

TRANSFER OF A PART ONLY OF LAND

PETER LAI KHEE – CHIN & ANOR.

v.

COLLECTOR OF STAMP DUTIES¹

The National Land Code, 1965, provides in Section 214(1)(a) that "the whole, but not a part only, of any alienated land" shall be capable of being transferred under the Act. After the 1st day of January, 1966, the date of coming into force of the Act, the proprietor of any alienated land, attempting to transfer an undivided share only in the land comprised in his document of title, had the discomfiture of having his transfer rejected by the Registrar on the ground that such a transfer contravened the provisions of Section 214(1)(a) as being an attempt to transfer not the whole, but a part only, of the land.

For many years, this decision of the Registrar was tacitly accepted by practitioners and no attempt was made to have it tested in Court. Proprietors, however, could not long be restrained from transferring an undivided share only in their land as this method of dealing with land had for more than twenty years been the accepted practice under the repealed F.M.S. Land Code, 1926, and the various Land Enactments of the Malay States. Recourse was accordingly had by practitioners to an indirect method of circumventing the restrictive effect of the Registrar's decision. The device employed was disarming in its simplicity. Instead of transferring out from his land merely an undivided share therein to a transferee, the proprietor executed a transfer of his land to the transferee and himself as co-proprietors in undivided shares, thus ostensibly transferring the whole of his land. This method of by-passing the prohibition was apparently received by the Registrar without objection for it soon became the accepted practice. The transfer was stamped with a stamp duty only in respect of the value of the undivided share actually passing to the other transferee and not on the value of the whole of the land and this was also apparently accepted by the Collector of Stamp Duties without disapproval.

It was some eight years after the coming into force of the Act before both the validity of such a transfer and the liability for stamp duty thereon first came up for consideration by the Court. In the case of *Peter Lai Khee-Chin & Anor. v. Collector of Stamp Duties*.¹ A, desiring to

¹[1973] 2 M.L.J. 33.

make a gift *inter vivos* of an undivided half interest in his land to his wife, executed a transfer of the whole of his land to himself and his wife as co-proprietors in equal undivided shares. The instrument of transfer was submitted to the Collector of Stamp Duties for adjudication of stamp duty. The Collector assessed the duty payable on the value of the whole of the land and on A's objection, the matter came up before the Court on a case stated by the Collector. Gill, F.J. (as he then was) applied Section 16(4) of the Stamp Ordinance, 1949, and held that as no beneficial interest passed in the undivided share transferred by A to himself, stamp duty was not payable thereon and that the only stamp duty payable on the transfer was on the value of the undivided share transferred by A to his wife.

Although the specific issue before the Court in this case was the incidence of stamp duty, a point was raised on behalf of the Collector that such a transfer was invalid as it contravened the provisions of Section 214(1)(a) of the Act. While the learned Judge brushed aside this contention as being a matter for the proper registering authority to decide when the transfer was presented to him for registration and not the concern of the Collector of Stamp Duties, His Lordship did express the view that the transfer in question, being a transfer of the whole of the land, did not contravene the provisions of that section. Though *obiter*, this view impliedly assumed that the transfer of an undivided share only in the land amounted to a transfer of a part only of the land and was accordingly caught by the prohibition in that section. But was the prohibition intended to apply to a transfer of an undivided share only by the proprietor of the entirety of the land or was it intended to prohibit and strike at a different type of transaction altogether?

The Act empowers the proprietor of any alienated land to transfer his land by an instrument of transfer "to two or more persons or bodies as co-proprietors", (S. 208(1)(c)) and " 'co-proprietorship' means the holding of alienated land by two or more persons or bodies in undivided shares" (S. 342(1)). A proprietor could thus effectively transfer his land by an instrument of transfer to two, or even to a dozen or more co-proprietors in undivided shares. There does not seem, therefore, to be any logical justification why a proprietor, desiring to retain an undivided share in his land, should be prohibited from transferring the remaining undivided share to another, thereby constituting the transferee and himself as co-proprietors of the land in undivided shares, when it is legally permissible for a proprietor to transfer his land by an instrument of transfer to two or more persons or bodies in undivided shares. The end result is the same in either case; that is, the land is vested in co-proprietors in undivided shares except that in the former, the original proprietor himself becomes a co-proprietor, whereas in the latter, the original proprietor drops out and other transferees become co-proprietors of the land. Moreover, no difficulty in effecting the

registration of the transfer could arise in the one case that could not possibly arise in the other, which would warrant a valid distinction being made between these two transactions by prohibiting one and sanctioning the other.

The repealed F.M.S. Land Code, 1926, which was used as the basis for the present Act, contained a restrictive provision, the effect of which was also to restrict the transfer of a part only of any alienated land. Section 48 of the repealed Code, provided:

"An undivided share in land may be transferred, transmitted, devised or charged, *but no area not being the whole area of the land comprised in any document of title shall be transferred or charged until the land shall have been divided by survey and fresh documents of title registered*" (emphasis added).

This provision however, clearly differentiates 'an undivided share in land' from 'an undivided part or portion of land', and it was the transfer of the latter which was restricted. It is easy to understand the reason for this restriction. In a system designed to establish the indefeasibility of the registered title, the conclusiveness of boundaries must be an essential requirement. To permit the proprietor to create at random a new boundary in his land, by the transfer of an undivided part or portion thereof without a prior approved subdivision with properly surveyed boundaries, would be to add unnecessarily to the exceptions to indefeasibility. No such adverse effect could possibly arise in the case of a transfer of an undivided share only in the land, for no new boundary would be created until such time as the co-proprietors decide, if at all, to apply for a proper partition or subdivision of the land.

Unlike the repealed Code, the Act does not expressly make it compulsory for the land to be subdivided by survey before the transfer of an undivided part thereof can be effected, but the same result is achieved by imposing an absolute prohibition against transferring a part only of the land. The proprietor is indirectly compelled under the Act to apply for a proper subdivision and the issue of fresh titles for each of the subdivided parts before such a transfer can be carried out. As submitted earlier, the necessity for a prior subdivision does not arise in the case of a transfer of an undivided share only in the land and there is no valid reason for depriving the proprietor of his right to deal with his land in this manner. That the prohibition against transferring a part only of the land in Section 214(1)(a) was not intended to apply to a transfer of an undivided share only in the land is further reinforced by the provisions relating to leases in the Act. Section 221 confers on the proprietor of any alienated land the power to "grant leases of the whole or any part thereof". The section further provides that "in any case where the lease relates to a *part only of any alienated land*, there shall be attached to the instrument a plan and

description sufficient to enable the part to be accurately identified." (emphasis added). It is clear that the expression, "a part only of any alienated land", can apply only to a lease of an undivided part or portion of the land and not to an undivided share therein. Where the meaning of an expression used in one part of a statute is unambiguous, the presumption that the legislature intended an identical expression in another part of the same statute to bear the same meaning is difficult to displace, especially where both those sections relate, as they do here, to the same subject-matter of dealings with land. Neither the context in which the expression is used in Section 214(1)(a), nor the true reason for the prohibition, as demonstrated, afford any valid justification for construing the expression any differently from the clear and unambiguous meaning given to it by Section 221. It is, accordingly, unnecessary for practitioners to resort to the present inelegant device of doubtful validity for the purpose of circumventing an assumed prohibition, which was not in fact intended to strike at the particular transaction which the device was designed to facilitate.

S.T. Chung

REGISTRAR'S CAVEAT
TEMENGGONG SECURITIES LTD. & ANOR
v.
REGISTRAR OF TITLES, JOHORE & ORS¹

The registrar's *caveat* is an innovation introduced by the National Land Code Act, 1965. This *caveat* was not recognised under the previous land law. Sections 166–178 of the F.M.S. Land Code Cap 138 (now repealed by the National Land Code Act) merely dealt with private *caveats*. The F.M.S. Land Code made no mention of a *caveat* for any of the purposes similar to those mentioned in section 320 of the present National Land Code. The effectiveness of this *caveat* was tested before the Federal Court in *Temenggong Securities Limited & Anor. v. Registrar of Titles, Johore & Ors*. The facts of the case are as follows. On 30th August, 1972, the 1st Appellant entered into an agreement with a company incorporated in Singapore, Li-Ta Company Private Limited, for the purchase of lands for a consideration of \$6 million; the transaction to be completed on or about the following 30th September. On 22nd September, 1972, both the

¹ [1974] 2 M.L.J. 45.