Privy Council Appeal No. 40 of 1920.

Khaw Sim Tek and others - - - - - - - *Appellants*

v.

Chuah Hooi Gnoh Neoh - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST OCTOBER, 1921.

Present at the Hearing:
LORD BUCKMASTER.
LORD ATKINSON.
LORD CARSON.

[*Delivered by* LORD BUCKMASTER.]

The real question that arises on this appeal is whether the respondent is disentitled by lapse of time from maintaining the proceedings which she instituted on the 25th February, 1916, for the purpose of obtaining (1) a declaration as to the effect of a gift for yearly and other sacrifices contained in the Will of a testator who died on the 25th May, 1882, and (2) the distribution of the estate upon the footing that the gift was void and the property so given passed to the next of kin. The Will is in Chinese form, and was made in 1874; the original has been lost, and there is nothing but a translation by a former interpreter of the Court in Penang by which it is possible to ascertain its contents. So far, however, as the critical question in this case is concerned, the translation, as it is before their Lordships, is adequate for the purpose. The testator provided that his property was to be dealt with by payment of a very large number of pecuniary legacies, and after they had been paid and satisfied, the residue was to be divided

into 60 shares. As to sixteen of those 60 shares he directed that they should be the means of his maintenance during his lifetime, and should be "Kong Lin for yearly and other sacrifices" after his death. Both by clause 4 and by clause 22 of the testator's Will it appears that he contemplated that this residue should be left undistributed for sixteen years. It is unnecessary for their Lordships to say definitely whether the directions that he imposed upon his executors in this respect were in the nature of a mere appeal to their discretion or created an imperative trust, since for the respondent's purpose the most favourable assumption is that the period of sixteen years was a definite period definitely fixed before which no division of the estate could take place, and for the purpose of this decision their Lordships will accept this view. At the expiration of sixteen years the testator declares by clause 22 that the income of the shares shall "begin to be my sons and grandsons (or grandchildren) Kong Lin for yearly sacrifices as well as for sacrifices in spring and autumn." The plaintiff is the legal representative of a granddaughter of the testator, her grandfather, the testator's son, having died in the testator's lifetime. Her claim, therefore, is as the legal personal representative of one of the female next of kin of the testator, and in this capacity she instituted these proceedings, asking that the gift of these sixteen 60ths of the residue to the Kong Lin should be declared void and distributed among the next of kin. Among other answers to that claim the appellants urged that the right to bring the action is barred by virtue of the Statute of Limitations which exists in the Straits Settlements. The ordinance in question is Ordinance No. 6, 1896. This provides by Section 4 that:—

> "Subject to the provisions contained in Sections 5 to 25 inclusive, every suit instituted after a period of limitation prescribed therefor by the Second Schedule hereto shall be dismissed provided that limitation has been set up as a defence."

By Schedule II there is a provision in Article 99 that a suit for obtaining a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an intestate cannot be maintained after the lapse of twelve years from the time when the legacy or share becomes payable or deliverable. Mr. Upjohn contended that in any circumstances that period must have elapsed before this suit was instituted. If it be taken from the date of the death, of course it is obvious that it has long gone by. If a further period of sixteen years be taken and the calculation is assumed to date from the period of division fixed by the testator for the estate, still the suit is out of time, for the period expired in 1898; but finally if it be taken, as has been urged on behalf of the respondent, that it should be at the period when the trustees had in accordance with the trusts of the Will so dealt with the estate that it was ready for division, then again the plaintiff is out of time, for elaborate accounts were prepared on the 15th January, 1904, in which a full and proper allocation of the shares of the residue applicable for this rotation of the Kong Lin was set apart and fixed. Their Lordships think,

therefore, that it is unnecessary for them to decide which of those three periods is the right one to fix, because whatever period may be taken the plaintiff is too late. Their Lordships cannot support the view which appears to have found favour with the learned Judge before whom the case was first heard that the time runs from the date when the clause is construed by a competent Court, nor that suggested by Ebden, J., in the Court of Appeal that the time fixed is when the intestacy is declared by a decree established beyond appeal. The intestacy, if it exists, has existed throughout, and the distributive share of one of the next of kin has been his to claim from the time when the intestacy arose and not when it was declared. The Probate gives no efficacy to the provisions of the Will; it is merely proof of the contents, and their Lordships think Ebden, J., was in error in saying, "When a Will has been admitted to probate its provisions stand good unless and until they are avoided by the declaration of a competent Court." Such provisions could be ignored from the outset, and the declaration of the Court is merely as to how the will ought to have been construed throughout, nor is it necessary that "a suit to recover such a share would have to be preceded by a suit to attack the Will." But it is then urged that the exception referred to in clause 4 of the Ordinance of 1896, making the times in the schedule subject to the provisions of Sections 5 to 25, enabled the plaintiff to maintain the suit because Section 10 provides that :—

> "Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of followng in his or their hands such property shall be barred by any length of time."

The contention is that in this case the property was vested in trust for a specific purpose, because in the event of the sixteen 60ths being declared to have been gifts for a purpose that failed, they became vested in the trustees' hands in trust for the next of kin, and in support of that contention reference has been made to the old and well-known case of *Salter* v. *Cavanagh* (1 Dru and Walsh, 668), which has been subsequently followed, though with some hesitation, in other authorities. So far as that case is concerned, apart from an argument as to the meaning of clause 22 of the Will, it affords him no assistance, for the principle that underlies that authority is this: that if property be set aside by a testator from the general body of his estate and vested in trustees upon certain trusts, which upon the face of them are inadequate to exhaust the whole of the property, there remains as to the balance a trust impressed upon the trustees in favour of the next of kin or the heir at law, a trust for the purpose of which you have to do no violence whatever to the language of the Will, for which it is unnecessary to disregard any intention or desire that the testator has expressed, for which it is only necessary to imply that when the testator knew, as he must have done, that the specific purpose to which the property had been devoted did not exhaust the

whole trust estate, the balance would of necessity be held by the trustees for the heir at law or the next of kin.

In this case the only way in which the next of kin can, apart from clause 22, assert their position is by defeating the provisions that the testator has made in his Will. It is only upon the hypothesis that those provisions are bad that his interest arises, and it is in the opinion of their Lordships impossible to say that in those circumstances the property was vested in trust for a specific purpose in which the next of kin was in any way interested. A specific purpose, within the meaning of Section 10, must, in their Lordships' opinion, be a purpose that is either actually and specifically defined in the terms of the Will or the settlement itself, or a purpose which, from the specified terms, can be certainly affirmed. The statement which was made in the authority of *Balwant Rao* v. *Puran Mal* (I.L.R. 6 All. 1) that the purpose of following the property in the hands of the trustees referred to at the end of Section 10 must be the purpose of restoring it to the trust which is specified in the earlier part of the section is in their Lordships' opinion a sound and critical test by which to consider whether or not any particular trust is within the provisions of the section. Their Lordships therefore think that so far as the general claim of the next of kin is concerned on the hypothesis that the gift is wholly void, the Statute of Limitations affords a complete and effectual bar, and this view appears to be in agreement with that of Sproule, J. But it was then urged that there was an alternative view which arises upon the face of the Will by which it may be said that the plaintiff was in fact entitled under the benefit of the trust contained in clause 22. This proposition was only raised at the end of the earlier argument, and certainly found no part in the original claim. There was therefore some technical difficulty in the way of the respondent, but their Lordships were anxious that a matter which had come from such a distance and is of such importance to the parties should not be imperfectly considered, and therefore they heard all that could be urged upon this later branch of the case, but in truth when it is examined there is very little that can be said. Clause 22 provides that at the expiration of sixteen years the shares "shall begin to be my sons and grandsons Kong Lin for yearly sacrifices as well as sacrifices in the spring and autumn." The copy of the Will before us has the words "or grandchildren" added after the "grandsons," but whether or no that was the real interpretation of the word it seems difficult to ascertain, because the word in the previous clause 21, which has been the subject of interpretation and has been held to include grandchildren, has not necessarily the same meaning in clause 22, and their Lordships think there is much weight in the statement made by Mr. Justice Ebden, who must be much more familiar with the local circumstances than their Lordships can possibly be, when he pointed out that the sacrificial rites which are imposed upon the property and for which, under clause 22, the beneficiaries there mentioned are

to use the estate, are rites for which the daughter is a useless person. To use the language of the learned Judge, he says :—

> "'She is useless for the purpose of ancestor worship which requires male issue,' and he says again that 'the phrase itself which was assumed to mean grandchildren including daughters, might, on careful consideration, be shown only to mean sons and grandsons for the reason that daughters have no place in Chinese succession.'"

This is a cogent argument to show that in clause 22 there never was any intention that a granddaughter should be included. If, however, the clause is capable of such a construction as the two other learned Judges in the Court of Appeal appear to hold, there still remains the difficulty that the gift is not to the class beneficially but to perform ceremonies which it is said render the gift void, so that even on this hypothesis the respondent is not seeking to restore the property to the trust but to take it away, and consequently Section 10 is inapplicable. It follows, therefore, that the respondent is unable to escape from the general effect of the Statute of Limitations, and that this suit was instituted too late for it to be capable of being entertained by the Court before whom it was brought.

For these reasons their Lordships will humbly advise His Majesty that the suit should be dismissed, that this appeal should be allowed with costs, and that the decree of the 12th August, 1919, except so far as it dealt with costs, should be set aside.

In the Privy Council.

KHAW SIM TEK AND OTHERS

v.

CHUAH HOOI GNOH NEOH.

DELIVERED BY LORD BUCKMASTER.

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