

(1929) 07 PRI CK 0007

In the Privy Council

Case No : Privy Council Appeal No. 110 of 1928

Cheang Thye Phin

APPELLANT

Vs

Lam Kin Sang and others

RESPONDENT

Date of Decision : 04-07-1929

Acts Referred:

Citation : (1929) AIR(PC) 240

Hon'ble Judges : Atkin, Warrington of Cliffe, Viscount Sumner, JJ.

Advocate : Drew and Loughborough, Nisbet, H.F.F. Freenland, G.T. Simonds, for the Appearing Parties.

Judgement

Lord Warrington of Clyffe

This appeal raises certain questions arising in the course of an action for the administration of the estate of one Cheang Ah Quee (hereinafter referred to as the testator), who died on 13th December 1901.

The plaintiff in the action is the legal personal representative of certain persons who were interested only in certain shares of the income of the testator's estate, as to which it has been determined that he died intestate. No part of the corpus of the estate has yet become divisible, nor will the plaintiff in any event have an interest in the corpus.

The writ in the present action was issued on 21st June 1920. It claimed administration of the estate of the testator. The appellant (defendant 1 in the action) was one of the executors and original trustees of the will. The other executors and original trustees are all dead and the appellant has now retired from the trusts. The present trustees are respondents to the appeal.

By his statement of claim the plaintiff alleged that the appellant and his co-trustees had committed serious devastavits and breaches of trust, and in particular the following, which alone are material to the present appeal, viz., that they had improperly advanced the following sums :

(a) \$50,703,36 to the appellant himself.

(b) \$61,315,76 to Cheang Thye Cheong one of the original trustees, now deceased.

(c) \$86,380 to Chop Phin Kee, a business belonging to the appellant.

(d) \$50,000 to Chee Kok Peng.

The plaintiff claimed a declaration that the advances were breaches of trust or alternatively breaches of duty and acts of wilful default, and claimed administration of the estate of the testator and the execution of the trusts of his will and all proper accounts and enquiries on the footing of wilful default.

The several defendants, amongst other defences, pleaded the limitation Ordinance No. 6 of 1896, under which the period of limitation for a distributive share of the property of an intestate is 12 years from the time when the share becomes payable or deliverable.

For the purposes of the present suit the period has by common consent been taken to have commenced on 30th March 1908, being the day following the 29th March 1908, 12 years prior to 29th March 1920, the date of the institution by the plaintiff of a suit since stayed or discontinued for the recovery of the shares to which he was entitled in the undisposed income of the testator's estate.

The present suit came on for hearing before Branch, J., in the month of October 1921. The decree therein was pronounced by him on 20th December 1921.

By this decree it was declared that the plaintiff was entitled to receive certain shares of income of the testator until the period for distribution of the corpus arrives or until further order. It contained, amongst others, the following declarations : " 4. That the plaintiff's claim to shares of the income of the moveable and immovable property situate in Penang and of the moveable property situate in Perak and in Hong Kong belonging to the estate of the testator accruing prior to 30th March 1903, is barred by limitation."

" 9. That the question whether defendants 1, 2 and 3" (the original trustees) "have committed all or any of the acts of wilful default alleged in para. 20 of the statement of claim" (which included the making of the advances above mentioned and the alleged failure of the trustees to take steps to recover or call in the same), "be reserved for further consideration, but that the following accounts and enquiries be taken and made by the Registrar or his Deputy, and that the plaintiff be at liberty to surcharge on the footing of wilful default, and if it shall hereafter appear that any act of wilful default entitling the plaintiff to accounts on that basis have been committed, then defendants 1, 2 and 3 shall be chargeable on the footing of wilful default, but if it shall appear that none of the acts of wilful default alleged in the statement of claim have been committed, then defendants 1, 2 and 3 shall not be chargeable on the footing of wilful default."

Numerous accounts and enquiries were directed, but the only one material to the present question is the following viz. :

"(a) An account as from 30th March 1908, of the receipts and payments in respect of the property (moveable and immovable) in Penang and the moveable property in Perak and Hong Kong (hereinafter called the trust funds,) subject to the trusts of the will or passing under the intestacy of the testator."

The direction in para. 9 of this decree that the plaintiff shall be at liberty to surcharge on the footing of wilful default, although such wilful default had not then been established, is one of an unusual character, inasmuch as the liability of the accounting party is not determined by the result of the account. He may afterwards clear himself of the charge of wilful default, and surcharges made on that footing would then have to be disallowed. The decree, however, is binding on the parties and on the Court, and at the present stage surcharges made on the ground of wilful default would be properly allowed, although such default has not at present been proved.

Another point that has to be borne in mind is that the account is of receipts and payments as from 30th March 1908, and therefore no receipts or payments prior to that date are to be included.

On 9th January 1922, notice of the decree was given to persons interested in the estate not already parties, and on 14th July 1922, a classification order was made, regulating the attendance in chambers of those who had obtained liberty to attend. The various persons interested and having liberty to attend are respondents to the appeal, but none of them has submitted a case or appeared before this Board, and the appeal is therefore *ex parte*.

The taking of the account (a) was in due course proceeded with by the Registrar, and by an order dated 10th October, 1924, made by Whitley, J., it was ordered that the books of account kept by the clerks employed by the trustees should be taken as *prima facie* evidence of the actual sum paid and of the purposes for which it was paid, but not as evidence of the proper appropriation of any payment to capital account or to income account.

The plaintiff carried in a large number of surcharges, of which the following only need be mentioned for the purpose the present appeal - viz., 21, 26, 27, 31 11A, 12A, 16A. The last three items are for interest only.

The Registrar allowed the surcharges 26, 11A, 31 and 16A in full, and in respect of 21- 27 and 12A allowed the following sums, viz., \$50,000 plus interest at 4 per cent per annum from 30th March 1908, to 30th June 1909 and at the rate of 8 per cent per annum from the latter date up to 6th April 1921.

The present appellant then issued a summons to vary the certificate by disallowing, amongst other sums :

(a) \$50,000, part of surcharge No. 26.

(b) \$50,000 in respect of surcharges Nos. 21 and 27.

(e) \$27,147,67, part of surcharge No. 31.

(d) All interest under surcharge 12A.

And by allowing interest at the rate of 3 per cent only on \$14,354,57 balance of surcharge No. 26, and \$59,232,33 balance of surcharge No. 31, or so much of the said balances respectively as was owing in each year.

It is common ground that the sums sought to be disallowed under heads (a), (b) and (c) above mentioned all represented income of the testator's estate accrued prior to 30th March 1908.

The summons came before Sproule, J., on 16th July 1927, who, by his order of that date, ordered that the certificate should be varied in, amongst others, the following particulars :- (5) As to surcharges Nos. 11A, 12A and 16A by allowing simple interest at the rate of 5 per cent per annum only, and that in all other respects the certificate should be confirmed.

The present appellant then appealed to the Court of Appeal from the refusal of the learned Judge further to vary the certificate as respects the items now in question.

The appeal was heard on 16th February 1928, by a Court consisting of McCabe Reay, Deane and Dismore, JJ., who by their order of that date allowed the appeal in so far as the sum of \$50,000, part of surcharge No. 26, and the amount of \$27,147.67 part of surcharge No. 31, were concerned, but in other respects dismissed the appeal.

The appellant then obtained from the Supreme Court of the Straits Settlements leave to appeal to his Majesty in Council from the order of the Court of Appeal, and in due course presented this appeal.

The appellant's case is that the surcharges 21 and 27, which admittedly refer to one matter only, ought to be disallowed altogether, and that, if this is right, then that it necessarily follows that surcharge 12A, which is for interest on the principal sum claimed by surcharges 21 and 27, should be disallowed also on the ground that, if the principal sum cannot be claimed, neither can any interest thereon be payable, interest, it is said, being merely an accessory to the principal. Then, as to surcharges 26 and 31, he contends that inasmuch as the Court of Appeal reduced the amount of the principal in each case by the sum representing advances made prior to 30th March 1908, they ought also to have correspondingly reduced the sum chargeable for interest and to have allowed interest only on the balances of the principal in each case.

Their Lordships will deal with this last-mentioned question first. The sums sought to be surcharged under items 26 and 31 were advances to the appellant himself or to his firm of Chop Phin Kee, and he is a debtor to the estate in respect of these sums, irrespective of his position as trustee. No question of wilful default

arises. The position is simply one of debtor and creditor. The claim of the plaintiffs, except as regards sums advanced since 30th March 1908, has been held to be barred by the Statute. It seems to their Lordships to follow that there being no independent contract to pay interest, the interest is a mere accessory of the principal and if the principal is irrecoverable so is the interest on it. See *Hollis v. Palmer* (1841) 2 Bing. (N. C.) 713 : 3 Scott. 265 : 5 L. J. C. P. 264 : 2 Hodges 55.

The question as to the \$ 50,000 under surcharges 21 and 27 and the interest thereon stands on a different footing. This was not an advance to the trustee as against whom the account is being taken, but to a third person, and the liability for it is that of a trustee who has made a payment not authorized by his trust. If it was paid away prior to 30th March 1908 he cannot now be charged with it at the instance of the plaintiff, and from an account taken under the order in the present case it must be excluded altogether. Their Lordships are of opinion that, as regards the principal sum it was established, and Sproule, J. accepted, this view, that the \$ 50,000 was originally, viz., before 30th March 1908, advanced to Cheang Thye Cheong, though in the name of his agent or attorney, Chee Kok Peng, and that the alteration subsequently to that date in the books by the transfer of the account into the name of Cheang Thye Cheong was not the record of a new debt, but merely the transfer of the old debt from the name of the agent to that of the principal, from whom it had been owing all along. If this is so, the sum was paid away before the crucial date and should be excluded from the account.

It does not follow, however, that in this case the interest on the sum in question should also be excluded. The interest is represented by the surcharge 12A. This sum was due, not from the trustee himself but from the person to whom it had been advanced by the trustee, and it would appear from the evidence (Record, p. 52 1, 17) that there was a special contract to pay interest at a specified rate. This being the case, the principle that where interest is a mere accessory to the principal and a claim to the latter is barred by Statute, the interest thereon cannot be recovered, does not apply. The trustee might have received the interest as it became due, and each such receipt after the 30th March 1908, would have come into the present account. The account is to be on the footing of wilful default, and as it is *prima facie* the duty of the trustee to take steps to recover sums which should have been paid during the accounting period, he is properly charged with the interest on the \$ 50,000 since 30th March 1908. It is true that he has been charged at a flat rate of 5 per cent for the whole period, being less than the conventional rate of 80 cents per month, but as there is no cross-appeal on this point the judgment of the Supreme Court cannot be disturbed.

For these reasons their Lordships are of opinion that the order of the Supreme Court ought to be varied by disallowing surcharges 21 and 27, and so much of surcharges 11A and 6A respectively as represents interest on \$ 50,000, part of

surcharge 26, and \$ 27,147.67, part of surcharge 31. In other respects the order appealed from should be affirmed.

The appellant should have his costs of this appeal out of the estate. Their Lordships will humbly advice His Majesty accordingly.