

**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA
SAMAN PEMULA NO: BA-24MFC-967-12/2019
PERMOHONAN PERLAKSANAAN NO.: BA-38-1053-11/2020**

Dalam perkara mengenai Seksyen 265(3)
dan 265 (3A) Kanun Tanah Negara, 1965

Dan

Dalam perkara mengenai gadaian di bawah
Perserahan No. 9880/2014 ke atas
hartanah yang dipegang di bawah Geran
Mukim 5486, Lot 1866, Mukim Klang,
Daerah Klang.

Dan

Dalam perkara mengenai Aturan 83
Kaedah-Kaedah Mahkamah 2012

ANTARA

OCBC AL-AMIN BANK BERHAD

[NO. PENDAFTARAN: 200801017151 (818444-T)] ... PLAINTIF

DAN

CREDENCE PROPERTY MANAGEMENT SDN BHD

[NO. PENDAFTARAN: 201201035941 (1020423-H)] ... DEFENDAN



JUDGMENT

Introduction

[1] Article 13(1) of the Federal Constitution provides that:

No person shall be deprived of property save in accordance with law.

[2] It is obvious that while the rights to property is guaranteed under the Federal Constitution, this safeguard is not absolute. The good citizens of this country may find themselves having their prized or valued possession taken away through innumerable circumstances sanctioned by law.

[3] The matter before this Court concerned one such circumstance. It involved an Order for Sale made against a property. The pivotal concern of this Court was to ensure that the process had been carried out in accordance with law.

The Parties and the Nature of the Case

[4] The case before this Court involved an appeal/application by the appellant/defendant, Credence Property Management Sdn Bhd, for an order that a public auction that has been fixed to take place on 18 May, 2023 be vacated. This appeal/application was filed on 19 April, 2023. It was an appeal to me as a Judge in Chambers pursuant to Order 56 of the Rules of Court 2012, against an Order made by the learned Deputy Registrar during a case management conference via email on 5 April,



2023. As noted, the learned Deputy Registrar had fixed 18 May, 2023 as the date for the public auction.

[5] The application in this appeal was premised on the basis that a new valuation report to determine the reserve price of the property which formed the subject matter of an order for sale to be carried out in a public auction will have to be obtained. If this application were allowed, the auction date that had been fixed on 18 May, 2023 would have to be vacated.

[6] The respondent/plaintiff, OCBC Al-Amin Bank Bhd, objected to the above application and argued that the public auction should proceed as per the date fixed by the learned Deputy Registrar.

[7] This appeal/application was heard by me on 16 May, 2023. I dismissed the appeal/application with costs. The reasons for my dismissal of the appeal/application are outlined below.

The Case for the Appellant/Defendant

[8] The appellant/defendant had objected to 18 May, 2023 as the date for the public auction as the valuation report relied on by the respondent/plaintiff, dated 5 November, 2020, was made over two years ago.

[9] In support of its appeal/application, the appellant/defendant relied on Article 13(1) of the Federal Constitution and the Arahan Amalan Pendaftar Mahkamah Tinggi Malaya Bilangan 1 Tahun 2018.



[10] On the issue of the appellant/defendant's fundamental right under Article 13(1) of the Federal Constitution, the appellant/defendant conceded that it had defaulted in the repayment of a loan and the respondent/plaintiff was entitled to sell the charged property pursuant to an Order for Sale to settle the outstanding sum owed (together with all interest and costs). However, the appellant/defendant maintained that it still retained its "constitutional rights pursuant to Article 13 in relation to the balance sum after payment of the outstanding sum".

[11] On its entitlement for the remainder or balance sum after the proceeds from the sale of the land had been utilized to pay off the outstanding sum owed, the appellant/defendant rationalized that the rationale for setting a two-year validity period for valuation reports for purposes of an order for sale is to reflect on the current market value of the land involved.

[12] As for the Arahan Amalan Pendaftar Mahkamah Tinggi Bilangan 1 Tahun 2018, the appellant/respondent referred this Court to paragraphs 1.2 and 1.3 of the e-Leong System Guidelines (for public auction by electronic means for sale of immovable property) which provide as follows:

1.2 Harga rizab hartanah adalah berdasarkan kepada Laporan Pernilaian yang difailkan oleh Plaintiff. Tempoh sah laku Laporan Pernilaian adalah dua (2) tahun dari tarikh Laporan Pernilaian tersebut disediakan.

1.3 Jika lelongan awam gagal dijalankan dalam tempoh dua (2) tahun dari Tarikh Laporan Pernilaian pertama yang difailkan,



Plaintif hendaklah memfailkan Laporan Pernilaian baharu supaya Mahkamah dapat menetapkan harga rizab terkini hartanah tersebut

[13] It was the appellant/defendant's contention that since the valuation report submitted by the respondent/plaintiff was dated 5 November, 2020, the two-year validity period of the valuation report had lapsed. The respondent/plaintiff was thus required, according to the appellant/defendant, to obtain and file a new valuation report for the court to determine the current reserve price.

[14] In its written submission, the appellant/defendant argued as follows:

A lot could have happen [sic] over the 2 years in terms of market movement and prices. Hence, a new Valuation Report is required in the interest of justice and the Court is to determine the current Reserve Price. In fact on the facts, 2 years ago the property market was down due to the lockdown. Things have moved on since.

[15] The appellant/defendant referred to a recent decision of the Federal Court in *Spicon Products Sdn Bhd v Tenaga Nasional Berhad & Anor* [2022] 4 AMR 228; [2022] 4 CLJ 195; [2022] 2 MLJ 721; [2022] 3 MLRA 307 ("*Spicon Products*") which made reference to Article 13 of the Federal Constitution.

[16] The appellant/defendant also raised a point of procedure. The appellant/defendant submitted that the correct procedure in order to obtain a new auction date was for the respondent/plaintiff to apply by way of a Notice of Application together with an Affidavit in Support as required



under paragraph 9.1 of the Arahan Amalan Pendaftar Mahkamah Tinggi Bilangan 1 Tahun 2018.

[17] Reliance was also placed on section 257 of the National Land Code, on “Matters to be dealt with by order for sale”. By failing to file a Notice of Application, the appellant/defendant argued that it had been denied its constitutional rights under Article 13(1) of the Federal Constitution to file an Affidavit-in-Reply with evidence for the Court to determine the current reserve price.

The Case for the Respondent/Plaintiff

[18] The respondent/plaintiff submitted that this appeal/application was an abuse of the process of Court.

[19] The respondent/plaintiff averred to the fact that the reserve price for the property which is the subject matter of an Order for Sale had been fixed as per an Order of the Court dated 1 November, 2021. The decision to fix the reserve price at RM6,000.000.00 with the public auction date fixed on 7 April, 2022 (vide an Amended Order dated 22 February, 2022) was made by the learned Deputy Registrar. The reserve price, as noted earlier, was based on the respondent/plaintiff’s valuation report dated 5 November, 2020.

[20] It was the respondent/plaintiff’s contention that the Order dated 1 November 2021 was and remained a valid and enforceable Order.

[21] The respondent/plaintiff clarified the events which had led to the need to fix a new auction date, which the Court did, on 5 April, 2023, with



the new action date fixed on 18 May, 2023. According to the respondent/plaintiff, the Order made by the learned Deputy Registrar on 5 April, 2023 merely fixed a new auction date and affirmed the Order dated 1 November, 2021 that had fixed the reserve price at RM6,000.000.00.

[22] The events that necessitated the change in the auction date from 7 April, 2022 to 18 May, 2023 were not disputed and will be outlined in paragraph [41] below.

[23] The respondent/plaintiff further submitted that there was “no appealable matter ... to decide” when this appeal/application came before me on 16 May, 2023 “as the reserve price has already been determined vide Order dated 1.11.2021”. Therefore, the respondent/plaintiff asserted that the principles of *res judicata* applied in the instant matter. The decision of the Federal Court in *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 4 AMR 385; [2013] 6 CLJ 673; [2013] 5 MLJ 1 was cited by the respondent/plaintiff in support of its above contention.

The Principal Issues Before this Court

[24] The overriding poser in this appeal/application was whether the valuation report dated 5 November, 2020 was no longer valid and thus a new valuation report will have to be submitted by the respondent/plaintiff.

[25] Consequentially, this Court had to consider the issue of whether the public auction that had been fixed on 18 May, 2023 ought to be vacated.



Application of the Law and Principles

The Constitutional Point

[26] This Court agrees wholeheartedly with the pronouncement by the Federal Court in *Spicon Products* that where a matter involves a deprivation of property, Article 13(1) of the Federal Constitution will intercede to ensure that any such deprivation is carried out in accordance with law. In reading Article 13(1) of the Federal Constitution, Mary Lim FCJ at para [40] articulated the proper approach to be taken in the following terms:

In the reading and application of this guarantee, there must be a propensity to safeguard as opposed to denying that guarantee. Unless and until there are clear express provisions restricting a right of participation in any exercise to deprive property, any relevant law must be read to allow if not encourage such participation. The adequacy of any compensation paid for the deprivation may otherwise be compromised.

[27] The Federal Court in *Spicon Products* was dealing with a matter that pertained to a compulsory acquisition of property under the Land Acquisition 1960. Henceforth, the reference by her Ladyship to “a right of participation in any exercise to deprive property” must be understood in the context of adequacy of compensation as enshrined in Article 13(2) of the Federal Constitution. Article 13(2) of the Federal Constitution states as follows:



No law shall provide for the compulsory acquisition or use of property without adequate compensation.

[28] Regardless of whether a deprivation of property is undertaken pursuant to, for example, the Land Acquisition 1960 (in which case, Article 13(2) of the Federal Constitution will apply) or through other processes sanctioned by law, such as, an Order for Sale made pursuant to the National Law Code, the “save in accordance with law” rider, as expressly specified in Article 13(1) of the Federal Constitution, must be abided at all costs.

[29] With the above mandate in mind, this Court had posed itself the following question: whether the use of the valuation report dated 5 November, 2020 will result in the deprivation of the appellant/defendant’s property without due compliance with law?

Effect of Practice Directions

[30] As noted, the appellant/defendant had referred this Court to paragraphs 1.2 and 1.3 of the e-Leong System Guidelines (for public auction by electronic means for sale of immovable property). These Guidelines, “Garis Panduan Sistem e-Lelong: Lelong Awam Secara Elektronik Bagi Harta Jualan Tak Alih (e-Lelong), are to be read together with the Arahan Amalan Pendaftar Mahkamah Tinggi Bilangan 1 Tahun 2018 (see paragraph 16 of the latter).

[31] Order 92 rule 3B of the Rules of Court 2012 provides that:



The Chief Judge after consulting the Chief Justice may issue such practice directions as may be necessary for the better carrying out or giving effect to the provisions of these Rules.

[32] In *Jayasankaran v PP* [1983] 1 CLJ 171; [1983] 1 MLJ 379, the Federal Court opined that practice notes or directions are “intended to be no more than a directive for administrative purposes”. The Federal Court held that practices notes or directions “cannot be exalted into a rule of law”. The principle that practice directions are intended to be no more than directions for administrative purposes” was reiterated by the Supreme Court in *Ooi Bee Tat v Tan Ah Chim* [1995] 3 AMR 3040; [1995] 4 CLJ 484; [1995] 3 MLJ 465.

[33] Despite the repeated statements by our apex Court that practice directions are issued for administrative purposes, parties in the civil litigation process will be ill-advised to disregard practice directions issued by the Courts. For example, Order 59 rule 8(d) of the Rules of Court 2012 states that the Court, in exercising its discretion as to costs, shall, to such extent, if any, as may be appropriate in the circumstances, take into account –

- (d) in particular, the extent to which the parties have followed any relevant pre-action protocol or practice direction for the time being issued by the Registrar.

[34] The Court of Appeal in *Chua Choong Yin v Tan Boon Bak Trading* [2002] 3 AMR 3023; [2002] 3 CLJ 357; [2002] 4 MLJ 145 CA whilst conceding that practice directions do not have the force of law, reminded that they are created to regulate a systemic and consistent procedure



governing – in that case – the filing of appeal records. Adherence to that practice direction in question was thus deemed as essential.

[35] The Guidelines, as appended to the Arahan Amalan Pendaftar Mahkamah Tinggi Bilangan 1 Tahun 2018 and relied on by the appellant/defendant, are what they are, guidelines. The two-year validity period as stated in the Garis Panduan of the Arahan Amalan Pendaftar Mahkamah Tinggi Bilangan 1 Tahun 2018 does not have the force of law.

[36] The “law” or legal provisions which provide the scheme and safeguards when a property has been the subject matter of an Order for Sale are found in the National Land Code. The appellant/defendant did not raise any argument to show that there was non-compliance with the provisions in the National Land Code.

[37] The subsidiary legislation dealing with the procedural aspect of an Order for Sale is the Rules of Court 2012. In this regard, the provisions in Order 31A and Order 83 of the Rules of Court 2012 are to be observed. Once again, the appellant/defendant did not contend that there had been a failure to comply with the provisions in Order 31A and/or Order 83 of the Rules of Court 2012.

The Validity Period of a Valuation Report

[38] Since the validity period of a valuation report is not provided in any primary nor subsidiary legislation, this Court was satisfied that the valuation report dated 5 November, 2020 could be used in a public auction that had been fixed to take place on 18 May, 2023.



[39] This Court was also firmly of the view that the appellant/defendant's constitutional rights as guaranteed under Article 13(1) of the Federal Constitution has not been breached.

The Assumption that "in Accordance with Law" Requires Compliance with the Garis Panduan Sistem e-Lelong

[40] Even if we afford an expansive meaning to the term "in accordance with law" in Article 13(1) of the Federal Constitution as requiring compliance with administrative directions, this Court was satisfied that there was no breach of the Guidelines as appended to the Arahan Amalan Pendaftar Mahkamah Tinggi Bilangan 1 Tahun 2018.

[41] It is vital that the chronology of events that led to this present appeal/application is set out and understood.

22 September, 2020 Order for Sale was granted by the Shah Alam High Court over the appellant/defendant's charged property. The amount owing on that date was RM3,782,373.71.

18 November, 2020 The respondent/plaintiff filed an application in Enclosure 1, *inter alia*, to fix an auction date and to fix the reserve price at RM6,000,000.00. The appellant/defendant objected to the same and filed their own Valuation Report.



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| 1 November, 2021 | The learned Deputy Registrar allowed the respondent/plaintiff's application. [By an Amendment Order dated 22 February 2022, the said Property was fixed for public auction on 7 April, 2022 with a reserve price fixed at RM6,000,000.00 based on the respondent/plaintiff's Valuation Report dated 5 November, 2020.] |
| 15 November, 2021 | The appellant/defendant filed a Notice of Appeal against the said decision of the learned Deputy Registrar to the Judge in Chambers. |
| 25 January, 2022 | The learned High Court Judge dismissed the appellant/defendant's appeal. |
| 24 February, 2022 | The appellant/defendant's filed a Notice of Appeal to the Court of Appeal against the said decision of the High Court. |
| 30 March, 2022 | The learned Deputy Registrar allowed the stay of the auction fixed on 7 April, 2022 pending disposal of the appeal to the Court of Appeal. |
| 4 April, 2022 | The Court of Appeal dismissed the appellant/defendant's appeal. |



5 April, 2022

Parties attended before the Deputy Registrar via email to update the status of the appeal and since the appeal had been dismissed, the respondent/plaintiff requested the Court to fix the auction date.

The learned Deputy Registrar fixed a new auction date on 18 May, 2023 – maintaining the reserve price as stated in the Order dated 1 November, 2021 at RM6,000,000-00 based on the respondent/plaintiff's Valuation Report dated 5 November, 2020.

19 April, 2023

The present appeal/application was filed by the appellant/defendant against the decision of the learned Deputy Registrar made on 5 April, 2022.

[42] It should be noted that the above events proved that the appellant/defendant's rights had been fully ventilated in accordance with law.

[43] If the public auction had taken place on 7 April, 2022 as ordered by the Court, the issue pertaining to the validity of the valuation report would not have arisen. The public auction originally fixed on 7 April, 2022 could not be held simply because –

- (i) the appellant/defendant had invoked its rights to appeal against the decision of the learned Deputy Registrar to the



Judge in Chambers of the High Court (on 15 November, 2021);

- (ii) the appellant/defendant had further appealed to the Court of Appeal against the decision of the High Court which had ruled against it (on 24 February, 2022); and
- (iii) the appellant/defendant had applied for and obtained an Order granting a Stay of the public auction on 7 April, 2022 (on 30 March, 2022).

[44] When the Court of Appeal finally determined the appeal on 4 April, 2023, the matter reverted to the learned Deputy Registrar the very next day. An Order was made to maintain that the reserved price of RM6,000,000.00, as had been affirmed by both the High Court and the Court of Appeal. A new auction date was fixed on 18 May, 2023.

[45] If this Court had allowed the appeal/application by the appellant/defendant and ordered that the date of the public auction fixed on 18 May, 2023 be vacated with a new auction date fixed and for a new valuation report to be submitted by the respondent/plaintiff, the appellant/defendant will once again be permitted to invoke the entire process to challenge the new valuation report. And when the process is completed, there may very well be the need for another valuation report to be submitted as another two years may have elapsed.

[46] When the appellant/defendant invoked its rights as demonstrated in the chronology of events outlined above, the appellant/defendant had exercised its rights as conferred by law. The appellant/defendant had exhausted the rights conferred on it by law.



[47] The Order made on 5 April, 2023, to give effect to an Order of Sale granted by the Court way back on 22 September, 2020, through a public auction based on a reserve price that had been determined by the High Court and Court of Appeal, is one that has been carried out in accordance with law.

[48] The two-year validity period of the Valuation Report in this appeal/application had not lapsed. The two-year validity period was “suspended” pending the determination of the appeal process invoked by the appellant/defendant.

[49] On the argument by the appellant/defendant that the market value of the subject property would have increased over the last three years, this Court was of the view that such a contention was speculative in nature.

The Procedural Point

[50] In the appeal/application before me, the appellant/defendant put forth the argument that the respondent/plaintiff failed to file a Notice of Application together with an Affidavit in Support as per paragraph 9.1 of the Arahan Amalan Pendaftar Mahkamah Tinggi Bilangan 1 Tahun 2018 when the matter was before the learned Deputy Registrar on 5 April, 2023. Accordingly, the appellant/defendant argued that it had been denied its constitutional rights under Article 13(1) to file an Affidavit-in-Reply with evidence for the Court to determine the current reserve price.



[51] The Arahan Amalan Pendaftar Mahkamah Tinggi Bilangan 1 Tahun 2018 provides for an important aspect concerning the “Pembatalan Lelong Awam”. Paragraph 9 of the said Practice Directions reads as follows:

9. Pembatalan Lelong Awam

9.1 Jika Plaintiff berhasrat untuk meneruskan sesuatu lelong awam yang telah dibatalkan, Plaintiff hendaklah memfailkan Notis Permohonan yang baharu bersama Affidavit Sokongan yang melampirkan dokumen yang berikut:

(a) Laporan Penilaian;

(b) Perintah Jualan Termeterai atau Perintah Jualan yang diakui sah; dan

(c) Salinan resit fi pelaksanaan bagi Notis Permohonanan (Kod 38) yang asal.

[52] In this matter before me, there was no “pembatalan” of the public auction. What we have in the present appeal/application was a “penangguhan” or a “penggantungan” of the public auction. The deferment or suspension of the public auction was to enable the appellant/defendant to ventilate its rights in accordance with law. Hence the issue of denial of the appellant/defendant’s constitutional rights did not arise.

[53] The need to file a Notice of Application together with an Affidavit in Support of the application will only arise if there had been a “pembatalan”



of the public auction. In this appeal/application, paragraph 9 of the Arahan Amalan Pendaftar Mahkamah Tinggi Bilangan 1 Tahun 2018 was not applicable.

[54] The appellant/defendant also relied on section 257 of the National Land Code. The relevant provision deals with “Matters to be dealt with by order for sale”. It reads as follows:

257 Matters to be dealt with by order for sale

- (1) Every order for sale made by the Court under section 256 shall be in Form 16H and shall—
 - (a) provide for the sale to be by public auction;
 - (b) require the sale to be held on, or as soon as may be after, a date specified therein, being a date not less than one month after the date on which the order is made;
 - (c) specify the total amount due to the chargee at the date on which the order is made;
 - (d) require the Registrar of the Court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question;
 - (e) specify that no bidder shall be allowed to bid in the sale unless the officer of the Court is satisfied that the bidder possesses, at the time of the sale, the sum equivalent to



ten per centum of the reserve price specified under paragraph (d);

- (f) specify that where the full amount of the purchase price is not paid after the fall of the hammer by the successful bidder, the sum specified in paragraph (e) shall be paid as deposit to the chargee and forthwith credited into the account of the chargor pending the settlement of the balance of the purchase price;
- (g) specify that the balance of the purchase price shall be settled on a date not later than one hundred and twenty days from the date of the sale and that there shall be no extension of the period so specified; and
- (h) specify that where the balance of the purchase price is not settled on a date specified under paragraph (g), the sum paid as deposit under paragraph (f) to the chargee shall be forfeited and disposed of in the manner specified under section 267A.

- (2) Any such order may contain such other directions with respect to the sale as the Court may think fit, and in particular (but without prejudice to the generality of the foregoing) may, where the charge in question relates to more lands or leases than one, direct—

- (a) that they be offered for sale individually, and in a specified order; and



- (b) that, in the event of the price fetched by one or more of them exceeding an amount specified in the order, or to be determined by the Registrar of the Court, the other or others shall be withdrawn from the sale, and shall cease to be subject to the order.
- (3) In specifying or determining any amount for the purposes of paragraph (2)(b), the Court or the Registrar, as the case may be, shall have regard not only to the liability of the chargor under the charge, but also to any liabilities which (under section 268) will fall to be discharged out of the proceeds of sale in priority thereto.

[55] This Court was of the view that the measures put in place in section 257 of the National Land Code had been complied with.

[56] In view of the above findings, this appeal/application was dismissed with costs.

[57] The appellant/defendant was ordered to pay the respondent/plaintiff costs of RM3,000.

Postscript

[58] At the hearing of this appeal/application on 16 May, 2023, this Court was in agreement with the respondent/plaintiff that a fresh Notice of Application and Valuation Report would become necessary if the auction



fixed on 18 May, 2023 were unsuccessful and a fresh public auction would have to be held.

[59] This Court has been informed that there was one registered bidder but no bid was received at the auction held on 18 May, 2023.

[60] In view of such development the provisions in section 265(3) and (3A) of the National Land Code 1965 will become applicable. As there was no bid by the sole registered bidder, there was a “Pembatalan Lelong Awam” pursuant to paragraph 15.1(d) of the Garis Panduan Sistem e-Lelong.

[61] Not only that the appellant/defendant’s wish for a new public auction date and a new Valuation Report would now be fulfilled, the respondent/plaintiff would also be required to file a new Notice of Application (see paragraph 15.2 of the Garis Panduan Sistem e-Lelong).

Dated: 7 July, 2023

sgd

[CHOONG YEOW CHOY]

Judicial Commissioner

High Court of Malaya

Shah Alam



Counsel:

Edwin a/l Jerome E Lewis for the Defendant/Appellant
(Messrs. Edwin Lewis)

Shantini Koshy a/p Cherian Koshy for the Plaintiff/Respondent
(Messrs. Yong & Rakan-Rakan)



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