Mohamad bin Nohing (Batin Kampung Bukit Rok) & Ors v Pejabat Tanah dan Galian Negeri Pahang & Ors

HIGH COURT (TEMERLOH) — APPLICATION FOR JUDICIAL REVIEW NO 25–4 OF 2007
AKHTAR TAHIR J
18 MARCH 2013

Land Law — Customary land — Right to — Whether Semalai was identifiable aboriginal tribe entitled to native customary rights to land — Whether rights of tribe to native customary land encroached upon by State action

The applicants in the instant case were members of the Semalai tribe of the Orang Asli community who had existed in the Bera district of Pahang for generations. Their judicial review application sought declarations and an order to quash the Pahang State Government's approval for a project to be undertaken on their native customary land ('the NCL'). The applicants contended, inter alia, that the gazetting of part of the disputed land as Malay Reserve Land and the activities of the land development authority, FELCRA, constituted an illegal encroachment upon their NCL.

Held:

(1) Based on expert evidence adduced by the applicants the court found that the Semalai were an identifiable aboriginal group who had existed in the Bera region for a considerable period of time and that the applicants were descendants from a continuous line of the earliest Semalai who had set foot in the Bera area especially on the claimed NCL. The respondents failed to produce any expert evidence of their own to dispute the findings and opinion of the applicants' expert witness (see paras 16–19).

(2) The rights over the area claimed as NCL accrued to the Semalai the minute they sat foot in the Bera region which was very much earlier than the time either the court or the State recognised their rights. Any alienation (of the land) after the period when the right first accrued was illegal and could be regarded as an encroachment. This included the area gazetted as Malay Reserve Land in 1923 or the setting up of the FELCRA scheme (see paras 34–35).

[Bahasa Malaysia summary

Pemohon-pemohon di dalam kes ini adalah ahli-ahli puak Semalai komuniti Orang Asli yang wujud di daerah Bera Pahang untuk beberapa generasi. Permohonan semakan kehakiman meraka memohon perisytiharan dan

perintah untuk membatalkan kelulusan Kerajaan Negeri Pahang untuk projek dilaksanakan di atas tanah adat mereka ('NCL'). Pemohon-pemohon berhujah, antara lain bahawa penwartaan bahagian tanah yang dipertikaikan sebagai Tanah Rizab Melayu dan aktiviti-aktiviti pihak berkuasa pembangunan tanah, FELCRA, membentuk pencerobohan haram ke atas NCL mereka.

Diputuskan:

(1) Berdasarkan keterangan pakar yang dikemukakan oleh pemohon-pemohon mahkamah mendapati bahawa puak Semalai adalah kumpulan penduduk orang asli yang boleh dikenalpasti yang wujud di kawasan Bera untuk tempoh masa yang agak lama dan bahawa pemohon-pemohon adalah keturunan-keturunan daripada jurai berterusan puak Semalai terawal yang menjejakkan kaki mereka di kawasan Bera terutamanya di atas NCL yang dituntut tersebut. Responden-responden gagal untuk mengemukakan apa-apa keterangan pakar mereka sendiri untuk mempertikaikan dapatan dan pandangan saksi pakar pemohon-pemohon (lihat perenggan 16–19).

(2) Hak ke atas kawasan yang dituntut sebagai NCL terakru kepada puak Semalai sebaik sahaja mereka menjejakkan kaki mereka di kawasan Bera yang mana adalah lebih awal daripada masa yang sama ada mahkamah atau Kerajaan mengakui hak mereka. Apa-apa pemindahan tanah selepas tempoh apabila hak pertama terakru adalah salah di sisi undang-undang dan boleh dianggap sebagai pencerobohan. Ini termasuk kawasan yang diwartakan sebagai Tanah Rizab Melayu pada tahun 1923 atau penubuhan skim FELCRA (lihat perenggan 34–35).]

Notes

For cases on right to, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3220–3222.

Cases referred to

Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289; [2005] 4 CLJ 169, CA (refd)

Alexkor Ltd v Richtersveld Community and others 2003 (12) BCLR 1301 (refd)

Amodu Tijani v Southern Nigeria Secretary [1921] 2 AC 399, PC (refd)

Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal [2011] 6 MLJ 297; [2011] 8 CLJ 766, FC (refd)

Legislation referred to

Aborigines People's Act 1954

Federal Constitution art 8, 8(5)(c)

Lim Heng Seng (Fara Nadia bt Hashim and Lisa Tan Yu Wan with him) (Lee Hishamuddin, Allen & Gledhill) for the applicants.

Mat Zaraai bin Alias (Kamal Azira bin Hassan with him) (Pahang State Legal Advisor) for the first and second respondents.
Noor Hisham bin Ismail (Muzila bt Mohamed Arshad with him) (Senior Federal Counsel Office) for the third and fourth respondents.

Akhtar Tahir J:

[1] The applicants in this case claiming to be from a native tribe called Semalai have made a claim for an area of land which they claim to be part of aborigine inhabited land. The area claimed includes three areas called Padang Kepayang, Kampung Bukit Rok and Kampung Ibam ('the native customary land') in the district of Bera, Pahang. The native customary land is being claimed on the basis that the Semalais have occupied and inhabited the land for generations.

[2] The claim by the applicants made by way of judicial review application was triggered by the fact that the state government had given approval for a project to be undertaken on the native customary land being claimed by the applicant.

THE RIGHTS OF NATIVES UNDER THE FEDERAL CONSTITUTION

[3] Under art 8 of the Federal Constitution although equality and equal protection before the law is a fundamental right, it does not invalidate or prohibit extra protection to the natives.

[4] Article 8(5)(c) states as follows:

> This Article does not invalidate or prohibit —
>
> (a) ...
>
> (b) ...
>
> (c) Any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (*including the reservation of land*)...(Emphasis added.)

STATUS OF CUSTOMARY LAND IN MALAYSIAN CONTEXT AS RECOGNISED BY THE MALAYSIAN COURTS

[5] It is to be noted that the Malaysian courts have given due recognition to the rights of natives over customary land. This is clear from the various decisions meted out by the highest court of the land.

A **[6]** I will begin with the Federal Court case of ***Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal*** [2011] 6 MLJ 297; [2011] 8 CLJ 766 where the issue was not so much the recognition of native customary land but more under what circumstances this rights over native customary land can be extinguished. Richard Malanjum CJ (Sabah and Sarawak) in para 125 stated as
B follows:

> As for the argument that the government stands in a fiduciary position to protect the interest of the natives, I am of the view that such notion has been accepted by our courts (see *Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors*. It has also been
C adopted in foreign jurisdictions (see for instance the Supreme Court of Canada in *Delgamuukw v British Columbia* [1997] 3 SCR 1010). It is therefore not unheard of that the government ought to protect the interest of the natives and stand in a fiduciary position vis a vis the natives.

D **[7]** The Court of Appeal case of *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289; [2005] 4 CLJ 169 decided two matters the first being that the Malaysian courts recognised common law right over native customary land and the second that such rights existed despite the Aborigines Peoples Act 1954 ('the Act').

E

[8] Gopal Sri Ram JCA stated that the definitive position at common law is that stated by Viscount Haldane LC in the case of *Amodu Tijani v Southern Nigeria Secretary* [1921] 2 AC 399. His Lordship then continued and stated as
F follows:

> First, that the fact that the radical title to land is vested in the Sovereign or State (as is the case here) is not an ipse dixit answer to a claim of customary Utile. There can be cases where radical title is burdened by a native or customary title. The precise nature of such customary title depends on the practices and usages of each
G individual community. And this brings me to the second important point. It is this. What the individual practice and usages in regard to the acquisition of customary title is a matter of evidence as to the history of each particular community. In other words it is a question of fact to be decided (as was decided in this case) by the primary trier of fact based on his or her belief of where on the totality of evidence, the truth of the claim made lies.

H

COMMON LAW VS ABORIGINE PEOPLES ACT 1954

[9] His Lordship Gopal Sri Ram JCA then in ***Sagong Tasi's*** case further
I discussed whether the Aborigine People's Act 1954 excluded the common law.

[10] His Lordship begun by determining the purpose the Act was enacted referring to proximately contemporaneous material that included an article in the *Malay Mail* quoting Dato Sir Onn Jaffar's speech in the Federal Legislature,

the debate in the Federal Legislative Assembly and, the policy statement issued by the Jabatan Hal Ehwal Orang Asli Department ('JHEOA'). After referring to the above materials His Lordship concluded at p 185 as follows:

> Now, the extrinsic material to which I have referred makes it abundantly clear that the purpose of the 1954 Act was to protect and uplift the First Peoples of this country. It is therefore a human rights statute. It acquires a quasi constitutional status giving it pre-eminence over ordinary legislation. It must therefore receive a broad and liberal interpretation.

[11] In pp 305 (MLJ); 186 (CLJ) His Lordship further stated:

> There is therefore no doubt in my mind that the 1954 Act calls for a construction liberally in favour of the aborigines as enhancing their rights rather than curtailing them.

[12] In my mind apart from the decision of the Court of Appeal above to which I am bound, the fact that the Act was enacted at all is a testimony that the rights of aborigine over the land occupied has been given due recognition.

[13] What the Act seeks to do if at all is to define the rights and limits of the land area over which the aborigines can lay a claim to. It is necessary to define the limits as well as gazette this limits to protect the land from being encroached and trespassed by unrelated individuals or groups. A further reason could be that rapid development of the country necessitates for a boundary to be fixed to encompass the actual requirement of the particular aborigine group.

[14] Having determined that both common law and statute recognises native customary land I now move on the facts of the case at hand. As observed by Gopal Sri Ram JCA in *Sagong Tasi*'s case finding of facts form the substratum of the case for making out customary community title amply supported by cogent evidence.

[15] In this case I have made the following finding of facts

Semalais are an identifiable aborigine group

[16] In making a finding that the Semalais are an identifiable native aborigine group I relied on the testimony of Dr Colin George Nicholas ('SP1') in court as well as his affidavit in support of the application of the applicants.

[17] I accepted the evidence of Dr Colin as an expert based on his qualifications and achievements. The qualification are too numerous to note

A everything down but can be seen from his biodata. The qualifications and bio data of Dr Colin are contained in his affidavit (bundle C).

[18] I noted however that Dr Colin was a partisan witness as he had shown his partiality in supporting the application of the applicants by filing an affidavit and from my observation he was at the side of the applicants throughout the trial and he sat in court in jotting down notes. To me being a partisan witness does not make SP1 an unreliable witness. Further SP1's findings are based not only his research but more on the research done by other persons whom he has quoted extensively.

[19] The defendants also did not produce an expert of their own to dispute the findings and opinion of SP1 and therefore the evidence of SP1 can be accepted and considered as it is unchallenged.

[20] In his affidavit, Dr Colin has outlined in detail the presence of natives loosely called orang asli in the Peninsular Malaysia since thousands of years ago. I do not purport to go into the details of this early arrival suffice to say I am satisfied of the presence of orang asli in Peninsular Malaysia. This fact has also not been challenged by the defendants.

[21] Dr Colin further speaks of presence of orang asli in the region of Pahang and this is borne out by the writings of various authors studying the matter. More important is that this early writings confirm that amongst the orang asli groups present in Pahang are the Semalais.

[22] Amongst others Dr Colin referred to the publication of Pater P Schebesta an ethnographer in the bulletin of the School of Oriental and Asian Studies in 1926. It was stated in this publication that:

> within the category 'Jakun' the Semalai are specifically associated with the Bera River Drainage Area. In addition he estimates (at page 274) that the Semalai population to be about 2000

[23] There are a number of other references of the presence of Semalais in the Bera region as stated by Dr Colins as stated from paras 31–37 of his affidavit (bundle C).

[24] As a conclusion I am satisfied that the Semalais are identifiable aborigine native groups who have existed in the Bera region for a very considerable period of time.

The applicants are the decedants of Semalais

[25] The first applicant in order to show that he and other members of the community are descendants of the early Semalais in the region produced a family tree dating back many generations. The information contained in the family tree was by the word of mouth which to me an acceptable means of information being carried from generation to generations. I noticed that the first applicant and the native community as a whole took great pride in retracing their ancestry perhaps more than other races in Malaysia.

[26] I also made a site visit to the disputed area and observed that the first applicant and the other members of the community who were present were familiar with the landmarks and were able to identify the various earlier settlements, structures and geographical spaces. They could also identify the grave of their ancestors nestled in dense jungle and marked with objects like pots.

[27] I was satisfied that the applicants were truly the descendants from a continuous line of the earliest Semalais having set foot in the Bera area especially in the area of dispute.

The area claimed has been amply identified

[28] Dr Colin had studied the various maps and writings and concluded that 'the Semalai Orang Asli without doubt the earliest inhabitants of the Bera area' (para 48 of affidavit bundle C).

[29] I do not wish to go into details but I agree with this above conclusion of Dr Colin based on his reasoning given in paras 38–47 of his affidavit (bundle C).

[30] The history of the earliest settlements of the Semalais on the Bera River until its existence till today is well expressed by Dr Colin from paras 61–69 of his affidavit (bundle C).

[31] I wish to emphasise here that there were various unsuccessful attempts to gazette at least 2,023.47 hectares which formed part of customary land the boundaries which were determined using natural terrain of rivers and hills.

[32] Although the size of the land can be determined from the correspondences the boundaries of the area remain uncertain but can be

A determined with the help of the applicants. In this respects I agree with the first applicant the boundaries should follow the natural terrain rather than mechanically marking the boundaries.

B **[33]** In this case I also decided that the Semalais did not surrender occupation of any part of the customary land although after the big flood in 1975 they were forced to abandon the area called Padang Kepayang. The movement out of the area was more out of safety rather than abandonment of their rights. I therefore have determined that any setting of boundaries must include the Padang Kepayang area.

C

STATUS OF CUSTOMARY LAND AGAINST MALAY RESERVE LAND AND FELCRA

D **[34]** Even before looking at any legislation it is my finding that the rights over the land accrued to the Semalais the minute they sat their foot in the Bera region. The rights over the land do not begin from the time the court recognises the right or the state recognises the right. It accrues very much earlier.

E **[35]** Having determined this any other alienation after the period when the right first accrued is illegal and can be regarded as an encroachment. This includes the area gazetted as Malay reserve land in 1923 or the setting up the FELCRA scheme.

F LAND SOUGHT FOR FORAGING AND HUNTING IS IT JUSTIFIABLE?

[36] It must be recognised that not all area of land is occupied by the G aborigine people for the sole purpose of cultivation of crops or other subsistence but rather a large area of land is required to roam and forage.

[37] To me if the law recognises the rights of the aborigines over land it must also give rights and recognition of the customary activities carried out by the H aborigines which includes hunting, roaming and foraging the jungle. The instinct to roam, hunt and forage the jungle is an in built instinct of the aborigine people which cannot be extinguished by providing them with modern amenities.

I **[38]** It was argued by the defendants that the applicants had been relocated and provided with school, hospital and other modern amenities. In fact during my visit to the area in dispute I noticed that the first applicant in this case and his other community members were well settled with having comfortable homes.

[39] It was argued by the defendants as the applicants had been given all the facilities by the state government they could not claim the land for the mere purpose of foraging and roaming the jungle.

[40] I heard the testimony of the first applicant who testified as SP2 and I was satisfied and convinced by his testimony that foraging and roaming of the jungle was something which the community could not give up despite being given all the comforts of modern living.

[41] The extent to which the aborigine community was to be allowed to satisfy their inborn instinct is something which the Act sets to define. To me the area of the land to be alienated for the purpose of the aborigine community should take into the facts of each case taking into consideration the size of the community and to what extent they should be allowed to roam and forage.

[42] In the case of *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 130 the extent of the right was stated as follows:

> In the light of the evidence and of the findings by the SCA (Supreme Court of Appeal) and the LCC (Land Claims Court) we are of th view that the reral character of the title that the Richtersveld Community possessed in the subject land was right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the community. The community had the right to use its water, to use its land for grazing and hunting and to exploit the natural resources, above and beneath the surface.

[43] Further I would agree with Dr Colin when he stated in para 143 of his affidavit (bundle C) 'Thus, while the nature of their economic activity has changed over time, their dependence on the land for sustenance and wellbeing still remains the same'. Dr Colin was referring to the change of activities of Semalais from purely subsistence activities to more cash-based activities such as rubber and oil palm cultivation as well as small businesses.

[44] In the light of the above findings i made the following orders:

(a) I declared that the portion of the Malays Reserve Land encroaching upon the land as claimed by the Semalais as an illegal encroachment and has to be de-gazzeted;

(b) I declared that the land utilised by FELCRA that encroaches upon the land claimed is an illegal encroachment and has to be vacated and the boundaries set up be removed with the cost to be borne by FELCRA;

(c) I directed the relevant land authorities with the assistance of the applicants immediately take measures to identify and draw the boundaries of the claim using natural boundaries of rivers and hills and

take steps to *gazette* the identified area the size which corresponds as close as possible to the area claimed. I directed that this exercise right up to gazetting take not more than one year; and

(d) I disallowed the applicants' claim for damages although there was an encroachment and breach of fiduciary duty on the part of the state as I cound not detect any tangible loss suffered by the applicants apart from suffering inconvenience.

[45] I directed cost to be taxed before the senior assistant registrar. In trying this matter I noted a number of weaknesses in the record keeping of the relevant authorities when discovery of documents was directed by the court. From the feedback received by the counsels appearing for both the parties in this case it was observed that the records of customary land were not kept in proper manner and many documents including correspondence of the natives and native bodies with the authorities were missing. It could not be determined whether this was due to sheer carelessness of the authorities or it was purposely done by design. To complicate matters the witnesses called by the respondent to assist the court took an indifferent attitude towards the issues at hand and were generally ignorant of the matters at hand to be of any assistance. This lackadaisical attitude on the part of the authorities needs to be rectified.

Order accordingly.

Reported by Ashok Kumar