpur (Hashim J.) dated the 14th October 1963 and ordered judgment to be entered in his favour against the Appellant for a sum equal to 1% of the selling price of all ore sold from certain land in Johore. Such sum has been duly certified by the Registrar of the Federal Court to be \$251,529.50. The Federal Court further ordered that the Appellant was entitled to be indemnified by the Third Parties Appellants against their liability to the said A.E. Schmidt (hereinafter called "the Deceased").

pp.140-156.

pp.117-126.

p.159.

Record

2. The issues arising on the Appellant's appeal are whether it is obliged to pay the specified 1% tribute on ore extracted from the land in Johore either under an agreement dated the 31st July 1954 (hereinafter called "the 1954 agreement") or under a supplementary agreement between it and the deceased dated the 26th September 1955 (hereinafter called "the 1955 agreement").

The issue arising on the appeal of the Third Parties Appellants is whether they are obliged to indemnify the Appellant against any amount due from it to the deceased by reason of the terms of a consent judgment of the High Court at Kuala Lumpur dated the 27th March 1957 in proceedings to which the Third Parties Appellants and the Appellant were parties.

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p. 34

3. In his amended Statement of Claim in the High Court at Kuala Lumpur dated the 28th June 1960, the deceased set up the 1954 agreement and the 1955 agreement, and claimed an account and payment of all monies due from the Appellant under one or other or both of such agreements in respect of the obligation thereunder to pay him 1% of the selling price of all ore that should be sold from any portion of the land at Bukit Kepong in the State of Johore as defined in such agreements.

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p. 6

4. The deceased delivered further and better particulars of his Statement of Claim on the 15th July 1960 to which were annexed the 1954 agreement and the 1955 agreement.

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pp. 9-12.

The 1954 agreement had been made between the deceased acting as attorney for one Tan Chew Seah and the Respondent. Its recitals referred to the grant to Tan Chew Seah of a prospecting permit to search for minerals over an area of 1,000 acres at Bukit Kepong in the District of Muar; this land was described as the said land, which was expressly provided to include any neighbouring land which might form part of the same mining project; the recitals further referred to an agreement between the said Tan Chew Seah and the deceased whereby the former had agreed that the deceased should receive 1% of the selling price of ore sold from the said land in consideration of services rendered and to be rendered by the deceased. The 1954 agreement then provided for

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a transfer of the interests of Tan Chew Seah in the said land to the Appellant in consideration of an issue of shares to him equal to the number of shares issued to any other shareholder. Clause 4 of the 1954 agreement provided:

10 "4. The Company shall take over the obligation of the Permit Holder to pay A.E. Schmidt 1% of the selling price of all ore that may be sold from any portion of the 1,000 acres of State Land at Bukit Kepong with the following modifications:-

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

20 5. The 1955 agreement was made between the deceased and the Appellant. It recited the making of the 1954 agreement and set out clause 4 thereof, and provided that the Appellant, in consideration of services rendered and to be rendered to it by the deceased, agreed to pay to the deceased 1% of all the selling price of all ore sold from the land defined in the 1954 agreement; this obligation was to continue until the land was worked out.

30 6. The Amended Defence filed by the Appellant on the 1st March 1961 denied any liability in the Appellant under either the 1954 agreement or the 1955 agreement. The Appellant joined the Third Parties Appellants as third parties, and their defence dated the 6th August 1962 in turn denied liability in respect of the deceased's claim.

pp. 23-27.

40 7. The trial of the action before Hashim J. in the High Court at Kuala Lumpur took place between the 18th March and 21st June 1963, when judgment was reserved. A considerable amount of evidence was given on behalf of all three parties, the effect of which is summarised in the judgments of Hashim J. and on appeal.

8. Judgment was given by Jashim J. on the 14th October 1963 by which he dismissed the deceased's claim with costs.

pp.117-126.

Record
pp.117-123.

He found that the following facts were not in dispute:-

- (1) Sometime in 1953 one Tan Chew Seah applied for a prospecting permit for iron ore at Bukit Kepong, Muar, Johore. Tan called in the Plaintiff, a consulting engineer, to assist him in obtaining a permit, as the Kepong area was a very bad area vis-a-vis the Emergency. The Plaintiff then interviewed various Government and police officials and thereby paved the way for the prospecting permit to be approved. 10
- (2) In September 1953 the Johore Government intimated that it was prepared to grant a prospecting permit to Tan.
- (3) On 2.12.53 Tan wrote a letter to the Plaintiff. As this letter appears to be a very important document to the Plaintiff I would quote it in full:-

"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." 20
- (4) On 5.7.54, Plaintiff, Chua Kwang Song and Chan Chewo Kiat executed a Declaration of Trust making themselves trustees for an intended private company to be known as the Kepong Prospecting Ltd. 30
- (5) On 11.7.54 Tan executed a comprehensive Power of Attorney in Kota Bharu, Kelantan, in favour of the Plaintiff. This Power of Attorney was registered in the Supreme Court Registry, Kuala Lumpur on 23.7.54 as P/A No. 783/54. 40
- (6) On 27.7.54 the Kepong Prospecting Ltd. was registered under the Companies Ordinance 1940. The "subscribers" were the Plaintiff, Chan

Cheow Kiat and Gwee Yam Keng both of Malacca. Plaintiff was described as a consulting engineer and the other two as merchants.

- (7) It was discovered that the area covered by Prospecting Permit No. 10/53 had little iron ore and in July 1954 a further application for another 1200 acres was made to include B Bukit Pasol. The second application was also made in the name of Tan Chew Seah. The second application was approved in Prospecting Permit No. 3/55. So the Kepong Prospecting Ltd. had the permit to prospect the whole area covered by P.P.10/53 and P.P.3/55.
- (8) The Board of Directors of Kepong Prospecting Ltd. held its first meeting in Kuala Lumpur on 31.7.54. The following were appointed its first directors:-
1. The Plaintiff who was appointed Chairman of the Board of Directors.
 2. Tan Chew Seah.
 3. Lee Kok Peng.
 4. N.A. Marjoribanks, Advocate and Solicitor.
 5. Chua Kwang Song.
 6. Chan Cheow Kiat.
 7. Gwee Yam Keng.
- (9) On 31.7.54 an agreement (hereinafter called the first agreement) was executed between the Plaintiff as attorney for Tan Chew Seah on the one part and Kepong Prospecting Ltd. on the other part. I would quote the following clauses as they would appear to be very material to the question at issue:-

"AND WHEREAS the Permit Holder agreed with his attorney, A.E. Schmidt (the Plaintiff) that in consideration of his services rendered in the past, the present and to be rendered in the future he will ensure 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 1,000 acres of State Land at Bukit Kepong already referred to above. (The reference is that the Permit Holder has been granted a permit No. 10/53 dated 25.11.53).

AND WHEREAS the Company has agreed to take over the obligation of the Permit Holder to A.E.

Record

Schmidt (the obligation is the letter dated 2.12.53 from Tan Chew Seah to the Plaintiff referred to in (3) above) in consideration of this agreement with such modifications as appear hereinafter.

The Company shall take over the obligation of the Permit Holder to pay A.E. Schmidt 1% of the selling price of all ore that may be sold from any portion of the 1,000 acres of State Land at Bukit Kepong with the following modifications:--

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

- (10) The first agreement was signed by the Plaintiff as attorney for Tan Chew Seah and Plaintiff as permanent director of the Company Lee Kok Peng a director and Leong Kum Weng the Secretary in the presence of N.A. Marjoribanks. At this stage it is pertinent to quote Article 101 of the Memorandum and Articles of Association of the Company. I quote:--

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"The Seal of the Company shall be affixed to any instrument in the presence of at least one director and of the managing director or a permanent director and the said director and managing directors shall sign every instrument to which the seal shall be so affixed in the presence of each other and in favor of any purchaser or person bona fide dealing with the Company, such signatures shall be conclusive of the fact that the Seal has been properly affixed".

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On the surface this first agreement would appear to have been properly executed in accordance with Article 101. This first agreement was tabled and accepted at the first meeting of the Board of Directors held in Kuala Lumpur on 31.7.54. It would appear that it was at this first meeting that Messrs. Lovelace & Hastings, a legal firm of which a director Mr. N.A. Marjoribanks was a partner, was appointed the Company's Solicitors.

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- (11) It was at the seventh meeting of the Board of Directors held in Kuala Lumpur on 26.9.55 that a "supplementary" agreement (hereinafter called the second agreement) was tabled and be "approved and executed". This second agreement was intended to "supplement" the first agreement.
- 10 (12) From the time the Company was registered on 27.7.54 to 1.3.56 only a limited amount of work was done at the site in the way of "borings". Nothing was done to mine the ore due to lack of capital. At this eighth meeting of the Board of Directors on 1.3.56 the Plaintiff informed the meeting that he would accept one per cent tribute on the F.O.B. price of the ore less export duty and the barge contract rate in settlement of the Company's obligation under the second agreement. It was at this meeting that the Company resolved to proceed with mining operations.
- 20 (13) The Company tried to find ways and means to raise capital to operate the mine and eventually invited Mr. S.K. Jagatheesan who represented a group of persons interested in investing capital in the Company to attend a meeting of the Board of Directors which was held in Kuala Lumpur on 4.8.56. Mr. Jagatheesan attended this meeting and after some discussion it was agreed that a total of 315,000 \$1/- shares be allotted to Mr. Jagatheesan and his associates not exceeding nine persons in all. It was also agreed at this meeting that Mr. Chua Kwang Son's application for 300,000 \$1/- shares be accepted.
- 30 (14) There was then a struggle to control the Company between the old group represented by the original directors and the new group represented by Mr. Jagatheesan and his associates.
- 40 (15) An extraordinary general meeting was held on 5.9.56. From the minutes of this meeting it would appear that the meeting was a stormy one. Both groups of directors attended the meeting. Some claimed that the meeting was irregular and invalid. The result of the meeting would appear to be that the new group ousted the old group on the Board of Directors.

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- (16) At the fifteenth meeting of the Board of Directors held on 1.10.56 the Plaintiff was removed as Chairman of the Board of Directors and Mr. Tsang Tak Chuen from Mr. Jagatheesan's group was appointed Chairman.
- (17) On 25.9.56 one Lim Ngian Cher, the holder of Share Certificate No. 79 representing 5,000 shares in Kepong Prospecting Limited filed an Originating Motion in the Kuala Lumpur High Court in O.M. 6/56. He cited the new directors and Kepong Prospecting Limited as respondents. He applied that the names of the new directors be deleted as holders of ordinary shares under section 101 of the Companies Ordinance 1940. 10
- (18) The Motion came up before Sutherland J. and a consent order was made on 27.3.57. The gist of the order was that the old directors replaced the new directors and the new directors were granted a sub-lease of the mining land and were allowed to work the mine. The new directors were to pay to Kepong Prospecting Limited at the rate of \$2.70 per ton of ore removed from and sold off the mining land according to the shipping or other sales documents. The new directors were also to take over from Kepong Prospecting Ltd. the payment of 1% tribute to the Plaintiff. 20
- (19) As a result of this consent order Kepong Mines Ltd. (the third parties) came into existence. From the evidence of Tsang Tak Chuen it would appear that he is at present the sole owner of Kepong Mines Limited. 30

9. The Learned Trial Judge stated that the deceased's case was based on three documents, the letter of 2.12.53 from Tan Chew Seah, the 1954 agreement, and the 1955 agreement. He held that Tan Chew Seah had the right to offer the 1% tribute to the deceased, and the offer was put into legal form in the agreement of 31.7.54. However the question arose as to whether the deceased had sufficient authority by the Power of Attorney given to him to enter into the 1954 agreement. After considering the scope and object of the Power of Attorney, the Learned Judge said that he considered 40

that there was no provision empowering the deceased to make this agreement. The 1954 agreement was accordingly void. This view was strengthened by consideration of the 1955 agreement. The deceased had said that he had been advised by his solicitor that "the position wanted tidying up"; this showed that there were doubts about the validity of the 1954 agreement. After considering the evidence about the making of the 1955 agreement and the dates when it might have been signed the Learned Judge held that the 1955 agreement was not properly executed in accordance with Article 101 of the Articles of the Appellant. While he had the greatest sympathy with the deceased who had clearly been promised the 1% tribute, the deceased's claim must fail and must therefore be dismissed.

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10. The deceased appealed against this judgment to the Federal Court of Malaysia (Thomson L.P., Barakbah C.J. Malaya and Tan F.J.) which by an order dated the 1st June 1964 allowed the appeal, entered judgment for the deceased against the Appellant for the amount of the tribute to be agreed or certified by the Registrar, and ordered the Appellant to be indemnified against such amount and their costs by the Third Parties Appellants.

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pp.128-131

pp.157-8

11. The judgment of the Federal Court was delivered by Thomson L.P. He began by stating that it was not seriously disputed that, if the Appellant was liable to the deceased, he was entitled to be indemnified by the Third Parties Appellants. While there were certain lacunae in the evidence there was no real controversy over the facts of the case, and the only question was whether, on those facts, the deceased was legally entitled to recover sums to which he appeared to have a very strong moral claim. The learned President then considered the facts disclosed by the evidence up to the making of the consent order of the 27th March 1957. The day following that order, the deceased's appointment as Chief Engineer ceased; thereafter although he remained a director until some time in 1959, he took no further part in the Appellant's affairs.

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p.147

As to the issues, there were now only two of substance between the deceased and the Appellant: the Appellant argued that the deceased could not rely upon the 1954 agreement because he was not a

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party to it, and that the 1955 agreement was void for uncertainty and lack of consideration. After stating the reasons given by the trial judge for dismissing the claim the learned President said that he did not think that those reasons could be supported.

12. The learned President first considered the point that the Power of Attorney given to the deceased was not sufficient to authorise his making the 1954 agreement as attorney; he found that the terms were sufficient to enable the deceased to act within it when executing the 1954 agreement. The learned President then considered the evidence relating to the making of the 1955 agreement, and concluded that this had been made after 1st October despite its date, and had been properly executed by the correct persons. Turning to the main question relating to the 1954 agreement, the learned Judge held, after considering certain English authorities, that, since the deceased was not a party to that agreement, he could not rely upon it. However the agreement was still a perfectly good contract which was enforceable at any time by Mr. Tan against the Appellant. Turning to the 1955 agreement, it was not a novation of the 1954 agreement; the parties were different. It was not too uncertain in its terms, and the Appellants, by agreeing to be responsible personally to the deceased for the payment of the tribute, had given good consideration for the agreement. Accordingly the deceased was entitled to rely on the 1955 agreement to justify his claim against the Appellant. His claim was not affected by his receipt of certain payments received by him in connection with work done for the Appellant and for acting as managing director; further, although he had offered to accept a reduction of the amount due to him, that offer had never been taken up by the Appellant. The counterclaim brought by the Appellant against the deceased was without substance and should be dismissed.

In those circumstances the appeal would be allowed and judgment entered for the deceased.

13. On the 24th December 1964 the Assistant Registrar of the High Court at Kuala Lumpur certified that the amount due to the deceased under the order of the 2nd June 1964 of the Federal Court of Malaysia was \$251,529.50.

14. The Respondent respectfully submits that the Appellant's appeal against the judgment of the Federal Court should be dismissed. It is submitted that the Federal Court was correct in holding that the deceased was entitled to rely upon the 1955 agreement to support his claim, and that such agreement was valid and binding upon the Appellant. It is submitted that, on a proper examination of the evidence, the 1955 agreement was only made by officers of the Appellant having authority so to do, and that such agreement was in no manner void for uncertainty. The Appellant gave good consideration therefore, as did the deceased, and merely because it confirmed the terms of the 1954 agreement, the 1955 agreement was not rendered unenforceable for that reason. There was no conduct by the deceased, either by receiving sums of money or otherwise, which disentitled him to rely upon the agreement.
15. If, contrary to the Respondent's contentions, the 1955 agreement was not enforceable by the deceased, the Respondent submits that the deceased was entitled to recover the amounts claimed by him by reason of the terms of the 1954 agreement. While the deceased was not in law a party to that agreement, it was made for his benefit, in his presence, and recorded an understanding between him and Mr. Tan, whose interest was being assigned to the Appellant.
16. As to the appeal of the Third Parties Appellants herein, the Respondent would submit that it should be dismissed. If the appeal of the Appellant is dismissed, the Respondent has an interest in supporting the claim of the Appellant to an indemnity against the Third Parties Appellants, since the Respondent has some reason to apprehend that the Appellant, since ceasing to carry on business, may not have the financial resources to satisfy the judgment in favour of the Respondent herein together with the award of costs already made and which may be made in this appeal. The Respondent will accordingly seek to support any submissions that the Appellant will make in this appeal in support of the order of the Federal Court granting the Appellant an indemnity in respect of its liability against the Third Parties Appellants.
17. The Respondent therefore, respectfully submits

that these appeals should be dismissed with costs, and that the judgment of the Federal Court of Malaysia should be affirmed, for the following, among other

R E A S O N S

1. BECAUSE the deceased was entitled to recover by reason of the 1955 agreement.
2. BECAUSE the 1955 agreement was valid and certain.
3. BECAUSE the parties to the 1955 agreement gave good consideration therefor. 10
4. BECAUSE the 1955 agreement was duly made in accordance with the powers of the Appellant.
5. BECAUSE the deceased was entitled to recover by reason of the 1954 agreement.
6. BECAUSE the 1954 agreement imposed a liability on the Appellant to account to the deceased in respect of the tribute he was to receive.
7. BECAUSE of the other reasons in the judgment of the Federal Supreme Court. 20
8. BECAUSE the Appellants are entitled to be indemnified by the Third Parties Appellants against the Respondent's Claim.

MERVYN HEALD.

No. 6 of 1965

IN THE PRIVY COUNCIL

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

B E T W E E N :

KEPONG PROSPECTING LIMITED
Appellant

- and -

S.K. JAGATHEESAN
and Others Third Parties
Appellants

- and -

S C H M I D T
Respondent

CASE FOR THE RESPONDENT

PARKER GARRETT & CO.,
St. Michael's Rectory,
London, E.C.3.
Solicitors for the Respondent.