

(1931) 02 PRI CK 0013

In the Privy Council

Case No : Privy Council Appeal No. 129 of 1929

Lim Teck Kim

APPELLANT

Vs

Wee Hum Soon and others

RESPONDENT

Date of Decision : 13-02-1931

Acts Referred:

Citation : (1931) AIR(PC) 171

Hon'ble Judges : Lord Russell of Killowen, Lord Tomlin, Lord Blanesburgh, JJ.

Advocate : Jagues and Co, Solicitors, Whites and Co., for the Appearing Parties.

Judgement

Lord Russell of Killowen

This is an appeal from a decision of the Court of Appeal of the Supreme Court of the Straits Settlement, allowing an appeal from a decision of the Chief Justice. The question involved concerns the true construction of the will of a testator, Khoc Boon Seng, who died on 5th November 1383. To make intelligible the question which were originally raised by this appeal, and those which ultimately survived for decision, it is advisable at once to refer to the provisions of the will.

By the earlier clauses of his will, which was dated 23rd August 1883, the testator appointed executors and trustees, made divers pecuniary bequests and divers specific bequests and devises, directed divers payments out of the income of his residuary estate during the period of 21 years from his death, and directed his trustees to sell such part of his real estate as they might consider unproductive and out of the proceeds to pay his debts and legacies.

By Cl. 21 the testator devised " all the residue of all my real estate " and bequeathed " all the residue of my personal estate " to the trustees upon the trusts therein mentioned, viz., during the period of 21 years from his death to manage the real estate, and after payment of the outgoings of his real estate, to pay certain monthly sums, as therein mentioned. By Cl. 22, the testator directed that the residue of his personal estate and the balance of the rents and profits of his real estate should, during the period of 21 years from his death be invested

as therein mentioned and that after making certain payments as therein mentioned, the trustees should accumulate the unapplied yearly income. The only remaining relevant provisions of the will are Cls. 23 and 24, which run thus :

?23. I direct that during the lifetime of my said sons Khoo Tiong Lip, Khoo Poon Lip Khoo Beow Lip, and Khoo Tek Lip or during the life of the last survivor of them, the land in which I may be buried shall not be sold or mortgaged but that the same shall be kept and managed as a family burial ground.

?24. I direct that after the expiration of the said period on 21 years my trustees or trustee shall call in all investments and shall sell by public auction the residue of my real estate and divide the net proceeds thereof and the money arising from the calling in the said investments amongst my said sons Khoo Tiong Lip, Khoo Poon Lip, Khoo Beow Lip and Khoo Tek Lip and also amongst my hereinafter begotten son or sons in equal shares."

The testator had only four sons, viz., those mentioned in Cls. 23 and 24; and they all survived him.

After all the testator's real estate had been sold, with the exception of some 25 acres at Tanglin, in which the testator and one of his wives had been buried, an application was made by one Ramasami Chitty, in the year 1905, for the sale of the 25 acres or the greater part thereof. By order dated 2nd June 1905 the Court did not think fit to make any order on the application, except as to the costs thereof. In the course of his written judgment the Judge (Thornton, J.,) stated his view that Cl. 23 of the will was not void.

The suit which has given rise to the present appeal, was commenced by originating summons, dated 4th January 1928. In the meantime, three of the testator's sons had died, leaving Khoo Poon Lip the sole survivor.

The plaintiff on the originating summons is the present appellant Lim Teck Kim, in whom are now vested the respective interests in the said piece of land at Tangling under the will of Khoo Tiong Lip, Khoo Poon Lip and Khoo Tek Lip, three of the four sons. The defendant was Wee Hum Soon, the trustee of the will. By order of the Court, the originating summons was served on Khoo Poey Gheok Neo, the administratrix of the testator's son Khoo Beow Lip, and on the testator's then surviving son, Khoo Poon Lip. It was further ordered at the hearing that Khoo Poey Gheok Neo should represent those who claimed that the land at Tanglin be kept in trust as a family burial ground, and that Khoo Poon Lip should represent the testator's next-of-kin.

The relief asked for by the originating summons was as follows:

""(1) An enquiry to ascertain particulars of the property of which the residuary estate of the above named Khoo Boon Seng deceased now consists.

"(2) An enquiry to ascertain the persons who are entitled to the residuary estate of the said Khoo Boon Seng deceased.

"(3) A declaration as to the rights of the plaintiff in the residuary estate of the said Khoo Boon Seng deceased and in particular as to whether the plaintiff is entitled to partition of such residuary estate.

"(4) An order for all necessary accounts.

"(5) Such further or other order as to the Court shall seem just.

"(6) An order that the costs of this application and incidental thereto may be provided for."

The summons was heard by Murison, C. G., and it appears from his notes of the proceedings before him that counsel for the plaintiff contended (1) that subject to the trust under Cl. 23 of the will, the beneficial interest in the land at Tanglin passed to the four sons under Cl. 24; (2) that the trust under Cl. 23 was invalid; (3) that the plaintiff was not estopped by the judgment of Thornton, J., from alleging that the trust was invalid; but (4) that if the trust was to be held valid, the plaintiff and the representative of the son, Khoo Beow Lip, were then entitled to the land, subject to that trust. Counsel for Khoo Poon Lip (who represented the testator's next-of-kin) argued that the plaintiff was estopped, that against him the validity of the trust was *res judicata*, and that subject to the trust, there was an intestacy as to the land.

The learned Judge held (1) that the trust under Cl. 23 was invalid; (2) that there was no estoppel; and (3) that the land formed part of the residue of the real estate of the testator, and was subject to the trusts declared and contained in Cl. 21 of the will. An order was accordingly made, dated 27th March 1928, the operative part of which was framed in the following terms:

"The Court . . . doth declare that the plaintiff is entitled to three undivided fourth parts or shares of and in the said piece of land and to possession thereof, and that the said Khoo Poey Geok Neo as administratrix of the estate of the said Khoo Beow Lip deceased is entitled to the remaining one equal fourth part of share of and in the said piece of land and to possession thereof, and this Court doth make no order for the enquiries and accounts prayed for by para. 1, 2 and 4 of the Originating Summons herein, and this Court doth order that the costs of all parties of and incidental to this application be taxed as between Solicitor and client and be charged upon the said piece of land; and this Court doth lastly order that the further consideration of this Originating Summons be adjourned into Chambers with liberty for any party to apply."

Their Lordships observe that the titles declared, relate not to the proceeds of sale of the land, but to the land unsold; and they assume that the parties concerned must have elected to take the land and not the proceeds of sale.

Khoo Poon Lip appealed to the Court of appeal against the order of 27th March 1928, upon the grounds (amongst others) that the plaintiff was estopped, that the trust in Cl. 23 was not void, and that the land at Tanglin was not part of the residuary estate of the testator distributable under Cl. 24.

The appeal was heard by Sproule, Acting C. J., and Prichard and Burton, JJ., on 12th and 13th June 1928. On the latter date the Court made an order; the portion of which relevant to this appeal was in the following terms:

"This Court doth unanimously order and adjudge that this appeal be, and it is hereby, allowed and this Court doth declare that the respondent (plaintiff) is estopped per rem judicatam from contesting the validity of the trust contained in Cl. 23 of the will of the testator the above named Khoo Boon Seng deceased, and that the only estate of the testator which remains undisposed of being the land in the said decision mentioned is upon the death of the said Khoo Poon Lip and the expiration of the trust period in the said Cl. 23 mentioned distributable among the next-of-kin of the said testator ascertained as at the date of his death and this Court doth not vary the order as to costs in Court below."

In view of the present appeal, the reasons of the learned Judges for their decision were recorded and filed in the month of July 1929.

Sproule, J., held that the plaintiff was estopped, because the written judgment of Thornton, J., showed that the validity of the trust under Cl. 23 of the will was one of the issues which had been decided by that learned Judge. Having thus determined that for the purposes of the litigation, the trust must be treated as a valid trust, he proceeded to deal with the question of construction thus:

"Then as to who should take the land upon the death of Khoo Poon Lip, the last surviving son, with every leaning against intestacy I thought that testator was careful to avoid allowing this land to be caught by the residue. The burial ground was not to be sold or mortgaged till after all his four sons were dead. The residuary estate, however, was to wait only twenty one years and then be divided between four sons and any after-begotten sons. Testator made sure that none of his four sons should take any share in the burial ground having made ample detailed provision for them earlier in his will, and again in Cl. 24. Save for that precaution, he made no disposition of the burial ground, and we held that it must go to the next-of-kin, there being sufficient evidence of a contrary intention to prevent the operation of S. 20, Wills Act."

The reference to "S. 20, Wills Act," is obviously a reference to S. 20, Straits Settlements Ordinance No. 3 (Wills), which corresponds to S. 25 of the English Wills Act and is in the following terms;

"20. Unless a contrary intention appears by the will, such real estate and interest therein as is comprised or intended to be comprised in any devise in such will contained, which fails or is void by reason of the death of the devisee in the lifetime of the testator or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise, if any, contained in such will."

Prichard, J., agreed with the judgment of Sproule, J. Burton, J., after holding that by virtue of the estoppel, the burial trust must be held to be good, continued:

"As it remains effective till the death of the last surviving son, I think that this land cannot fall into residue under S. 20, Ordinance 3 (Wills). I think that there is an intestacy as to this land and that it goes to the next-of-kin to be ascertained at the date of the death."

After the plaintiff had appealed to His Majesty in Council, and after the cases of the parties to that appeal had been lodged, the testator's surviving son, Khoo Poon Lip, and the original defendant, and surviving trustee of the testator's will, Wee Hum Soon, both died.

By an order of the Supreme Court of the Straits Settlements, dated 11th August 1930 and made upon the application of Chang Tew Muey (claiming to be interested in the testator's estate), it was certified that the applicant was the proper person to be substituted on the record in the appeal herein in place of Khoo Poon Lip to represent the next-of-kin of the testator, and it was ordered that a certificate to that effect be transmitted by the Registrar of the Supreme Court to the Registrar of the Privy Council.

A similar order of the same date was made in regard to Khoo Ek Neo, who had been appointed trustee of the testator's will in place of Wee Hum Soon. By an Order in Council made on 27th October 1930, it was ordered that the above mentioned substitutions be made and that this appeal stand revived accordingly.

It will be observed that the death of Khoo Poon Lip reduced the number of questions which required to be argued before their Lordships, in order to enable them to advise His Majesty in regard to the merits of the appeal. The validity or invalidity of the provisions contained in Cl. 23 of the will ceased to be of importance. The trust was not, on any hypothesis, a subsisting trust. The question of estoppel, too, faded from the picture. The only effective question which remained for decision on the merits, was whether the beneficial interest in the land at Tanglin (subject to a trust which was either invalid or had ceased) passed, as decided by the Chief Justice, under the disposition of "the residue of my real estate," contained in Cl. 24 of the testator's will, or as decided by the Court of appeal, passed as on an intestacy.

In these circumstances, counsel for the appellant only opened the appeal in relation to this question, and refrained from arguing the points of estoppel and invalidity or any other question, except the one above-mentioned. This course commended itself to their Lordships as reasonable and proper. No other question could have any relevance, except possibly as to costs.

Their Lordships now turn to the consideration of the question upon which the rights of the parties depend. They find it difficult to accept the reasoning of the Court of appeal. The case was decided in that Court upon the footing that the trust contained in Cl. 23 of the will was a valid trust; that is the logical result of the decision on estoppel. In these circumstances S. 20 of the Ordinance could have no application to the case at all for *ex hypothesi*, there was no lapsed or void devise.

The same position obtains before their Lordships' Board; the appeal as to estoppel not having been opened here the decision of the Court of appeal upon estoppel must stand.

But apart from these considerations, the true construction of the will seems reasonably plain. It appears to their Lordships to be merely a case of attributing to a devise of residuary real estate its ordinary meaning and effect, and including within it every interest in the testator's real estate, which he has not effectively devised by other dispositions contained in his will or codicils. By Cl. 21 of his will the testator vests in his trustees all his real estate and his residuary personalty. Trusts of the real estate are declared by that clause, in respect of the period of 21 years from his death. By Cl. 22 he declares, in respect of the same period, trusts for the accumulation of surplus income of his real estate and residuary personal estate. Cl. 24 contains the trusts which, on the expiration of the 21 years, are to be applicable to "the residue of my real estate," and the investments representing the residuary personalty and the accumulations of income.

So far no difficulty suggests itself. It was however argued that because the testator by Cl. 23 directed that the land in which he might be buried should not be sold or mortgaged during the lifetime of his four sons or the life of the survivor (a period which might and probably would outlast the period of 21 years from his death) he must, when he used in Cl. 24 the words "the residue of my real estate," have meant his real estate other than the land in question. Further it was said that in the absence of a clear provision to that effect, the testator who had so carefully protected the land from sale or mortgage for a period within perpetuity limits, could not be presumed to have included it in an immediate trust for sale, on the expiration of that period.

Their Lordships, while appreciating them, are unable to accept these views. They see no reason for suggesting that the testator meant by the words "the residue of my real estate" in Cl. 24 anything different from what he meant in Cl. 21 by the words "the residue of all my real estate," or for suggesting that the latter words, which clearly include the land in question, cover more than the former.

The law on this subject is conveniently stated in Theobald (Edn. 8) at pp. 252-3:

"A testator may have given partial interests in land by his will and the question then arises whether a subsequent residuary devise passes the reversion of those lands. It is well settled that it does, though the residuary devise may be of lands, "not hereinbefore devised or disposed of," and there may be directions or limitations which are not appropriate to the reversion in the lands previously devised."

Their Lordships are of opinion that the direction contained in Cl. 24 applied to all the testator's real estate not specifically devised by the will, but, as regards the land in question, subject to the additional direction which is contained in Cl. 23 and which (on the assumption of its validity) came to an end with the death of

Khoo Poon Lip.

For these reasons the appeal must succeed and an order made in the terms hereinafter mentioned. As regards the costs incurred in the various Courts, the position is complicated by the death of Khoo Poon Lip, and the fact that his legal personal representative is not a party to the present appeal. The costs of all parties of the original hearing were properly charged upon the land in question: and this part of the order of 27th March 1928 was not varied in the Court of appeal.

The costs of the appeal were dealt with as follows: The present appellant was ordered to pay Khoo Poon Lip's costs as between party and party. The difference between Khoo Poon Lip's party and party costs and his solicitor and client costs was charged on the land. The costs of the trustee, Wee Hum Soon, and of Khoo Pooy Geok as between solicitor and client, were charged upon the land.¹⁷⁵ There is no one who could, on this appeal, be ordered to repay to the present appellant the amount of Khoo Poon Lip's party and party costs, had the amount in fact been paid over to him. Their Lordships were informed that the necessary sum had been provided by the present appellant, but was standing to a suspense account under the control of Messrs. John G. Campbell and Co., Solicitors, of Singapore. Their Lordships were assured by counsel for the respondent, that in the event of the present appellant being successful on this appeal, the said solicitors would repay to him the moneys standing to the credit of the suspense account. With that assurance their Lordships are satisfied.

As regards the present appellant's costs of the appeal to the Court of appeal, since there is no party to the present appeal who could properly be ordered to pay them, those costs and the costs of the trustee must be charged upon the land in question. Their Lordships however think that no costs should be allowed to any other party to that appeal.

As regards the costs of the present appeal, their Lordships are of opinion that the respondent Cheang Tew Muey, having applied for and obtained a certificate that she was the proper person to be substituted on the record as respondent in place of Khoo Poon Lip, may properly be ordered and should be ordered to pay the costs of the appellant and the other respondents of this appeal.

Their Lordships are of opinion that this appeal should succeed and that the proper order to make thereon should be as follows:

Discharge the order of 13th June 1928, except in so far as it declared that the plaintiff was estopped from contesting the validity of the trust contained in Cl. 23 of the testator's will and except in so far as it ordered the costs of Wee Hum Soon, the trustee, to be charged upon the land, and, in lieu of the other provisions contained in the said order. Declare that, subject to the directions contained in the said Cl. 23, the land at Tanglin, referred to in the order of 27th March 1928, formed part of the residue of the testator's real estate referred to in Cl. 24 of the said will, and that the testator did not die intestate in respect

thereof. Order the costs of the plaintiff (respondent) of that appeal to be charged upon the said land.

The respondent, Cheang Tew Muey, must pay the costs of all parties of the appeal before their Lordships" Board. Their Lordships will humbly advise His Majesty accordingly.