

44/84

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N:

SUN KEE & CO. (sued as a Firm) Appellants

- and -

1. CHOP SIN HUA HIN
2. HO HAI POH Respondents

CASE FOR THE APPELLANTS

Record

10 1. This is an appeal brought by the Appellant pursuant to leave granted by the Federal Court of Malaysia on the 22nd March 1982 from the judgment of the said Federal Court given on the 23rd July 1981 whereby the Federal Court dismissed an appeal by the Appellant from the judgment of Mohammed Azmi J. given in the High Court in Malaya at Kuala Lumpur (Commercial Division) on the 23rd December 1980. p.73 p.79

20 2. On the 6th March 1978 the First Respondent obtained a judgment against the Appellant in the sum of 164,200 dollars with interest in Kuala Lumpur High Court Civil Suit No. 1009 of 1976.

30 3. On the 11th January 1980, on the application of the First Respondent in the High Court in Malaya at Kuala Lumpur, the Senior Assistant Registrar ordered that certain lands of the Appellant held under Documents of Title No. H.S.(D) 24508, P.T.53 and H.S.(D) 24509, L.O.54, both in the Mukim of Batu district of Kuala Lumpur be sold by public auction on the 17th March 1980 under the direction of the said High Court at 10.30 a.m. at the High Court Garage, Kuala Lumpur, and it was ordered that the reserve price of the said lands be fixed at 270,000 dollars. It was further ordered (inter alia) that out of the total sum realised from the sale the sums due to certain chargees specified in the said Order should be paid and that the

Record

balance after all expenses be paid to the First Respondent towards satisfaction of the amount due to it in connection with the judgment hereinbefore mentioned. The Appellant was not present or represented at the hearing at which such Order was made.

4. On the 17th March 1980 the Appellant attempted to move the said High Court for an order restraining the holding of the said auction sale on the grounds that the said Order for sale contained an irregularity in that it wrongly specified the reserve price for such sale and that in any event the said reserve was significantly below the true market value of the said lands, and also that the said order was defective in that it made no provision for the said two pieces of land to be sold separately. However, on the morning of the 17th March 1980 all the Judges of the said High Court were attending the opening of Parliament and the Appellant was unable to move his motion before the time fixed by the said Order for the said sale. 10 20

5. By the said 17th March part of the said judgment debt had been paid by the Appellant and the amount thereof owing to the First Respondent had been reduced to 132,804.64 dollars with interest.

6. The said auction sale was held on the 17th March 1980 pursuant to the said Order and the said lands were bought thereat by the Second Respondent for the sum of 275,000 dollars. 30

7. On the 17th March 1980 the Appellant changed its Solicitors and on the 20th March 1980 the Appellant served notice of Motion to set aside the said sale. The said motion was supported by an affirmation made on the 19th March 1980 by one K.B. Thuraisingham a partner in the firm of the Appellant's new Solicitors, in which he set out as the grounds on which it was sought to set aside the said sale the following, namely:-

(a) The said Order made on the 11th January 1980 contained a material irregularity in that it disclosed the reserve price fixed for the said sale; 40

(b) The said Order contained a further material irregularity in that it did not provide for the sale of the two pieces of land comprised therein separately as provided for by Section 257(2) of the National Land Code 1965; and

(c) The said reserve price fixed by the said Order and the price realised by the said sale 50

were below the market value of the land as shown by either of two valuations produced by the Appellant, the one made by Jordan Lee & Jaafar on the 11th January 1980 which showed the market value of the said lands to be 495,000 dollars, and one made by Lew Chin Chuan & Co. on the 19th March 1979 which showed the market value of the said lands to be 360,000 dollars.

10 8. The said application to set the said sale aside was made pursuant to Order 43 Rule 11(e) of the Rules of the Supreme Court which empowers the Court to set aside such a sale on the ground (inter alia) of a material irregularity in prohibiting or conducting it.

9. The said application was heard by Mohammed Azmi J. who dismissed it with costs on the 28th January 1981 on the following grounds:- p.71

20 (1) The learned Judge found that the fact that the said Order for sale itself specified the reserve price was not a material irregularity within the ambit of the said Order 43 Rule 11(e). p.80

30 (2) The learned Judge held that the provisions of Section 257(2) of the National Land Code are not mandatory, but merely give the Court power to give directions, where the charge in question relates to more lands than one, that they be offered for sale individually in a specified order. He further held that the fact that the said Order for sale did not contain any such direction did not amount to an irregularity sufficiently material to justify the setting aside of the sale. p.80

40 (3) The learned Judge, found that the only question requiring serious consideration was whether the reserve price of 270,000 dollars did represent a price equal to the estimated market value of the lands in question as required by Section 257(1)(d) of the National Land Code. He went on to hold that the two valuations produced by the Appellant and referred to above were less reliable than a valuation made by Messrs. Jones Lang Wootton, which was available to the Court when the reserve price was fixed, which assessed the market value of the said lands at 300,000 dollars. The learned Judge
50 concluded that the reserve of 270,000 dollars was a price equal to the estimated market value of the said lands.

10. The Appellant appealed against the said judgment to the Federal Court by Notice of Appeal dated the 29th March 1980. The said appeal was heard in the Federal Court of Malaysia holden at Kuala Lumpur on the 20th May 1981 by Raja Azlan Shah C.J., Abdul Hamid F.J. and Abdool Cader J. The appeal relied on the three grounds on which the motion had been based as set out above.

p.88

11. The Federal Court dismissed the said appeal, The Court delivered a single judgment in which it recorded (as was the case) that at the hearing Counsel for the Appellant had to concede that Section 257 of the National Land Code had no application to this case. The Court went on to dismiss the appeal on the following grounds:-

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p.91

(1) The incorporation of the reserve price in the said Order of 11th January 1980 was not an irregularity which would vitiate the sale, and neither was the fact that the two plots of land were not directed to be sold separately.

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p.92

(2) The two valuation reports produced by the Appellant and referred to above were made for the purpose of raising mortgage finance and should not be held to invalidate the fixing of the reserve price of 275,000 dollars by the Court on the basis of the said valuation of Messrs. Jones Lang Wootton.

12. The Federal Court also commented on the fact that the Appellant was not present or represented when the Court made the Order for sale on the 11th January 1980 and said that his absence might well be taken to amount to a willingness to the Summons for sale go by default.

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p.98

13. By Order of the 25th September 1981 the Federal Court granted the Appellant conditional leave to appeal to His Majesty the Yang Di-Pertuan Agong, and by Order dated the 22nd March 1982 the said Court gave final leave to appeal as aforesaid.

14. The Appellant respectfully submits that the Federal Court was wrong in dismissing the Appellant's appeal for the following reasons:-

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(1) Although it appears that Section 257 of the National Land Code did not apply to the said sale, the reserve price should not have been disclosed by the said Order for sale, because such disclosure inevitably carried the risk of depressing the level of bids at the intended auction, and hence did constitute a material irregularity in the said Order the

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terms of which should have been such as to ensure that the best price reasonably obtainable was realised by the said sale having regard to the interest of the Appellant in the proceeds of sale, and the Appellant suffered substantial injury therefrom.

10 (2) Similarly the Court did not properly protect the said interest of the Appellant in that the said Order for sale did not provide for the sale of the said two pieces of land separately, or, at least, the Court gave no consideration before making such Order to the possibility that such a sale would have produced a better price than a sale of the same together as one lot. Such failure constituted a material irregularity in the conduct of the said sale from which the Appellant suffered substantial injury.

20 (3) The Court should not have been satisfied that the reserve of 270,000 dollars fixed by the said Order for sale represented the market value of the said lands. In the light of the two valuations produced by the Appellant and referred to above it is submitted that it is clear that such reserve was significantly below the true market value. It is submitted that the High Court and Federal Court were wrong to discount the effect of the said valuations on the ground that they were prepared for financing purposes for each of such valuations expressed the valuer's opinion of the market value of the said lands. Moreover the said reserve was even significantly below the market value of 300,000 dollars assessed by the said valuation of Messrs. Jones Lang Wootton. Accordingly the said interest of the Appellant was seriously prejudiced by the fixing of the reserve and consequent subsequent sale at less than the market value of the said lands. The fixing of such reserve at less than the said market value constituted a material irregularity in the conduct of the said sale whereby the Appellant suffered substantial injury. Accordingly the said sale should have been set aside.

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15. The Appellant accordingly humbly submits that the judgment of the High Court and Federal Court be reversed and an order made that the said sale be set aside and that the Respondents do pay the Appellant's costs of this appeal and of the proceedings in the High Court and Federal Court for the following amongst other reasons:-

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R E A S O N S

(1) The disclosure of the reserve price by the said Order for Sale constituted a material irregularity in the conduct of the said sale as a result of which the Appellant suffered substantial injury.

(2) The Court's failure to provide for or alternatively to consider providing for the said two pieces of land to be offered for sale individually as separate lots constituted a material irregularity in the conduct of the said sale as a result of which the Appellant suffered substantial injury.

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(3) The fixing of the said reserve price below the market value of the said lands constituted a material irregularity in the conduct of the sale as a result of which the Appellant suffered substantial injury.

DONALD RATTEE

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CASE FOR THE APPELLANTS

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