



PEGUAM NEGARA MALAYSIA
ATTORNEY GENERAL MALAYSIA
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Attorney General's Chambers, Malaysia (AGC)
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BY E-MAIL ONLY

Our Ref.: JPN(R)152/137/17

Date : 19 September 2019

Paul H Cohen
Barrister
4-5 Gray's Inn Square Chambers
Gray's Inn
London WC1R 5AH
United Kingdom
pcohen@4-5.co.uk

Dear Sir,

Re: Fornan et al v. Malaysia

I refer to your letter dated 3rd September 2019.

2. It is vital at the outset to appreciate the legal basis of your clients' claim against the Government of Malaysia, which, we contend, has been wrongly brought within the jurisdiction of Spain, and which Malaysia neither recognises nor submits to. Accordingly, nothing in this letter should be construed as Malaysia submitting to the jurisdiction of the laws of Spain, whether under its national court system, arbitral jurisdiction or otherwise.

3. That legal basis arises from a Grant by Sultan of Sulu of Territories and Lands on the Mainland of the Island of Borneo dated 22nd January 1878 (**1878 Grant**) issued by the Sultan of Sulu to a British Company acting through its representatives,

Gustavus Baron de Overbeck of Hong Kong and Mr. Alfred Dent Esquire of London, whereby the Sultan of Sulu granted and ceded to the British Company “for ever and in perpetuity all the rights and powers “ belonging to the Sultan of Sulu, territories and land in the island of Borneo specified in the said Grant to the British Company, in consideration of “the sum of five thousand dollars per annum”.

4. Two other clauses in the 1878 Grant are relevant for present purposes. First, that the British Company can only transfer the territories and lands concerned upon “the sanction of Her Britannic Majesty’s Government first being obtained”. Secondly, any dispute arising between the parties “should be submitted to Her Britannic Majesty’s Consul-General for Borneo”.

5. On the same day the Grant was issued (22nd January 1878) the Sultan of Sulu also issued a Commission appointing Baron de Overbeck (the chief and only authorized representative of the Company in Borneo) to be the Datu Bandahara and Rajah of Sandakan. Upon the death or retirement from office of Baron de Overbeck, the British Company was empowered to appoint others to the office of Datu Bandahara and Rajah of Sandakan.

6. Over time, obviously the contracting parties changed. Upon the establishment of Malaysia on 16th September 1963, Malaysia became the successor-in-title to the British Company viz. the British North Borneo Company under the 1878 Grant and Confirmation by Sultan of Sulu of Cession of Certain Islands dated 22nd April 1903 (**1903 Confirmation of Cession**). From 1963 to 2012, that is, for an unbroken and continuous period of 49 years, Malaysia had been, under the 1878 Grant, paying your clients (themselves the successors-in-title to the Sultan of Sulu) the annual sum of 5300 dollars. The payment was increased by 300 dollars per annum by way of the 1903 Confirmation of Cession.

7. From the beginning, Malaysia paid to your clients the agreed annual sum (**Cession Monies**) of 5300 dollars in Malaysian Ringgit, that is, 5300 MYR. The payment of Cession Monies had been made to the rightful heirs of the Sulu Sultanate, consistent with the judgment delivered by Chief Justice C.F.C. Macaskie on 18th

December 1939 in the High Court of the State of North Borneo in the case of Dayang-Dayang Haji Piandao Kiram of Jolo, Philippines & 8 Others v. The Government of North Borneo & Others [Civil Suit No. 169/39]. That judgment declared that the Plaintiffs therein are the rightful heirs with the right over the Cession Monies. The grounds of judgment are attached hereto as Annexure A.

8. Malaysia had continuously paid the Cession Monies to the heirs of the Sulu Sultanate through their appointed attorney Ulka T. Ulama until 2010. For the years 2011 and 2012, the Cession Monies were paid directly to the heirs of the Sulu Sultanate and not through their appointed attorney as the Ambassador of Malaysia to the Republic of the Philippines had received complaints from the heirs to the Sulu Sultanate on the delay of payments made previously and costs charged by the attorney for such services. Due to these complaints, the Ambassador of Malaysia to the Republic of Philippines decided to make payment directly to the heirs of the Sulu Sultanate. The payment of the Cession Monies were made in Philippine Peso based on the prevailing exchange rates. A copy of letter dated 28 June 2012 from the Ambassador of Malaysia to the heirs of the Sulu Sultanate concerning the aforesaid payment is attached as Annexure B.

9. Regrettably, payments ceased in 2013. Malaysia is now ready and willing to pay your clients all arrears from 2013 to 2019, and agrees to fully comply with the 1878 Grant and the 1903 Confirmation of Cession from henceforth with regards to future payments. As to the arrears, Malaysia is also agreeable to paying simple interest of 10% p.a. on the annual payments for each of the years concerned, as stated in the Table below.

Year	Arrears (Malaysian Ringgit)	10% interest
2013	5,300.00	3,180.00 (6 years)
2014	5,300.00	2,650.00 (5 years)
2015	5,300.00	2,120.00 (4 years)
2016	5,300.00	1,590.00 (3 years)
2017	5,300.00	1,060.00 (2 years)

2018	5,300.00	530.00 (1 year)
2019	5,300.00	-
TOTAL	37,100.00	11,130.00
GRAND TOTAL		48,230.00 MYR

10. Accordingly, please revert with details of your clients' names and banking records so that we can arrange the telegraphic transfer of the relevant payments, immediately.

11. In these circumstances, there is no longer any disagreement between the parties, and we therefore expect your clients to discontinue all proceedings they have instituted in Spain (or indeed elsewhere) upon receipt of the arrears. Indeed, this payment will be paid on that basis.

12. We conclude by reiterating that this letter and our intention to re-commence payment of the Cession Monies under the 1878 Grant and the 1903 Confirmation of Cession should not be construed as submitting to the jurisdiction of Spain.

Yours faithfully,



Tan Sri Tommy Thomas
Attorney General
of Malaysia

c.c.: Arbitrator
Dr. Gonzalo Stampa
C/ Ayala, 4, 1° izda.
28001 Madrid
SPAIN

IN THE HIGH COURT OF THE STATE OF NORTH BORNEO.

Civil Suit
No. 169/39.

Dayang Dayang Haji Piandao Kiram (f)
of Jolo, Philippines & 8 others
Vs.
The Government of North Borneo & Others.

JUDGMENT.

This is a suit by Dayang Dayang Haji Piandao Kiram and eight others against the Government of North Borneo and others to obtain a declaration that they are entitled to receive the Cession monies payable by the first defendants under a deed of Cession made between the Sultan of Sulu and the predecessors of the defendants on 22nd January, 1878, and under a confirmatory deed dated 22nd April, 1903.

The plaintiffs claim as beneficiaries under the Will of the late Sultan Haji Jamalul Kiram, who died at Jolo on 7th June, 1936.

The first and second defendants, that is, the British North Borneo Chartered Company and the Government of the State of North Borneo, who can be taken for the purposes of this suit to be the same legal person, dispute the claim only formally. Their attitude is that they admit that the monies are payable to someone and they are ready and willing to pay them as soon as they can ascertain who is entitled to them.

The third defendant Datu Mohamed Maolana, who was added as a co-defendant at the hearing of the suit, contests the right of the plaintiffs to receive the monies.

The history of the case will be given briefly. Sulu was at one time an independent principality, but under a treaty of 1851 between the Sultan and Spain its status resembled that of a Spanish protectorate. The internal administration of Sulu, its customs, laws and religion were fully respected and were not subject to Spanish jurisdiction.

The Sultans of Sulu also claimed sovereignty over certain territories which now form part of the State of North Borneo. In 1878 Gustavus Baron de Overbeck obtained a grant of these territories in Borneo from Sultan Mohamat Jamal Al Alam. The deed of Cession dated 22nd January, 1878, grants in perpetuity all the rights and powers belonging to the Sultan over the territories named in consideration of the payment to the grantor and his heirs or successors of the sum of five thousand dollars a year. The confirmatory deed dated 22nd April, 1903, relates only to certain islands which had not been specifically named in the main deed. The consideration was a further payment of three hundred dollars a year. The question of the sovereignty over the islands mentioned in the confirmatory deed has been the subject of an agreement between the British and American Governments, but it is unnecessary to consider this confirmatory deed further since the Government of North Borneo do not contest their liability to pay the additional sum of three hundred dollars a year to the heirs or successors of the Sultan.

By the Treaty of 1851 the Sultan of Sulu had acknowledged the sovereignty of the Spanish Government over Sulu, but any question of his power to make a valid cession of the territories named in the main deed of Cession was set at rest by a Protocol of 1885 signed on behalf of the British, Spanish and German Governments at Madrid on 7th March, 1885.

Article III of that Protocol reads:-

"The Spanish Government renounces, as far as regards the British Government, all claims of sovereignty over the territories of the Continent of Borneo, which belong, or which have belonged in the past to the Sultan of Sulu (Jolo), and which comprise the neighbouring islands of Balambangan, Banguay, and Malawali, as well as all those comprised within a zone of three maritime leagues from the coast, and which form part of the territories administered by the company styled the "British North Borneo Company"."

Sultan Mohamat Jamal Al Alam died in 1881. He was succeeded by his son Badarud Din who died in 1884, and after an interregnum Datu Harun ar-Rashid was appointed Sultan in 1886 by the Spanish Government. His appointment was unacceptable to the majority of the Sulus, who favoured the candidature of Jamalul Kiram, a brother of Sultan Badarud Din, and considerable disorder occurred. In 1894 the Spanish Government recognized the succession of Sultan Jamalul Kiram who continued to enjoy the monies payable under the deeds of Cessions until his death in 1936.

Spain evacuated Sulu in May 1899, and on 26th August, 1899, General Bates, of the United States army, concluded a treaty with Sultan Jamalul Kiram and the sovereignty of Sulu passed from Spain to the United States of America.

The status of Sulu had entirely changed by 1915 and the Sultan had by then been shorn of all temporal power and retained only the empty title of Sultan and certain religious jurisdiction exercisable only by the consent of the parties, a situation which is described by a letter to the Sultan dated 30th July, 1920, from the Director of the Bureau of Non-Christian Tribes of the Department of the Interior, Manila.

After the death of Sultan Jamalul Kiram in 1936 the Philippine Government, the successors in sovereignty of the United States of America, decided not to recognize the continued existence of the Sultanate, according to a letter to the Governor of North Borneo dated 28th July, 1936, from His Britannic Majesty's Consul General at Manila. It was admitted by the defendant Datu Mohamed Maolana that no one has yet been elected Sultan to succeed Sultan Jamalul Kiram, but he claimed that he and certain other persons were eligible for election. That election from persons belonging to the royal families is the normal procedure is borne out by a statement in "Studies in Moro History, Law and Religion"

by Hajeeb M. Saleeby published by the Department of the Interior, Manila, in 1905. On page 237, Part I, Vol. IV the author states:-

"The question of a successor to Sultan Badarud Din II proved to be very vexatious, both to the Sulus and to the Spanish Government. At that date the eligibles to the sultanate belonged to three houses - that of Sultan Jamalul Kiram I; the house of Sultan Shakirul Lah, and that of Datu Putung, the son of Sultan Alimud Din I. These houses were represented by the three candidates, Raja Muda Amirul Kiram, Datu Aliyud Din, and Datu Harun ar-Rashid."

The difference in the situation now appears to be that the Government of the Philippine Islands will no longer recognize the title of Sultan or attribute to the holder, that is to anyone recognized by the people of Sulu as Sultan, any of the attenuated prerogatives enjoyed by the late Sultan Jamalul Kiram.

This attitude is a matter of considerable importance, because the defendant Datu Mohamed Maolana bases his objection to the Plaintiffs' claim on the ground that the Cession was an act of sovereignty and the monies payable should be paid only to the successors in sovereignty of the Sultan.

The translation of the main deed of Cession of 1878 as given in "Treaties and Engagements affecting the Malay States and Borneo" by Maxwell and Gibson is as follows:-

"GRANT by Sultan of Sulu of Territories and Lands on the Mainland of the Island of Borneo. Dated 22nd January, 1878.

We Sri Paduka Maulana Al Sultan Mohamet Jamal Al Alam Bin Sri Paduka Al Marhom Al Sultan Mohamet Rathlon Sultan of Sulu and the dependencies thereof on behalf of ourselves our heirs and successors and with the consent and advice of the Datoos in council assembled hereby grant and cede of our own free and sovereign will to Gustavus Baron de Overbeck of Hong Kong and Alfred Dent Esquire of London as representatives of a British Company co-jointly their heirs associates successors and assigns for ever and in perpetuity all the rights and powers belonging to us over all the territories and lands being tributary to us on the mainland of the island of Borneo commencing from the Pandassan River on the northwest coast and extending along the whole east coast as far as the Sibuco River in the south and comprising amongst others the States of Paitan, Sugut, Bangaya, Labuk, Sandakan, Kina Batangan, Mumiang, and all the other territories and states to the southward thereof bordering on Darvel Bay and as far as the Sibuco River with all the islands within three marine leagues of the coast.

In consideration of this grant the said Baron de Overbeck and Alfred Dent promise to pay as compensation to His Highness the Sultan Sri Paduka Maulana Al Sultan Mohamet Jamal Al Alam his heirs or successors the sum of five thousand dollars per annum.

"The said territories are hereby declared vested in the said Baron de Overbeck and Alfred Dent Esquire co-jointly their heirs associates successors or assigns for as long as they choose or desire to hold them. Provided however that the rights and privileges conferred by this grant shall never be transferred to any other nation or company of foreign nationality without the sanction of Her Britannic Majesty's Government first being obtained.

In case any dispute shall arise between His Highness the Sultan his heirs or successors and the said Gustavus Baron de Overbeck or his Company it is hereby agreed that the matter shall be submitted to Her Britannic Majesty's Consul-General for Borneo.

The said Gustavus Baron de Overbeck on behalf of himself and his Company further promises to assist His Highness the Sultan his heirs or successors with his best counsel and advise whenever His Highness may stand in need of the same.

Written in Lipuk in Sulu at the Palace of His Highness Mohamet Jamal Alam on the 19th Moharam A.H. 1295, answering to the 22nd January, A.D. 1878."

It will be seen that the cession was made "with the consent and advice of the *Matus* in council assembled". The word "heirs" is a term of art in English law but I am satisfied that in this deed it was used in its ordinary dictionary meaning of one who succeeds another in the possession of property by descent or by testamentary disposition.

The deed of Cession was a complete and irrevocable grant of territory and the right reserved was only the right to an annual payment, a right which is in the nature of movable property.

The question which arises is whether this right descends to the successors in sovereignty of the Sultan or to his private heirs or representatives.

In United States of America v. Mc Rae, (L.R.8 Eq.69) James, v.C. said:-

"I apprehend it to be the clear public universal law that any government which de facto succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property of the displaced power, whatever may be the nature of origin of the title of such displaced power."

It is abundantly plain that successors in sovereignty of the Sultan are the Government of the Philippine Islands, but Mr. De Leon contends that the decision of the Philippine courts in the administration suit relating to the late Sultan's estate precludes that government from asserting any claim to the Cession monies. In my view this is correct. The Philippine Government allowed Sultan Jamalul Kiram to enjoy

the cession monies as a private person since 1915, they have made no claim on his death and have by a judgment of a Philippine court recognized the right of the private heirs of the Sultan to receive the cession monies.

The right of private heirs to succeed is strengthened by a passage from a judgment of Lord Cairns in United States of America v. Wagner (L.R. 2 Ch. 582) as follows:-

"It was contended then, that when a monarch sues in our Courts, he sues as the representative of the state of which he is the sovereign; that the property claimed is looked upon as the property of the people or state; and that he is permitted to sue, not as for his own property, but as the head of the executive government of the state to which the property belongs; and it was contended, in like manner, that when the property belongs to a republic, the head of the executive, or in other words the President, ought to sue for it.

This argument, in my opinion, is founded on a fallacy. The sovereign, in a monarchical form of government, may, as between himself and his subjects, be a trustee for the latter, more or less limited in his powers over the property which he seeks to recover. But in the Courts of Her Majesty, as in diplomatic intercourse with the Government of Her Majesty, it is the sovereign, and not the state, or the subjects of the sovereign, that is recognized. From him, and as representing him individually, and not his state or kingdom, is an ambassador received. In him individually, and not in a representative capacity, is the public property assumed by all other states, and by the Courts of other states, to be vested."

The plaintiffs base their claim on the Will of Sultan Jamalul Kiram. The vital words are as follows:-

"One half of my estate goes to Piandao Kiram and the other half to be divided equally between rarahata Kiram and Sakimur In Kiram. Only my sandakan estate will be divided into four, one part I give to Datu Raja Muda my younger brother."

Datu Raja Muda died intestate on 21st November, 1936, and his children claim per Stirpes. Letters of administration with will annexed were obtained in the Court of First Instance of Sulu, 9th Judicial District, by Dayang Dayang Haji Piandao Kiram on 2nd April, 1937, and on 25th July, 1939, the administratrix obtained approval of an agreement between the beneficiaries of the will for the distribution of the estate, the agreement being called the project of partition.

The plaintiffs have called Mr. Galixto de Leon, a counsellor at law of the Philippines, who has testified that Mohammedan law does not govern the law of inheritance in Sulu and that disposition by will is free, the governing law being contained in section 614, Chap. XXXI of the Code of Civil Procedure of the Philippine Islands (Act 190). I have no doubt that he is correctly stating the views of the Philippine legislature. It is worth noting however that a Sulu code known as the Luwaran exists.

Article LXXIII of that code states

"The will of a free person shall be legitimate whether he be a non-mohammedan or a person of bad character."

Article LXXIV states

"If a person wills his estate to one of his heirs the will shall be sustained if the other heirs consent to it, but if they do not consent, the will shall not be sustained."

There is also a code prepared by Sultan Mohamat Jamal Al Alam and a new code prepared in 1902 by Haji Butu Abdul Baqui, which however has not met with general acceptance. Neither of these codes appear to deal with inheritance, and according to Najeed M. Saleeby the laws of inheritance as given in the Luwaran are generally disregarded and are seldom considered at all by the Philippine Courts. These facts bear out Mr. De Leon's views, and in any case Article LXXIV of the Luwaran has been complied with by the project of partition which was an agreement between the only persons who would inherit in intestacy, as Mr. De Leon, the attorney to the Kiram family, has proved.

Any speculations as to the correctness of the approval of the Philippine court to the project of partition are idle if the contention of the plaintiffs is accepted that this court is bound by the Philippine court's decision.

The argument is that the deed of Cession was a complete and irrevocable grant of the territories comprised therein and all that the grantor obtained was the right to a money payment, that is, only a contractual right, personal to the Sultan and to his private heirs. I do not say that I accept the argument of the plaintiffs in its entirety on this point but where there is no claim by the successors in sovereignty then the claims of the private heirs are valid.

Succession to the movables of a deceased person is governed by the law of the country of his domicile at the date of his death. Where probate has been granted in such country this court will endorse the grant without examining the grounds on which it was based (In the goods of Smith (1868), 16 W.R. 1130). The law of the country of the domicile at the time of death as to what constitutes the last will of the deceased is binding on other countries. (Laneville v. Anderson (1860) 9. W.R. 74).

There is evidence that Sultan Jamalul Kiram had no "Sandakan estate" except his right to the Cessions monies, and the project of partition approved by the Philippine court specifically sets out the proposed partition of the Cession monies.

In a letter dated 14th April, 1937, the Resident, Sandakan, wrote to the counsel for the plaintiffs the following letter:-

"In a letter dated the 28th July 1936 His Britannic Majesty's Consul General at Manila informed His Excellency that the Philippine Government had decided not to recognize the continued existence of the Sultanate; and I am to say that His Excellency is therefore unable to take cognizance of Dayang Dayang Haji Piandao or anyone else as Sultan of Sulu.

there will accordingly be no longer any "successor" to the Sultanate and the question of the person to whom the cession moneys are to be paid depends on who is the rightful heir under the Cession of 22nd January, 1878.

Before, therefore, any of the Cession Money due in respect of the period subsequent to the demise of the Sultan can be paid, it will be necessary for any claimants to establish their claim in the High Court of this State and it will be for them to produce evidence of the Sulu custom of inheritance sufficient to satisfy the Court that their claim is valid."

I quote this letter because it sets out the official view of the North Borneo Government.

For the reasons stated above I am satisfied that the plaintiffs have proved that their claim is valid, and I give judgment accordingly that Dayang Dayang Haji Piandao Kiram, Putli Tarhata Kiram, Putli Sakinur In Kiram, Mora Napsa, Msmail Kiram, Datu Punjungan Kiram, Sitti Mariam Kiram, Sitti Rada Kiram and Sitti Putli Jahara Kiram are entitled to the monies payable under the deeds of Cession dated 22nd January, 1878 and 22nd April, 1903, in the following shares

Dayang Dayang Haji Piandao Kiram	-	three eighths
Putli Tarhata Kiram	...	- three sixteenths
Putli Sakinur In Kiram	...	- three sixteenths
Mora Napsa	...	- one twenty-fourth
Msmail Kiram	...	- one twenty-fourth
Datu Punjungan Kiram	...	- one twenty-fourth
Sitti Mariam Kiram	...	- one twenty-fourth
Sitti Rada Kiram	...	- one twenty-fourth
Sitti Putli Jahara Kiram...	-	one twenty-fourth

Monies now due and payable under the deeds of cession will be calculated by the Sandakan Treasury and any party is at liberty to apply to this Court in the event of any dispute arising thereon.

I will make no order as to costs and each party must pay his own.

232 27
See Note (93) 72nd
Jan. 5 1940

I have not acceded to the request of the first and second defendants to adjourn proceedings until further time has been given to one Jainal Abirin to lodge an application for permission to be joined as a co-defendant. I am satisfied from the evidence of Datu Mohamed Maolana, the third defendant, that Jainal Abirin's objection is similar to his own. Notice to Jainal Abirin that the date of hearing was fixed for 16th December, 1939, was sent to him on 13th October, 1939, and he has had sufficient time to put in an appearance if he wished. Neither Jainal Abirin nor Datu Mohamed Maolana lodged any objection to the proceedings in the Philippine Courts and I have held that this court is bound by the decision given there as to the rights of the plaintiffs to receive the Cession monies. I therefore do not consider that it would be fair to the plaintiffs to put them to the additional expense of an adjournment.

(Signed) U.F.C. MACASKIE.
Chief Justice.

Sandakan,

18th December, 1939.

Certified true copy

(Signed) C. SINN FATT
Clerk to C. J.



Ambassador of Malaysia

29th Floor, World Centre Building
330 Senator Gil J. Puyat Avenue
Makati City, Philippines

Ruj Kamk SR (063) 384/1-5 Vol
(Our Ref)

Tarikh: 28 June 2012
(Date)

Ms Dayang-Dayang Piandao Taj-Mahal Kiram-Tarsam Nasul
No.8, Jalandoni Street
Approval Phase 1
Taugig City

Dear Taj,

PAYMENT OF "CESSION MONEY" TO HEIRS OF SULTAN OF SULU FOR THE YEAR 2012

With reference to the above matter, I would like to inform you that the Embassy of Malaysia already prepared cheque No. 0000073637-43 dated June 27, 2012 amounting to Php Seventy Two Thousand Five Hundred Ninety Six and Centavos Seventy-Seven (Php 72,596.77) Only being the payment of "Cession Money" to be paid according to all administrators of the Heirs of Sultan of Sulu for the year 2012.

2. In this regard, appreciate if all the administrators or their representative could collect their cheque at Embassy of Malaysia, Level 29, The World Centre Building, 330 Senator Gil J. Puyat Avenue, Makati City 1200.

Thank you.

Thank you.

Yours sincerely,

(DATO SERI DR. IBRAHIM SAAD)

Payment of "Cession Money" to Heirs of Sultan of Sulu for the year 2012

Name of Administrator/ Administrative	Share	Amount
1. Dayang-Dayang Hadas Taj-Mahal Kiram-Tarsum Muqul	9/15	Php 40,825.67
2. Pudi Nurhina Kiram Forman	2/15	13,611.80
3. HIA. Siti Ayecha KAR. Sutipung	1/12	6,049.79
4. Sultan Fudul A. Kiram	1/24	3,024.87
5. Dayang-Dayang Shetamat T. Kiram	1/24	3,024.87
6. Princess Paimaipari Kiram-Guerson	1/24	3,024.87
7. Siti Jenny R.A. Sampang	1/24	3,024.87
		Php 72,586.77



Dato Seri Dr. Ibrahim Saud
Ambassador

07 June 2012

Dayang - Dayang Taj - Mahal Kiram - Tarsum Muqul

Representing:

Dayang - Dayang Hadji Hadas - Kiram

futli Tarhata Kiram