

Privy Council Appeal No. 12 of 1918.

Cheang Thye Phin and others - - - - - *Appellants*

v.

Tan Ah Loy, since deceased - - - - - *Respondent*

FROM

**THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT
OF PENANG).**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 25TH NOVEMBER, 1919.**

Present at the Hearing :

VISCOUNT FINLAY.

LORD PARMOOR.

LORD SCOTT DICKSON.

[*Delivered by* VISCOUNT FINLAY.]

This is an appeal from a decision of the Supreme Court of the Straits Settlements (Penang). The question is as to succession to the estate of a Chinaman named Cheang Ah Quee, who resided and carried on business in the Straits Settlements. The Supreme Court, reversing the decision of Sproule, J. who had confirmed the Registrar's certificate, held that a Chinese woman, Tan Ah Loi, was a secondary wife of the deceased, and that her daughter by him, Ah Soo, was legitimate.

With regard to Chinese settled in Penang, the Supreme Court recognises and applies the Chinese law of marriage. It is not disputed that this law admits of polygamy. By a local ordinance the Statute of Distributions has been applied to Chinese successions, and the Courts have treated all the widows of the deceased as entitled among them to the widows' share under the statute. No question has been raised on the present appeal as to the propriety of this practice: the only question is whether Tan Ah Loi was one of the widows.

Cheang Ah Quee, the deceased, was married early in life in China to Lim Ah Chen, with the elaborate ceremonies appropriate to marriage with a "t'sai" or principal wife; she remained in China and survived him. After his removal to the Straits Settlements he married, in accordance with a practice which has there been recognised as legal, three other women successively as "t'sais," one of whom, Tan Gek Im, survived him. While residing at Penang he had by Tan Ah Loi, who resided in his house, three children. Two of them died early, but one survives, Cheang Ah Soo. In the will of the deceased he mentions by name Lim Ah Chen and Tan Gek Im as his wives, and refers to sons and daughters named in the will, "or who may hereafter be born by either of my said wives or by any concubine who now is or who may be hereafter living with me." This will was in English, and contains a bequest "to my daughter Cheang Ah Soo, now an infant, dollars two thousand absolutely; provided that if she is still an infant at the time of my death the same shall be paid to her mother, Ah Loi, in trust for her; but provided also that if she should die without attaining twenty-one or marrying under that age, the said Ah Loi shall be entitled to keep the said dollars two thousand (\$2,000) for her own use."

Reliance was placed on the terms of this will by the appellants. It was urged that only two women are mentioned as wives, and that the reference to concubines would include Tan Ah Loi. The terms of the will *primâ facie* tend to support the contention of the appellants; but they are far from conclusive, and the case must be determined upon the whole of the evidence.

The whole matter was referred to the Registrar for enquiry, and his certificate is dated the 24th December, 1915. He disbelieved evidence which had been given of the performance, in the case of Ah Loi, of a ceremony such as sometimes, at all events, is performed when a woman is taken as a "t'sip," or secondary wife, and sums up his conclusions thus: "I find therefore that no ceremony was performed in the case of Ah Loi, and that, though she was a 't'sip,' she is by the decision in the *Six Widows Case* excluded from participation in the widow's third of the property in respect of which there is an intestacy, and that her daughter, Ah Soo, is therefore not one of the next of kin of Cheang Ah Quee. By Chinese ideas she would be regarded as one of the next of kin, and in excluding her I am traversing these and following the decision by which I am bound."

Their Lordships have carefully examined the decision in the *Six Widows Case* and can find no foundation for the statement made in the certificate that the Court there decided that a ceremony was necessary to constitute a "t'sip." It is unfortunate that, in consequence of this misconception, the Registrar thought himself bound to disregard Chinese ideas on the subject, and to dismiss the claim simply on the ground that there was no ceremony. The certificate was confirmed by Sproule, J., but in the Court of Appeal it was pointed out that it was based on a misconception of the *Six Widows Case*, and that the present case must be decided

on the view to be taken of the evidence as to Tan Ah Loi's position. Their Lordships have before them the Registrar's notes of the evidence on the enquiry, which form part of the record, and they entirely agree with the view taken by the Court of Appeal (Bucknill, C.J., Earnshaw, J. and Ebdon, J.) that the position of Tan Ah Loi as a secondary wife has been established. Indeed, so far as questions of fact are concerned, it would appear that their findings are in accordance with the view of the Registrar himself.

It is clear that a ceremony of marriage is necessary to constitute the relation of principal wife or "t'sai," and the ceremony is one in which both the bridegroom and the bride must take part. By Chinese law a man may have secondary wives or "t'sips," as they are sometimes called. The position of a secondary wife is superior to that of a mere concubine, though this term is sometimes applied to a "t'sip." It is usual that there should be some sort of ceremony when a "t'sip" is taken, but it is not a ceremony of marriage; indeed, the man is not usually present when it does take place. The "ceremony" varies in its details, but the principal features of it are the doing of obeisance to the "t'sai" by the prospective secondary wife, and the offering of tea by the latter to the "t'sai" and the relations.

In the *Six Widows Case* (1908, 12 Straits Settlements Law Reports, 120) Hyndman Jones, C.J., said in the Appeal Court (p. 187):—

"The evidence, therefore, is very contradictory, but I am disposed to think that when it is intended to take a woman into a man's household as a concubine for the purpose of securing succession, or at all events as more than a temporary mistress, there are some sort of ceremonies, although these ceremonies in some districts and in some classes are of a more or less perfunctory character and always much less elaborate than those adopted in the case of taking a 't'sai.'"

and he goes on to say that, subject to divorce, the union with the "t'sip" is regarded by the law as being of a permanent nature. Braddell, J. says, on page 209, referring to what the Chief Justice had said:—

"I entirely adopt this exposition of the Chinese law given in the judgment of the Chief Justice, and concur with him in the conclusion at which he has arrived—namely, that concubinage is recognised as a legal institution under Chinese law conferring on the 't'sip' a legal status of a permanent nature which, subject to divorce, entitles her to maintenance during her life."

There is nothing in the *Six Widows Case* justifying the proposition that the Court decided that a ceremony was essential.

The evidence in the present case falls under two heads:— I. Evidence to show that there was in Ah Loi's case a ceremony appropriate to the taking of a "t'sip"; and II. Evidence to show that the position of Ah Loi in the household was that of a "t'sip."

I. Evidence was given as to the ceremony by Tan Ah Loi herself. She stated that she was married to the deceased when she was twenty-two, that she was then living in the house of Teng Nyong, the "t'sai" of the deceased, that she worshipped the

Joss and served tea to the "t'sai" and a sister-in-law of the deceased, and that there was a feast with over ten guests present, and she was confirmed by Oh Kit Niang. The learned Registrar refers to the evidence of two witnesses on the other side and speaks of the evidence as to the ceremony as fairly balanced, but finds that there was no ceremony. He therefore considered himself as bound to decide that Ah Loi was not legally a wife, and that her daughter was therefore not one of the next of kin of the deceased. There is great force in the criticisms passed by Ebdon, J. in the Court of Appeal upon the reasoning of the learned Registrar on the question of the ceremony in point of fact, but it is not necessary to arrive at any conclusion on this point. All the judges of the Appeal Court held that a ceremony, though usual, was not essential to constitute a secondary wife. The view taken by them on this point is entirely consistent with the *Six Widows Case (ubi supra)*, and with the view of the majority of the Court of Appeal in *Ngai Lau Shia v. Low Chee Neo*, decided at Singapore in January, 1916, and reported in an appendix to the record in the present case. Their Lordships see no ground for differing from the conclusion arrived at upon this point in the Court below.

The Registrar did not accept the evidence that a ceremony had taken place in the present case, and on a point of this kind the opinion of the tribunal before which the evidence was taken is, of course, entitled to the greatest weight. It is, however, difficult to see that there was any sufficient ground for his finding that no ceremony was performed. If a woman has been in fact a "t'sip," the performance of the slight ceremony which is often performed in such cases might, if it were essential, be readily inferred from the evidence as to the position which she had in fact occupied. It is not easy to see what evidence there was to justify the express finding of the Registrar that no ceremony had taken place, even if the evidence was not regarded as sufficient to establish affirmatively the fact of a ceremony.

II. All the judges in the Court of Appeal found that the evidence established that in fact Ah Loi was a "t'sip" or subordinate wife. The evidence as to all the claims was taken together. The witnesses who gave evidence which is worth notice with reference to Tan Ah Loi's position were Tan Ah Loi herself (R., pp. 25-27), Neoh Guat Neoh (R., pp. 23-25), Cheang Ah Soo (R., pp. 29 & 30), Oh Kit Niang (R., pp. 30 & 31), Lam Kin Shang, husband of Ah Soo (R., pp. 31 & 32), Cheang Thye Phin, son of the deceased by Teng Nyong (R., p. 35), and Tan Yok Moi (R., p. 37).

The evidence appears to establish that Tan Ah Loi's relation with the deceased was one of a permanent nature, and that the offspring of the union was recognised by the father. It further establishes that there was recognition of Tan Ah Loi's position by the first "t'sai" in China on the occasion of the three visits which Tan Ah Loi paid to her in company with the deceased. It appears also that Tan Ah Loi, after the deceased's death,

resided with his second "t'sai," Tan Gek Im, at Penang, and that lady in her will speaks of Ah Soo as her stepdaughter and of Ah Loi as her sister, leaving legacies to each. Ah Soo's name appeared on the tombstone of the deceased. There was also other evidence of recognition. But, in truth, it is not necessary to labour this part of the case. The Registrar himself found that Ah Loi was a "t'sip," by which it is clear he means a secondary wife, although, owing to his misconception of the law, he found that the absence of a ceremony was fatal to her claim. Sproule, J. simply upheld the Registrar's certificate. In the Court of Appeal the Chief Justice says that the Registrar was quite right in his decision that the woman was a "t'sip," and proceeds to say:—

"What had we here to justify the finding? Very much. Some twenty-six years' maintenance and residence under deceased's roof; three children by deceased, one of whom survives the deceased, is referred to by the deceased in his will as 'daughter,' and is given a legacy; recognition by the original 't'sai'—the first real wife who was wedded and remained in China—as a 'concubine'; recognition by another—a Penang—so-called 't'sai' (called 'wife' by the deceased) as a concubine, designated in her will as 'sister,' and, very important, with whom after the deceased's death she lived, and by whom she was left a legacy; and recognised also as a true 'concubine' by other members of the family. Such was no temporary liaison, nor its object a mere casual mistress. Whether or not her effort to prove a ceremony was true matters not. I think the decision that the woman was a 't'sip' was right, and as such she is entitled to participate in the intestate estate."

Earnshaw, J. also found that Tan Ah Loi was a secondary wife or "t'sip" of Cheang Ah Quee, and on his death became a lawful widow of him and therefore entitled to the widow's third in case of intestacy. He summarises the evidence as to her position and concludes:—

"Tan Ah Loi is thus recognised as a member of the family both by the Chinese and the Penang branches. The absence of any ceremony in the circumstances is not of any importance."

Ebden, J. referred to a number of circumstances already adverted to by the other members of the Court, and laid stress upon two facts as to Ah Soo as throwing light on her mother's position. He says:—

"Cheang Ah Soo was allowed a magnificent portion by the trustees on her marriage. The fact that her name is on Cheang Keng Kwi's tombstone indicates recognition either of legitimacy, in the Chinese sense of the word, or of full adoption, and legitimacy of the child must imply the lawfulness of the union of which it is the offspring."

He states his conclusions in the following terms:—

"I certainly agree with the rest of the Court that Tan Ah Loi's claim to the position of a lawful consort has been fully made out, and that by the principle which has been so fully established by former decisions of the Courts of the colony as to be beyond our power of alteration, she is entitled to participate in the widow's third of the property in respect of which there has been found to be an intestacy. I also find that the Registrar was wrong in refusing to accept Cheang Ah Soo as one of the next of kin to Cheang Keng Kwi."

On a question of fact of this kind their Lordships would be very slow to differ from the conclusion arrived at by the Registrar and by all the judges before whom the case has come, but they think it right to add that they entirely agree that it has been proved that in point of fact Tan Ah Loi was a secondary wife.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

CHEANG THYE PHIN AND OTHERS

v.

TAN AH LOY, SINCE DECEASED.

DELIVERED BY VISCOUNT FINLAY.

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