UNITED MALACCA BHD v PENTADBIR TANAH DAERAH ALOR GAJAH AND OTHER APPLICATIONS [2003] 1 MLJ 465

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FEDERAL COURT (KUALA LUMPUR)

AHMAD FAIRUZ CJ (MALAYA), ABDUL MALEK AHMAD, HAIDAR, MOHTAR ABDULLAH FCJJ AND DENIS ONG JCA

APPLICATIONS NO S 08–4, 5, 6, 7, 8 OF 2002(M), 08–9, 10, 12 OF 2002(N), AND 08–11 OF 2002(J)

24 August 2002

Case Summary

Land Law — Acquisition of land — Reference to court — Whether appeals on such matters from the High Court lay to the Court of Appeal or the Federal Court — Courts of Judicature Act 1964, ss 4 and 67 — Land Acquisition Act 1960, s 49

There were nine motions which were heard together. They were all for extension of time to appeal to the Federal Court. The background facts for all the motions were the same. Nine land acquisition appeals had been filed on diverse dates in the Court of Appeal against orders made by the High Court. The High Court had made such orders in 1999, although the cases had been referred to the High Court between November 1995 and November 1996. There was some confusion as to whether the appeals should be heard in the Court of Appeal or the Federal Court. Hence, the necessity for filing the motions. In fact, one of the appeals, ie the appeal pertaining to the eighth motion, filed in the Court of Appeal, had already been transferred, together with 96 other appeals, to the Federal Court (see *Tanah Sutera Development Sdn Bhd v Pentadbir Tanah Daerah Johor Bahru* [2002] 2 MLJ 65).Such confusion arose with the establishment of the Court of Appeal. On 24 June 1994, the Federal Constitution ('the Constitution') was amended, via Act A885, to establish the Court of Appeal. Section 46 of Act A885 provides that all references in and under the Constitution or any written law to the 'Supreme Court' shall be construed as references to the 'Federal Court'. In view of the establishment of the Court of Appeal, s 67 of the Courts of Judicature Act 1964 ('the CJA') was also amended by way of a blanket amendment where the words 'Supreme Court' were replaced by the words 'Court of Appeal'. The amendment came into force on 24 June 1994 as well. The amendment would mean that from 24 June 1994, all appeals from the High Court lay to the Court of Appeal instead of the Supreme Court. However, s 49(1) of the Land Acquisition Act 1960 ('the LAA') which provides that any person may appeal from a decision of the High Court to the Supreme Court was only amended on 1 March 1998. The issues before the court were: (i) what was the proper forum for land acquisition appeals before the amendments to the LAA; and (ii) whether the Court of Appeal had the power to transfer such appeals to the Federal Court.

Held, striking out the first five motions, granting orders in terms for the remaining motions and setting aside the order of transfer:

(1) (per **Abdul Malek Ahmad FCJ**) Section 49(1) of the LAA, as it stood prior to its amendment vide Act A999 which came into effect [*466]

on 1 March 1998 provided that appeals in land acquisition matters lay direct to the Federal Court and not the Court of Appeal. Its conflict with s 67 of the CJA, as amended by Act A886 which came into force on 24 June 1994, which provides that all appeals in civil matters from the High Court lay to the Court of Appeal, could not be resolved through s4 of the CJA. The words 'in force at the commencement of this Act' appearing in s 4 meant that provisions of the CJA which were inconsistent or in conflict with other written laws would only prevail if such inconsistency or conflict was in existence at the time when the CJA was

enacted (see pp 474G, 476B–E); *Pentadbir Tanah Daerah Melaka Tengah v Mat Nayan bin Tak* [1996] 2 MLJ 45 overruled; *Lim Chee Cheng & Ors v Pentadbir Tanah Daerah Seberang Perai Tengah Bukit Mertajam* (Federal Court Civil Appeal No 02-15-2000(P)), *Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan* [2002] 2 MLJ 399 and *Pahang South Union Omnibus Co v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199 followed.

(2) (per **Haidar FCJ**) Where there is a conflict between any other written law and CJA other than the Constitution in force at its commencement then to that extent CJA prevails. If there is a conflict after the commencement of CJA, then s 4 of the CJA is inapplicable. Therefore, s 4 of the CJA had no application in the present case (see p 482F–G); *Pentadbir Tanah Daerah Melaka Tengah v Mat Nayan bin Tak* [1996] 2 MLJ 45 overruled; *Pahang South Union Omnibus Co v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199 followed.

(3) (per **Abdul Malek Ahmad FCJ**) The effect of the sequence of amendments to the Constitution, the CJA and the LAA on appeals against decisions of the High Court in land acquisition matters would be as follows: (a) before the establishment of the Court of Appeal on 24 June 1994, all appeals lay to the Supreme Court; (b) for decisions from 24June 1994 up to 28February 1998, the appeals lay to the Federal Court; and (c) after 1 March 1998, all such appeals lay to the Court of Appeal, but for land acquisition matters referred to the court after that date, there shall be no appeal where the award comprises an award for compensation. Therefore, for the first five motions pertaining to land acquisition matters in Melaka where the reference to the court was made before 1March 1998, but the decisions in the High Court were made after that date, the appeals would lie to the Court of Appeal (see p477C–G) (**Denis Ong JCA** dissenting); for the remaining four motions relating to land acquisition cases in Negeri Sembilan and Johor where the decisions of the High Court were before 1March 1998, the appeals would lie to the Federal Court (see p491C).

(4) (per **Haidar FCJ**) Ultimately, the important legislation for consideration is the Constitution. The jurisdiction of the Federal Court is provided by art 121(2) of the Constitution. It is an [*467]

enabling provision. The word 'other' in art 121(2)(c) means other jurisdiction than that provided by the CJA, that is there may be legislation that may provide for jurisdiction to the Federal Court to hear appeal direct from a decision of the High Court. One such legislation was s 49(1) of the LAA until it was amended (see pp483B, D, H–484A); *Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan* [2002] 2 MLJ 399 followed.

(5) (per **Haidar FCJ**, **Abdul Malek Ahmad FCJ**, concurring) With regards to the appeal pertaining to the eighth motion and the 96 other appeals, the Court of Appeal had no power to transfer the cases to the Federal Court. The proper order should have been to strike out the appeal and leave it to the appellant to proceed with the necessary steps as provided by the Rules of the Federal Court 1995. The Court of Appeal's reliance on *Tanah Sutera Development Sdn Bhd v Pentadbir Tanah Daerah Johor Bahru* [2002] 2 MLJ 65, on para 12 of the Schedule to the CJA to order such transfer was unjustified. The Schedule to the CJA was made pursuant to the power under s 25(2) thereof wherein additional powers may be set out in the Schedule.Such powers are conferred on the High Court. In that context, the word 'Court' in para 12 of the Schedule must refer to the High Court as the word 'Court' under s 3 of the CJA means the Federal Court, the Court of Appeal or the High Court, as the case requires. Further, looking at s 25 of CJA and the meaning of 'Court', the words 'any other Court' in para 12 should in its proper context mean a court of co-ordinate jurisdiction. Under para 12, power is given to 'transfer any proceedings to or from a subordinate court and to give any directions to the further conduct thereof provided that this power shall be exercised in such manner as may be prescribed by any rules of court'. The Court of Appeal had no such power. 'Subordinate court' under s 3 of the CJA means 'any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court …'; *Tanah Sutera Development Sdn Bhd v Pentadbir Tanah Daerah Johor Bahru* [2002] 2 MLJ 65 overruled (see pp 485I-486B, 487E-F).

(6) (per **Denis Ong JCA** dissenting) The appeals of the first five motions lay to the Federal Court and not to the Court of Appeal. All five cases were governed by the proviso to s49(1) before its amendment by s27(b) of Act A999 because: (i) the objection and reference in those cases were against the written award of the Land Administrator as to the amount of compensation notified to the applicants in Form H; (ii) on the dates the five cases were referred to the High Court, neither s 40D(3), which declares that any decision as to the amount of compensation awarded by the High Court under that section is final and is non-appealable, nor the proviso to sub-s (1) of s 49 in its amended form, which provides that 'where the decision comprises an award of compensation there shall be no appeal therefrom', had come into force. The [*468]

amendments introduced by ss23 and 27(b) of Act A999 operated prospectively with effect from 1 March 1998 and had no retrospective application; (iii) on the dates the five cases were referred to the High Court, although the Court of Appeal was already established, no right of appeal to the Court of Appeal had been conferred on the applicants until 1 March 1998; and (iv)on the dates the five cases were referred to the High Court, the applicants' rights of appeal were to the Federal Court and those substantive rights could not be altered or affected by orders of the High Court issued after 1 March 1998 (see pp 490H–491H).

Bahasa Malaysia summary

Terdapat sembilan usul yang didengar serentak. Kesemuanya adalah untuk perlanjutan masa bagi merayu kepada Mahkamah Persekutuan. Latar belakang fakta-fakta untuk kesemua usul tersebut adalah sama. Sembilan rayuan pengambilan tanah telah difailkan pada tarikh-tarikh yang berlainan di dalam Mahkamah Rayuan terhadap perintah-perintah yang dibuat oleh Mahkamah Tinggi. Mahkamah Tinggi tersebut telah membuat perintah-perintah sedemikian pada tahun 1999, meskipun kes-kes tersebut telah dirujuk kepada Mahkamah Tinggi antara bulan November 1995 dan November 1996. Terdapat kekeliruan berhubung dengan sama ada rayuan-rayuan tersebut seharusnya didengar dalam Mahkamah Rayuan atau Mahkamah Persekutuan. Oleh itu, adalah perlu untuk memfailkan usul-usul tersebut. Malahan, salah satu daripada rayuan-rayuan tersebut yang difailkan dalam Mahkamah Rayuan, rayuan yang berkaitan dengan usul kelapan telah pun dipindahkan, bersama dengan 96 rayuan lain, kepada Mahkamah Persekutuan (lihat *Tanah Sutera Development Sdn Bhd v Pentadbir Tanah Daerah Johor Bahru* [2002] 2 MLJ 65). Kekeliruan sedemikian terbit bila Mahkamah Rayuan ditubuhkan. Pada 24 Jun 1994, Perlembagaan Persekutuan ('Perlembagaan tersebut') telah dipinda, melalui Akta A885, bagi menubuhkan Mahkamah Rayuan. Seksyen 46 Akta A885 memperuntukkan bagi segala rujukan 'Mahkamah Agung' di dalam Perlembagaan tersebut atau mana-mana undang-undang bertulis hendaklah disifatkan sebagai rujukan kepada 'Mahkamah Persekutuan'. Memandangkan penubuhan Mahkamah Rayuan tersebut, maka s 67 Akta Mahkamah Kehakiman 1964 ('AMK') juga telah dipinda dengan menggantikan perkataan-perkataan 'Mahkamah Agung' kepada 'Mahkamah Rayuan'. Pindaan tersebut mula berkuatkuasa pada 24 Jun 1994 juga. Pindaan tersebut bermakna bahawa dari 24 Jun 1994, segala rayuan dari Mahkamah Tinggi terletak kepada Mahkamah Rayuan, bukan lagi Mahkamah Agung. Walau bagaimanapun, s 49(1) Akta Pengambilan Tanah 1960 ('APT') yang memperuntukkan bahawa sesiapa yang berminat boleh merayu daripada keputusan Mahkamah Tinggi kepada Mahkamah Agung hanya dipinda pada 1 Mac 1998. Isu-isu yang terdapat di hadapan mahkamah adalah: (i) di manakah [*469]
forum yang sesuai untuk rayuan-rayuan pengambilan tanah dibuat sebelum pindaan kepada APT tersebut berkuatkuasa; dan (ii) sama ada Mahkamah Rayuan mempunyai kuasa untuk memindahkan rayuan-rayuan sedemikian kepada Mahkamah Persekutuan.

Diputuskan, membatalkan lima usul yang pertama, membenarkan perintah-perintah seperti yang dipohon untuk usul-usul yang selebihnya dan mengenepikan perintah pemindahan tersebut:

(1) (oleh **Abdul Malek Ahmad HMP**) Seksyen 49(1) APT, seperti mana keadaannya sebelum pindaannya melalui Akta A999 yang mula berkuatkuasa pada 1Mac 1998, memperuntukkan bahawa rayuan-rayuan di dalam perkara-perkara pengambilan tanah dihadapkan secara langsung pada Mahkamah Persekutuan dan bukannya Mahkamah Rayuan. Percanggahannya dengan s 67 AMK, seperti mana yang terpinda oleh Akta A886 yang mula berkuatkuasa pada 24 Jun 1994, yang memperuntukkan bahawa kesemua rayuan-rayuan dalam perkara-perkara sivil daripada Mahkamah Tinggi dihadapkan pada Mahkamah Rayuan, tidak boleh diselesaikan melalui s4 AMK. Perkataan-perkataan 'in force at the commencement of this Act' yang terdapat dalam s 4 bermakna bahawa peruntukan-peruntukan AMK yang tidak konsisten atau bercanggah dengan undang-undang bertulis yang lain akan hanya berkekalan jika keadaan tidak konsisten itu atau percanggahan tersebut wujud apabila AMK tersebut digubal (lihat ms 474G, 476B–E); *Pentadbir Tanah Daerah Melaka Tengah v Mat Nayan bin Tak* [1996] 2 MLJ 45 ditolak; *Lim Chee Cheng & 4 Ors v Pentadbir Tanah Daerah Seberang Perai Tengah Bukit Mertajam* (Rayuan Sivil Mahkamah Persekutuan No 02-15-2000(P)) diikut; *Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan* [2002] 2 MLJ 399 dan *Pahang South Union Omnibus Co v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199 diikut.

(2) (oleh **Haidar HMP**) Di mana terdapatnya konflik di antara apa-apa undang-undang bertulis dan AMK selain daripada Perlembagaan yang berkuatkuasa pada ketika itu, AMK perlulah diberikan kepentingan. Sekiranya terdapat konflik selepas penggubalan AMK, s 4 AMK tidak boleh dipakai. Oleh itu, s 4 AMK tidak boleh dipakai dalam kes ini (lihat ms 482F–G); *Pentadbir Tanah Daerah Melaka Tengah v Mat Nayan bin Tak* [1996] 2 MLJ 45 ditolak; *Pahang South Union Omnibus Co v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199 diikut.

(3) (oleh **Abdul Malek Ahmad HMP**) Kesan turutan pindaan-pindaan kepada Perlembagaan Persekutuan, AMK dan APT atas rayuan-rayuan terhadap keputusan-keputusan Mahkamah Tinggi di dalam perkara-perkara pengambilan tanah adalah seperti berikut: (a) sebelum penubuhan Mahkamah Rayuan pada 24 Jun 1994, kesemua rayuan dihadapkan kepada Mahkamah Agong; (b)untuk keputusan-keputusan daripada 24 Jun 1994 sehingga 28Februari 1998, rayuan-rayuan tersebut dihadapkan pada [*470]

Mahkamah Persekutuan; dan (c) selepas 1 Mac 1998, kesemua rayuan sedemikian dihadapkan pada Mahkamah Rayuan, tetapi untuk perkara-perkara pengambilan tanah yang dirujuk kepada mahkamah selepas tarikh itu, tidak akan terdapat rayuan di mana award tersebut terdiri daripada award untuk pampasan. Oleh itu, untuk lima usul yang pertama berhubung dengan perkara-perkara pengambilan tanah di Melaka di mana rujukan kepada mahkamah telah dibuat sebelum 1Mac 1998, tetapi keputusan-keputusan di dalam Mahkamah Tinggi telah dibuat selepas tarikh itu, rayuan-rayuan tersebut akan dihadapkan pada Mahkamah Rayuan (lihat ms 477C–G) (**Denis Ong HMR** menentang); bagi empat usul selebihnya itu yang berkaitan kes-kes pengambilan tanah di Negeri Sembilan dan Johor di mana keputusan-keputusan Mahkamah Tinggi telah dibuat sebelum 1 Mac 1998, rayuan-rayuan tersebut akan dihadapkan pada Mahkamah Persekutuan (lihat ms 491C).

(4) (oleh **Haidar HMP**) Dasarnya, undang-undang yang perlu dipertimbangkan ialah Perlembagaan. Bidangkuasa Mahkamah Perlembagaan adalah diperuntukkan oleh perkara 121(2) Perlembagaan Persekutuan. Ia merupakan suatu peruntukan yang memberi bidangkuasa. Perkataan 'other' di dalam perkara 121(2)(c) bermaksud bidangkuasa lain yang diperuntukkan oleh AMK, iaitu terdapatnya undang-undang yang memberikan bidangkuasa kepada Mahkamah Persekutuan untuk membicarakan rayuan terus dari keputusan Mahkamah Tinggi. Salah satu daripada undang-undang seperti ini ialah s 49(1) APT sehinggalah ia dipinda (lihat ms 483B, D, H–484A); *Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan* *[2002] 2 MLJ 399* diikut.

(5) (oleh **Haidar HMP**, **Abdul Malek Ahmad HMP**, bersetuju) Berhubung rayuan-rayuan yang berkaitan usul kelapan tersebut dan 96 rayuan-rayuan lain, Mahkamah Rayuan tidak mempunyai kuasa untuk memindahkan kes-kes tersebut kepada Mahkamah Persekutuan. Perintah yang sesuai sepatutnya ialah membatalkan rayuan tersebut dan membiarkan perayu terus dengan langkah-langkah yang perlu seperti mana yang diperuntukkan oleh Kaedah-Kaedah Mahkamah Persekutuan 1995. Penggantungan Mahkamah Rayuan kepada *Tanah Sutera Development Sdn Bhd v Pentadbir Tanah Daerah Johor Bahru* *[2002] 2 MLJ 65*, di perenggan 12 Jadual AMK tersebut untuk memerintahkan pemindahan yang sedemikian adalah tidak wajar. Jadual kepada AMK telah dibuat selaras dengan kuasa di bawah s 25(2) di mana kuasa-kuasa tambahan boleh dibentangkan dalam Jadual tersebut. Kuasa-kuasa sedemikian diberikan kepada Mahkamah Tinggi. Dalam konteks itu, perkataan 'Court' dalam perenggan 12 Jadual tersebut mesti merujuk kepada Mahkamah Tinggi kerana perkataan 'Court' di bawah s 3 AMK bermakna Mahkamah Persekutuan, Mahkamah Rayuan atau Mahkamah [*471]

Tinggi, seperti mana yang diperlukan oleh kes tersebut. Selanjutnya, melihat s 25 AMK dan makna 'Court' tersebut, perkataan-perkataan 'any other Court' di dalam perenggan 12 seharusnya dalam konteks yang sesuai bermakna sebuah mahkamah berbidangkuasa setara. Di bawah perenggan 12, kuasa diberikan untuk 'transfer any proceedings to or from a subordinate court and to give any directions to the further conduct thereof provided that this power shall be exercised in such manner as may be prescribed by any rules of court'. Mahkamah Rayuan tidak mempunyai kuasa sedemikian. 'Subordinate court' di bawah s 3 AMK bermakna 'any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court …'; *Tanah Sutera Development Sdn Bhd v Pentadbir Tanah Daerah Johor Bahru* *[2002] 2 MLJ 65* ditolak (lihat ms 485I-486B, 487E-F).

(6) (oleh **Denis Ong HMR** menentang) Rayuan-rayuan lima kes pertama dihadapkan kepada Mahkamah Persekutuan dan bukannya kepada Mahkamah Rayuan. Kelima-lima kes tersebut dikuasai oleh proviso kepada sub-s (1) s49 sebelum pindaannya oleh s27(b) Akta A999 kerana: (i) bantahan dan rujukan di dalam kes-kes itu adalah terhadap award bertulis Pentadbir Tanah berhubung dengan jumlah pampasan yang dimaklumkan kepada permohon-pemohon tersebut dalam Borang H; (ii) pada tarikh-tarikh kelima-lima kes tersebut dirujuk kepada Mahkamah Tinggi, s 40D(3), yang mengisytiharkan bahawa sebarang keputusan berhubung dengan jumlah pampasan yang diberikan oleh Mahkamah Tinggi di bawah seksyen tersebut adalah muktamad dan tidak boleh dirayu, mahupun proviso kepada sub-s (1) s 49 dalam bentuk terpindanya, yang mana memperuntukkan bahawa 'where the decision comprises an award of compensation there shall be no appeal therefrom', tidak berkuatkuasa. Pindaan-pindaan yang diperkenalkan oleh ss 23 dan 27(b) Akta A999 tersebut beroperasi secara prospektif bermula daripada 1 Mac 1998 dan tidak mempunyai sebarang pemakaian secara kebelakangan; (iii) pada tarikh-tarikh kelima-lima kes tersebut dipindahkan kepada Mahkamah Tinggi, meskipun Mahkamah Rayuan telah ditubuhkan,

tiada hak rayuan kepada Mahkamah Rayuan telah diberi kepada pemohon-pemohon tersebut sehingga 1 Mac 1998; dan (iv) pada tarikh-tarikh kelima-lima kes tersebut dirujuk kepada Mahkamah Tinggi, hak rayuan pemohon-pemohon adalah kepada Mahkamah Persekutuan dan hak substantif itu tidak boleh diubah atau terjejas oleh perintah-perintah Mahkamah Tinggi yang dikeluarkan selepas 1 Mac 1998 (lihat ms 490H–491H).

Notes

For cases on references to court, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 1702–1712.

Cases referred to

Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan [2002] 2 MLJ 399

Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan [1998] 3 MLJ 205

Chief Kofi Forfie v Barima Kwabena Seifah [1958] 1 All ER 289

Craig v Kanseen [1943] 1 All ER 108

Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341

Lee Chow Meng v PP [1978] 2 MLJ 36

Lee Lee Cheng (f) v Seow Peng Kwang [1960] MLJ 1

Lim Chee Cheng & Ors v Pentadbir Tanah Daerah Seberang Perai Tengah Bukit Mertajam Federal Court Civil Appeal No 02-15-2000(P)

Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors [1986] 1 MLJ 166

Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793

PP v Dato' Yap Peng [1987] 2 MLJ 311

Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor [1981] 2 MLJ 199

Pentadbir Tanah Daerah Melaka Tengah v Mat Nayan bin Tak [1996] 2 MLJ 45

Pepper (Inspector of Taxes) v Hart [1993] AC 593

Sinnathamby & Anor v Lee Chooi Ying; Brijkishore & Anor v Lee Chooi Ying [1987] 1 MLJ 110 116

Tanah Sutera Development Sdn Bhd v Pentadbir Tanah Daerah Johor Bahru [2002] 2 MLJ 65

Legislation referred to

Constitution (Amendment) Act 1994 ss 13, 20, 46

Courts of Judicature Act 1964 ss 3, 4, 23, 24, 25, (2), 50, 67, (1), 68(1), 87, 96, Pt III, para 12 to the Schedule

Courts of Judicature (Amendment) Act 1994 s 20, Pt IV

Courts of Judicature (Amendment) Act 1995 ss 1, 17

Criminal Procedure Code ss 374, 418A

Federal Constitution *arts 4(1), 121, (1), (1A), (1B), (2), (2)(a), (2)(b), (2)(c), 128, (3), 130, 159, Pt IX*

Industrial Relations Act 1967 s 9(5)

Interpretation Acts 1948 and 1967 s 17A

Land Acquisition Act 1960 ss 46, *49*, *(1)*

Land Acquisition (Amendment) Act 1997 ss 1(2), 23, 24, 25, 27, (b), 40D(3), para 27, (a), (b)

Laws of the Gold Coast 1936 O 41 r 1, Sch 3 to c 4

Legal Profession Act 1976 s 103E

National Land Code s 214A

Rules of the Court of Appeal 1994 *r 76*

Rules of the High Court 1980 O 92 r 4, O 94 r 4

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Robert Lazar (*Teh Lay Kheng* with him) (*Shearn Delamore & Co*) for the applicants in Motions Nos 08–4–2002 (M) to 08–8–2002 (M), 08–9–2002 (N), 08–10–2002 (N) and 08–11–2002 (J).

DP Naban (*Lambert Rasaratnam* with him) (*Lee Hishammuddin*) for the applicant in Motion No 08–12–2002 (N).

Nor Bee Ariffin (State Legal Adviser, Melaka) for the respondents in Motions Nos 08–4–2002 (M) to 08–8–2002 (M).

Hinshawati Shariff (State Legal Adviser, Negeri Sembilan) for the respondents in Motions Nos 08–9–2002 (N), 08–10–2002 (N) and 08–12–2002 (N).

Umi Kalthum Abdul Majid(State Legal Adviser, Johor) for the respondent in Motion No 08–11–2002 (J).

ABDUL MALEK AHMAD FCJ

: We heard these nine motions together. They were all for extension of time to appeal to the Federal Court. The first five motions involved land acquisition matters in Melaka; the sixth, seventh and ninth land acquisition matters in Negeri Sembilan; and the eighth a land acquisition matter in Johor.

Appearing for the first eight motions were Robert Lazar and Teh Lay Kheng, and for the ninth motion, DP Naban and Lambert Rasaratnam. The respondents were represented by the three respective State Legal Advisers; Nor Bee Ariffin for Melaka, Hinshawati Shariff for Negeri Sembilan and Umi Kalthum Abdul Majid for Johor.

The background facts were the same for all. All land acquisition appeals had been filed in the Court of Appeal, but in view of certain conflicting decisions as to the proper forum for those appeals, there appears to be some confusion as to whether they should be heard in the Court of Appeal or only in this court. Hence the necessity for filing the motions. In addition, the land acquisition appeal pertaining to the eighth motion had already been transferred from the Court of Appeal to the Federal Court on 15 January 2002. The question arising from that appeal in *Tanah Sutera Development Sdn Bhd v Pentadbir Tanah Daerah Johor Bahru* *[2002] 2 MLJ 65*, and 96 other land acquisition appeals dealt with on that same date, was whether the transfer of land acquisition appeals from the Court of Appeal to the Federal Court was the correct and proper procedure.

The confusion probably began when *s 67* of the Courts of Judicature Act 1964 ('the CJA') was amended by way of a blanket amendment in Act A886, which came into force on 24 June 1994, where the words 'Supreme Court', wherever they appear in the CJA, were replaced by the words 'Court of Appeal'. The said s 67 provided for the jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil matter. This would mean that from 24 June 1994, all appeals in civil matters from the High Court lay to the Court of Appeal

instead of the Supreme Court and that included land acquisition cases. On the same date, vide Act A885, the Federal Constitution ('the Constitution') was amended to establish the Court of Appeal from 24 June 1994.

The Land Acquisition Act 1960 ('the LAA') was amended vide Act A999, which was published on 31 July 1997, to come into force on such [*474]
date as the minister may, with the approval of the National Land Council, by notification in the Gazette, appoint. However, it was also provided that the amendments in ss 23, 24, 25 and para 27(b) of Act A999 shall apply only to land acquisition cases referred to the court after the coming into force of the amending Act. Eventually, 1 March 1998 was appointed as the date of coming into force of Act A999.

The amendment to s 49(1) of the LAA by para 27(b) of Act A999 deleted the words 'unless the amount awarded by the Court exceeds five thousand ringgit' appearing in the proviso. The result is that where the decision comprises an award of compensation, there shall be no appeal therefrom.

Paragraph 27(a) of Act A999 amended s 49(1) of the LAA by substituting for the words 'Supreme Court' the words 'Court of Appeal and to the Federal Court'. This is the amendment relevant to our problem.

Contributing to the earlier confusion was the notion that it was once thought that the proper forum for appeals in land acquisition cases was the Court of Appeal as seen in *Pentadbir Tanah Daerah Melaka Tengah v Mat Nayan bin Tak* [*[1996] 2 MLJ 45*]. There, the respondent landowner referred his claim for compensation to the High Court after being dissatisfied with the compensation awarded by his collector. The High Court increased the award to RM44,964.71 and the district land administrator sought leave to appeal against the 174.44% increase.

The question before the Court of Appeal was whether leave was required to appeal in a land acquisition matter as the award was below RM250,000. It was contended that no leave was required under s 68(1) of the CJA as it did not apply, on the premise that the LAA was a self contained piece of legislation which conferred the applicant an independent right of appeal as long as the collector's award was above RM5,000.

The Court of Appeal was of the view that in the light of s 4 of the CJA, the provisions of the CJA shall prevail and accordingly, the Court of Appeal had the jurisdiction under s 67(1) of the CJA to hear the appeal stating that the right of appeal under s 49 of the LAA confers the same right. Leave to appeal was granted since the amount was more than RM5,000 but less than RM250,000.

To be fair, this decision appears to be in error as s 49(1) of the LAA as it stood when that appeal was heard states that appeals in land acquisition matters lay directly to the Federal Court and not the Court of Appeal which was only amended to take effect on 1 March 1998.

The position is strengthened by the decisions of this court in two other appeals. One is *Lim Chee Cheng & Ors v Pentadbir Tanah Daerah Seberang Perai Tengah Bukit Mertajam* (Federal Court Civil Appeal No 02-15-2000(P)) which (Eusoff Chin Chief Justice, Wan Adnan Ismail CJ (Malaya) and Ahmad Fairuz FCJ) on 18 October 2000 recorded a consent order between the parties.

It actually started off as Federal Court Civil Appeal 02–4–2000(P) following the decision in the High Court (Mokhtar Sidin J) on [*475]
12September 1995. The Court of Appeal (NH Chan, Abu Mansor Ali and Ahmad Fairuz JJCA) on 26 February 1998 dismissed the appeal. Leave to appeal was granted by this court (Eusoff Chin Chief Justice, Wan Adnan Ismail CJ (Malaya) and Abdul Malek Ahmad FCJ) vide Federal Court Civil Application No 08–23–98(P) on 3 April 2000. The two questions posed were whether under the circumstances the Court of Appeal has the jurisdiction to entertain the appeal and whether in the assessment of the market value of estate land within the meaning of s 214A of the National Land Code, the Land Administrator could ignore the fact that estate lands are freely transferable to a single person or company. On 15 May 2000, this court (Eusoff Chin Chief Justice, Abdul Malek Ahmad FCJ and Denis Ong JCA) held that the appeal should be heard in the Federal Court, declared the proceedings in the Court of Appeal on 26 February 1998 null and void and granted the appellant an extension of time to file the appeal to the Federal Court which they did. The appeal then came to the Federal Court as Federal Court Civil Appeal 02–15–2000(P) as stated earlier.

The other case is *Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan* (Federal Court Civil Appeal No 02-19-2000(P) now reported as [2002] 2 MLJ 399). The High Court matter (Abdul Hamid Mohamed J) was decided on 9 October 1995 and the Court of Appeal (NH Chan, Abu Mansor Ali and Abdul Malek Ahmad JJCA) dismissed the appeal with costs on 22 September 1997. Leave to appeal to the Federal Court (Eusoff Chin Chief

Justice, Zakaria Yatim FCJ and Gopal Sri Ram JCA) vide Federal Court Civil Application No 08-77-97(P) was dismissed on 11 January 1999. Another motion to extend time to file the appeal to the Federal Court was made vide Federal Court Civil Application No 08-76-2000(P) and on 18 October 2000, this court (Eusoff Chin Chief Justice, Wan Adnan Ismail CJ (Malaya) and Ahmad Fairuz FCJ) granted, by consent of the parties, the order in terms.

On 7 February 2001, this court (Wan Adnan Ismail CJ (Malaya), Ahmad Fairuz and Siti Norma Yaakob FCJJ) amended the Federal Court order dated 18 October 2000 to insert the words 'that the decision of the Court of Appeal dated 22 November 1997 is null and void and further that the Federal Court order dated 11 January 1999 is null and void'.The appeal was on that same date heard on the merits and was dismissed on 10September 2001.

For effect, it is worthwhile to compare the position of s 49(1) of the LAA before and after the relevant amendment. Before the said amendment, it read as follows:

> 49 Appeal from decision as to compensation
>
> (1) Any person interested, including the Land Administrator and any person or corporation on whose behalf the proceedings were instituted pursuant to section 3 may appeal from a decision of the Court to the Supreme Court:
>
> Provided that where the decision comprises an award of compensation there shall be no appeal therefrom unless the amount awarded by the Court exceeds five thousand ringgit.

[*476]

After the amendment, the provision states:

> 49 Appeal from decision as to compensation
>
> (1) Any person interested, including the Land Administrator and any person or corporation on whose behalf the proceedings were instituted pursuant to section 3 may appeal from a decision of the Court to the Court of Appeal and to the Federal Court.
>
> Provided that where the decision comprises an award of compensation there shall be no appeal therefrom.

The resultant effect of this amendment is that prior to 1 March 1998, all appeals in land acquisition matters lay to the Supreme Court. This appears to be in conflict with the blanket amendment of the CJA, vide Act A886, which came into force on 24 June 1994, which provided that all appeals from the High Court, including land acquisition matters, lay to the Court of Appeal.

Section 4 of the CJA states:

> Provision to prevent conflict of laws
>
> In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.

The crucial words of that section appear to be 'in force at the commencement of this Act', meaning that the inconsistency or conflict with any other written law should be at the point of time when the CJA was enacted and not subsequently.

This view is cemented by the finding of this court more than 20 years ago in *Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199 when it said at p 203:

> Mr Kulasegaran, however, submits that *South-East Asia Fire Bricks Sdn Bhd v Non Metallic Mineral Products Manufacturers Employees Union & Ors* [1980] 2 MLJ 165; 3 WLR 318; 2 All ER 689 was decided per incuriam and is not good law, on the argument, briefly, to the effect that s 9(5) is inconsistent and conflicts with the provisions of s 25(2) of the

Courts of Judicature Act 1964 which give the High Court the additional powers set out in the Schedule thereto and therefore with para 1 of the Schedule which gives power to issue directions, orders or writs including writs inter alia of the nature of certiorari, and that in the circumstances the privative clause in s 9(5) cannot prevail against these provisions of the Courts of Judicature Act and is *pro tanto* void by virtue of s4 thereof which provides that in the event of inconsistency or conflict between that Act and any other written law other than the Constitution in force at the commencement of that Act, the provisions of that Act shall prevail. Assuming for a moment for the sake of argument that there is in fact any such inconsistency or conflict as is contended, but there is none as will appear, *s 4* of the Courts of Judicature Act can have no application as the provisions of the Courts of Judicature Act (apart from s 5 which took effect on 16 September 1963) came into force on 16 March 1964 but the Industrial Relations Act was enacted much later and brought into force on 7 August 1967 and indeed as a result of an amendment thereto s 9(5) itself only took effect on 9 October 1969, and it was therefore not in force at the commencement of the Courts of Judicature Act, thus negating any application [*477]
of s 4 thereof in the event if at all of any inconsistency or conflict between the several statutory provisions in question.

It must be observed that in that case, the written law that is said to be in conflict with the CJA was not in force when the CJA was enacted. In our situation, the said written law was but there was no inconsistency or conflict between it and the CJA at the time the latter came into force. The fact that the inconsistency or conflict took place some 20 years later is therefore only of academic value and must probably be due to an oversight of the parliamentary draftsman in not making the amendment at the same time as the CJA in 1994.

Accordingly, the only conclusion that can be reached as regards the inconsistency or conflict is that between 24 June 1994, when Act A886 was enacted, up to 28 February 1998, the day before Act A999, came into force, all appeals in land acquisition matters lay to the Federal Court.

In short, the effect of the sequence of amendments to the Constitution, the CJA and the LAA on appeals against decisions of the High Court in land acquisition matters would be as follows:

(a) before the establishment of the Court of Appeal on 24 June 1994, all appeals prior to that date lay to the Supreme Court;

(b) for decisions from 24 June 1994, the appeals lay to the Federal Court up to 28 February 1998; and

(c) after 1 March 1998, all such appeals lay to the Court of Appeal but for land acquisition matters referred to the court after that date, there shall be no appeal where the award comprises an award for compensation.

As regards the transfer to this court by the Court of Appeal on 15 January 2002 of 97 land acquisition appeals in *Tanah Sutera Development Sdn Bhd*, I entirely agree with the reasoning of my learned brother Haidar FCJ in his judgment in this appeal, when he concluded that the Court of Appeal had no power to do so.

Therefore, for the first five motions pertaining to land acquisition matters in Melaka where the reference to the court was made before 1March 1998 but the decisions in the High Court were made after that date, the appeals would lie to the Court of Appeal, but for the remaining four motions relating to land acquisition cases in Negeri Sembilan and Johor where the decisions of the High Court were before 1 March 1998, the appeals would lie to the Federal Court. As stated earlier, the transfer of the land acquisition appeal in the eighth motion by the Court of Appeal to the Federal Court is declared null and void together with 96 other land acquisition appeals transferred by the Court of Appeal on the same date.

The first five motions are accordingly struck out and orders in terms are granted for the remaining motions. There shall be no order as to costs.

HAIDAR FCJ

: There are nine applications by way of notices of motion before the court. They are:

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(1) Mahkamah Persekutuan Permohonan Sivil No 08–4–2002 (M);

(2) Mahkamah Persekutuan Permohonan Sivil No 08–5–2002 (M);

(3) Mahkamah Persekutuan Permohonan Sivil No 08–6–2002 (M);

(4) Mahkamah Persekutuan Permohonan Sivil No 08–7–2002 (M);

(5) Mahkamah Persekutuan Permohonan Sivil No 08–8–2002 (M);

(6) Mahkamah Persekutuan Permohonan Sivil No 08–9–2002 (N);

(7) Mahkamah Persekutuan Permohonan Sivil No 08–10–2002 (N);

(8) Mahkamah Persekutuan Permohonan Sivil No 08–11–2002 (J);

(9) Mahkamah Persekutuan Permohonan Sivil No 08–12–2002 (N).

Mr Robert Lazar together with Ms Teh Lay Khang appear for the applicants in applications (1) to (8) and Mr DP Danabalan and MrLambert Rasaratnam appear for the applicant in application (9).

YB Nor Bee bte Ariffin, Legal Adviser for Melaka, appears for the respondent in applications (1) to (5). YB Hinshawati bte Shariff, Legal Adviser for Negeri Sembilan, appears for the respondent in applications (6), (7) and (9), whereas YB Umi Kalthum bte Abdul Majid, Legal Adviser for Johor, appears for the respondent in application (8).

It was agreed that all the applications be heard together. Counsel for both parties agreed that for applications (1) to (5), the appropriate appellate court is the Court of Appeal. If the court agrees, then these applications should be struck out. Parties agreed that in the event of such an order being made, each party bears its own costs.

Counsel for both parties in applications (6) to (9) agreed that the appropriate appellate court is the Federal Court. If the courts agrees, then in granting the applications, the parties agreed that each party bears its own costs.

So much for the agreement or concession made by the parties. Be that as it may, in view of the confusion as to the appropriate appellate court in relation to land acquisition cases, there is a need for consideration to be given as to the appropriate appellate court and for this court, being the apex court in the country, to make a ruling accordingly.

Now, the confusion arose with the establishment of the Court of Appeal in the hierarchy of the court system in this country. It started with the amendment to the Constitution in 1994 by the Constitution (Amendment) Act 1994 (Act A885).

Constitution (Amendment) Act 1994 (Act A885)

Act A885 came into force on 24 June 1994. Article 121 was amended to establish the Court of Appeal by way of cl (1B) which reads:

> There shall be a court which shall be known as the Mahkamah Rayuan (Courtof Appeal) and shall have its principal registry in Kuala Lumpur, andthe Court of Appeal shall have the following jurisdiction, that is to say—
>
> [*479]
>
> (a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the court and appealable under federal law to a judge of the court); and
>
> (b) such other jurisdictions as may be conferred by or under federal law.

Section 46 of Act A885 provides that all references in and under the Constitution or any written law to the 'Supreme Court' shall be construed as references to the 'Federal Court'.

As a result of the amendments to the Constitution, there would therefore be a need to make the necessary amendments to the CJA to make provisions for the composition of the Court of Appeal, its jurisdiction and powers. This was done by way of the Courts of Judicature (Amendment) Act 1994 (Act A886).

Courts of Judicature (Amendment) Act 1994 (Act 886)

Act A886 came into force on 24 June 1994, that is, the same date that Act A885 came into force. The date of coming into force of both amended Acts has to be the same in view of, inter alia, the establishment of the Court of Appeal.

Part III of the original CJA which provides for the composition of the Federal Court, its criminal and civil jurisdictions, including its original jurisdiction, as well as its powers, etc was amended and replaced therein by the Court of Appeal with the necessary modifications. There were other consequential amendments made also with which we are not concerned here.

As Pt III now makes provisions for the Court of Appeal, Act A886 therefore inserted Pt IV therein to provide for the composition of the Federal Court, its jurisdiction and powers, etc previously set out in Pt III thereof with the necessary modifications (see s 20 of Act A886).

It seems clear that as of 24 June 1994, ordinarily all appeals from the decisions of the High Court will thenceforth go to the Court of Appeal, and subject to ss 87 and 96 of CJA, to the Federal Court.

I will next have to consider the Land Acquisition (Amendment) Act 1997 (Act A999) which made amendments, inter alia, to s 49(1) in relation to an appeal from a decision of the High Court in respect of land acquisition cases. This amendment provides for an appeal from a decision of the High Court to the Court of Appeal and to the Federal Court. Before the amendment, an appeal against a decision of the High Court goes to the Supreme Court ('Federal Court').

Land Acquisition (Amendment) Act 1997 (Act A999)

Act A999 which amended, inter alia, s 49(1), came into force on 1 March 1998 vide PU(B) 94/98 dated 26 February 1998. The original s 49(1) reads:

> Any person interested, including the Land Administrator and any person or corporation on whose behalf the proceedings were instituted pursuant to [*480]
> section 3 may appeal from a decision of the court (meaning High Court under section 1 thereof) to the *Supreme Court*.
>
> Provided that where the decision comprises an award of compensation there shall be no appeal therefrom *unless the amount awarded by the court exceeds five thousand ringgit*. (Emphasis added.)

Act A999 amended s 49(1) by substituting for the words 'Supreme Court' the words 'Court of Appeal and to the Federal Court' and deleting the words 'unless the amount awarded by the court exceeds five thousand ringgit' in the proviso.

The effect of the amendment as of 1 March 1998 would appear to be:

(a) an appeal in respect of a decision of the High Court as from 1 March 1998 goes to the Court of Appeal and to the Federal Court, other than an award of compensation;

(b) the amendment to the proviso shall only apply to land acquisition cases referred to the High Court after 1 March 1998.

Arising out of the amendments to the three legislation, the appropriate appellate courts in respect of land acquisition cases may be categorized as follows:

(i) any decision of the High Court prior to 24 June 1994 (the date of the establishment of the Court of Appeal) goes to the Supreme Court (Federal Court);

(ii) any decision of the High Court between 24 June 1994 and before 1March 1998, is the appellate court the Federal Court or the Court of Appeal?

(iii) any decision of the High Court after 1 March 1998 goes to the Court of Appeal and to the Federal Court with a proviso that where the decision comprises an award of compensation there shall be no appeal in respect of the cases referred to the High Court after 1 March 1998.

Category (i) is without doubt very clear as to the appropriate appellate court.

Category (ii) creates an interesting situation for the period of 24 June 1994 to 28 February 1998, for we have the Court of Appeal under the CJA as the appellate court against a decision of the High Court and at the same time under the LAA, an appeal against a decision of the High Court goes to the Supreme Court (Federal Court) until it was amended on 1 March 1998, vide Act 999. This is the grey area we are concerned with.

We thus have two parallel federal legislation in conflict with each other regarding the appropriate appellate court against a decision of a High Court for the said period. Interestingly enough, this issue was considered by the Court of Appeal in *Pentadbir Tanah Daerah Melaka Tengah v Mat Nayan bin Tak* [1996] 2 MLJ 45 when considering whether the Court of Appeal had the jurisdiction to hear an appeal from a decision of the High Court in respect of land acquisition cases in view of the original s 49(1) of the LAA which specified the Supreme Court (Federal Court) as the appellate court [*481]
at the material time, and if it had the jurisdiction, whether leave was required in view of the amount involved.

In *Mat Nayan*, both Mahadev Shankar JCA and NH Chan JCA, in granting leave to appeal (which is not the issue here) ruled that the Court of Appeal had the jurisdiction to hear the appeal pursuant to s 67(1) read with s 4 of the CJA. While s 67(1) of the CJA provides the jurisdiction for the Court of Appeal to hear an appeal from a decision of the High Court, there is a conflict here, as I stated earlier, where at the material time s 49(1) provides for an appeal directly to the Supreme Court (Federal Court). To resolve the conflict, the learned judges of the Court of Appeal resorted to s4 of the CJA which reads:

> Provision to prevent conflict of laws
>
> In the event of inconsistency or conflict between this Act and any other written law other than the Constitution *in force at the commencement of this*Act, the provisions of this Act shall prevail. (Emphasis added.)

With respect, the learned judges did not adequately consider the words in s4 viz, 'in force at the commencement of this Act'. In my view, the conflict envisages any other written law in conflict 'at the commencement of the CJA', that is 16 March 1964. At this date, there was no conflict with the original s 49(1) of the LAA as under the CJA, an appeal from a decision of the High Court lies to the Federal Court, as is similarly provided by s 49(1). The establishment of the Court of Appeal, as I stated earlier, came about only on 24 June 1994. It was contended by counsel for the applicants, as well the legal advisers acting for the respondents, that the learned judges in *Mat Nayan*, in considering s 4 of the CJA, did not have the benefit and assistance of the Federal Court case of *Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199 and the Supreme Court case of *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793. Had they had the benefit of these two cases, according to counsel for all the parties, the learned judges could very well have come to a different conclusion.

In *Pahang South Union Omnibus*, the Federal Court, in dealing with the power of the Minister of Labour and Manpower under s 9(5) of the Industrial Relations Act 1967 (pertaining to recognition of the trade union) which incorporates a privative or ouster clause provision that a decision of the Minister under that section shall be final and shall not be questioned in any court is inconsistent and conflicts with s 25(2) of the CJA, which gives the High Court the additional powers set out in the Schedule thereto, and therefore para 1 of the Schedule which gives power to issue directions, orders or writs, including writs, inter alia, of the nature of certiorari, and that in the circumstances, the privative clause in s 9(5) cannot prevail against the provisions of the CJA and is *pro tanto*void by virtue of s 4 thereof, which provides that in the event of an inconsistency or conflict between the CJA and any other written law other than the Constitution in force at the commencement of the CJA, the provisions of the CJA shall prevail, stated at p 203:

[*482]

> Assuming for a moment for the sake of argument that there is in fact any such inconsistency or conflict as is contended, but there is none as will appear, s 4 of the Courts of Judicature Act can have no application as the provisions of the Courts of Judicature Act (apart from section 5 which took effect on 16September 1963) came into force on 16 March 1964 but the Industrial Relations Act was enacted much later and brought into force on 7 August 1967 and indeed as a result of an amendment thereto section 9(5) itself only took effect on 9 October 1969 and *it was therefore not in force at the commencement of the Courts of Judicature Act*, thus negating any application of s 4 thereof in the event if at all of any

> inconsistency or conflict between the several statutory provisions in question. (Emphasis added.)

The case of *Mohamed Habibullah bin Mahmood* is not directly on point with the facts of the case before us, though s 4 of the CJA was dealt with by the Supreme Court. There, s 4 was dealt with more in the context of the word 'Constitution' used therein in relation to the law incorporating art 121(1A) in the Constitution which ousted the jurisdiction of the civil courts in respect of any matter within the jurisdiction of the Syariah courts. The law is the Constitution (Amendment) Act 1988 and it was argued that since the Constitution (Amendment) Act 1988 was not made retrospective, the jurisdiction of the High Court under ss 23 and 24 shall continue or at least to be concurrent with the jurisdiction of the Syariah court, as it was caught by s 4 of the CJA. Mohamed Azmi SCJ, in dealing with the Constitution (Amendment) Act 1988 and s 4 of the CJA, stated at p 813:

> Furthermore the provision of *s 4* of the Courts of Judicature Act itself, does not support the proposition that it is capable of rendering ineffective for whatever reason the provisions of any Constitution Amendment Act enacted under art 159. The words,'other than the Constitution' in s 4 are not mere surplusage. Under art 160, the term 'written law' includes the Constitution and the word 'law' and 'federal law' includes 'any Act of Parliament' which amends the Constitution under art 159. The intention of Parliament in s 4 is expressly to exclude the Constitution or any Act of Parliament enacted under art 159 which amends the Constitution. In any event, therefore, s 4 of the 1964 Act is not applicable to the Constitution (Amendment) Act 1988, and it cannot prevail over art 121(1A) of the Constitution.

From the above, it can be distilled that where there is a conflict between any other written law and the CJA, other than the Constitution in force at its commencement, then to that extent the CJA prevails. In the event there is a conflict between the CJA and any other written law after the commencement of the CJA, it would appear that s 4 of the CJA is inapplicable (see *Pahang South Union Omnibus*). However, in so far as the law enacted under art 159 of the Constitution to amend the Constitution is concerned, such law has no application within the context of any other written law under s 4 of the CJA.

I am of the view therefore that s 4 of the CJA has no application here. In that event, until s 49(1) is amended, the appropriate appellate court for land acquisition cases is the Federal Court. In that respect, the decision in *Mat Nayan*on the application of s 4 of the CJA by the Court of Appeal and that it had the jurisdiction at the material time to hear the land acquisition case cannot be supported.

[*483]

In respect of category (iii), it seems clear to me that as of 1 March 1998, an appeal against a decision of the High Court goes to the Court of Appeal and to the Federal Court, but such an appeal is only in respect of matters other than an award of compensation. However, in respect of land acquisition cases referred to the High Court before 1 March 1998, an appeal on an award of compensation is preserved. This is provided by s 1(2) of the Land Acquisition (Amendment) Act 1997.

Ultimately, the important legislation for consideration is the Constitution, the supreme law of the country. Previously, under Pt IX of the Federal Constitution in relation to the judiciary, the words 'judicial power' were used in art 121(1). Amendments were made by the Legislature in 1988 vide Act A704 where those words were deleted and an amendment was made, if I am not wrong, in the light of the majority judgment of the Supreme Court in *Public Prosecutor v Dato' Yap Peng* *[1987] 2 MLJ 311*, which struck down the amendment to s 418A of the Criminal Procedure Code giving the power of transfer of any particular case triable by a criminal court subordinate to the High Court on the issuance of a certificate to that effect by the public prosecutor, as being in violation of the provisions of art 121(1) and was therefore unconstitutional and invalid under art 4(1).

Be that as it may, the jurisdiction of the Federal Court is provided by art 121(2) of the Constitution:

> There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry in Kuala Lumpur, and the Federal Court shall have the following *jurisdiction*, that is, to say —
>
> (a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof; and
>
> (b) such original jurisdiction or consultative jurisdiction as is specified in Articles 128 and 130; and
>
> (c) such other jurisdiction as may be conferred by or under federal law. (Emphasis added.)

Article 121(2)(b), inter alia, provides for the original jurisdiction of the Federal Court as is specified in art 128. Article 128(3) provides that the jurisdiction of the Federal Court to determine appeals from the Court of Appeal, the High Court or a judge thereof shall be such as may be provided by federal law. The then Supreme Court in *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166 in considering whether the court had the power to review appeals heard and disposed of by it, stated that 'law' referred to in cl 3 of art 128 is the CJA. In the circumstances, it is my view that art 121(2)(a) is an enabling provision. Quite apart from its original or consultative jurisdiction as is specified in arts 128 and 130 of the Constitution, art 121(2)(c) also provides for other jurisdictions as may be conferred by or under federal law. The word 'other' must, in my view, mean other jurisdiction than that provided by the CJA, that is, there may be legislation that may provide for jurisdiction to the Federal Court to hear an appeal direct from a decision of the High Court instead of via the Court of Appeal under the CJA. Such legislation that I can think of are:

[*484]

(a) s 49(1) of the LAA, until it was amended;

(b) s 374 of the Criminal Procedure Code which relates to habeas corpus matters;

(c) s 103Eof the Legal Profession Act 1976 relating to a decision of the High Court in respect of disciplinary matters of the members of the Bar.

In respect of (a), there has been a judgment of this court recently by way of obiter dictum, impliedly saying that the Federal Court is the court having jurisdiction in respect of land acquisition cases even though at the time of the lodgement of the appeal on 6 November 1995, the Court of Appeal was in existence. The case is *Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan* [2002] 2 MLJ 399, where Siti Norma Yaakob FCJ, speaking for the court stated at p 402:

> It was based on that reasoning that the appellant's solicitors filed a notice of motion dated 7 September 2000, in this court for an extension of time to appeal against the High Court decision dated 9 October 1995, and to proceed to rehear the matter on its merits. On 18 October 2000, this court allowed the application on the undisputed ground that all proceedings in the Court of Appeal and subsequent proceedings relating thereto in this court were null and void. To that end the Court of Appeal order dated 22 September 1997, dismissing the appellant's appeal with costs as well as the order of this court dated 11 August 1998, dismissing the appellant's application for leave to appeal should, for completeness, have been declared to be null and void and expressed to be so in the consent order dated 18 October 2000. However a perusal of that latter order shows no such declaration. It was to correct this omission that Dato Alizatul Khair raised the preliminary point for it is her contention that if left uncorrected the Court of Appeal order dated 22 September 1997, and the order of this court dated 11 August 1998, would appear to be valid and subsisting. For the reasons already stated, this could never be. We entirely agree with her.

Under (b), as far as I know, no party has raised the issue of the jurisdiction of the Federal Court when ordinarily such appeals should go to the Court of Appeal when they came into existence (see s 50 of the CJA).

As regards (c), there is decision of this court which set aside the order of the Court of Appeal on the ground of its lack of jurisdiction, though we do not have the benefit of a written judgment. It is the case of *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341. The Court of Appeal itself, through Gopal Sri Ram JCA, expressed reservation whether it had the jurisdiction.

It seems clear to me that the Constitution, by art 121(2)(b) in particular, by way of art 128 provides for jurisdiction to the Federal Court under the CJA and art 121(2)(c) provides for other jurisdictions to the Federal Court as may be conferred by or under federal law unless caught by s 4 of the CJA.

Transfer of cases from the Court of Appeal to the Federal Court

There is yet another issue in respect of the power of the Court of Appeal to transfer land acquisition cases to the Federal Court. In the applications [*485]
before us, only application (8) is affected. According to its counsel, MrRobert Lazar, when the said application was filed in this court on 11January 2002, the order of transfer was not yet made by the Court of Appeal. It was ordered by the Court of Appeal on 15 January 2002 (see *Tanah Sutera Development Sdn Bhd v Pentadbir Tanah Daerah Johor Bahru* [2002] 2 MLJ 65).

Mr Robert Lazar indicated that he would be quite happy if this court takes the view that the Court of Appeal has the power to transfer but he, however, was of the view that the Court of Appeal has no such power. Hence application (8) before this court. He therefore sought the ruling of this court on this issue as the order of the Court of Appeal affected many other appeals besides his client's appeal (*Tanah Sutera Development Sdn Bhd*).

The Court of Appeal in *Tanah Sutera Development Sdn Bhd*, whilst acknowledging that it had no jurisdiction to hear the appeal relating to land acquisition cases before it, citing the decision of the 'Federal Court' in *Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan* [1998] 3 MLJ 205 (it should be the decision of the Court of Appeal and the issue was on compensation only) thought that it had, nevertheless, the requisite jurisdiction and power to order a transfer. In support thereof it referred to three provisions:

(a) para 12 of the Schedule to the CJA;

(b) r 76 of the Rules of the Court of Appeal 1994; and

(c) O 92 r 4 of the Rules of the High Court 1980.

Paragraph 12 of the Schedule reads:

> Power to transfer any proceedings to any other Court or to or from any subordinate court, and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof:
>
> Provided that this power shall be exercised in such manner as may be prescribed by any rules of court.

The Court of Appeal then took the approach that the words 'any other Court' must in that context be read generously and purposively, citing *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, per Lord Griffith at p 617. It then quoted s 17A of the Interpretation Acts 1948 and 1967 to show the will of Parliament. Section 17A reads:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

I agree on the purposive approach that can be taken by the court but the issue is whether the words 'any other Court' was read in the right context by the Court of Appeal so as to read them generously and purposively.

With respect, the Schedule to the CJA was made pursuant to the power under s 25(2) thereof wherein additional powers may be set out in the Schedule. Such powers are conferred on the High Court. In that context, [*486]
the word'Court' in para 12 of the Schedule must refer to the High Court as the word 'Court' under s 3 of the CJA means the Federal Court, the Court of Appeal or the High Court, as the case requires.

Looking at s 25 of the CJA and the meaning of 'Court', the words 'any other Court' should in its proper context mean a court of co-ordinate jurisdiction. This is further amplified by the power given to transfer any proceedings to or from a subordinate court and to give any directions to the further conduct thereof provided that this power shall be exercised in such manner as may be prescribed by any rules of court. I find no such power for the Court of Appeal to do so. 'Subordinate court' under s 3 of the CJA means 'any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court …'. It cannot be intended to include a higher court, that is, the Federal Court in this case as it seemed to be what the Court of Appeal intended it to mean.

On this issue, though it had no jurisdiction to hear the appeal, the Court of Appeal was nevertheless of the view that it had the jurisdiction and power to order a transfer of the appeal to the Federal Court by stating that the two conditions set by *Lee Lee Cheng (f) v Seow Peng Kwang* [1960] MLJ 1, were satisfied. I need to examine what the court said in *Lee Lee Cheng*.

In *Lee Lee Cheng*, this is what Thompson CJ said at p 3 in regard to 'jurisdiction' and 'powers' in a statute:

> It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where different words are, as here, used repeatedly. This leads to the view that in the Ordinance there is distinction between the jurisdiction of a Court and its powers, and this suggests that the word 'jurisdiction' is used to denote the types of subject matter which the Court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in

> matters over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers.

As is clear from what Thompson CJ stated, if the Court of Appeal here has no jurisdiction in respect of the appeal before it, it follows that it has no power to transfer. It cannot, with respect, fall back on the Schedule to the CJA to look for jurisdiction on transfer when it is clear that it is intended only to apply to the High Court.

Rule 76 of the Rules of the Court of Appeal 1994 and O 94 r 4 of the Rules of the High Court 1980 relied on by the Court of Appeal have no application to the facts of the matter before us. While I appreciate'the only postulate for the exercise of jurisdiction is the interests of justice' per Gopal Sri Ram JCA, we still have to cross the first hurdle, ie the jurisdictional issue. Even if the court has the jurisdiction to deal with the matters before it, the court cannot exceed its powers. The Court of Appeal agreed it has no jurisdiction and therefore it has no power of transfer unless it is so provided by law.

The Court of Appeal went on to quote a passage from the Privy Council case of*Chief Kofi Forfie v Barima Kwabena Seifah* [1958] 1 All ER 289 by [*487]
way of analogy and I quote 'if we have no jurisdiction to hear this appeal, we nevertheless have jurisdiction to transfer this appeal to a court which has jurisdiction to hear and dispose of it; in this instance the Federal Court'. With respect, the facts in *Chief Kofi Forfie*and the facts of the appeal before it are totally different even to justify the analogy.

*Chief Kofi Forfie*is a case where the president of the Chief Commissioners Court, when giving judgment on 10 May 1949, had no power to exercise judicial functions on that day as his appointment to preside over it stood rescinded. This was the main ground of appeal against his decision to the West Africa Court of Appeal. Possibly realizing this error, he was appointed again for the period of 23 June to 30 June 1949, wherein on 29 June 1949, acting under a power to review a judgment conferred by O 41 r 1 contained in Sch 3 to c 4 of the Laws of the Gold Coast 1936, he reviewed his judgment of 10 May 1949 and delivered a judgment identical in terms with his original judgment. On appeal, the West Africa Court of Appeal held that the judgment delivered on review on 29 June 1949 must also be held to be a nullity as the judgment delivered on 10 May 1949 was a nullity.

On appeal to the Privy Council, it was held, after quoting a passage from the judgment of Lord Greene MR in *Craig v Kanseen* [1943] 1 All ER 108(at p 113) :

> Assuming that the judge had no power on 29 June 1949 to review his judgment on 10 May 1949 he nevertheless had power to declare it a nullity and proceed to give a fresh judgment.

Given the matters before the Court of Appeal, it appears to me, with respect, that even to rely on *Chief Kofi Forfie* by way of analogy is entirely wrong and misplaced.

In the circumstances, I am of the view that the Court of Appeal has no power to transfer cases to a higher court, that is, the Federal Court. The proper order should have been to strike out the appeal and leave it to the appellant to proceed with the necessary steps as provided by the Rules of the Federal Court 1995, in particular r 126.

While I appreciate the concern of the Court of Appeal to see that justice is accorded to the litigants, at the same time it is not appropriate for the Court of Appeal to speculate on whether the applicant/appellant would be granted an extension of time to appeal by the Federal Court to justify it ordering the transfer of the appeal to the Federal Court on grounds of justice. I should say that the matter should be left to the good wisdom of the Federal Court to decide. There are established principles on which the court will exercise its powers in such a situation (see *Sinnathamby & Anor v Lee Chooi Ying; Brijkishore & Anor v Lee Chooi Ying* [1987] 1 MLJ 110 at p 116,). In my view, this is a proper case for the court to exercise its discretion in favour of the applicants having regard to the grounds stated therein.

For the reasons stated, I make the following orders:

(1) Federal Court Civil Applications Nos 08–4–2002 (M) to 08–8–2002 (M) are struck out as the Court of Appeal is the appropriate appellate court; [*488]

(2) Federal Court Civil Applications Nos 08–9–2002 (N), 08–10–2002 (N), 08–11–2002 (J) and 08–12–2002 (N) are allowed and I order that the notices of appeal be filed within 7 days of this order;

(3) the transfer of all the land acquisition appeals including the transfer in respect of the appeal under Application No 08–11–2002 (J) by the Court of Appeal on 15 January 2002 is null and void and the order of transfer is set aside;

(4) as agreed by the parties, each party shall bear its own costs and I order that the deposit paid be refunded.

My learned CJ (Malaya) has read my judgment and agreed with the reasons and the conclusions therein.

DENIS ONG FCJ

: I have had the advantage of reading the judgments in draft of my learned brothers Abdul Malek Ahmad, Haidar and Mohtar Abdullah FCJJ. With respect, I differ from them in my decision with regard to the first five motions concerning the lands in Malacca and would give my reasons for doing so.

There are altogether nine motions for extension of time and leave to appeal to the Federal Court. Five motions are concerned with lands in the State of Malacca, three with lands in Negeri Sembilan, and one with land in the State of Johor. In all these cases, notices of appeal to the Court of Appeal were filed by the appellants/applicants ('the applicants') on diverse dates against orders made by the High Court.

The question in general is whether the appeals of the applicants lie to the Court of Appeal or to the Federal Court. Essentially, the answer to that question depends upon the right of appeal of the applicants which must be determined having regard to the relevant dates on which such notices of appeal were filed and also to the relevant provision of s 49(1) of the LAA, which section confers such a right of appeal. Section 49, so far as is relevant, reads thus:

> Appeal from decision as to compensation
>
> (1) Any person interested, including the Land Administrator and any person … on whose behalf the proceedings were instituted pursuant to section 3 may appeal from the decision of the Court to the Court of Appeal and to the Federal Court:
>
> Provided that where the decision comprises an award of compensation there shall be no appeal therefrom.
>
> (2) Every appeal under this section shall be presented within the time and in the manner provided for appeals in suits in the High Court:
>
> Provided that the time within which an appeal may be presented shall only be capable of enlargement by order of a Court in such special circumstances as the Court may think fit.
>
> (3) (Omitted).

The words 'Court of Appeal and to the Federal Court' in sub-s (1) of s 49 were substituted for the words 'Supreme Court', previously in that sub-s, by s 27 of the Land Acquisition (Amendment) Act 1997 (Act A999) and [*489]
the reason stated in the explanatory statement to the Bill for that Act for the substitution was'in view of the introduction of the Court of Appeal as an additional court for appeal'. The proviso to sub-s (1) of s 49 was also amended by way of the deletion of the words 'unless the amount awarded by the court exceeds five thousand Ringgit' in such proviso previously, and the reason stated in the explanatory statement for the deletion was that it was a consequential amendment necessitated by the introduction of sub-s40D(3) also by Act A999. Subsection (3) of s 40D declares that any decision as to the amount of compensation awarded by the High Court under that section is final and is non-appealable. In accordance with s 1(2) of Act A999, the amendment to the proviso to sub-s (1) of s 49 applies only to land acquisition cases referred to the High Court by the Land Administrator after 1 March 1998, the date of the coming into force of Act A999 (see PU(B) 94/98). Act A999 itself was published on 31 July 1997.

Section 49(1) as amended by Act A999 embodies two provisions: (1) a right of appeal to the Court of Appeal; and (2) a right of appeal to the Federal Court. In regard to the right of appeal to the Court of Appeal, it is clearly a new and additional right of appeal created for the 'person interested' named therein — new, in the sense that it never existed before and also in relation to the Court of Appeal which was newly established by the insertion of cl (1B) to art 121 of the Constitution by s 13 of the Constitution (Amendment) Act 1994 (Act A885), which was published on 23 June 1994 and came into force on 24 June 1994, additional, in relation to the existing right of appeal as at 24 June 1994 from the High Court to the Federal Court which is the highest court in Malaysia.

Simultaneously, in accordance with s 46 of Act A885 upon the coming into force of that Act, that is, on 24 June 1994, all references in and under the Constitution or any written law to the Supreme Court are to be construed as references to the Federal Court. Act 486 (the LAA) is such a 'written law' within the meaning of that expression as defined in the Interpretation Acts 1948 and 1967 (Act 388) which came into force on 19October 1989. Consequently, reference to 'Supreme Court' in s 49(1) of Act 486 is read as a reference to the Federal Court with effect from 24June 1994. From that date, the Supreme Court ceased to exist and the right of appeal of the person interested was from the High Court to the Federal Court. Proceedings which included land acquisition appeals pending in the Supreme Court as at 23 June 1994 were saved and continued or proceeded with before the Federal Court by a saving and transitional provision in s 17 of the Courts of Judicature (Amendment) Act 1995 (Act A909) published on 16 February 1995 but in force retrospective to 24 June 1994 by virtue of s 1 of that Act. For that purpose, the Federal Court was vested with and shall exercise all the powers of the Supreme Court prior to 24 June 1994. So far as the right of appeal to the Federal Court was concerned, it was plain sailing; it existed before as a right of appeal to the Supreme Court and devolved upon the Federal Court after the change over from the Supreme Court to the Federal Court. The amendment to s 49(1) in this respect thus represented no more than a revision exercise by the legal draftsman.

[*490]

There was thus a hiatus between 24 June 1994, the date on which the Court of Appeal came into existence and 1 March 1998, the date on which the right of appeal to the Court of Appeal was conferred on the person interested in s 49(1) of Act 486 in the sense that such person was without a right of appeal to the Court of Appeal so that it might fittingly be described that during such a hiatus, such a person interested literally leap-frogged the Court of Appeal from the High Court to the Federal Court. The creation and interposition of the new and additional right of appeal to the Court of Appeal by the amendments to s 49(1) brought about by s 27 of Act A999, was obviously to confer on the person interested that right and to stop any leap-frogging from the High Court to the Federal Court but only with effect from 1 March 1998 onwards and not before that date.

The new right of appeal thus created is a substantive right and not merely a procedural matter. Thus, such an amendment could only apply prospectively and not retrospectively unless so expressed in clear terms to that effect: *Lee Chow Meng v Public Prosecutor* [1978] 2 MLJ 36. As observed earlier, Act A999 was published on 31 July 1997 and came into force only on 1 March 1998. By s 1(2) thereof, the amendments in s 27(b) were also expressed to apply only to land acquisition cases referred to the High Court after 1 March 1998, ie prospectively and there was nothing about retrospective application. Thus, to an extent, Act A999 achieved in bridging the gap between the High Court and the Federal Court by providing a right of appeal to the Court of Appeal for the person interested but only from 1 March 1998 onwards and not before that date. The hiatus between 24 June 1994 and 1 March 1998 remains and appeals from the High Court in land acquisition cases continue to be brought directly to the Federal Court during that hiatus, leap-frogging the Court of Appeal.

Reverting to the first five motions which concerned lands in the State of Malacca, it is observed that in all of them the objection and reference was to the amount of compensation awarded by the Land Administrator, and reference to the High Court was made in the case of the fifth motion on 3November 1995, as was evident from the Form N exhibited; whereas in the remaining first four motions, such reference was made on or about 15November 1996 as was evident from their Form N exhibited. In the case of the fifth motion, the High Court order was dated 20 August 1999 and the notice of appeal to the Court of Appeal was dated 9 September 1999. In the cases of the remaining first four motions, the High Court orders were all dated 25 March 1999 and the notices of appeal to the Court of Appeal were dated 19 April 1999.

The issue here is whether the appeals lie to the Court of Appeal or to the Federal Court.

In my view, all five cases are governed by the proviso to sub-s (1) of s49 before its amendment by s 27(b) of Act

A999 because:

(i) the objection and reference was against the written award of the Land Administrator as to the amount of compensation notified to the applicants in Form H; [*491]

(ii) on those dates, neither s 40D(3) nor the proviso to sub-s (1) of s 49 in its amended form came into force. The amendments introduced by ss23 and 27(b) operated prospectively with effect from 1 March 1998 and had no retrospective application;

(iii) on those dates, although the Court of Appeal was already established, no right of appeal was conferred on the applicants until 1 March 1998. In short, the objection and reference took place during the hiatus; and

(iv) on those dates, their rights of appeal were to the Federal Court and those substantive rights could not be altered or affected by orders of the High Court issued after 1 March 1998.

For these reasons stated, I am of the opinion that the appeals lie to the Federal Court and not to the Court of Appeal in these cases. The notices of appeal to the Court of Appeal filed were thus mistaken.

The sixth, seventh and ninth motions concerned lands in Seremban. It is also observed that in all three of them the objection and reference was to the amount of compensation awarded as their Forms N dated 3 May 1994, 9September 1993 and 21 February 1994 respectively disclosed. The High Court orders were made on 21 February 1995, 21 December 1995 and 14February 1996 respectively.

The issue here is the same as in the first five motions namely, whether the appeals lie to the Court of Appeal or to the Federal Court. And for the same reasons, I answer that the appeals lie to the Federal Court and not to the Court of Appeal. Consequently, the notices of appeal to the Court of Appeal were also mistaken.

In the premises and for the explanation given by learned counsel for the applicants, which I accept, I would allow all these motions and orders in terms but make no order as to costs.

As regards the eighth motion which concerned lands in Johor, on the chronology of events derived from the motion papers, I am also of the opinion that the appeal in this case lies to the Federal Court and not to the Court of Appeal for the same reasons. Consequently, I would also allow the motion and order in terms and make no order as to costs.

Finally, on the issue of whether the Court of Appeal has power to transfer this appeal to the Federal Court, I agree that the Court of Appeal has no such power and the transfer of this appeal to the Federal Court was consequently null and void.

First five motions struck out, orders in terms for the remaining motions granted and order for transfer set aside.

Reported by Joel Ng

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