Privy Council Appeal No. 11 of 1982

Lam Wai Hwa and Another *Appellants*

v.

Toh Yee Sum and Others *Respondents*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH JULY 1983

Present at the Hearing:

LORD KEITH OF KINKEL
LORD ELWYN-JONES
LORD SCARMAN
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN

*[Delivered by **Lord Keith of Kinkel**]*

This appeal is concerned with rights of succession in the estate of the late Tong Poh Hwa ("the deceased") a man of Chinese origin professing the Buddhist faith, who died intestate on 22nd December 1960. Letters of Administration were granted to the appellants on 24th August 1961.

The deceased was lawfully married to the first appellant on 11th May 1947, and there were seven children of the marriage.

On 3rd December 1952 the deceased entered into a Marriage Agreement with the first respondent, whereby it was recited that the parties were desirous of contracting a marriage according to Chinese rites and traditions and were willing to become husband and wife with the full consent of their respective parents upon the conditions therein set out. These conditions included (a) that the husband should pay the wife $300 per month for her maintenance, subject to such increase as his financial circumstances might permit; (b) that he would within a reasonable time execute a marriage settlement in the wife's favour entitling her to a share of the husband's property, or alternatively undertake to bequeath to her a share of his property for her use and enjoyment, and (c) that in the event of the husband deserting the wife he would continue to pay her the minimum allowance of $300 per month. The wife

covenanted that on execution of the agreement she would consummate the marriage with the husband and thereafter live with him as husband and wife.

On 17th December 1952 the deceased and the first respondent went through a marriage ceremony according to Buddhist rites at a Chinese restaurant in Kuala Lumpur. The marriage was registered by the Registrar of Marriages for Selangor on 21st February 1953. Under section 3 and Schedule A of the Marriage Registration Enactment the registered particulars of the marriage are required to include "whether the husband has any other wife living and, if so, names and addresses of all such wives". In the registered particulars of this marriage there was entered against that head the word "Nil".

The deceased and the first respondent lived together until his death. There were four children of the union. They are the second, third, fourth and fifth respondents. After the death of the deceased, the first respondent received regular monthly payments of $300, increased to $700 from 1972 onwards. The payments ceased in 1975. The first respondent believed that these payments came from the estate of the deceased. The evidence on the source of these payments was sketchy in the extreme; but contained some indication that they may have come from a company in which the deceased's estate had an interest.

When the payments ceased, the first respondent took legal advice, and as a result she and the other respondents, on 24th March 1978, instituted proceedings against the appellants as administrators of the deceased's estate by originating summons in the High Court at Kuala Lumpur. The relief sought in the summons included declarations that the first respondent and the other respondents were respectively the lawful widow and the lawful issue of the deceased, and were accordingly beneficiaries of his estate and entitled to share therein under section 6 of The Distribution Ordinance 1958, and also orders for delivery of a statement of the assets and liabilities of the estate and accounts from the date of death.

The case came before Suffian L.P. sitting at first instance. There were two issues between the parties. The first was whether the marriage between the deceased and the first respondent was valid, the principal argument against the validity being that the existence of the earlier marriage between the deceased and the first appellant had not been disclosed. The second issue was whether the respondents' claim was time barred under the provisions of the Limitations Ordinance 1953. The learned Lord President decided both these issues in favour of the respondents, and on 16th April 1979 he made an order granting the declarations sought in the originating summons, but not at that stage requiring the

delivery of statements of assets or accounts. The appellants appealed to the Federal Court, but on 21st February 1981 that Court (Raja Azlan Shah, C.J. Malaya, Syed Othman and Salleh Abas, F.JJ.) dismissed the appeal. The case now comes before this Board on appeal to His Majesty the Yang di-Pertuan Agong.

Their Lordships deal first with the issue of the validity or otherwise of the marriage between the deceased and the first respondent. The marriage was registered under the Marriage Registration Enactment but, as was pointed out both in the judgment of Suffian L.P. and in that of the Federal Court, section 8 of that Enactment provides that neither the registration of nor the omission to register any marriage shall affect the validity of the marriage nor shall any error in the particulars recorded nor any omission to record any particular which ought to have been recorded affect the validity of the registration of the marriage. It follows that in the present case the marriage must be taken to have been validly registered, notwithstanding that the fact of the deceased's earlier marriage was not recorded, and indeed it was recorded, contrary to the true state of affairs, that he had no other wife living. Under section 9 of the Enactment, the extract from the register was admissible as evidence that the marriage was in fact contracted at the place and time stated, but not of the validity of the marriage. The section, however, goes on to provide:-

> "...but the Court may in the absence of evidence to the contrary presume any marriage registered under this Enactment to have been valid and the onus of proving that there was no such valid marriage shall be on the person who asks the Court to believe that there was no such valid marriage."

So it was for the appellants to prove the invalidity of the marriage.

It was not disputed on behalf of the appellants that the deceased and the first respondent might lawfully have married each other notwithstanding that the deceased already had a wife living at the time. This is a matter of Chinese customary law. Although no evidence of such customary law was led in the instant case there are many reported decisions which recognise and give effect to that law in contexts such as the present. The Federal Court cited with approval the following passage from the judgment of Carey J. in *Tan Ah Bee v. Foo Koo Thye and Anor* [1947] M.U.L.R. 72 at page 73:-

> "It is established that a Chinese man may have as many wives as he may be disposed to. Usually he has a principal wife and may have several secondary wives as well. No precise ceremony of marriage is requisite in the case of a secondary wife, but there must be some evidence of intention and some recognition of the

status of wife in order that a secondary marriage may be established."

In *Khoo Hooi Leong v. Khoo Chong Yeok* [1930] A.C. 346, an appeal heard by this Board from the Supreme Court of the Straits Settlements (Penang), Lord Russell of Killowen said at page 355:-

"The modifications of the law of England which obtain in the Colony in the application of that law to the various alien races established there, arise from the necessity of preventing the injustice or oppression which would ensue if that law were applied to alien races unmodified....

From the above mentioned necessity arises the recognition by the Courts of the Colony of polygamous marriages among the Chinese, and, as a logical consequence, the recognition of the legitimacy of the offspring (whether male or female) of such marriages."

It is apparent from the authorities that some distinction exists between the status of a principal wife (known as a t'sai) and that of a secondary wife (known as a t'sip), but it is by no means apparent what is the precise nature of that distinction, either from the social or from the legal point of view. The distinction is not, however, relevant for the purpose of deciding the issue in this appeal. Nor, as already observed, is there any question as to the capacity of the parties to contract a marriage apt to confer upon the first respondent the status of t'sip. The sole argument for the appellants is that this was not validly accomplished because it was not disclosed to the Registrar, nor, inferentially, to the first respondent herself, that the marriage was intended to be a secondary one. The evidence does not reveal whether or not the first respondent was aware at the time of the purported marriage that the deceased already had a wife living. But for the purpose of dealing with the argument their Lordships are prepared to assume that she was not so aware.

The argument is founded upon the decision of the Federal Court of Malaysia in *Re Lee Gee Chong (deceased)* [1965] 31 M.L.J. 102. That case laid down, or at least recognised, certain principles as to the legal requirements for marriage with a t'sip. The first of these is expressed in the headnote as follows:-

"...to prove a Chinese secondary marriage it is only necessary to prove a common intention to form a permanent union as husband and secondary wife and the formation of the union by the man taking the woman as his secondary wife and the woman taking the man as her husband."

It is maintained that the common intention which must be proved is that of forming a union which is specifically

a secondary marriage, and that if the woman does not know that the man already has a wife living she cannot have that particular intention. So far as she is concerned, her intention is to enter into a principal marriage. So the requisite common intention in such a situation is not proved, and it was not proved in the present case.

Their Lordships are unable to regard *Lee Gee Chong (supra)* as authority for the proposition advanced by the appellants. It was common ground that if there were a marriage at all, it could only be a secondary marriage, and it was the legal requirements for such a marriage which the Court was concerned to clarify. In these circumstances it was natural that the relevant statement of principle should refer to "a permanent union as husband and secondary wife". The issue which arises in the present appeal was not one which was open on the facts of the case, and it was not argued. In that situation it is highly unlikely that the Court should have thought it appropriate to indicate any opinion upon the issue, and there is nothing in the judgments of the members of the Court to suggest that any of them intended to do so.

In *Re Ho Khian Cheong Dec'd* (1963) 29 M.L.J. 316 the facts were that the deceased and a lady called Quek Boo Lat had gone though a ceremony which was appropriate for marrying a principal wife according to Chinese custom. The deceased had had a principal wife living at the time, but the lady did not know this. Ambrose J. held that by her marriage to the deceased the lady became his secondary wife, notwithstanding that the ceremony they went through was appropriate for the purpose of marrying a principal wife. He cited with approval a passage from the judgment of Murray-Aynsley C.J. in *Re Yeow Kian Kee (Dec'd)* [1949] M.L.J. 171, to the following effect:-

> "The legal requirements for marriage with a t'sai (principal wife) or a t'sip (secondary wife) are the same. This means that the law of this Colony (Singapore) merely requires a consensual marriage i.e. an agreement to form a relationship that comes within the English definition of marriage."

Ambrose J. went on to say at page 317:-

> "In my opinion, as the deceased had a principal wife living in Singapore at the time he went through a ceremony of marriage with Quek Boo Lat, he could only take her as a secondary wife. Considering the fact that the deceased and Quek Book Lat had agreed to become man and wife, it seemed unfair to me to relegate her to the position of concubine merely because the position of principal wife which she intended to fill had been taken by someone else. Both justice and common sense required that she be accorded the status of a secondary wife. Such a conclusion seemed to me to be in accordance with the

views expressed by Murray-Aynsley C.J. in *Re Yeow Kian Kee Dec'd (supra).*"

That decision of Ambrose J. is directly in point for purposes of the present appeal, and is an authority adverse to the contention for the appellants. Their Lordships have no doubt that the decision was correctly arrived at, and fully approve the reasoning and conclusions which led to it. It is to be observed that the decision was referred to without any suggestion of disapproval in the judgment of Wylie C.J. in Re Lee Gee Chong dec'd (supra) at page 112. Further, all the judges of the Federal Court cited with approval the passage from the judgment of Murray-Aynsley C.J. in *Re Yeow Kian Kee Dec'd (supra)* which was relied on by Ambrose J.

The appellants' attack on the validity of the marriage between the deceased and the first respondent must therefore fail. Given that the legal requirements for a principal marriage and for a secondary marriage are the same, it follows that in every case where these requirements are satisfied a valid marriage will result, provided always that the parties have the necessary capacity. The marriage will be a principal marriage or a secondary marriage according to whether or not the man already had a wife living. There can be no doubt that in the present case these legal requirements were satisfied. The Marriage Agreement, the Buddhist ceremony, the registration of the marriage and the fact of the couple having co-habited for eight years with the birth of four children amply demonstrate the requisite common intention. In the circumstances it is irrelevant whether or not the first respondent was aware at the outset that the deceased already had a wife living.

As regards the issue arising under the Limitation Ordinance 1953, the first question for determination is whether the limitation period applicable to the respondents' claim is that provided for under section 6(2) of the Ordinance or that provided for under section 23.

Section 6 (2) provides:-

"An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action."

Section 23 provides:-

"Subject to the provisions of sub-section (1) of section 22 of this Ordinance, [Limitation of actions in respect of trust property] no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued ..."

The appellants maintain that section 6(2) applies because the relief sought in the originating summons includes an order for delivery by them of accounts and balance sheets of the deceased's estate from his date of death. That relief is, however, purely ancillary to the main relief sought, namely declarations that the respondents as respectively the lawful widow and lawful issue of the deceased are entitled to share in his estate under The Distribution Ordinance 1958. Their Lordships are in no doubt that the respondents' action falls squarely within section 23, as being in respect of a claim to a share or interest in the estate of the deceased. The applicable limitation period is accordingly twelve years.

On the basis, however, that the respondents became entitled to share in the estate of the deceased upon his death on 22nd December 1960, or at the latest when letters of administration were issued in August 1961, more than twelve years had elapsed when proceedings were instituted by the respondents in March 1978. But the respondents found on section 26(2) of the Ordinance, which provides:-

> "Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment."

As has already been mentioned, evidence was led in the High Court to the effect that from the date of death of the deceased until some time in 1975 the first respondent received payments of $300 per month later increasing to $700 per month. While the source of these payments was by no means made entirely clear in the evidence, their Lordships consider that there was sufficient to entitle the learned judge and the Federal Court on appeal to hold, as they did, that these payments were made by or at the direction of the appellants as administrators of the deceased's estate. It was suggested on behalf of the appellants that the payments, the making of which was not seriously disputed, might have been made purely *ex gratia* on compassionate grounds. If such a case were to be made it would have been for the appellants, who were in possession of all the material facts about the payments, to have offered evidence in support of it. In the absence of any such evidence the proper inference is that the payments were made in respect of the respondents' claim on the deceased's estate. In the circumstances section 26(2) of the Ordinance applies to the effect that time did not begin to run under section 23 in respect of the

respondents' claim until the date of the last payment in 1975. It follows that the respondents' action was raised well within the limitation period.

For these reasons their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed. The appellants must pay the respondents' costs of the appeal.