DALAM MAHKAMAH PERSEKUTUAN MALAYSIA DI PUTRAJAYA

(BIDANGKUASA RAYUAN)

RAYUAN SIVIL NO. 01-4-2011(Q)

ANTARA

BATO BAGI & 6 YANG LAIN … PERAYU-PERAYU

DAN

KERAJAAN NEGERI SARAWAK … RESPONDEN

DAN

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA DI PUTRAJAYA

(BIDANGKUASA RAYUAN)

RAYUAN SIVIL NO. 01-5-2011(Q)

ANTARA

1. JALANG AK PARAN … PERAYU-PERAYU
2. KAMPONG ANAK AMIH

DAN

1. KERAJAAN NEGERI SARAWAK
2. BORNEO PULP AND PAPER SDN. BHD … RESPONDEN-RESPONDEN
(Syarikat No. 355914-M)

Coram: Zaki Tun Azmi, CJ

Richard Malanjum, CJSS

Raus Shariff, FCJ

JUDGMENT OF RICHARD MALANJUM (CJSS)

Introduction

1. The two appeals, namely *Bato Bagi & 6 Ors v. Kerajaan Negeri Sarawak (No 01-4-2011(Q))*, and *Jalang ak Paran & Ors v. Kerajaan Negeri Sarawak & Anor (No 01-5-2011(Q))*, were heard together as they involved the same question of law though they began as entirely separate actions before the High Court. Further, the parties agreed to this approach and I do not think there is any prejudice caused.

2. As the appeals were heard together, I therefore propose to give my grounds under one judgment. Of course, wherever necessary, I shall make separate and specific reference to a particular appeal.

3. For clarity and convenience, the respective Appellants in these appeals were Plaintiffs and the Respondents were Defendants before two different learned High Court Judges in two entirely separate actions. Further, in this Judgment, I will refer to the first appeal as the 'Bato's case' or 'Bato' where the context requires and the second appeal as the 'Jalang's case' or 'Jalang' where the context may require. Otherwise, the term 'Appellants' in this Judgment refers to both the Appellants in these two appeals.

4. Failing to succeed before the High Court, Bato and Jalang appealed to the Court of Appeal. They were also unsuccessful. It

is to be noted that the Court of Appeal basically focused its decision on the applicability of Order 14A. The constitutionality question was hardly discussed save for an expression on its agreement with the finding of the learned High Court Judge. The Court of Appeal deemed it unnecessary since it was not neither covered in the Memorandum of Appeal nor argued. Thus, not much assistance can be derived from the decision on the issue. Dissatisfied, they are now appealing to this Court.

5. Leave was granted on 1st March 2011 by this Court on one question:

> *'Whether section 5 (3) and (4) of the Sarawak Land Code relating to the extinguishment of native customary rights are ultra vires Article 5 of the Federal Constitution read with Article 13 of the Federal Constitution.'*

6. In addition, the parties were also given liberty to raise issues relating to pre-acquisition hearing and the type of compensation to be awarded.

7. After hearing the parties relating to the appeals proper on 28.4.2011, 16.6.2011, and 12.8.2011, this court adjourned for deliberation. I now give my decision together with my reasons.

Preliminary issues

8. First, it is my considered view that the leave question posed cannot be answered in vacuum without paying due consideration on the facts which caused the commencement of the suit. Hence, there is a need to elicit and to consider the facts and circumstances surrounding both appeals.

9. Second, at the outset of the hearing learned counsel for the Respondents raised a preliminary objection ('PO') relating to the approach taken by the Appellants before this Court. It was submitted that as the matters were never pleaded and raised in the Courts below, the Appellants should not be allowed to raise them in these appeals. Moreover, the leave question had not been framed with the contemplation of such issues, and in any event, those matters were not decided by the High Court and the Court of Appeal. Reliance was placed on section 96(a) of the **Courts of Judicature Act 1964** and the case of **Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor [2011] 1 CLJ 51**.

10. This court indicated to the Respondents that it would consider the PO when it deliberates over its decision. I have attached due consideration to the PO and I reject it. My answer is simple. In order to prevent any miscarriage of justice, this Court is entitled to allow an appellant to raise matters outside of the grounds upon which leave has been granted. In **Menteri Sumber Manusia v Association of Bank Officers, Peninsular**

Malaysia [1999] 2 MLJ 337 Edgar Joseph Jr FCJ said this at page 354:

> "*Clearly, therefore, having regard to these provisions, the Federal Court has the power and therefore the discretion to permit an appellant to argue a ground which falls outside the scope of the questions regarding which leave to appeal had been granted in order to avoid a miscarriage of justice.*" (Emphasis added).

11. Having said that, I hasten to add that this Court should nevertheless prevent a litigant from raising matters which were not raised in the Courts below in clear cut cases, which is the general rule. If however, it can be shown that a serious miscarriage of justice had occurred as a result of the approach adopted at the Courts below this Court should always be at liberty to intervene.

12. The foregoing view is not inconsistent with the authority of **Terengganu Forest** (supra) where it is said that '…*once leave is granted on any one or more grounds discussed in this judgment this court can of course hear any allegation of injustice.*'

13. I now proceed to deal with the surrounding circumstances and background of both these appeals.

14. For the Bato's case, it is beyond doubt that the matter proceeded upon application by the Respondents under the summary procedure of Order 14A of the Rules of the High Court 1980 ('Order 14A'). The learned High Court Judge was of the view that the matter at hand was suitable to be disposed of in such a manner and found in favour of the Respondents. This approach was upheld by the Court of Appeal. It was the approach taken by the learned High Court Judge in the disposal of the matter which became the focal complaint of Bato before the Court of Appeal and before this Court as well. Obviously Bato want their full day in Court. As such, in this Judgment, that issue will be in the forefront of my mind.

15. However, for Jalang's case, the parties agreed that the matter should proceed without calling oral evidence. Hence, the matter proceeded by relying on the agreed facts, agreed issues and bundle of documents prepared by the parties and based on submissions by the respective parties.

16. I pause to note that although in Jalang's case the High Court did not proceed on the basis of Order 14A, it is clear that the approach adopted by the Court was premised on a somewhat similar fashion. In the final analysis in both Bato's case and Jalang's case there was no evidence recorded viva-voce vide an ordinary course of full trial. The only material difference is that it was strenuously contested in the former while consented to in the latter. As in Bato's case the basic complaint of Jalang before the Court of Appeal and before this Court is also on the approach adopted by the learned High Court Judge despite the

fact that at the commencement of the proceeding all parties agreed to proceed without the need to call witnesses.

Bato's Case

17. Bato sued on behalf of themselves and on behalf of all other residents of Uma Balui Ukap at Batu Kalo, Uma Lesong at Batu Keling, Uma Bakah at Long Bulan, Rumah Kulit at Long Jawe and Rumah Ukit at Long Ayak, all of Ulu Balui, Belaga District Kapit Division Sarawak as at 23 June 1997 who have native customary rights over lands along Batang Balui and its tributaries, Belaga District Kapit Division Sarawak for a declaration that the extinguishment of their native customary rights vide the Land Direction (Extinguishment of Native Customary Rights) (Kawasan Kebanjiran Bakun) (No.26) 1997 ('Bakun NCR Extinguishment Direction') was void because it violated Bato's fundamental rights under Articles 5, 8, 13, and 153 of the Federal Constitution ('FC') and Articles 39(1) and 39(2) of the Constitution of the State of Sarawak ('SC').

18. In short, Bato sought to declare Sections 5(3) and 5(4) of the Sarawak Land Code ('impugned sections') as unconstitutional, and that the extinguishment of their native customary rights made thereunder was invalid and void. Alternatively, they prayed for adequate compensation and damages.

19. The impugned sections read:

'(3) (a) Any native customary rights may be extinguished by direction issued by the Minister which shall be-

(i) published in the Gazette and one newspaper circulating in Sarawak; and

(ii) exhibited at the notice board of the District Office for the area where the land, over which such rights are to be extinguished is situate, and on the date specified in the direction, the native customary rights shall be extinguished and the land held under such rights shall revert to the Government:

Provided that where such rights are extinguished in pursuance of this section compensation shall be paid to any person who can establish his claims to such rights in accordance with paragraphs (b) and (c); or other land over which such rights may be exercised may be made available to him with or without the payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise.

(b) Any person who desires to make any claim for compensation must submit his claim with evidence in support thereof to the Superintendent, in a form to be prescribed by him, within such period as may be stipulated in the direction issued by the Minister

under paragraph (a), provided that the period so stipulated shall not be less than sixty days from the date of publication or exhibition thereof.

(c) No claim for compensation for the extinguishment of native customary rights shall be entertained by the Superintendent unless such claim is submitted within the period stipulated in paragraph (b).

(4) (a) Any person who is dissatisfied with any decision made by the Superintendent under subsection (3) on the ground that –

(i) his claim to native customary rights has been rejected or not recognised by the Superintendent;

(ii) the allocation of land over which such rights are to be exercised, is inadequate or inequitable; or

(iii) the amount or apportionment of compensation is inadequate, unfair or unreasonable,

may within twenty-one days from the date of receipt of the decision of the Superintendent, by notice in writing addressed to the Superintendent, require the matter to be referred to arbitration in accordance with section 212.

(b) Upon receipt of the notice of arbitration, the Superintendent shall direct that any compensation payable to the person who desires to have his claim or matter referred to arbitration, to be deposited in the High Court, pending the outcome of such arbitration proceedings.'

20. It is not contradicted that till today Bato or at least most of them still live along the lands of Batang Balui and refused to relocate to the Sg. Asap Resettlement Site.

21. According to facts averred in the High Court and raised before this court in submission, it may be summarized:

i. that Bato were not aware of the Gazette notification and the requirement for them to submit their claim within any particular time limit;

ii. that the compensation paid was grossly inadequate because it did not take into account the significance of the Appellants' rights over the land;

iii. that surveys conducted over the land were done in an arbitrary and improper manner; and

iv. that compensation was awarded only for some of their lands and not all of it.

22. The Respondents' short reply to this was that the extinguishment was done in accordance with the law and that adequate compensation had been paid and accepted in that connection. Learned counsel went on to say that the area in question is now part of the completed Bakun Dam and thus completely submerged under water. There is no question of it reverting to Bato.

23. In making the application to have the case proceeded under Order 14A, the Respondents contended that if the questions of law were answered it would dispose of the claim brought by the Bato and those questions could be answered without the matter going for full trial. Ultimately, according to the Respondents, it would be shown that Bato did not have any proper cause of action against them.

24. Despite strenuous objection by Bato the learned High Court Judge agreed with the Respondents and proceeded to consider the case under Order 14A. I do not intend to reproduce the entire decision of the learned High Court Judge as the same can be found in **[2008] 6 CLJ 867**. I would however deal with the pertinent and relevant findings of the learned High Court Judge.

25. The learned Judge was of the view that the case was suitable for disposal under Order 14A without the need for the matter to be ventilated through full trial. The learned Judge opined that there were sufficient material facts through the pleadings and affidavits before him to enable him to decide on the question of law.

26. The High Court appeared to have heavily relied on the dicta of the Court of Appeal in its decision in **Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu [2003] 4 CLJ 337**, without examining the facts and circumstances in that case, as authority that even though a particular case involves complex issues, the court should not shun away from Order 14A.

27. In short, the learned Judge was of the view that the matter could be disposed of by way of affidavit evidence and proceeded to do the same. The Court found in favour of the Respondents, to wit, that the impugned sections were not unconstitutional and that the extinguishment of the native customary rights was done in a proper and valid manner.

28. With respect, I do not think the Court of Appeal in **Petroleum Nasional Bhd** (supra) laid down a hard and fast rule for courts to comply with when confronted with applications under Order 14A. All the Court of Appeal did was to state the relevant factors which should be considered and which in my view the relevant factors to consider are not exhaustive. Indeed the Court of Appeal was clear when it said this (paragraph 35 of its Judgment):

> *'Clearly, it demonstrates the lack of appreciation of the scope and efficacy of O14A and O33 r 2 and the distinction between them. Under the former, the entire cause or matter need not be finally determined. It also permits any claim or issue herein to be so*

determined, but the question must be purely question of law or construction of document. And the latter caters not only for the question or issue of law arising in a cause or matter to be tried but also of fact or partly of fact and partly of law, and also the entire cause or matter need not be finally determined. .... It is manifestly evident that the court has a wide discretion on the matter.' (Emphasis added).

But I hasten to add that the discretion must be exercised judicially and in accordance with the law.

29. On appeal to the Court of Appeal, the decision of the High Court was affirmed. The main plank of its decision is that the High Court was correct in proceeding under Order 14A. On the constitutional issue, the Court of Appeal did no more than to wholly stamp its endorsement on the finding of the learned High Court Judge. No view of its own was proffered. There was also no discourse on the approach to be taken in construing a constitutional provision. Neither was there any detailed analysis on what the Court should look for where there is a constitutional challenge against a piece of legislation or certain specific provisions of its content. The Judgment of the Court of Appeal can be found in **[2011] 6 CLJ 387**.

Jalang's Case

30. Jalang are residents of Rumah Munggu, a longhouse in Tatau, Bintulu Division, Sarawak, and are members of the Iban

community and have Native Customary Rights (NCR) over lands in Ulu Batang Tatau, Tatau, Bintulu Division, Sarawak. It has not been challenged that till today Jalang and their families continue to live on their lands in Ulu Batang Tatau, Tatau, Bintulu, Sarawak.

31. Similar to Bato's case, Jalang's native customary rights were extinguished vide the Land (Extinguishment of Native Customary Rights) (Pulpwood Mill Site at Ulu Batang Tatau) (No. 3) Direction 1997, pursuant to the impugned sections ('Ulu Batang Extinguishment Direction'). It is also not in doubt that the extinguishment was done for a Pulpwood Mill to be constructed but to date the Pulpwood Mill has not been set up and that the land has reverted to jungle.

32. Jalang brought an action for similar relief as in Bato's case, namely that the impugned sections are unconstitutional vis-a-vis Articles 5, 8, 13, and 153 of the FC and Article 39 of the SC and that the extinguishment of their native customary rights was void.

33. As noted above, the High Court recorded the parties' consent that the matter could be dealt with by way of parties tendering agreed facts, agreed issues, bundle of documents and written submissions. The decision of the High Court is reported in **[2007] 1 MLJ 412**

34. After considering the relevant case law on point, the learned High Court Judge concluded that impugned sections were not

unconstitutional because the law allows for the extinguishment of native customary rights where clear words are used and that payment of compensation is provided for. The learned High Court Judge also found that the construction of a Pulpwood Mill must be deemed to be for a public purpose and as such the extinguishment was proper.

35. It may be noted here that the under the impugned sections there is no requirement of public purpose as a reason for the exercise of the power therein. Hence, the reference by the learned High Court Judge of public purpose is misplaced. It is not on the same footing as in land acquisition. It is my considered view that section 15A of the Sarawak Land Code ('Code') cannot be read into the impugned sections. Section 15A is limited to instances of post-extinguishment, i.e. with lands which have been 'surrendered, reverted, or resumed' to the Government. The Extinguishment Order in Jalang's case states that:

> "*On the day of coming into force of this direction, all native customary rights that may be claimed or have subsisted over the land situated at Ulu Batang Tatau, Tatau, and more particularly described in the Schedule below, shall be extinguished and the land held under any such rights shall revert to the Government of Sarawak*".

In my opinion, once the land is extinguished and reverted back to the Government, only then does section 15A come into application.

36. Similarly, section 15(1) of the SLC which states that:

> "*Without prejudice to sections 18 and 18A, where native customary rights have been lawfully created over State land, such land shall not be alienated or be used for a public purpose until all native customary rights have been surrendered or terminated or provision for compensating the persons entitled thereto have been made*"

does not make "public purpose" a pre-requisite to extinguishment of NCR. It clearly deals with post-extinguishment.

37. Hence, with respect, the learned High Court Judge was wrong to "import" the provisions of section 15A to assert that the NCR could only be extinguished for a public purpose. It must be borne in mind that that is not a pre-requisite for extinguishment. The closest provision to suggest that it may be an essential consideration is section 5(5) of SLC which states that subsection 5(3) of SLC '*shall apply whether the land over which the customary rights are exercised is required for a public purpose or the extinction of such rights is expedient for the purposes of facilitating alienation...*'. However, upon a close perusal of the said provision, I am of the view that it cannot be taken as a requirement under the law for the public purpose consideration to be a pre-requisite to extinguishment.

38. That leaves me with the conclusion that the impugned sections can be invoked to extinguish native customary rights even in cases where it is not strictly speaking for a public purpose. The learned High Court Judge in my view erred to find that upon stating the type of the development that is to commence on the land, the law *ipso facto* deems it to be for a public purpose.

39. If indeed the public purpose consideration was to be a pre-requisite to extinguishment of native customary rights, it would have been stated within the impugned sections in clear and unambiguous words. In the absence of such clear and unambiguous words, it must be presumed that such consideration is not a pre-requisite for extinguishment.

40. This is, in my view, extremely regrettable. Its implications are drastic as it would mean that native customary rights may be extinguished for ulterior purposes. This is where the question of the constitutionality of the impugned sections arises. I shall revisit this again below.

41. In any event, on appeal to the Court of Appeal, the decision of the High Court was affirmed. As in Bato's case, the Court of Appeal in Jalang's case also merely endorsed the finding of the learned High Court Judge with emphasis that the impugned sections *'is a valid piece of legislation which is allowable under art. 5 Federal Constitution, non-discriminatory in nature so as to offend art. 8 Federal Constitution and in providing for compensation falls within the ambit of art. 13 of the Federal Constitution'*. Unfortunately, the discussion on the

constitutionality issue was minimal. The decision of the Court of Appeal is reported in **[2011] 3 CLJ 469**.

42. With due respect, a piece of legislation passed by Parliament or State Assembly may be the will of the majority but it is the court that must be the conscience of the society so as to ensure that the rights and interests of the minority are safeguarded. For what use is there the acclamation: 'All persons are equal before the law and entitled to the equal protection of the law' (Article 8 of FC) when it is illusory. If '*an established right in law exists a citizen has the right to assert it and it is the duty of the Courts to aid and assist him in the assertion of his right. The Court will therefore assist and uphold a citizen's constitutional rights. Obedience to the law is required of every citizen, and it follows that if one citizen has a right under the Constitution there exists a correlative duty on the part of the other citizens to respect that right and not to interfere with it*.' (See: ***Educational Company of Ireland Ltd v Fitzpatrick (No 2) (1961) I.R. 345*** per Budd J. at page 368).

43. Further, the approach adopted by the Judges in the Courts below when considering the constitutional provisions seemed to be one of 'strict constructionist', literal, dogmatic and overly reliance on the English philosophy of legal positivism. They took 'the face value, plain view or literal meaning approach to interpretation.' They declined to follow the universally accepted liberal and pragmatic approach. (See: **Constitutional Interpretation in a Globalised World by Prof. Dr. Shad Saleem Faruqi [2005] [Paper presented at the 13th**

Malaysian Law Conference, Kuala Lumpur, 16-18 November 2005]). Hence, with such approach in mind they proceeded to consider the constitutionality of the impugned sections.

44. In my view, when confronted with such issue it is incumbent upon the Court to first consider in pragmatic, purposive and liberal fashion the fundamental purpose of the constitutional provision or provisions bearing in mind that it is there not only to safeguard the textual rights 'but also rights that are implicit' therein. The focus should also be rights-based and principle-based. Having done so the Court should then proceed to test objectively whether the impugned sections are within the ambit of those constitutional provision or provisions. (See: Tan Tek Seng [supra]). Of course at the same time it must be borne in mind the presumption of constitutionality of an enactment under challenge together with the rule that the court should try to sustain its validity as much as possible. (See: **Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169**).

45. And perhaps some guidance can be derived from these words:
'Our democratic Constitution inhibits blanket and arbitrary deprivation of a person's liberty by authority. It guarantees that no one shall be deprived of his personal liberty except in accordance with procedure established by law. It further permits the State, in the larger interests of the Society to so restrict that fundamental right in a reasonable but delicate balance is maintained on a legal fulcrum between individual liberty and social security. The slightest deviation from, or displacement or infraction or violation of the legal procedure symbolised on that

fulcrum upsets the balance, introduces error and aberration and vitiates its working. The symbolic balance, therefore, has to be worked out with utmost care and attention.' (See: **Vedprakash v The State 1987 AIR Gujarat 253** at para.24 per Gokulakrishnan, C.J.).

Submissions on Behalf of the Appellants

46. As alluded to earlier the primary contention on behalf of the Appellants is that both Bato's case and Jalang's case were not suitable to be disposed of without going for full trial because facts needed to be elicited by way of oral evidence/testimonies before a proper analysis could be done as to whether the impugned sections have indeed failed or contravened the legislative intention and spirit of Articles 5 and 13 of the FC.

47. According to their learned counsel, there has to be sufficient factual matrix present before the Court could answer the said question. Further, it was contended that there should be prior consultation with the Appellants before an extinguishment order could be made. If consultation has been done, facts such as the reasons for their attachment to the land (i.e. burial grounds, farms, etc) would have been uncovered. All these facts when put together would show that the land is part and parcel of their livelihood which is within the meaning and spirit of Article 5 of the FC. (See: **Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771**). As the impugned sections are silent on prior consultation, it has to be against the legislative intent of Article 5.

48. Learned counsel for the Appellants further argued that consultation prior to extinguishment of native customary rights is of the utmost necessity as opposed acquisition cases (where pre-acquisition hearing is not a requirement, as held by the then Federal Court in **S. Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors [1982] CLJ (Rep) 314**) because of the nature of native customary rights and its implication to the livelihood of the natives.

49. It was also impressed upon this Court that in considering whether the impugned sections contravened Article 5 of the FC, reference ought to be made to how foreign jurisdictions have dealt with native rights. Learned counsel urged this Court to take into account international norms in relation to this aspect, for instance, as embodied in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

50. Another point submitted for the Appellants is the contention that the Government stands as a fiduciary to the natives and owes a fiduciary duty to protect the interests of the natives including the protection of their claims on the land which is premised on native customary rights. Learned counsel submitted that this point should be argued upon and a determination be made because based on the way the impugned sections have been relied upon it could very well be that Article 5 of FC has been breached. In this regard, learned counsel argued that as the matters did not go for full trial, the issue of this fiduciary duty and its possible breach could not have been ventilated.

51. It follows, according to learned counsel for the Appellants, that by nature of this fiduciary duty, the Government is duty bound to consider the principle that the natives are part and parcel of the land, that they belong to the land and not as a separate entity present on the land. In other words, as far possible, the Government is duty bound to ensure that the natives are not separated from the land to which they belong.

52. Furthermore, learned counsel submitted that native customary rights are not only about monetary compensation. He said that the dimension of native customary rights goes beyond monetary value because it involves the very existence, survival and well-being of the natives and their lives. Their way of life is their livelihood and that deserves utmost protection. With the extinguishment of their native customary rights, their livelihood is destroyed and this strikes at the very heart of Article 5 of the FC.

53. Hence, it was contended that all the matters above could not have been dealt with and fully ventilated by the Court without the matters going for full trial. In other words, the trial Court could not have decided as to whether the impugned sections were unconstitutional without sufficient factual matrix and evidence placed before it which could only have been obtained through oral evidence adduced at a full trial. Learned counsel for the Appellants therefore urged this Court to remit these appeals back to the High Court for full trials.

54. Alternatively, learned counsel for the Appellants also submitted on the quantum of compensation payable upon the extinguishment of their native customary rights. It was contended that the nature of the long term effect and impact on the natives and their livelihood must be taken into account and not merely considering how much money is their native customary rights valued at.

Submissions on Behalf of the Respondents

55. On behalf of the Respondents, it was argued that all the matters raised by the Appellants were not part of their pleaded case. Further, it was also argued that the Appellants' approach in dealing with the present appeals was not within the ambit of the leave Question.

56. The Respondents also objected to the Appellants urging this Court to look at international conventions such as the UNDRIP in considering the extent and breath of Article 5 of FC in view of them not being part of municipal law.

57. The Respondents went on to submit that it was not disputed that the Appellants had native customary rights. The only remaining issue is whether the native customary rights can be extinguished via the impugned sections.

58. On the issue of fiduciary duty, it was argued for the Respondents that such duty does not arise because that

argument is only in relation to alienation of land and not to native customary rights and its extinguishment.

59. On the need for prior consultation before an extinguishment direction can be issued, the Respondents contended that there is no necessity for the same. According to the Respondents, there is already a mechanism provided for in the Code upon invoking the impugned sections, for instance, arbitration in the event of being dissatisfied with the quantum of compensation.

60. It was highlighted by learned counsel for the Respondents that compensation had been paid and the matters were even referred to arbitration whereby the amount was increased. In this regard, Jalang contended that they were not part of the group that agreed to the compensation. In reply, the Respondents argued that Jalang through their counsel had participated in the arbitration and in fact had the arbitration stayed.

61. Finally it was argued for the Respondents that even where native customary rights have been issued with title deeds, it could still be acquired. As such native customary rights without title should not be put on a better footing with differential treatment.

Issues Before This Court

62. Based on the arguments raised by both sides as summarized above and keeping in mind the sole Question posed together

with the qualification given, I am of the view that the determinative issues before this Court are as follows:

i. Whether the respective learned High Court Judges were correct in disposing of both the matters by way of Order 14A or equivalent in order to decide on the constitutionality of the impugned sections; and

ii. If so, whether the Question posed should be answered in view of the limited arguments presented.

Findings

63. First, on the complaint by the Respondents that the Appellants raised matters outside their pleaded case, I have already addressed the same above.

64. Simply put, it is the case of the Appellants that by failing to allow the matters to go for full trial, a miscarriage of justice had occasioned to the Appellants. There was insufficient factual matrix and evidence before the respective High Court to determine and decide on the constitutionality of the impugned sections vis-a-vis Articles 5 and 13 of the FC.

65. Having considered the opposing arguments, I find no reason to disallow the Appellants from raising the same. Accordingly, I find there is nothing improper with the Appellants' approach to the present appeals.

66. On the first determinative issue, in respect of Bato's case, as stated earlier, it is quite obvious in the Judgment of the Court of Appeal that the main focus was on the appropriateness of the use of Order 14A. And although the constitutionality issue was touched upon it was nothing more than merely approving the conclusion of the learned High Court Judge. It is therefore still incumbent upon this Court, if there is any need, to consider whether the learned High Court Judge correctly dealt with the issue, including the approach taken in his interpretation of the relevant Articles in FC.

67. And in respect of Jalang's case in which the parties agreed to the mode of trial adopted at the Court of First Instance, whether the Court of Appeal was correct in its conclusion particularly on the constitutionality issue.

68. Having considered the submissions of parties, I am of the view that based on the materials before him, the learned High Court Judge in Bato's case vide Order 14A procedure was in the position to address the constitutional issue as presented. As such the complaint before the Court of Appeal against the use of Order 14A by the learned High Court Judge was misplaced. And in Jalang's case it should not arise as the parties agreed to the mode of trial.

69. Accordingly, having heard the parties before this Court, I find no basis to say that the learned High Court Judges were wrong in adopting the procedures as they did. All parties were allowed to adduce evidence vide affidavits on their respective versions of

the case. And it is settled law that a judge is entitled to make his or her determination on the issue or issues before him or her despite conflicts in the affidavits. More so when there is no allegation of any serious conflict. (See: **Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212**; **Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400**).

70. Hence, in so far as it relates to complaint on the mode of hearing adopted by the Courts of First Instance, I find there is no ground for me to interfere. Thus, if these appeals are considered solely on that basis, I am of the view that they should be dismissed.

71. However, in the course of their Judgments the Court of Appeal in both the cases went on to conclude on the constitutionality of the impugned sections, procedural fairness and Order 53 of the Rules of the High Court 1980. And this brings me to the second determinative issue.

72. As stated earlier, it is the approach undertaken by the learned Judges in the Court of First Instance in construing the relevant provisions of FC vis-a-vis the impugned sections that require close examination.

73. Unfortunately, this was not the focus in the submissions advanced by both the Appellants and the Respondents before this Court. The concentration was whether or not the cases should be remitted back to the High Court for want of procedural defect in the use of Order 14A or its equivalent. I have already given my view on the issue.

74. In my view this Court has not been fully assisted on this second determinative issue although the Question posed was staring at the parties. There was no discussion on whether the Courts below were correct in their approaches in construing the relevant provisions of FC or whether they adopted the right test in considering the constitutionality of the impugned sections in relation to those relevant provisions of FC.

75. Meanwhile it may be helpful to bear in mind that *'the expression 'life' appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment'*. (See: **Tan Tek Seng** [supra]).

76. If indeed extinguishment of their native customary rights has an adverse effect on the livelihood of the natives in the same way as dismissal has on the livelihood of a gainfully employed person in the public service, then it is only fair in my view that before any extinguishment direction is issued the holders of native customary rights should be given the opportunity to present their case. This is essential justice and procedural fairness which a public decision-maker should ensure as having been meted out before and when arriving at his decision. (See: **Tan Tek Seng** (supra); **Sivarasa Rasiah v Badan Peguam**

Malaysia & Anor [2010] 2 MLJ 333; **Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285**; **Plaintiff M70/2011 v Minister for Immigration and Citizenship & Anor [2011] HCA 32** [31 August 2011]).

77. An excerpt from a recent article entitled '**The 'UNDRIP' and the Malaysian Constitution: Is Special Recognition and Protection of the *Orang Asli* Customary Lands Permissible?' ([2011] 2 MLJ cxxvi)** is quite illuminating on this issue. It states:

> *'The most relevant provisions of fundamental liberties that would affect any law providing for the protection of orang asli customary land rights are art 5 (particularly, the right to life), art 8 (equality before the law) and art 13 (right to property). These provisions shall be examined in turn and in the light of other relevant constitutional provisions. The separate treatment of these provisions does not suggest that they are to be read in isolation. Articles 5 and 13 are read harmoniously with the fundamental right to equality contained in art 8. Accordingly, art 8 will form the starting point and be considered in the light of arts 5 and 13. In the words of Gopal Sri Ram JCA (as he then was), 'when interpreting other parts of the Constitution, the court must bear in mind the all pervading provision of art 8(1). That article guarantees fairness of all forms of state action'.*

78. And perhaps it is opportune here to be reminded that *'the courts should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of constitutional interpretation. They should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such an objective may only be achieved if the expression 'life' in art 5(1) is given a broad and liberal meaning'*. (See: **Tan Tek Seng** [supra]).

79. Hence, with the limited submissions made before this Court while the focus was on the appropriateness of the mode of hearing adopted by the Courts of First Instance and having reached a conclusion on the issue, I do not think there is a need for me to answer the Question posed. To do so would be unfair not only to this Court but to the parties as well. I think that such an important issue is best left to another occasion when it is fully ventilated instead of being made just a side issue.

80. Of course, one may say that in taking such step, I am allowing to stand the conclusions of the Courts below on the constitutionality of the impugned sections. That might appear to be so. But the facts and circumstances of these cases should also be taken into account. For instance in Bato's case the compensation money was agreed and accepted by them. They did not go for arbitration. They did not even accept the

compensation under protest. Further, the land in question is now under water upon the completion of the Bakun Dam. There is no question of returning it to them.

81. As for Jalang's case, they had gone for arbitration but they had it subsequently stayed. But it is also a fact that substantial number of the former residents of the land in question had accepted the compensation which was later increased by the arbitrator. In my view they are in the same position as in Bato's case. The land has been vacant for some years now.

82. Hence, on the facts and circumstances of these two cases it serves no purpose to answer the Question posed. It may also be noted that a party should not be allowed to approbate and reprobate. (See: **Verschures Creameries v Hull & Netherlands Steampship Co Ltd [1921] 2 KB 608**).

83. Suffice it for me to say here that if anything, the Courts below should have been put on guard as to the adverse effect of the impugned sections to the livelihood and very existence of the natives. By merely looking at the impugned sections, it gives one the impression that it is too vague, too broad, unfettered and untrammelled in that they may be open to abuse. That surely cannot be within the spirit of the fundamental rights embedded in the FC, in particular Articles 5, 8 and 13.

84. There is hardly any guideline or basis upon which extinguishment of native customary rights may be done. The words used are: '*Any native customary rights may be*

extinguished by direction issued by the Minister...'. With these words there is nothing to prevent the Minister who is answerable to no one, not even to the Sarawak State Assembly or the Tuan Yang Terutama, from issuing directions to extinguish all existing native customary rights in Sarawak. The millions of natives whose livelihood and their future generations depend entirely on the land can be made landless by a stroke of the pen in any event. They may end up as squatters in their own lands where they and their ancestors have been living for generations, pre-existing even the impugned sections.

85. At least in acquisition cases, it is provided for in the relevant Acquisition Act and Enactments the grounds such as public purpose before the exercise of such deprivative power. It is therefore inappropriate in answer to this wide discretion given under the impugned sections to cite the case of **Sagong Tasi** (supra). It should be noted that there is no equivalent of the impugned sections found in the National Land Code.

86. I have already dealt with the public purpose requirement in extinguishment cases and found that it is not a consideration which is strictly required by the law. This is indeed unfortunate because as I have observed above, the extinguishment procedures may be used for ulterior purposes.

87. In my view, the impugned sections may just be a general guideline since it is left to the discretion of the Minister. But even if it is a discretion it should not be untrammelled and unfettered of which the courts frown upon. Indeed '*every discretion cannot*

be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene'. (See: **Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135**). In fact, the impugned sections do not prescribe any mechanism on how the Minister should come to his decision in extinguishing native customary rights.

88. And it has also been said that '*the common law respects the pre-existence of rights under native laws or customs though such rights may be taken away by clear and unambiguous words in legislation*'. (See: **Nor Anak Nyawai** (supra). The question is whether the impugned sections can be said to be 'clear and unambiguous' considering their far-reaching effects upon being exercised on the lives of the natives such as being made landless and deprived of their sources of livelihood.

89. The Courts do not treat such provisions with fondness, particularly where fundamental rights involving life, liberty, and property have been adversely affected.

90. It is essential for the Court to understand the true operation of the impugned provisions in order to decide on their constitutionality. In this regard, I take guidance from the decision of the High Court of Australia in **Kartinyeri v. The Commonwealth [1998] HCA 22** where Brennan CJ and McHugh J said at paragraph 7 that "*the operation and effect of a law define its constitutional character*", and "*to ascertain the nature of rights, duties, powers and privileges which an Act*

changes, regulated or abolishes, its application to the circumstances in which it operates must be examined".

91. I have also noted an error in the conclusion of the learned High Court Judge in Bato's case. Indeed, it has also been accepted as the law that native customary rights pre-existed statutes. (See: **Superintendent of Lands & Surveys, Bintulu v. Nor anak Nyawai [2005] 3 CLJ 555** and **Superintendent of Lands & Surveys, Miri Division v. Madeli Salleh [2007] 6 CLJ 509**). And the precept seems to have been recognised by the impugned sections with the use of the words '...*the native customary rights shall be extinguished and the land held under such rights shall revert to the Government'* - (Section 3).

92. Yet the learned High Court Judge said, inter alia, that the '*property in this case, which is the lands with NCR, is State lands'*. If indeed it is State's land in the first place then there is no question of the same reverting to the Government upon extinguishment of the native customary rights.

93. And this brings me to the issue of payment of compensation being one of the redresses stipulated under the impugned sections. Learned counsel for the Respondents submitted that this should satisfy the complaint that the extinguishment contravened Article 13 of FC.

94. With due respect, I am of the view that it might very well be a misdirection made by the courts previously relying on Article 13(2) of the FC to assert that adequate compensation must be

paid in extinguishment cases. The Article stipulates that no law shall provide for the compulsory acquisition or use of property without adequate compensation.

95. The instant appeals involve extinguishment of native customary rights. There is no principle in law which states that extinguishment is on equal footing as acquisition. This, in my view gives rise to the issue of whether legislation intended at all that native customary rights could be extinguished in the first place! Perhaps this point requires thorough deliberations when the need arises. In any event perhaps the relevant factors relating to the amount of compensation payable could be addressed before the arbitrator.

96. In considering the quantum of compensation, the relevant authority should not attempt to evaluate native customary rights purely from monetary aspect. All relevant factors must be taken into account such as the natives belong to the land and are part and parcel of it instead of being the owners, their total dependency on the land and its surroundings, and how their daily livelihood depends on the land. These are factual issues. And most importantly, the amount of compensation must be reflective of the long term effect which the extinguishment is going to inflict upon the natives.

97. In my view, the compensation should not be merely adequate. It should also be sufficient and reasonable based on a long term scale.

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

99. The question in these appeals is therefore whether such duty has been breached. However, this issue is not the main plank of the Appellants' submission. And it is not quite related to the Question posed.

100. I would like to make another note on the use of Order 53 of the Rules of the High Court 1980 in cases involving native customary rights. This point was touched upon in Jalang's case by the Courts below. With respect, I find that it is highly unfair and prejudicial to insist upon the natives to proceed by way of Order 53 when they seek to enforce a constitutional right by way of a declaration to that effect.

101. Although it does, to a certain extent, fall within the realm of public law, I am of the view that it tilts more towards the vindication of a private right which is recognized both under statute and at common law (which pre-existed statute). As such, the natives should be at liberty to proceed by way of an ordinary civil suit. Another way of looking at it is to consider it as an

exception to the **O'Reilly v Mackman [1982] 3 All ER 1124** principle.

102. I therefore prefer to approve the recent decision of the High Court in **Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd& Ors [2010] 10 CLJ 383** to that of **Shaharuddin Ali & Anor v. Superintendent of Lands and Surveys, Kuching Division & Anor [2004] 4 CLJ 775.**

103. In the upshot, these appeals are therefore dismissed on the facts of these cases as discussed above. And for the reasons given as well, I decline to answer the Question posed. Having considered the circumstances of the case, I order no costs.

Signed.
(RICHARD MALANJUM)
CHIEF JUDGE (HIGH COURT OF SABAH AND SARAWAK)
FEDERAL COURT, MALAYSIA

Date: 8th September, 2011

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