Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 01(F)-11-05 OF 2012(Q)
ARIFIN ZAKARIA CHIEF JUSTICE, RICHARD MALANJUM CJ (SABAH AND SARAWAK), ABDULL HAMID EMBONG, SURIYADI AND HASAN LAH FCJJ
11 JULY 2013

Native Law and Custom — Land dispute — Customary rights over land — Whether lands were native customary land — Whether customary law allowed for sale or transfer of lands held under native customary rights to someone from outside their community or district — Whether sales and purchase transactions entered into by appellant were rendered void and ineffective

The appellant, an Iban by race and a native of Sarawak, claimed native customary rights ('NCR') over three parcels of land ('the land'), namely eight lots that he had bought under eight different sale and purchase agreements from different NCR beneficial owners ('the first parcel of land'), Lot 34 that had been cultivated by the appellant since 1986 ('the second parcel of land'), and three other lots of land that he was permitted to extract timber from ('the third parcel of land'). When the first and second respondents had issued two documents of title over the land in favour of the fourth respondent, the appellant had filed an action against the respondents claiming, inter alia, a declaration that he had acquired NCR over the land, a declaration that the respondents had impaired his rights and compensation from the third respondent for the damage to his land. The appellant contended that by his continuous occupation and cultivation of the first and second parcels of land and rights given to extract timber from the third parcel of land, he had acquired NCR over the land. The appellant also pleaded that he was given the understanding by the first respondent that if ever titles were issued for the land he would be the recipient of the issued titles. Thus, the appellant argued that the issuance of the documents of title in respect of the first parcel of land to the fourth respondent was null and void in law because it had impaired his NCR. The appellant also claimed that the third respondent had trespassed onto his lands and caused extensive damage to his property. The first and second respondents denied that the appellant had acquired any NCR over the lands through the sale and purchase transactions and denied the existence of any understanding that the appellant would be issued with titles over the three parcels of land in the event titles were issued. Additionally the fourth respondent fielded the defence that by the issuance of the documents of title it had acquired an indefeasible title over the first parcel of land. The trial judge

opined that NCR could not be transferred to another person by ordinary sales and purchase transactions and that the appellant had not adduced any evidence of any customary practice that enabled a native holding land under NCR to transfer his land or rights thereunder to a third party. Hence the High Court dismissed the appellant's claim with no order as to costs. The appellant appealed against that judgment but the Court of Appeal dismissed the appellant's appeal with costs. The appellant obtained leave to proceed with the present appeal based on two questions of law. It was the appellant's contention that the dealings with the eight lots that formed the first parcel of land were not prohibited by or contrary to any *adat* or custom. The appellant argued that the adat or custom that was in existence prior to the Fruit Trees Order 1889 ('the Order') became statute law when it was incorporated in the Order. However, subsequently when the Land Regulations 1920 repealed the Order, the custom was also extinguished and could not be revived as a custom. While the appellant submitted that there was never any adat or custom prohibiting sale of NCL and even if there was, it had been extinguished, the first and second respondents submitted that there was never an adat or custom especially amongst Ibans that allowed the sale of NCL. As such the question of extinguishment of an adat or custom did not arise upon the repeal of the Order.

Held, dismissing the appeal with costs:

(1) (per **Richard Malanjum CJ (Sabah and Sarawak)**) The creation and existence of NCL was orientated for the benefit and welfare of the inhabitants of the area where it was created. If the 'holders' of NCL were allowed to dispose them off by way of sale then the very purpose in the creation and existence of NCL would be defeated. The native *adat* and custom of 'tunggus asi' would be greatly undermined. Hence, if, to begin with, there was no *adat* and custom on transfer of NCL by way of sale, the question of extinguishment did not arise. Further the Order did not encapsulate any prior existing prohibitory *adat* or custom on sale of NCL. Instead, the Order is a clear indication on the absence of a permissive adat and custom on sale of NCL. As such, the issue on the applicability of the 'Tusun Tunggu' in the Kuching Division was not relevant (see paras 30–32).

(2) (per **Richard Malanjum CJ (Sabah and Sarawak)**) When the courts below referred to the decision of the Native Court of Appeal, it was not a case of the civil court taking that decision as a precedent. It was merely an adoption and application of the native *adat* and customs as applied by the Native Court of Appeal (see para 36).

(3) From the totality of evidence and authorities referred to, it was clear that the creation of NCR acquired by a native of Sarawak was conditional upon adherence to the custom or common practice of his community. According to custom, an Iban could acquire NCR by two modes, namely

by felling a virgin jungle and planting crops on it, or by gift or inheritance. In the present appeal, the appellant, though an Iban, could not inherit the land as he was neither an heir to the vendors nor a native of that community (see para 76).

(4) The novel argument that the sale and purchase transactions would fall under the phrase 'any other lawful method' would equally fail by virtue of the first parcel of land being native customary land created prior to 1 January 1958. There was no provision in the Sarawak Land Code that legitimises any transfer of NCR acquired prior to 1 January 1958 through the mode of sales and purchase transactions. Thus, the answer to the first question posed by the appellant would be in the negative (see paras 78–79).

(5) The appellant had pleaded that the first parcel of land was located in the Native Area Land. As such, it would be unnecessary to answer his second question, which pertained to Native Communal Reserve and had no bearing over the disputed lands (see para 80).

(6) The appellant's case had rested on conditional sale and purchase agreements as a basis for his alleged acquisition of NCR over the land, with the condition precedent being that the Sarawak Government would first alienate the lands to the vendors. However, this express condition was never fulfilled. As such, there was merit in the respondents' alternative argument that the sales and purchase agreements were rendered void and ineffective (see para 81).

[Bahasa Malaysia summary

Perayu, berbangsa Iban dan anak watan Sarawak, telah menuntut hak adat anak watan ('HAAW') ke atas tiga bidang tanah ('tanah tersebut'), iaitu lapan lot yang telah dibelinya di bawah lapan perjanjian jual beli berbeza daripada pemilik-pemilik benefisiari HAAW yang berbeza ('bidang tanah pertama'), Lot 34 yang telah diusahakan oleh perayu sejak 1986 ('bidang tanah kedua'), dan tiga lot tanah lain yang mana dia telah dibenarkan untuk mengekstrak kayu balak daripadanya ('bidang tanah ketiga'). Apabila responden-responden pertama dan kedua telah mengeluarkan dua surat ikatan hak milik ke atas tanah tersebut bagi pihak responden keempat, perayu telah memfailkan tindakan terhadap responden-responden dengan menuntut, antara lain, deklarasi bahawa dia telah memperoleh HAAW ke atas tanah tersebut, deklarasi bahawa responden-responden telah menjejaskan haknya dan pampasan daripada responden ketiga untuk ganti rugi terhadap tanahnya. Perayu berhujah bahawa dengan pendudukan dan penanaman berterusannya ke atas bidang tanah pertama dan kedua dan hak-hak yang diberikan untuk mengekstrak kayu balak daripada bidang tanah ketiga tanah, dia telah memperoleh HAAW ke atas tanah tersebut. Perayu juga merayu bahawa dia telah diberikan persefahaman oleh respondan pertama bahawa jika hak-hak

milik dikeluarkan untuk tanah tersebut dia akan menjadi penerima keluaran hak-hak milik tersebut. Oleh itu, perayu berhujah bahawa keluaran surat ikatan hak milik berkaitan bidang tanah pertama hingga keempat responden adalah terbatal dan tidak sah dari segi undang-undang kerana ia telah menjejaskan HAAWnya. Perayu juga mendakwa bahawa responden ketiga telah menceroboh ke atas tanah-tanahnya dan menyebabkan kerosakan teruk ke atas hartanahnya. Responden-responden pertama dan kedua menafikan bahawa perayu telah memperoleh apa-apa HAAW ke atas tanah tersebut melalui transaksi-transksi jual beli dan menafikan kewujudan apa-apa persefahaman bahawa perayu akan diberikan hak-hak milik ke atas tiga bidang tanah sekiranya hak-hak milik dikeluarkan. Tambahan pula responden keempat telah membuat pembelaan bahawa dengan pengeluaran surat ikatan hak milik ia telah memperoleh hak milik yang tidak boleh disangkal ke atas bidang tanah pertama. Hakim perbicaraan berpendapat bahawa HAAW tidak boleh dipindah milik kepada orang lain melalui transaksi-transaksi jual beli biasa dan bahawa perayu tidak mengemukakan apa-apa keterangan tentang apa-apa amalan adat yang membolehkan anak watan yan memegang tanah di bawah HAAW memindah milik tanah atau haknya kepada pihak ketiga. Justeru Mahkamah Tinggi menolak tuntutan perayu tanpa perintah untuk kos. Perayu merayu terhadap penghakiman itu tetapi Mahkamah Rayuan telah menolak rayuan perayu dengan kos. Perayu memperoleh kebenaran untuk meneruskan rayuan ini berdasarkan dua persoalan undang-undang. Adalah hujah perayu bahawa urusan lapan lot tanah yang membentuk bidang tanah pertama tidak dilarang oleh atau bertentangan dengan mana-mana adat. Perayu berhujah bahawa adat yang wujud sebelum Perintah Buah-Buahan dan Pokok 1899 ('Perintah') menjadi undang-undang berkanun semasa ia digubal dalam Perintah itu. Walau bagaimanapun, berikutan itu apabila Peraturan Tanah 1920 memansuhkan Perintah itu, adat tersebut juga dilupuskan dan tidak boleh dihidupkan semula sebagai suatu adat. Walaupun perayu berhujah bahawa tidak pernah ada adat yang menghalang jualan tanah adat dan anak watan ('TAAW') dan jikapun ada, ia telah dilupuskan, responden-responden pertama dan kedua berhujah bahawa tidak pernah ada adat terutamanya di kalangan kaum Iban yang membenarkan jualan TAAW. Oleh itu persoalan pelupusan adat tidak timbul selepas Perintah itu dimansuhkan.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Richard Malanjum HB (Sabah dan Sarawak)**) Pembentukan dan kewujudan TAAW adalah berorientasikan untuk faedah dan kebajikan penduduk kawasan itu apabila ia diwujudkan. Jika 'pemegang' TAAW dibenarkan untuk menjual tanah melalui jualan maka tujuan sebenar pembentukan dan kewujudan TAAW telah gagal. Adat anak watan dan adat 'tunggus asi' akan terjejas. Justeru, jika, pada awalnya, tiada adat tentang pindah milik TAAW melalui jualan, persoalan pelupusan itu tidak timbul. Bahkan Perintah itu tidak merangkumi apa-apa adat

larangan yang wujud terdahulu berhubung jualan TAAW. Sebaliknya, perintah itu adalah petanda yang jelas berhubung ketiadaan adat yang membolehkan jualan TAAW. Oleh itu, isu pemakaian 'Tusun tunggu' di daerah Kuching tidak relevan (lihat perenggan 30–32).

(2) (oleh **Richard Malanjum HB (Sabah dan Sarawak)**) Apabila mahkamah bawahan merujuk kepada keputusan Mahkamah Rayuan Anak Watan, ia bukan suatu kes untuk mahkamah sivil menganggap keputusan itu sebagai duluan. Ia hanya suatu penerimaan dan pemakaian adat anak watan sebagaimana digunapakai oleh Mahkamah Rayuan Anak Watan (lihat perenggan 36).

(3) Berdasarkan keseluruhan keterangan dan autoriti yang dirujuk, adalah jelas bahawa pembentukan HAAW yang diperoleh oleh anak watan Sarawak adalah bersyarat setelah mematuhi adat atau amalan biasa komunitinya. Menurut adat, seorang Iban boleh memperoleh HAAW melalui dua cara, iaitu dengan menerang kawasan hutan dara dan bercucuk tanam di atasnya, atau melalui hadiah atau harta pusaka warisan. Dalam rayuan ini, perayu meskipun seorang Iban tidak boleh mewarisi tanah tersebut kerana dia bukan waris kepada penjual mahupun anak watan komuniti tersebut (lihat perenggan 76).

(4) Hujah baru bahawa transaksi-transaksi jual beli terangkum di bawah frasa 'any other lawful method' akan sama sekali gagal oleh kerana bidang tanah pertama yang merupakan tanah adat anak watan terbentuk sebelum 1 Januari 1958. Tiada peruntukan dalam Kanun Tanah Sarawak yang mengesahkan apa-apa pindah milik HAAW yang diperoleh sebelum 1 Januari 1958 melalui transaksi-transaksi jual beli. Oleh itu, jawapan kepada persoalan pertama yang dikemukakan oleh perayu adalah negatif (lihat perenggan 78–79).

(5) Perayu telah merayu bahawa bidang tanah pertama terletak di Kawasan Tanah Anak Watan. Oleh itu, ia tidak perlu menjawab persoalan keduanya, yang berkaitan Rizab Perkauman Anak Watan dan tiada kaitan ke atas tanah-tanah yang dipertikaikan (lihat perenggan 80).

(6) Kes perayu adalah berdasarkan perjanjian-perjanjian bersyarat jual beli sebagai asas untuk dakwaan pemerolehannya ke atas HAAW tanah tersebut, dengan prasyarat bahawa Kerajaan Srawak akan terlebih dahulu memperoleh tanah-tanah kepada penjual-penjual. Walau bagaimanapun, syarat yang nyata ini tidak pernah dipenuhi. Oleh itu, terdapat merit dalam hujah alternatif responden-responden bahawa perjanjian-perjanjian jual beli tersebut dianggap tidak sah dan tidak mempunyai kesan (lihat perenggan 81).]

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 682–711.

Cases referred to

Abang v Saripah [1970] 1 MLJ 164 (refd)

Agi Ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors [2010] 4 MLJ 204, HC (refd)

Haji Khalid bin Abdullah v Khalid b Abg Haji Mazuki & Anor (Kuching OM KG 3/1983-Land Cases (1969–1987) (unreported) (refd)

Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors [1990] 3 MLJ 427, HC (refd)

Madeli bin Salleh (suing as administrator of the estate of Salleh bin Kilong, deceased) v Superintendant of Lands & Surveys, Miri Division & Anor [2005] 5 MLJ 305; [2005] 3 CLJ 697, CA (refd)

Masa Anak Nangkai & Ors v Lembaga Pembangunan Dan Lindungan & Ors [2011] MLJU 197; [2011] 1 LNS 145, HC (refd)

Nor anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors [2001] 6 MLJ 241, HC (refd)

Sapiah Mahmud v Superintendant of Lands and Surveys Samarahan Division & Ors [2009] MLJU 410; [2009] 9 CLJ 567, HC (refd)

Sat ak Akum & Anor v Randong ak Charareng [1958] SCR 104 (refd)

Sumbang Ak Sekam v Engkarang Ak Ajah [1958] SCR 95 (refd)

Superintendant of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (refd)

Superintendant of Land & Surveys, Bintulu v Nor anak Nyawai & Ors and another appeal [2006] 1 MLJ 256, CA (refd)

Legislation referred to

Federal Constitution art 161A(7)
Fruit Trees Order 1889 s 2
Land Regulations 1920
Sarawak Interpretation Ordinance 2005 Schedule
Sarawak Land Code (Cap 81) ss 2, 4(1), (4), 5(1), (2)(f), (2)(ii), (3), 6, 10(4)

Appeal from: Civil Appeal No Q-61–100 of 2008 (Court of Appeal, Putrajaya)

Mekanda Singh Sandhu (Kalveet Singh Sandhu with him) (Sandhu & Co) for the appellant.

JC Fong (Saferi Ali and Mohd Adzrul Adzlan with him) (State Attorney General's Chambers) for the first and second respondents.

Abang Halit bin Abang Malik (Loke, King, Goh & Partners) for the third respondent.

Bexter Michael (Ee & Lim Advocates) for the fourth respondent.

Richard Malanjum CJ (Sabah and Sarawak) (delivering supporting judgment of the court):

[1] I have read in draft the judgment of my learned brother Suriyadi Halim FCJ. I agree with his conclusion.

[2] But due to the important legal implications involved in this appeal I should give my views on the issues raised. It is also interesting to note that the courts below made reference to a decision of the Native Court of Appeal despite coming from two different judicial systems.

[3] Further, the answer to the questions posed, whether in the affirmative or negative has a far-reaching impact on the commercial value of native customary land ('NCL') in Sarawak. In other words, is NCL standing on the same footing as any titled land in Sarawak? Do 'holders' of NCL own them in the same way as titled lands in Sarawak?

[4] To begin with it may be useful to understand the various terminologies under NCL, namely:

> 'pemakai menoa' is a term given to an area of land selected by pioneers of a longhouse community who are usually related to each other for the construction of 'a longhouse with sufficient rooms arranged in a row, all joined together to accommodate the families' And the longhouse will just expand to with new families'. And it is within the 'pemakai menoa' that the longhouse community will establish 'temuda' which is an area of land accessible for farming and 'pulau' or 'pulau galau' which is the forest area where there may be rivers for fishing and the jungles for gathering of forest produce. The other Iban terms are 'tembawai' for old longhouse site; 'tanah umai' for cultivated land within 'pemakai menoa' and 'pendam' is cemetery. However, 'pemakai menoa' has its boundary usually based on streams, watersheds, ridges and permanent landmarks, separating it from another longhouse community (see *Superintendent Of Lands & Surveys, Bintulu v Nor Anak Nvawai & Ors And another appeal* [2006] 1 MLJ 256 [COA]).

[5] Now, the questions posed for consideration read:

(i) Whether, the alleged adat or custom that 'individual customary rights are not transferable by sale or otherwise for value' referred to and applied in *Sumbang Ak Sekam v Engkarang Ak Ajah* [1958] SCR 95 ceased to exist and enforceable as such:

(a) upon enactment of the same as law under Section 2 of the Fruits and Trees Order 1899, of the Rajah; and/or

(b) upon the subsequent repeal of the said Rajah's Order?

(ii) If the answers to question (1) above are in the negative, whether, by virtue

of section 6 of the Land Code, the alleged adat or custom applies only to land gazetted as native communal reserve? A

[6] The above questions relate to several pieces of land ('the subject lands') that are now included in the block of land under documents of title issued in favour of the fourth defendant. And it is the contention of the appellant that the inclusion of the subject lands was unlawful since he owned them. He had purchased them from the original owners ('the vendors') who the appellant claimed to have acquired native customary rights ('NCR') over them. Yet there was no extinguishment of the NCR over the subject lands before alienating them to the fourth defendant. The preceding sentence may have some force if the vendors of the eight lots are involved in this case as they should be entitled to claim compensations for the loss of their NCL (see *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509 (FC)). B C D

[7] During the hearing of the leave application and at the outset of hearing of this appeal the parties made several concessions. As such the followings are no longer in dispute: E

(a) that from the subject lands the appellant is only pursuing for the eight lots comprising the 37.24 acres ('the eight lots') which he acquired by way of 5 Sale and Purchase Agreements from 5 vendors. As such the giving of 'tungkus asi' between the vendors of the eight lots and the appellant did not arise; F

(b) that these eight lots satisfied the requirements for NCL. As such it is not necessary in this judgment for a legal discourse in the acquisition or creation of NCL in Sarawak. The guiding legal principles pertaining to them have already been well enunciated in several decisions of this court and the Court of Appeal (see *Superintendent Of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong); Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal*); G H

(c) that since the eight lots are NCL they are subject to the relevant adat and native customary laws such as:

(i) that the rights under NCL are, inter alia: I

(A) 'heritable, passing ideally from generation to generation of households members'; or

(B) transferable to the community or a member of the community of the longhouse of the original holder on

A payment of 'tungkus asi' to the original holder but revert to the original owner if he returns or to his heirs if they return to the community; and

(C) 'the rights taken over by the person paying the tungkus asi are inheritable by the heirs of the person'.

B

[8] The appellant is not disputing the *adat* and native customary laws as summarised above. And he is not claiming that he acquired NCR over the eight lots in accordance with the established procedure and requirements. His C argument is that he took over the NCR of the eight lots by virtue of five sale and purchase agreements with the vendors. And his learned counsel in respect of the question (a) submitted that the dealings with the eight lots 'were not prohibited by or contrary to' any adat or native custom. He argued that the *adat* or native custom as applied in *Sumbang Ak Sekam v Engkarang Ak Ajah* [1958] D SCR 95 is no longer in existence.

[9] Learned counsel premised his argument on the basis that *adat* or custom being in existence prior to the Fruits and Trees Order 1899 ('the said Order') 'became statute law when it was incorporated in Section 2 of the said Order'.

E

[10] Subsequently the Land Regulations 1920 repealed the said Order. With the repeal, learned counsel argued, such *adat* and custom that became part of a statutory law were thus extinguished and obliterated 'altogether and, consequently, it could no longer be revived as a custom'.

F

[11] In other words, it is his contention that 'once a custom is extinguished by its enactment as law and the law in which it merged is itself repealed, the custom cannot be revived as such'.

G

[12] As regards the incorporation of such adat and custom in the Tusun Tunggu learned counsel contended that it is only applicable to the Ibans and Iban communities residing in the third, fourth and fifth Divisions of Sarawak. The eight lots are in the first or Kuching Division and were not subject to the H Tusun Tunggu.

[13] In short, learned counsel for the appellant took the position that a 'holder' of NCL is entitled to sell it together with the NCR arising therefrom to another native buyer regardless of where that native buyer comes from.

I

[14] While learned counsel for the appellant submitted that there was *never* any *adat* or custom *prohibiting sale* of NCL and even if there was, it had been extinguished, learned counsel for the first and second respondents adopted a diametrically opposite approach. He submitted that there was *never* an adat or

custom especially amongst Ibans that *allows the sale* of NCL. As such the question of extinguishment of an *adat* or custom did not arise upon the repeal of the said Order. (Emphasis added.)

[15] Learned counsel for the first and second respondents went on to rely on the testimony of the *adat* expert (PW3 — Nicholas Bawin ak Anggat) called by the appellant who testified that there is no *adat* that permits the sale of customary land for value to any other person. If a person 'pindah' from his longhouse his rights to his NCL 'will either go to the community or he can transfer such rights to a cousin or relative who will in turn provide him with 'tungkus asi".

[16] It was also highlighted that the vendors were neither parties to the action by the appellant nor made parties in this appeal. This point has significance in relation to the concession made that the eight lots were NCL. If at all there is any claim for the loss of the NCR over the eight lots it should have been made by the vendors.

[17] Now, in order to appreciate the stances taken by the opposing sides, it is important to understand the actual position of NCL, including its historical background and purpose.

[18] Briefly, NCL existed even before the Rajahs came to Sarawak.

> At the time of James Brooke's arrival in Sarawak there had been for centuries been in existence in Borneo and throughout the eastern archipelago a system of land tenure originating in and supported by customary law. This body of custom is known by the generic term 'Indonesian adat'. Within Sarawak the term 'adat', without qualification, is used to describe this body of customary rules or laws; the English equivalent is usually 'native customary law' or 'native customary rights'. (See AF Porter: 'The Development of Land Administration in Sarawak from the Rule of Rajah Brooke to the Present Time (1841–1965)' at p 18. (See *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 (HC)).

[19] And when the First Rajah ruled Sarawak the position taken was 'a consistent respect for native customary rights over land (see Anthony Porter — *The Development of Land Administration in Sarawak from the Rule of Rajah James Brooke to the Present Time (1841–1965)*). In fact, James Brooke had referred to native customary rights as 'the indefeasible rights of the aborigines' (see John Tempter — *The Private Letters of Sir James Brooke, KCB, Rajah of Sarawak*). James Brooke was 'acutely aware of the prior presence of native communities, whose own laws in relation to ownership and development of land have been consistently honoured' (see Anthony Porter, p 16)'. (See *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* (HC)).

A **[20]** Thus, the recognition of NCL should no longer be an issue. In any event in this case it is not in dispute that the eight lots were NCL before they were alienated to the fourth respondent.

B **[21]** In respect of the intended purpose, NCL were created and existed by and for the natives in Sarawak. NCL are basically meant:

(a) for farming ('temuda/tanah umai') on the land within 'pemakai menoa' that is 'an area of land held by a distinct longhouse or village community, and includes farms, gardens, fruit groves, cemetery, water and forest C within a defined boundary (garis menoa)';

(b) for fishing in the rivers therein; and

(c) for the gathering of forest produce such as bamboo, 'damar' (resin) and timber for building boats and houses from the jungles ('pulau' or 'pulau D galau').

[22] In short, NCL was and is intended for the upkeep and survival of the inhabitants of each longhouse community. There is no element of commercial E enterprise involved. As Dimbab Ngidang puts it in his article *Transformation of the Iban land use system in post independence Sarawak*:

> A close relationship between land, farming practices, and resource use among the Iban reveal important features of the community's agrarian roots. The traditional Iban farming system comprised a rich mixture of religious rites and cultural F practices (Sather 1980, 1990 and Freeman 1955), and formed the basis upon which the pioneering ancestors of the present-day Iban first created customary rights to land in Sarawak.

G **[23]** And NCL do not stand on the same footing as titled land alienated under the Sarawak Land Code ('SLC'). Recognition of NCL and the rights and interests arising therefrom are premised on common law principle (see *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong)*. It is for that H reason that I have put within inverted commas the word 'holder' in relation to NCL.

[24] As such *adat* and customs of the natives and that includes the Ibans in this case were very relevant in the creation and existence of NCL.

I

[25] At the same time it should also be appreciated that 'although the natives may not hold any title to the land and may be termed licencees, such licence 'cannot be terminable at will. Theirs are native customary rights which can only be extinguished in accordance with the laws and this is after payment of

compensation'. (See *Superintendent of Lands & Surveys Bintulu v Nor Anak Nyawai & Ors And Another Appeal* (COA)). A

[26] Thus being licensee, an occupier of NCL is expected to use the NCL within the terms of his 'licence'. And one may say that the adat and customs of the Iban community are part and parcel of the licence. Moreover as a mere licensee he has no title to sell. B

[27] Another interesting approach is by looking at the Ibans (natives) as part of the land. Being part of the land a native is not in a position to sell any interest in the land for he is but a mere trustee of the land for his next generation. In *Agi Ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 4 MLJ 204 at p 217 David Wong J (as he then was) said this poignantly: C

> Let me also add that natives are the original inhabitants of the country and to treat claims for NCR by looking at it only from the point of ownership of the lands by the natives is not entirely correct. These claims should be looked at with the concept that the natives are part of the land as are the trees, mountains, hills, animals, fishes and rivers. My basis for saying this is simple. Prior to the arrival of white settlement there was no system of land ownership as we have now. There was no food processing factory then and they survived by foraging the land. The fruits on the wild trees, the fishes in the river, the wild boars and other animals on the land are their food for survival. It is not insignificant in this country that they are known as 'bumiputras'. It is my view that this concept must be kept at the forefront of our minds when dealing with native claims to lands. D E

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[28] Having therefore noted the purposes in the creation and existence of NCL since the early days it now behooves upon me to consider the respective stances of the parties in this appeal.

[29] Since the Ibans' *adat* and customs are closely connected to the creation and existence of NCL it is only logical to consider whether there was or is any particular Ibans' *adat* and customs that deal with the sale of NCL. G

[30] As discussed above the creation and existence of NCL is orientated for the benefit and welfare of the inhabitants of the area where it is created. This fact therefore give much credence to the opinion of the expert (PW3 — Nicholas Bawin ak Anggat) called by the appellant in that there has never been in existence any adat or custom that allows a 'holder' of NCL to part with it by way of sale. H

I

[31] In fact the very existence of the clear *adat* and custom on the transmission of NCL from one generation to another in the same longhouse and the giving of 'tunggus asi' to the 'holder' in the event of 'pindah' happening further supports such contention.

A [32] If 'holders' of NCL were or are allowed to dispose them off by way of sale then the very purpose in the creation and existence of NCL as discussed above would be defeated. The native *adat* and custom of 'tunggus asi' would be greatly undermined.

B [33] Worse still in this case where the appellant is an Iban who came from a community in Julau, Central Sarawak and had no initial connection with the Iban community where the eight lots are situated. And there is no issue of 'pindah' in this case since it is the case of the appellant that he bought the eight C lots by way of sale and purchase agreements from the vendors.

[34] Hence, if, to begin with, there was no *adat* and custom on transfer of NCL by way of sale, the question of extinguishment does not arise. As admitted by learned counsel for the appellant the promulgation of the said Order by the D Rajah did not encapsulate any prior existing prohibitory adat or custom on sale of NCL. Rather, the said Order is a clear indication on the absence of a permissive *adat* and custom on sale of NCL. As such the issue on the applicability of the 'Tusun Tunggu' in the Kuching Division is not relevant.

E [35] Incidentally, the absence of an *adat* and custom to allow the disposal of NCL by way of sale may have a bearing on the program called the 'New Concept of Development on Native Customary Rights (NCR) Land' initiated by the Sarawak State Government. The program involves the participation by 'holders' of NCL with third parties by way of joint venture agreements (see F *Masa Anak Nangkai & Ors v Lembaga Pembangunan Dan Lindungan & Ors* [2011] MLJU 197; [2011] 1 LNS 145). Fortunately that is not an issue in this case.

G [36] As to the reference by the courts below the decision of the Native Court of Appeal it is not a case of the civil court taking that decision as a precedent. It is merely an adoption and application of the native *adat* and customs as applied by the Native Court of Appeal.

H [37] Accordingly in view of the reasons above there is no necessity to answer question (i) but even if it is necessary the answer is in the negative. And for the same reasons given above question (ii) is also answered in the negative.

[38] This appeal is therefore dismissed with costs.

I

Suriyadi FCJ (delivering judgment of the court):

[39] On 9 April 2012 the Federal Court granted the plaintiff, hereinafter

referred to as the appellant, leave to appeal on three questions. On the day of the appeal the appellant invited us to determine only two questions, and they are:

(i) Whether, the alleged adat or custom that 'individual customary rights are not transferable by sale or otherwise for value' referred to and applied in *Sumbang Ak Sekam v Engkarang Ak Ajah* [1958] SCR 95 ceased to exist and enforceable as such:

(a) upon enactment of the same as law under Section 2 of the Fruit Trees Order 1889, of the Rajah; and/or

(b) upon the subsequent repeal of the said Rajah's Order?

(ii) If the answers to question (1) above are in the negative, whether, by virtue of section 6 of the Land Code, the alleged adat or custom applies only to land gazetted as native communal reserve?

THE ANTECEDENT AND FACTS OF APPEAL

[40] The appellant being an Iban and/or sea Dayak by race, thus a native of Sarawak, filed a writ of summons at the High Court of Sabah and Sarawak seeking declarations against the four respondents (the defendants) involving three parcels of land. He pleaded that he had acquired native customary rights (NCR) over the said three parcels of land through eight sale and purchase agreements (SPAs) and through a mixture of customary and other legal means. The following are the details of the transactions regarding these parcels of land and court action.

[41] The first parcel of land comprise eight lots bought under eight different S&Ps from five different NCR beneficial owners who had acquired the NCR by means of Iban's customary land law prior to 1 January 1958. Five lots (Lots 7, 9, 35, 36 and 43) were bought on 8 December 1984, two lots (lots 3 and 29) were bought on 29 October 1990 and one lot (lot 2) was bought on 10 July 1991. The appellant pleaded that he had continuously occupied and cultivated those eight lots of land. As per the pleadings the appellant stated that the eight lots had been *gazetted* as Native Area Land.

[42] The second parcel is lot 34 measuring 2.94 acres and likewise had been cultivated by him as early as 1986. He said he was the first person to cultivate this lot in 1986 under the Cocoa Scheme and later under the SEDC Adoption Scheme for cattle farming in 1991.

[43] The third parcel measuring 34 acres comprised three lots (Lots 1, 2 and 3) of land. This parcel was given to him through his wholly owned company by the Forest Department of Sarawak on 7 September 1993 vide a Letter of Authority No 6/93. He was permitted to extract logs or timber from this parcel.

A [44] The appellant also pleaded that he was given the understanding and or guarantee by the first respondent that if ever titles were issued for all the three parcels he would be the recipient of the issued titles. He also pleaded that by his continuous occupation and cultivation of the two parcels, together with the rights given to extract timber from the third parcel, he had acquired NCR over them.

B

THE PRAYERS IN THE STATEMENT OF CLAIM

C [45] We now touch on the prayers pleaded in the statement of claim. His first prayer was for a declaration that he acquired NCR over the said three parcels of land either collectively or separately.

D [46] Collectively all the 12 lots would fall under this first prayer. The second declaration prayed for was that with the acquisition of the NCR all the respondents were precluded from impairing his rights over the three parcels of land. The third declaration was for an alleged infringement of his rights over all the three parcels of land. He pleaded that on or about April 1993 two issue documents of title were issued for two areas known as Lots 85 and 86 in favour of the fourth respondent by the first and second respondents. The areas of Lots E 85 and 86 covered or included portions of all three parcels claimed by the appellant inclusive of the eight lots obtained vide the eight SPAs. He claimed that his NCR over the lands had been impaired and their inclusion in the two issue documents was null and void, irregular and unlawful as no prior extinguishment of his NCR had ever taken place. As against the third F respondent the appellant claimed that the Chief Scout Commissioner of Sarawak trespassed over those plots of land causing damage and hence entitled to damages. The rest of the prayers were consequential prayers.

G THE DEFENCE OF THE RESPONDENTS

[47] The respondents in their respective defences took the collective stance that the appellant had not acquired NCR over the first parcel of land through the SPAs. With no NCR created or acquired prior to 1 January 1958 over the H impugned lands no NCR could have been transferred to the appellant.

[48] As regards the second parcel the respondents replied that any activity carried out over that land was done without any lawful authority. Pertaining to the third parcel, the respondents agreed that a Letter of Authority (6/93) was I indeed issued on 7 September 1993 permitting the appellant to extract forest produce on that parcel of land but by 6 February 1994 the document had expired, causing further extraction of forest produce illegal.

[49] Further the respondents denied the existence of any understanding that

the appellant would be issued with titles over the three parcels of land in the event titles were issued. Additionally, the fourth respondent fielded the defence that by the issuance of the documents of title it had acquired an indefeasible title over Lots 85 and 86, which included the eight lots located in the first parcel.

[50] Alternatively learned state legal counsel for the first and second respondents also submitted that the appellant's case rested on conditional sale and purchase agreements (see para 8 statement of claim) as a basis for his alleged acquisition of NCR over the parcels of land; the condition precedent being that the Sarawak Government would first alienate the lands to the vendors. And since this express condition was never fulfilled the SPAs were thus rendered void and ineffective.

THE HIGH COURT'S DECISION

[51] On 30 April 2008, the High Court dismissed the appellant's prayers for the declaratory and consequential orders. Dr Hamid Sultan JC found that the appellant was not alleging that the acquisition of the NCR, whether by himself or his father was by the clearance, cultivation, occupation of the land or inheritance undertaken by them, but pursuant to ordinary sale and purchase transactions.

[52] The learned JC opined that NCR could not be transferred to another person by such means. In the course of dismissing the action the learned JC said:

> A native customary right can only be transferred in a limited sense like by gift or inheritance, within the community members of the native. That means, a native at south Sarawak cannot purchase the native customary rights from a native at north Sarawak. The nexus must be within the community and not within the race. For courts to recognise any such transfer it must be legislated.
>
> (i) The appellant did not also acquire native customary rights under the Sarawak Land Code.

THE COURT OF APPEAL'S DECISION

[53] Being dissatisfied the applicant appealed to the Court of Appeal. This court affirmed the Iban's customary concept of *Tusun Tunggu*, that an NCR could only be acquired by two modes namely by felling a virgin jungle and planting crops to create *temuda*, and secondly by gift or inheritance. The Court of Appeal further held the view that it was legally bound to take judicial notice of the customary law established by the Native Court of Appeal in Sarawak particularly the NCR principle having been created or acquired by natives

through the practice of their customs, with such rights not transferable for value to someone else outside the community or district. On 10 December 2010, the Court of Appeal unanimously dismissed the appeal.

[54] The appellant then successfully obtained leave to appeal to the Federal Court hence the matter before us.

CONCESSIONS MADE BY THE PARTIES

[55] In the course of the proceedings before us the appellant and the respondents made a few concessions. The appellant conceded that he was restricting his appeal to the eight lots comprising the 37.24 acres bought through the SPAs, as reflected in para 1.3 of the appellant's written submission and confirmed later in open court. By this concession the appellant had abandoned his claim to the other four lots, respectively lot 34 in the second parcel and Lots 1, 2, and 3 in the third parcel allegedly covered by the letter of authority. His appeal thus was limited to the alleged NCR obtained through the eight SPAs.

[56] Learned counsel for the respondents in the course of his submission conceded that the eight lots transacted in the eight SPAs were indeed native customary land at the time of their execution. By such concession the eight lots will be subject to native customary law, and the need to discuss lengthily whether they are located in a Native Area Land as pleaded, or the creation of the NCR was properly undertaken, become unnecessary. With the lots having been acquired by the vendors prior to 1 January 1958, as pleaded in the statement of claim, the rights acquired will be subject to customary law in force prior to that date. Lee Hun Hoe J in *Rampai ak Chunggat v Langau ak Chandai & Superintendant of Lands and Surveys, Third Division, Sibu (in Cases on Native Customary Law in Sarawak p 144)* had distinctly said:

> But rights acquired prior to 1958 will be decided according to law in force prior to 1958 ...

[57] Notwithstanding the concession, the respondents stood their ground that as the transactions had not adhered to native customary law, and with indefeasible title having been acquired by the fourth respondent, the appellant's position had become untenable.

OUR ANALYSIS

[58] Despite the contentious facts having been drastically reduced and the

issues simplified, contributed in no small way by the concessions, the need to discuss the current position as regards customary land and the acquired NCR in Sarawak must still be undertaken.

[59] We will begin with the unchallenged evidence adduced by the appellant through a witness in court. At pp 186–187 RR part B Vol 1, Nicholas Bawin ak Anggat, an Iban and the former Deputy President of the Majlis Adat Istiadat Sarawak, amongst others said:

> As a general rule, the household within the community that first felled the forest secured rights over specific pieces of land. These rights are heritable, passing ideally from generation to generation of households members ...
>
> Rights to a piece of land is lost if it is transferred to another person, for example a sibling, a cousin or a relative. It can also be lost if the person moves to another villages through marriages or migration (*pindah*).
>
> The adat on pindah is quite clear on depriving one's rights to customary land. For instance, section 73 of the Adat Iban 1993 stipulates that whoever moves from one longhouse to another shall be deprived of all rights to untitled land or any customary land that has not been planted with crops and all such lands shall be owned in common by the people of the longhouse.
>
> There is no adat on sale of customary land. If a person pindah from the longhouse, rights to customary land will either go to the community or he can transfer such rights to a cousin or relative who will in turn provide him with *tungkus asi*.
>
> *Tungkus asi* refers to the token provided by the recipient to the person who on account of his moving from the longhouse to another transfers rights of his customary land to the recipient.

[60] There is marked similarity in the above explanation regarding customary land law as discussed in case laws with the law in force prior to 1 January 1958. To illustrate, in *Abang v Saripah* [1970] 1 MLJ 164 the Native Court of Appeal of Sarawak when considering the factual question in issue of whether the appellant or the respondent was entitled to a piece of *temuda* land, at the same time had discussed Sarawak's native customary law in some detail. Briefly and simply put, *temuda* land is untitled virgin land cleared by a native whereupon he acquires some restricted right of proprietorship over that cleared land to be used by him. Once it is cleared it becomes *temuda*. In this case of *Abang v Saripah* the land was originally cleared by the respondent but subsequently abandoned for more than 20 years. The appellant wanting to claim the contested land alleged that he bought that *temuda* land from the respondent's brother in law. BTH Lee J who sat with two other assessors in the Native Court of Appeal agreed with the decision of the Resident's Native Court and dismissed the appeal. This Native Court of Appeal held that not only did the respondent lose her rights to the land when moving away (*pindah*) to another district (let alone without any right or power to alienate it), but the

A appellant likewise on the facts of the case could not claim NCR over it. In the course of it, the learned judge at p 165 stated the following:

> I do not find it necessary to discuss the point at great length. The law is to be found in the following passage from Native Customary Laws Ordinance (Cap 51) Vol VII
B Sarawak Law Appendix A' para 7 at p 636.
>
> Theoretically all untitled land whether jungle or cleared for *padi* farming (*temuda*) is the property of the Crown. The fact that Dayaks do clear a portion of virgin land for the site of their padi farm confers on them a restricted right of proprietorship over the land thus cleared. Once the jungle has been cleared it
C becomes 'temuda'. It is a recognized custom that 'temuda' is for the use of the original worker, his heirs and descendants. This is the only way Dayaks can acquire land other than by gift or inheritance ... No Dayak is allowed to sell, purchase or lease (by way of demanding rent either in kind or in cash) untitled land. It would be an infringement of the right of the Crown if they did so, and
D they may be prosecuted in view of the fact that selling of untitled land is prevalent in this division, and Dayaks seem to forget this custom.
>
> There are no other ways in which Dayaks can part with possession of untitled land other than by gift or on death. When a Dayak abandons his land 'temuda' and moves to another district he loses all his rights to it. The land that has been
E farmed by him reverts to the Crown (as legally it is Crown land) and it is usually set aside for the benefit of the general community or to help those who are otherwise lacking in land. In such a case the original owner has no right to prevent others from making use of the land and the user acquires the rights.
>
> This was made clear by the Rajah's order dated 10th August 1899 Land Tenure
F Act ...

[61] Another succinct elucidation was given by the Native Court of Appeal, the highest court in the Native Court System in Sarawak, in *Sat ak Akum & Anor v Randong ak Charareng* [1958] SCR 104 when it said in the following
G manner:

> Temuda rights are created by felling the old jungle and cultivating the land, and are created only for the use of original worker, his heirs and descendants. They certainly
H cannot be transferred for value.
>
> ... The owner leaving the district without any heir may arrange for someone else to have prior right to farm that land by taking from him what is called *tungkus asi*, which is some form of token to bind the agreement. It may not be anything of value, which would invalidate the transaction, but may consist of as much as a pig. The
I rights taken over by the person paying the *tungkus asi* are inheritable by the heirs of the person but revert to the original owner if he returns or to his heirs if they return.

[62] Another case for illustration, and incidentally part of the question for our determination, is *Sumbang Ak Sekam v Engkarang Ak Ajah* [1958] SCR 95.

This case not only discussed the customary law of a native in order to obtain NCR, but also deliberated on the issue of whether such right could be transferred for value. The matter was heard by the Native Court of Appeal of Sarawak, via case stated by the presiding magistrate who had earlier heard the appeal from the Resident's Native Court. The facts of the case are as follows. Guyu, a Dayak who stayed in a longhouse cleared, cultivated and occupied a piece of land but later decided to move to Bintulu. Before leaving he handed over his land and rights to Perada, who in return gave Guyu what is called *tungkus asi*. Despite having obtained this right Perada failed to use the land. Later this land, which was still without a title, became part of the Mixed Zone. The appellant ie Sumbang ak Sekam then desired not only to be declared the holder of the customary rights over the land but also the one to be given the right to a Mixed Zone title.

[63] When the matter went before the Resident's Native Court, it found that Guyu had contractually sold the land to Perada, and proceeded to hold that the *tungkus asi* was actually a sale price for the land. In a nutshell it was a commercial deal and that Perada had bought the land from Guyu. The Native Court of Appeal of Sarawak presided by Lascelles J thought otherwise. Before arriving at a factual finding Lascelles J had to contend with three points of native law or custom for decision, one of which is on point with this current appeal ie whether individual rights are transferable by sale or otherwise for value. The learned judge in the course of disagreeing with the Resident Native Court, after going through the facts, held the view that the heirs of Perada still held full customary farming rights and entitled to apply for title over the land.

[64] Lascelles J explained that *tungkus asi* could be best interpreted as a customary tanda or token and not a purchase price. He further explained that:

> In former days this was something of little value, supposed to represent a meal which might reach the level of a pig and was usually handed over in front of *tuai rumah*.

[65] The learned judge declared that as the *tungkus asi* received from Perada by Guyu was a mere token, it could not be regarded as a sale of the property. At p 96 of the case, he made the statement under scrutiny before us, when he said:

> In the court's opinion ... Individual customary rights are not transferable by sale or otherwise for value.

[66] The above statement posed for our determination, of whether individual customary rights are not transferable by sale or otherwise for value ceased to exist and become unenforceable upon the enactment and subsequent repeal of the Fruit Trees Order 1889 of the Rajah Order, requires discussion of like Orders. The Rajah's Orders, precursors to written and structured forms of

Sarawak Land law which included the recognition of Sarawak's land customary law, culminating in the Sarawak Land Code 1958 (Cap 81) made matters clearer. Skinner J (as he then was) in *Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong) v Superintendant of Lands & Surveys Miri Division & Anor* [2005] 5 MLJ 305; [2005] 3 CLJ 697 had occasion to discuss the Rajah's Order 1X 1875 which directed that any person who made clearings of old jungle but subsequently allowing the same to go uncared would lose all claim or title over such land. Such reference in Order 1X 1875 according to the Court of Appeal, of losing all claims over the uncared land, was clear recognition of such native custom of acquisition of NCR over land. This decision was approved by the Federal Court later (see *Superintendant of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509). We see no reason to disagree with the view held by the Court of Appeal of the clear recognition of acquisition of NCR, also confirmed by the Fruit Trees Order 1889 particularly s 2. This provision reads:

> Any Dayak removing from a river or district may not claim, sell or transfer any farming ground in such river or district, nor may he prevent others, farming thereon, unless he holds such land under a grant ...

[67] Before proceeding further some clarification is required on the applicability of this provision on the appellant who is an Iban. The above section speaks of Dayaks. Under art 161A(7) of the Federal Constitution the definition of natives include Sea Dayaks and Land Dayaks. Under the Sarawak Interpretation Ordinance 2005 found in the Schedule again the Dayaks are split into two, namely the Land Dayaks (Bidayuh) and the Sea Dayaks or Ibans. The Sea Dayaks and Ibans are one and the same indigenous race who are natives of Sarawak. As the Order of 1889 speaks of any Dayak regardless of whether a Land Dayak or Sea Dayak, being an Iban the above provision of s 2 would therefore apply on the appellant.

[68] This Fruit Trees Order 1889, which did not legislate in any way that it was replacing the native customary law, merely confirmed the existence of a dual system of land ie one subject to grant and the other not. Interpretatively under the system where a Dayak has a grant he could claim, sell or transfer any farming ground in such river or district, to others. Under the other sisterly system, where the Dayak has no grant ie untitled land and invariably applicable to customary land, he may not claim, sell or transfer any farming ground in such river or district, nor may he prevent others, farming thereon. Section 2 says nothing about preventing a Dayak having acquired NCR, handing down that right to another native, subject to the adherence of all the tenets of customary land law.

[69] In short whether s 2 of the Fruit Trees Order 1889 was enacted or repealed subsequently made no difference to native customary land or of the law and rights attached to it as its subsistence is guaranteed. Haidar J in *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* [1990] 3 MLJ 427 at p 432 succinctly said:

> As such it would appear that native customary rights whether communal or otherwise are recognised by the law ie the Land Code of Sarawak (Cap 81) (see ss 5 and 15 of the Land Code). In other words if native customary rights were established as at 1 January 1958 such rights shall subsist.

[70] The subsequent enactment of the Sarawak Land Code 1958 (Cap 81), the primary statute to make better provision in the law relating to land and at the same time ensuring the continued existence of native customary land, brought major changes but leaving the NCR unscathed. As an example, under Part II of Cap 81 the Minister may by order signified in the *Gazette* declare any area of land to be Native Area Land or Interior Land. The Minister is also empowered to declare any area of land to be Mixed Zone and any Native Area Land or Interior Land located within such area shall be part of the Mixed Zone (s 4(1)). Even the director of land and surveys may, with the approval of the Minister by notification in the *Gazette*, declare any such area as Native Area Land, inclusive of Interior Area Land located in that declared area. Despite these statutory powers to classify land, s 4(4) of Cap 81 states clearly that no native customary land shall be affected by the above declarations made by the Minister or director of lands and surveys, unless any part thereof may subsequently cease to be native customary land. Section 4(4) reads:

> Where the area in respect of which a declaration has been made under subsection (1), (2) or (3) comprises Native Customary Land, such land shall be unaffected by the declarations ...

[71] Under s 2 of Cap 81 Native Customary Land includes land on which NCR, whether communal or otherwise, have lawfully been created prior to 1 January 1958. In a gist NCR created prior to 1 January 1958, which does not owe its existence to statutes, is statutorily protected and continues to subsist under s 4(4) regardless of any declarations (see also *Sapiah Mahmud v Superintendant of Lands and Surveys Samarahan Division & Ors* [2009] MLJU 410; [2009] 9 CLJ 567).

[72] Apart from ensuring the subsistence of NCR already in existence prior to 1 January 1958, Cap 81 also provides for the creation of new NCR after 1 January 1958 on Interior Area Land, but subject to a permit (ss 5(1) and 10(4). Under s 5(2) the methods by which the new NCR may be acquired are:

(a) the felling of virgin jungle and the occupation of the land thereby cleared;

A (b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrine; or

B (e) the use of land of any class for right of way; or

(f) any other lawful method.

[73] The newly created NCR may be subject to extinguishment by direction of the Minister upon adherence of certain statutory requirements (s 5(3)). C Section 5(2)(ii) of Cap 81 is highly relevant if any extinguishment exercise of the new NCR is undertaken. It reads:

> the question whether any such right has been acquired or has been lost or extinguished shall, save as in so far as this Code makes contrary provision, be D determined by the law in force immediately prior to the 1st day of January, 1958.

[74] In simple terms, in the event any acquisition of new NCR comes under scrutiny, or whether subsequently lost, or extinguished shall be determined by E the law in force immediately prior to the first day of January, 1958. This provision therefore does not differentiate the treatment of the newly created NCR and rights acquired prior to 1 January 1958 (see *Rampai ak Chunggat v Langau ak Chandai & Superintendant of Lands and Surveys, Third Division, Sibu.*

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[75] Additional to the newly created NCR, is the creation of Native Communal Reserves under s 6 of Cap 81 whereupon the Minister may order and declare any area of state land for the use of any community having a native system of personal law. Rights in that Native Communal Reserve shall be G regulated by the customary law of the community for whose use it was declared to be reserved. Not unlike newly created NCR in Interior Area Land, the Minister may by order signified in the *Gazette* declare any part of the Native Communal Reserve to cease being part of it.

H OUR DECISION

[76] From the totality of evidence and authorities referred in the course of the hearing, we are satisfied that the creation of native customary land and rights acquired by a native of Sarawak, is conditional upon the adherence to I custom or common practice of his community. For an Iban, it has the customary concept of *Tusun Tunggu* whereby NCR could be acquired by two modes namely clearing untitled virgin jungle enroute to the creation of what is locally described as temuda and the other by receiving the *temuda* as a gift or inheritance. For the first mode, the common thread is that the acquisition of

NCR starts with the clearance of the said untitled virgin land or jungle by a native, followed by the occupation of the cleared land and thereafter not allowing the land to be abandoned. Once abandoned whatever NCR was created or acquired previously over that land would be lost. If the original owner abandons the land without more the community takes over.

[77] Even though native customary land remains state land, with such rights acquired being considered as individual rights, after his death that land may be inherited. The appellant certainly cannot inherit these eight lots as he is not an heir to the vendors. An original owner of native customary land who has no heir, may circumvent the loss of such NCR over the land by passing that land to some other person within the community, subject to him handing over to the original owner what is traditionally called *tungkus asi*. The *tungkus asi* is a form of token (*tanda*) symbolising the transfer of rights of the cleared land to the new owner. This token is customarily of little value, perhaps fetching the value of a pig, usually handed over in front of the head of the community. The appellant, though an Iban, will fail to qualify as a legitimate recipient of the *temuda* from the vendors as he not a native of that community.

[78] The novel argument that the S&Ps would fall under the phrase of 'any other lawful method', which concerns only newly created NCR as provided for under s 5(2)(f) of Cap 81, must equally fail by virtue of those eight lots being native customary land created prior to 1 January 1958. Lastly there is no hint of any provision in Cap 81 that legitimises any transfer of pre 1 January 1958 acquired NCR through the mode of SPAs. Such a drastic change that drifts away from established natives customary law require express and clear language in Cap 81 (*Haji Khalid bin Abdullah v Khalid b Abg Haji Mazuki & Anor* (Kuching OM KG 3/1983-Land Cases (1969–1987); *Superintendant of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509 per Arifin Zakaria FCJ (as he then was)).

[79] With the ineligibility of the appellant to inherit or acquire through the *tungkus asi* procedure, let alone the litany of case laws, inclusive of *Sat ak Akum & Anor v Randong ak Charareng* and *Sumbang Ak Sekam v Engkarang Ak Ajah*, establish that individual customary rights are not transferable by sale or otherwise for value thus invalidating the SPAs, the position of the appellant is tenuous. With the S&Ps being in contravention of customary land law in force immediately prior to 1 January 1958, the answer to questions 1(a) and (b) therefore must be in the negative.

[80] We find it unnecessary to answer question (ii) as the appellant in his

A pleadings stated that the eight lots are located in the Native Area Land whilst this question pertains to Native Communal Reserve, an area which has no bearing over the disputed properties.

B **[81]** I now return to the alternative argument of the state legal counsel briefly touched earlier. He argued that the appellant's case rested on conditional sale and purchase agreements, and the express conditions were never fulfilled thus rendering the SPAs void and ineffective. We agree with this submission.

C **[82]** We therefore dismiss this appeal with costs. We now invite parties to submit on the amount of costs.

Appeal dismissed with costs.

D Reported by Kohila Nesan

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