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BOHARI JAYA & ORS v. NAIM LAND SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
VARGHESE GEORGE JCA
IDRUS HARUN JCA
B [CIVIL APPEAL NO: Q-01-201-06-2014]
10 MARCH 2016

NATIVE LAW AND CUSTOM: *Land dispute – Native customary rights ('NCR') – Claim for – Whether location of NCR land identified – Whether 'Map/Plan X'*
C *formally admitted as evidence – Whether fundamental threshold evidentiary requirement met – Plaintiffs relied on material introduced by defendants to prove claimed NCR land – Whether 'fall back' approach condoned by courts – Whether plaintiffs established that NCR over land had been created before 1 January 1958*

D The plaintiffs, who were of Jati Meirek descent and natives of Sarawak, brought a native customary rights ('NCR') claim in respect of an area of land situated at Sg Adong, Miri ('Sg Adong'). The plaintiffs asserted that the plaintiffs' grandparents had lawfully acquired and created NCR over the area now claimed during the Japanese occupation, and that their parents and the plaintiffs themselves had continuously cultivated and occupied the claimed
E area. The plaintiffs submitted that according to their custom, the plaintiffs had the right to inherit the NCR attached to the area in question as the NCR thereon had never been extinguished. The High Court, however, dismissed the NCR claim over the land and held that the plaintiffs had not established that they had acquired or inherited NCR over the claimed land; that there
F was no documentary proof or otherwise that their great grandparents had settled or cultivated the land at Sg Adong, allegedly since 1947 and that the evidence adduced at the trial showed that they had not acquired NCR over the land in accordance with the laws in Sarawak. Hence, this appeal. The issues that arose were (i) whether the plaintiffs had, with some exactitude,
G established the precise 'location' in terms of boundaries of the land over which they assert NCR; and (ii) whether on evidence the plaintiffs had established such claimed NCR were created by their forefathers over that area in question before 1 January 1958.

Held (dismissing appeal)
H **Per Varghese George JCA delivering the judgment of the court:**

(1) The plaintiffs conceded that 'Map/Plan X' had not been formally admitted as evidence during the trial or its maker called to verify the sources relied upon or otherwise to confirm its accuracy. From the evidential perspective of this case, this fundamental threshold obligation

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on the plaintiffs to identify the location of the subject NCR claim by way of its approximate boundaries at least, had therefore not been met at trial by the plaintiffs. (para 23)

(2) The plaintiffs appeared to be relying upon material introduced by the defendants to identify the claimed NCR land limits. This 'fall back' approach that had been taken by the plaintiffs to identify the exact alleged encroached area ought not to be condoned by the courts, that was, notwithstanding the application of a flexible approach as judicially encouraged with respect to dealing with NCR claims. In this case, there was no evidence from the plaintiffs duly admitted by the court as proper evidence as regards the location of the claimed NCR area for the court to adjudicate upon and accordingly, no further enquiry was necessary. (paras 24 & 25)

(3) The trial judge did not misdirect himself in the conclusion drawn from a letter dated 26 August 1992 that the plaintiffs or their immediate ancestors, if at all, had only come onto the land in the 1970s or thereabouts to cultivate the same. There was no shred of evidence before this court that any of the plaintiffs' forefathers had carried out some physical activities on the claimed area prior to 1 January 1958 to displace that conclusion, or that NCR over the land had been created before the said date by the plaintiffs or their forefathers. Thus, there was no error on the part of the trial judge in his conclusions either in law or on the facts. (paras 27 & 32)

Bahasa Malaysia *Headnotes*

Plaintif-plaintif, yang berketurunan Jati Meirek dan orang asli Sarawak, membuat tuntutan hak adat anak negeri ('NCR') berkaitan sebuah kawasan tanah yang terletak di Sg Adong, Miri ('Sg Adong). Plaintif-plaintif menyatakan bahawa datuk nenek plaintif telah, menurut undang-undang, memperolehi dan mewujudkan NCR ke atas kawasan yang dituntut semasa zaman pendudukan Jepun, dan bahawa ibu bapa mereka dan plaintif-plaintif sendiri telah secara berterusan bercucuk tanam dan menduduki kawasan yang dituntut. Plaintif-plaintif menghujahkan bahawa menurut adat mereka, plaintif-plaintif mempunyai hak untuk mewarisi NCR yang terikat pada kawasan yang dipersoalkan kerana NCR tersebut tidak pernah luput. Mahkamah Tinggi, walau bagaimanapun, menolak tuntutan NCR ke atas tanah tersebut dan memutuskan bahawa plaintif-plaintif tidak membuktikan bahawa mereka memperolehi atau mewarisi NCR atas tanah yang dituntut; bahawa tiada bukti dokumentar atau sebaliknya yang nenek moyang plaintif telah menetap dan bercucuk tanam di Sg Adong, dikatakan sejak 1947 dan bahawa keterangan yang dikemukakan dalam perbicaraan menunjukkan bahawa mereka tidak memperolehi NCR ke atas tanah tersebut menurut undang-undang Sarawak. Oleh itu, rayuan ini. Isu-isu yang berbangkit adalah (i) sama ada plaintif membuktikan dengan tepat lokasi tepat dalam

soal sempadan ke atas tanah yang mereka dakwa mewarisi NCR berkaitan dan; (ii) sama ada atas keterangan plaintif-plaintif membuktikan hak NCR yang dituntut telah diwujudkan oleh nenek moyang mereka di kawasan yang dipersoalkan itu sebelum 1 Januari 1958.

Diputuskan (menolak rayuan)
Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Plaintif-plaintif mengakui bahawa 'Peta/Pelan X' tidak secara rasmi diterima masuk sebagai keterangan semasa perbicaraan atau pembuatnya dipanggil untuk mengesahkan sumber-sumber yang dirujuk ataupun mengesahkan ketepatannya. Dari perspektif keterangan kes ini, kewajipan ambang asas yang dikenakan atas plaintif untuk mengenal pasti lokasi subjek tuntutan NCR oleh sekurang-kurangnya jalan sempadan kasarnya, tidak dipatuhi oleh plaintif-plaintif semasa perbicaraan.

(2) Plaintif-plaintif dilihat bergantung pada material yang diperkenalkan oleh defendan-defendan untuk mengenal pasti had-had tanah NCR yang dituntut. Pendekatan 'fall back' ini yang diambil oleh plaintif-plaintif untuk mengenal pasti kawasan tepat yang dikatakan dicerobohi tidak harus diterima oleh mahkamah, walaupun satu pendekatan fleksibel digalakkan secara kehakiman semasa pengendalian tuntutan NCR. Dalam kes ini, tiada keterangan yang dikemukakan oleh plaintif-plaintif di mahkamah sebagai keterangan teratur berkenaan lokasi kawasan yang dituntut NCR untuk mahkamah menghakimi dan oleh itu, tiada penyelidikan selanjutnya diperlukan.

(3) Hakim bicara tidak tersalah arah dalam membuat kesimpulan daripada surat bertarikh 26 Ogos 1992 bahawa plaintif-plaintif atau nenek moyang mereka hanya mendatangi tanah tersebut pada tahun 1970an untuk bercucuk tanam. Tiada keterangan di mahkamah bahawa moyang plaintif-plaintif telah mengendalikan aktiviti-aktiviti fizikal ke atas kawasan yang dituntut sebelum 1 Januari 1958 untuk menukar kesimpulan yang dibuat, atau bahawa NCR ke atas tanah tersebut diwujudkan sebelum tarikh tersebut oleh plaintif-plaintif atau moyang mereka. Oleh itu, tiada kekhilafan oleh hakim bicara dalam kesimpulannya, sama ada dari segi undang-undang atau fakta.

Case(s) referred to:

Agi Bungkong & Ors v. Ladang Sawit Bintulu Sdn Bhd & Ors [2010] 1 LNS 114 HC ***(refd)***

Conlay Construction Sdn Bhd v. Perembun (M) Sdn Bhd [2013] 9 CLJ 828 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Hamit Matusin & Ors v. Superintendent of Lands & Surveys & Anor [1991] 2 CLJ 1524; [1991] 2 CLJ (Rep) 677 HC ***(refd)***

Jimi Mantali & Ors v. Superintendent of Lands & Surveys Samarahan Division & Anor [2011] 1 CLJ 1000 HC ***(refd)***

Superintendent Of Lands And Surveys Department Sibu Division & Anor And Another Appeal v. Usang Labit & Ors [2014] 9 CLJ 370 CA ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Legislation referred to:
Land Settlement Ordinance (Sarawak) (Cap 28), s. 66(b)
Land Code (Sarawak) (Cap 81), ss. 2, 13(1), 15(1)

For the appellants - Harrison Ngau; M/s HNL & Co
For the 1st respondent - Shankar RP Asnani (Daniel Ling with him); M/s Thomas, Shankar Ram & Co
For the 2nd & 3rd respondents - Mcwillyn Jiok; SFC

[Editor's note: For the High Court judgment, please see Bohari Jaya & Ors v. Naim Land Sdn Bhd & Ors [2014] 1 LNS 452 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Varghese George JCA:

[1] This appeal before us was against a decision of the Miri High Court where, after a full trial, the learned trial judge had dismissed a native customary rights (NCR) claim over land, brought by a group of 12 plaintiffs. They had cited the current owner of the claimed area and the state authorities as defendants.

In this judgment the parties will be referred to as they were at the High Court.

[2] As gleaned from the pleadings, the judgment of the learned trial judge and also the submissions before us of the respective counsel for the parties, the following formed salient aspects of the background to this case. Save for the matters in paras. (c) and (d) below which were contested by the plaintiffs, the rest was common ground between the parties.

(a) The plaintiffs were of Jati Meirek descent (considered as Malays) and therefore natives of Sarawak;

(b) The plaintiffs' NCR claim (as originally advanced) in their statement of claim was in respect of an area of 161.32 acres (85.9 ha) of land situated at Sg Adong, Miri;

(c) By a *Gazette* Notification No. 1806 published in the Sarawak Government *Gazette* dated 8 October 1965, an area of 105,500 acres had been declared as 'Lower Baram Forest Reserve (Third Extension)' including Sg Adong and Sg Adong Kechil with a specific reservation stated therein, namely, that '... the following people may farm in the existing temuda situated in Sungai Adong Besar and Sungai Adong Kechil ...', and included in the list of such persons was one 'Surin b Jamban of Pujut' to farm at Sungai Adong Besar;

(d) The area asserted by the plaintiffs to be under NCR land, also fell within a timber extraction area covered by Timber License No: T/0003 issued to one Chip Foh Sawmill Co Ltd on 1 January 1966 and there had been logging activities in that concession of the said company since 1966;

(e) The claimed NCR area was now within the boundaries of:

(i) Lot 819 Block 13 (alienated on 20 July 1995);

(ii) Lot 3247 Block 11 (alienated on 20 July 1995); and

(iii) Lot 6434 Block 10 (alienated on 21 August 1997)

all in Kuala Baram District, in respect of which the first defendant had been issued with provisional leases by the State; and

(f) By a *Gazette* Notification No: 115 published in Sarawak State Government *Gazette* dated 27 December 2001, the claimed NCR area fell within the boundaries of land earmarked and approved for development as the 'Tudan Special Development Area'.

[3] The plaintiffs only filed this suit on 16 April 2012. Essentially their plaint asserted that the plaintiffs' grandparents had lawfully acquired and created NCR over the area now claimed during the Japanese occupation, their parents and the plaintiffs themselves had continuously cultivated and occupied the claimed area and according to their adat and custom the plaintiffs had the right to inherit the NCR attached to the area in question as the NCR thereon had never been extinguished.

[4] The above assertions obviously were to ground legitimacy for the plaintiffs' claim within the provisions of s. 66(b) of the Land Settlement Ordinance (Cap 28) and ss. 2 and 13(1) of the Sarawak Land Code (Cap 81). Basically, the plaintiffs' claim was that the NCR over the area in dispute was acquired by their forefathers before 1 January 1958.

The Trial

[5] After having heard 11 witnesses for the plaintiffs and five witnesses for the defendants, the learned trial judge summarised his findings in the following terms:

> [26] In this case, on a balance of probabilities, the Plaintiffs have not established that they have acquired and or inherited NCR over their claimed land. Based on the evidence adduced during the trial, Sapiee bin Gani and the 1st Plaintiff had only farmed at the land claimed by them at Sg. Adong about 10 to 15 years ago. There was no documentary proof or otherwise that their great grandparents had settled or cultivated the land at Sg. Adong claimed by them since 1947 or before 1.1.1958. The evidence adduced at the trial showed that they have not acquired NCR over the land in accordance with the laws in Sarawak,

[6] In coming to the above conclusion, the learned trial judge in His Lordship's judgment highlighted the following: A

(a) The plaintiffs themselves did not have any personal knowledge on the acquisition of NCR by their great or grandparents except that they had been told by their parents so. The plaintiffs had not either produced any documentary evidence to support their assertion that their grandparents had acquired NCR rights over the area claimed prior to 1 January 1958; B

(b) The identity card of the first plaintiff (who had passed away subsequent to the filing of this writ) was never produced to verify the claim that he was born in Sg Adong, the NCR land in question, in 1924. None of the birth certificates of the plaintiffs showed that they were born at the claimed NCR land. The birth certificate of the tenth plaintiff (PW2) showed he was born at Kampung Pujut Miri which contradicted his testimony itself that he was born at the alleged NCR land; C

(c) The so called 'family tree' produced by the 11th defendant (PW10) was from their grandmother's (Hilipah binti Jamban) side and not from their grandfather's side showing the grandfather's siblings. In any event the 'family tree' had not been certified by any Ketua Kampung or District Office as to its correctness; D

(d) The plaintiffs' claimed NCR land was shown in a map marked 'X' (attached with the writ-discussed further in this judgment). There were 19 plots of land within the claimed NCR land but the witnesses for the plaintiffs were unable to identify the individual plots which were claimed or belonged to them. The first plaintiff's statutory declaration had adverted to Suriati binti Asit, Sapiee bin Gani and Aris bin Gani as those cultivating on land adjacent to the claimed NCR land but none of the witnesses could identify these pieces of land either. The plaintiffs had not been able to identify their respective claimed land and this raised doubts as to the credibility of their claims; and E F

(e) If the plaintiffs had a genuine or credible NCR claim, they should have taken action to protect their interest in the land at the earliest indication of encroachment. Despite the land being included in the Lower Baram Forest Reserve and also being given to a company for logging, the plaintiffs merely sat on their rights for nearly 47 years. Such inaction raised serious doubts as to the genuiness of their NCR claim now being pursued. G H

[7] Perhaps the crucial piece of evidence that appears to have weighed upon the learned trial judge's mind when the court dismissed the plaintiffs claim was the existence of a letter dated 26 August 1992 discussed in paras. 23 to 25 of the judgment. These paragraphs are reproduced in full below: I

A [23] The evidence showed that by a letter dated 26.8.1992 (pages 30-35 of BOD3), 118 persons had applied to the District Office, Miri for land at Sg. Adong to be given to them for farming. The application letter stated that many of these persons had been farming the land at Sg. Adong for many years; for example Sapiee bin Gani and Alek bin Tahar had been farming at the land for about 15 years whereas Hj. Hussien, Juli Suhaili
B and Mat Sudin Ibrahim had been farming at the land for about 10 years. The 1st Plaintiff, the 6th Plaintiff, the 9th Plaintiff, the 10th Plaintiff and the 12th Plaintiff were included in this list as applicants for the land at Sg. Adong. Based on this letter, if they had farmed at the land at Sg. Adong they would have done so for about 10 to 15 years only, not prior to 1.1.1958. The Plaintiffs did not call Nasiah bte Dahlan, the writer
C of the letter, to disprove the contents of this letter.

[24] Since the 1st Plaintiff had affirmed that Sapiee bin Gani was farming the land adjacent to his farms at Sg. Adong, and based on the letter dated 26.8.1992, Sapiee bin Gani had only been farming at Sg. Adong for about 15 years and not prior to 1.1.1958. This letter, on behalf of some of the
D Plaintiffs and Sapiee bin Gani, had contradicted their claims that they have acquired and or have inherited their claimed NCR land at Sg. Adong prior to 1.1.1958.

[25] The evidence showed that Sapiee bin Gani and others had sued the 1st, 2nd and 3rd Defendants in Suit No. 21-01.2009 (MR)/ 1 *inter alia* for
E a declaration that they had acquired NCR over an area of land at Pujut Sungai Adong, Miri. This suit was consolidated for trial with Suit No. 21-02.2009. After the full trial, the presiding High Court Judge ruled that the plaintiffs in those suits had failed to establish that they had acquired NCR over their claimed land at Sg. Adong and the suits were dismissed with costs. This again supported the contentions of the Defendants that
F the Plaintiffs and Sapiee bin Gani have not acquired and have not inherited NCR over their claimed land at Sg. Adong.

The Appeal

[8] At the outset of the appeal before us, learned counsel for the plaintiffs
G (the appellants) prefaced his submissions by what he termed as 'Concessions by the appellant'. They were two. The first was that should the plaintiffs succeed in this appeal, they would be limiting the remedy being sought to only damages to be assessed/ awarded for the loss of the claimed NCR area, and not for restoration of the lands (physically, that is) to them.

H The second was that premised on the aerial photographs taken over that area in 1947 and tendered by the defendants in evidence, the plaintiffs would be confining their NCR claim now to an area of 58.9ha only (as also reflected in the map/plan Appendix A produced and introduced by the second and third defendants at the trial) and thereby would no longer be pursuing their
I claim for NCR over 85.9ha (161.32acres) as set out in their statement of claim.

[9] The main plank of the submissions in appeal was that the learned trial judge had failed to give sufficient consideration to or otherwise there had occurred a lack of judicial appreciation of both the documentary and oral evidence led before the court. In this respect counsel argued that the approach to be taken by a court when dealing with proof of NCR claims should be somewhat flexible, in that, in interpreting the evidence that exists, the court should do so with a consciousness of the unique and special nature of aboriginal claims and the inherent difficulties in proving such rights which naturally go back in time, as was noted by David Wong J (now JCA) in *Agi Bungkong & Ors v. Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 1 LNS 114.

[10] Counsel for the plaintiffs elaborated and highlighted before us the following:

(a) DW4, a witness for the defendants (a cartographer attached to the Land and Survey Department HQ at Kuching) had testified that upon examination and comparison made of aerial photographs taken over the same area in 1947 and then in 1961 there was evident an "Area of Shifting Cultivation" of 58.9ha in 1947 and of about 62.0ha in 1961. And this was borne out also in the 'Bakong-T735 Series Map published by the Director of National Mapping Malaysia in 1974;

(b) There were neutral witnesses, namely, PW11 (Juli bin Aris), PW4 (Manai bin Junit) and PW5 (Ho Thian Ui) and their testimony that they had been to the claimed area and had seen the first plaintiff or members of his family cultivating or occupying the land in question, was not considered at all by the learned trial judge;

(c) There was no evidence adduced to justify the learned trial judge's conclusion that the claimed NCR land fell within the boundaries of the gazetted Lower Baram Forest Reserve (third extension) and there was no pleading to this effect as well;

(d) Although it was not disputed that there was a forest license issued to Chip Foh Sawmill Sdn Bhd, the claim that actual logging had indeed taken place on the land was suspect, as firstly, DW4 had told the court that there was no logging but only shifting cultivation that had occurred at that area, and secondly, DW3 (Romy Pudong) from the Forest Department did not produce in court any relevant 'Permit To Enter Coupe', a necessary prerequisite before any logging activity was allowed to commence in a licensed area to prove such a claim;

(e) The learned trial judge had erred in holding that that the plaintiffs did not have personal knowledge of their forefathers acquiring NCR over the claimed area as PW10 (11th plaintiff-Hamenah bt Ot) had given direct evidence to that effect;

A (f) The failure to produce the birth certificates of the first, eighth and 11th plaintiffs or the fact that the other plaintiffs were born elsewhere did not disprove the plaintiffs' NCR rights to the land in question;

(g) Nasiah bt Dahlan who principally signed the letter of 28 August 1992 to the Pegawai Daerah Miri, ought to have been called by the defendants B since this letter was introduced by the defendants and the learned trial judge was in error therefore in applying adverse inference against the plaintiffs for the non-calling of this person;

(h) The provisional leases issued to the first defendant was in contravention of ss. 2, 13(1) and 15(1) of Sarawak Land Code (Cap 81) as the C 'alienation' extended to cover land where NCR existed before 1 January 1958 and such right had not been extinguished or persons entitled to those NCR duly compensated for;

(i) The provisional leases were still subject to survey and were therefore D 'temporary' or 'conditional' with no final or absolute right accrued thereon in favour of the first defendant for any limitation period to commence against the plaintiffs; and

(j) In any event, the injury or damage to the plaintiffs (by reason of the encroachment onto the NCR land) were still continuing and ongoing to E the present and no statutory time-bar could in those circumstances be raised against the plaintiffs' action.

[11] The State Legal Officer for the second and third defendants submitted that the burden was always on the plaintiffs to prove their NCR over the claimed area as pleaded. To this end it was therefore incumbent upon the F plaintiffs to firstly adduce cogent and credible evidence to identify the exact location of the claimed NCR area and its boundary in precise terms. This, it was argued, the plaintiffs had failed to do. A map 'X' was attached to their statement of claim but this was never included in the bundles of documents (agreed as to authenticity) and more significantly it was not tendered in G evidence through its maker to constitute it as an admitted document at the trial. PW9 did make a reference to it in her evidence but this did not mean that the document could be accepted as a proved document.

[12] It was also contended for the second and third defendants that there was absolutely no evidence that the plaintiffs or their forefathers had been H the ones who had cleared, cultivated or occupied the claimed NCR area before 1 January 1958. The plaintiffs' claim was an opportunistic one and lacked credibility. This had even been admitted by PW4 and PW2 in their own testimony in court. Alternatively, it was submitted that the plaintiffs' action was statutorily time-barred when it was instituted.

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[13] In his submissions counsel for the first respondent stated that the decision of the learned trial judge in this case turned essentially on questions of facts and the court was not in error in holding that the plaintiffs had failed on the evidence adduced in court to prove their alleged NCR claim over the land in question. Our attention was drawn to the contradictory statements, and even concessions of some of the plaintiffs who were also witnesses at the trial, which went to demolish the very foundations of the plaintiffs' case itself. Most significantly, these witnesses could not positively identify the plots of land that they personally cultivated or occupied in the alleged area and was inconsistent as between themselves as to the number of houses or buildings erected and whether such were on land or in the river.

[14] It was emphasised to us that the evidence of DW1, (Penghulu Ahmad bin Rahman, also a relative of the plaintiffs), that plaintiffs' NCR claim was not genuine, remained unchallenged. It was counsel's further submission that the persons who had supported the letter of the 26 August 1992 (seeking allotment of land for farming) and who had put their respective signature as against the listed names attached to that letter included the first, sixth, ninth, tenth and 12th plaintiffs. Their testimony generally, and most specifically of PW2 (tenth plaintiff) and PW10 (12th plaintiff), under cross-examination amounted to an outright admission that, in any event they had only come onto the claimed area at the earliest in the 1970s, to cultivate in the area and not earlier than that.

[15] Even the testimony of the so called neutral witnesses were not of assistance to the plaintiffs. PW4 was not certain that the first plaintiff had a valid NCR claim over the land in question and stated that the first plaintiff only moved into the Sg Adong area sometime around 1975. PW5 was only the Agricultural Officer in mid-70's in that area and had categorically stated under cross-examination that he did not know if any of the plaintiffs had established NCR rights of the land before 1958. As for PW11, he was, although not one of the plaintiffs in this case, also a signatory to the letter of 26 August 1992 and also his answers were evasive if analysed further.

Our Discussion And Decision

[16] There was no issue in this case as to what had to be proven by the plaintiffs to succeed on their NCR over the claimed land. A helpful summary of the law on NCR in Sarawak was captured by Haidar Mohd Nor J (as he then was) in *Hamit Matusin & Ors v. Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ 1524; [1991] 2 CLJ (Rep) 677 in the following extract:

> Section 66 of the Land Settlement Ordinance (Cap. 28) [1933] provides for the recognition of native customary rights, *inter alia*, in respect of "land that has been in continuous occupation or has been cultivated or built on within 3 years". Even the present Land Code (Cap. 81) which came into force on 1 January 1958 gives explicit recognition of native customary rights by s. 5 thereof. In s. 2 of the Land Code "native customary land"

means, *inter alia*, "land on which native customary rights, whether communal or otherwise, have lawfully been created prior to 1 January 1958 and still subsist as such." *Section 5 would appear to draw a distinction between customary rights created before 1 January 1958 and thereafter. It imposes restrictions on the creation and recognition to such rights after 1 January 1958 while leaving undisturbed the position of native customary rights created prior to the said date*. We are here concerned with the situation prior to 1 January 1958. (emphasis added)

[17] The learned trial judge was therefore correct in focussing His Lordship's enquiry as to whether the plaintiffs had on evidence at the trial succeeded to establish that NCR rights as claimed, had been created prior to 1 January 1958 and was still subsisting as such. The burden was always on the plaintiffs to do so.

[18] This court had in the case of *Superintendent Of Lands And Surveys Department Sibu Division & Anor And Another Appeal v. Usang Labit & Ors* [2014] 9 CLJ 370; [2014] 3 MLJ 519, observed the best approach to be taken in dealing with NCR claims in the following terms:

[10] It is best, therefore, in NCR cases to approach such a claim broadly in the following steps:

(a) the **identification of the area** of alleged encroachment into the land over which NCR over land ('NCR land') is claimed;

(b) the ***bona fides* of the claim** to the NCR right;

(c) whether the particular NCR right relied upon is a right to the land over which the right is exercised; and,

(d) where relevant, what was the NCR right to land that can be acquired.

[11] The reasons are:

(a) If the area of alleged encroachment is not or cannot be identified, there is nothing to be considered as possible encroachment.

(b) If the claim made is not *bona fide*, for example it is false or purely opportunistic, or that he does not belong to a race that is native to Sarawak, there can be no basis for any claim of any NCR right over land.

(c) Given that native customary rights could range between communal, familial and individual on the one hand, and on the other, to the right to pass and repass through land, right of access to land for various purposes and rights to land cleared and cultivated. If the right is one that can be separated from the land over which it is exercised, it cannot be a right to the land.

(d) The NCR right over land that can be acquired under the Laws of Sarawak was varied over time as the law was changed. (emphasis added)

[19] More pointedly of relevance to the issue at hand in this case was the comments of the court in the case of *Jimi Mantali & Ors v. Superintendent of Lands & Surveys Samarahan Division & Anor* [2011] 1 CLJ 1000 reproduced here:

> The important point to note, however is this. *When did the land clearance and/or cultivation start, for the physical act and the time of commission of the act is what determines whether the plaintiffs have native customary rights over the said land; not just the acts themselves*. In saying this, I also fully appreciate the position of the defendants in cases of this nature for claims of native customary rights is relatively easy to make and open to abuse. It is, I am sure, difficult to separate the genuine claimants from those who were out to exploit the situation, who knew that the current evidential requirement on proof in native customary rights cases allows reception of evidence based on hearsay since most of the original settlers/occupants of the native customary land who foraged, cleared and/or cultivated the land way before 1958 would be long gone when the case goes to court. (emphasis added)

[20] The appeal before us was obviously against the finding of facts made by the learned trial judge. It was for the plaintiffs to convince us that the learned trial judge had misdirected himself on the evidence and the court's conclusions were against the weight of evidence. In other words it was for the plaintiffs to demonstrate that the dismissal of the plaintiffs' claim was plainly wrong and warranted appellate intervention.

[21] In our considered assessment, the outcome of this appeal turned on two key questions, namely, the following:

(a) Whether the plaintiffs had with some exactitude established on evidence before the court the precise 'location' in terms of boundaries of the land over which they assert that they have inherited NCR; and

(b) Whether on evidence the plaintiffs had also established such claimed NCR rights were created by their forefather over that area in question before 1 January 1958.

[22] The submissions surrounding the plaintiffs' 'Map/Plan X' attached to their statement of claim would principally feature in a consideration of the first question. The letter of the 26 August 1992 and the evidence and contentions surrounding the said letter would predominate in a determination of the second issue identified above.

[23] It was conceded before us by counsel for the plaintiffs that 'Map/Plan X' had not been formally admitted as evidence during the trial or it's maker called to verify the sources relied upon or otherwise to confirm its accuracy. From the evidential perspective of this case, this fundamental threshold obligation on the plaintiffs to identify the location of the subject NCR claim by way of its approximate boundaries at least, had therefore not been met at trial by the plaintiffs. (see the case of *Usang Labit & Another Appeal supra*.)

[24] What the plaintiffs appear to be now relying upon to identify the claimed NCR land limits, was merely the material that had been introduced instead by the defendants in their evidence. This was obvious as before us counsel for the plaintiffs was restricting the appeal to the claimed land area to 58.9 ha (not 85.9 ha as pleaded) coinciding with the 'area of shifting cultivation' that had been identified from the available aerial photographs of that region taken in 1947 and subsequently in 1962.

[25] In our considered view this 'fall-back' approach that has been taken by the plaintiffs to identify the exact alleged encroached area ought not to be condoned by the courts, that is, notwithstanding the application of a flexible approach as judicially encouraged with respect to dealing with NCR claims. If such a latitude was allowed wherein the plaintiffs' required proof of the location was based solely on the defendants' evidence, this would, in our assessment, amount to the courts approving a shifting of the burden of such proof (which was always upon the plaintiffs), to the State and other affected parties, rather to disprove such NCR rights. There was therefore merits in the submissions of the State Legal Officer for the second and third defendants, that in this case there was no evidence from the plaintiffs duly admitted by the court as proper evidence as regards the location of the claimed NCR area for the court to adjudicate upon and accordingly, no further enquiry was necessary.

[26] In any event, even if the plaintiffs were allowed to rely on the material that had been put in evidence for the defendants, it was obvious that the 1947-aerial photographs was indicative only of an 'area of shifting cultivation' of about 58.9 ha in that locality. It still begged the question who had cleared the same, and more pertinently if it was indeed the plaintiffs' ancestors who had cleared and used that area. It should be pointed out here that having examined the notes of the trial, the learned trial judge was in our assessment correct to conclude that such of the plaintiffs who testified in court were not able to personally identify the plots of land over which they or their forefathers had allegedly NCR claims, that is even with reference to 'Map/Plan X'.

[27] Even if the above hurdle is held to have been crossed by the plaintiffs, the consequential question was whether the plaintiffs had on evidence shown on a balance of probabilities that such claimed NCR rights were created by their own forefathers over that land (now reduced area) before 1 January 1958. We were of the view that the learned trial judge did not misdirect himself in the conclusion drawn from the letter of the 26 August 1992 seeking an allotment of land for farming that the plaintiffs or their immediate ancestors, if at all, had only come onto the land in the 1970's or thereabouts to cultivate the same. There was no shred of evidence before the court that any of the plaintiffs' forefathers had carried out some physical activity on the claimed area prior to 1 January 1958 to displace that conclusion.

[28] The first, sixth, ninth, tenth and 12th plaintiffs were signatories in the list attached to that letter of 26 August 1992 and it was never adverted to in that letter that the subject land had been cleared, cultivated, used or even settled prior to 1 January 1958 by any of their ancestors. What more there was outright admissions by PW2 (tenth plaintiff) and PW10 (12th plaintiff) that the plaintiffs had not come to the land prior to the 1970s. Relevant extracts from the testimony of PW2 and PW10 were as follows:

PW2

Q: Put that in 1995 there were no houses on the land area in Sungei Adong following this drawing at page 466 BOD 5.

A: No houses but only 'pondok rehat'

...

...

Q: You began to cultivate the land in 1970s?

A: Yes

PW10

Q: Put that Bohari bin Jaya and all the claimants in this case actually moved into the disputed area in about 1970s.

A: I agree.

[29] It is pertinent to note here that PW10 was the senior most in age among the plaintiffs (the first plaintiff had died prior to the commencement of the trial). We did not find any reason therefore to fault the learned trial judge in the inference the court drew from the contents of the said letter and the testimonies of witness that no case had been made out to the effect that the plaintiffs or their ancestors had been on any part of the claimed land prior to 1 January 1958.

[30] We did not agree with counsel for the plaintiffs that the learned trial judge had ignored the testimony of PW4, PW5 and PW12, allegedly uninterested witnesses, called by the plaintiffs. We have gone through their evidence. PW4 had stated categorically that the first plaintiff moved to Sungai Adong only around 1975 and the first plaintiff was from Pujut Miri. Similarly PW5 (the agricultural officer in that area in mid-1970s)) agreed that he would not personally know if any of the plaintiffs had established NCR over the subject land prior to 1 January 1958.

[31] We must also make particular note of the evidence of DW1, the Penghulu of the area, who was firm in his testimony that none of the plaintiffs had any NCR claims over the subject land. This evidence of a local chieftain remained materially unchallenged.

A

Conclusion

[32] This was a case that involved findings of facts and the learned trial judge was best placed to consider all issues with the audio-visual advantage of observing the demeanour of witnesses for the respective parties. As highlighted above, we were not persuaded that that there was any insufficient
B judicial appreciation of evidence or that the learned trial judge was plainly wrong such as to warrant appellate intervention. (*Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; *Conlay Construction Sdn Bhd v. Perembun (M) Sdn Bhd* [2013] 9 CLJ 828). Upon our review of the material
C before the trial court, we found that the plaintiffs had on their evidence clearly failed to identify with some degree of certitude the location of their claimed NCR land and, even if the court was to be generous or flexible on this issue of threshold evidentiary requirement, it was clear to us that there was no evidence that such NCR over the land was in fact created prior to
D 1 January 1958 by the plaintiffs or their forefathers. There was no error on the part of the learned trial judge in his conclusions either in law or on the facts.

[33] We were constrained therefore to dismiss this appeal. In the light of this concurrent findings that the primary evidentiary hurdles had not been
E satisfied by the plaintiffs, there was no necessity for us to consider the other submissions of parties, in particular, whether the plaintiffs' action were statutorily time-barred or not, and as to the legal effect of the 'provisional leases' issued to the first defendant.

[34] In the particular circumstances surrounding the background of this
F collective claim, we were also of the view that no order for costs ought to be made against the plaintiffs (the appellants) and accordingly each party is to bear their own costs. The deposit is also ordered to be refunded to the plaintiffs.

G

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