Privy Council Appeal No. 33 of 1953

Leong and another - - - - - - - - - *Appellants*

v.

Lim Beng Chye - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE FEDERATION OF MALAYA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH JULY, 1955

Present at the Hearing:

LORD RADCLIFFE
LORD TUCKER
MR. L. M. D. DE SILVA
[*Delivered by* LORD RADCLIFFE]

This appeal from an Order of the Court of Appeal, Supreme Court of the Federation of Malaya, dated 13th February, 1953, relates to two questions which arise in carrying out the testamentary provisions of a resident of Penang, Lim Kia Joo deceased (hereinafter called "the Testator").

The Testator died on 19th November, 1936, leaving a Will made in Penang on 21st August, 1936. Letters of administration *de bonis non* with the Will annexed were granted to two Administrators on 7th May, 1939, and it was they who instituted an Originating Summons to determine the questions that are the subject of the present appeal. The persons who appear respectively as Appellants and Respondent before the Board are interested parties whose interests will be apparent later when the terms of the Testator's Will have been referred to. Briefly, the main question in the appeal is whether the interests of the Appellants Sally Leong and her daughter, Lim Eang Hoong, or the interest of Sally Leong alone, has been forfeited by a provision in the Will requiring widows not to remarry. There is a subsidiary question as to the destination of the income of residue accruing prior to the date of distribution.

The Testator's Will is a document of some length and contains numerous dispositions. For the purposes of the appeal the important clause is clause 13, which constitutes a bequest of residue. By earlier clauses the Testator had given legacies to named grandchildren and daughters: had provided marriage portions for daughters by each of his two wives; had made certain dispositions by way of maintenance for his widows, infant sons and unmarried daughters, and provided for his house, 47 Northam Road, Penang, to be kept up as a place of residence for his family until the date when his residuary estate became distributable.

Clause 13 is a residuary bequest embracing all the Testator's property except his property in China. It sets up the usual trusts for sale, conversion and investment and then proceeds as follows:—

> "Upon Trust to pay out of the income of my residuary estate in the first place and out of the capital thereof if such income be insufficient the sums directed to be paid under clauses 9, 10, 11 and

12 hereof and until my youngest son living at my death shall attain the age of 21 years or if he shall die without having attained the age of 21 years then until such time as he would if living have attained such age. Upon Trust as to both the capital and income of my residuary estate to pay and divide the same equally among my said wives Yeoh Ah Eong and Queh Ah Gaik and my sons Lim Beng Hong, Lim Beng Choon, Lim Beng Sai, Lim Cheng Hooi, Lim Weng Hooi, Lim Beng Chye and Lim Chit Bah and my nephew Lim Joo Huat the son of my elder brother Lim Niah Sah and any other sons that may hereafter be born to me by my said wives Yeoh Ah Eong and Queh Ah Gaik. Provided that if either of my said wives shall not remain my widow or lead a chaste life or shall die before the period fixed for the division of my residuary estate her share shall go equally to my said sons Lim Beng Hong, Lim Beng Choon, Lim Beng Sai, Lim Cheng Hooi, Lim Weng Hooi, Lim Beng Chye and Lim Chit Bah my nephew Lim Joo Huat and any other sons that may hereafter be born to me by my said wives Yeoh Ah Eong and Queh Ah Gaik. And Provided that if any of my said sons Lim Beng Hong, Lim Beng Choon, Lim Beng Sai, Lim Cheng Hooi, Lim Weng Hooi, Lim Beng Chye and Lim Chit Bah, my nephew Lim Joo Huat and any other sons that may hereafter be born to me by my said wives shall die before the period fixed for the division of my residuary estate leaving male issue his share shall go to such male issue equally if more than one but if he shall not leave any male issue but shall leave a lawful widow and female issue his share shall go to such lawful widow and female issue equally if more than one provided such lawful widow shall remain the widow of such deceased son or nephew and lead a chaste life."

The youngest son of the Testator living at his death attained the age of 21 years on 8th March, 1952, and this date therefore was the date fixed by the Will for the distribution of residue. In the meantime, however, another son, Lim Beng Sai, had died on 22nd December, 1942, leaving a widow, Sally Leong, and a daughter Lim Eang Hoong. His widow, Sally Leong, married again on 13th August, 1949.

It was in these circumstances that the Originating Summons was taken out on 9th November, 1951. The summons asked for, and later obtained, a representation order to cover the interests of all persons claiming to be residuary legatees under the will other than the present appellants. The Court appointed the present respondent to appear in that capacity. Apart from that the summons, as later amended, raised two questions for the decision of the Court. They were as follows:—

"2. That it may be determined to whom, upon the true construction of clause 13 of the will of the said deceased and in the events which have happened, the share in the residuary estate of the said deceased bequeathed to Lim Beng Sai, deceased, provided that he survived the period of distribution, will be payable.

2*a*. Whether the surplus income of the said deceased's estate is divisible and, if so, amongst whom, or whether the same should be accumulated until the period of distribution."

The Courts in Malaya have returned divergent answers to Question 2. In the High Court at Penang Mr. Justice Spenser Wilkinson decided that the appellants were entitled to share equally between them the share of residue bequeathed to Lim Beng Sai, notwithstanding the remarriage of Sally Leong, and made a declaration accordingly. The Court of Appeal, on the other hand, made an order to the effect that neither of the appellants was entitled to any interest in the share of residue bequeathed to Lim Beng Sai, although the members of the Court were not unanimous as to the forfeiture of the interest of the infant appellant. As to Question 2*a*, both Courts agreed in giving the answer that the surplus income of the residuary estate ought to be accumulated until the date of distribution and then distributed as part of residue.

The divergence of view that has separated the two Courts arises in the application of the rule of English law which relates to conditions in partial restraint of marriage when imposed upon bequests of personalty made by will. It is common ground that a condition as to the remarriage of a widow is a partial restraint for this purpose. Their Lordships do not think that it is possible to solve the disputed question without saying something as to the origin and nature of the English rule.

In English law property, whether real or personal, can be validly limited to a person until marriage. The ambit of this rule is confined to conditions attached to devises or bequests of property and it does not relate to limitations themselves. Moreover, although it was the view of Mr. Jarman that, subject to certain established exceptions, conditions precedent were as much within the rule as conditions subsequent, it is only necessary for the present purpose to tread on the surer ground of conditions subsequent. As to these, while a condition in general restraint of marriage is *prima facie* void, at any rate when imposed upon a gift of personalty, a condition in partial restraint of marriage is certainly not void and is capable therefore of receiving legal recognition. But on the further point, how far and under what conditions such recognition should be given, the law differed in its treatment of realty and personalty. For, whereas a condition subsequent in partial restraint of marriage was effective to determine the estate in the case of a devise of realty even without any new limitation to take effect on the forfeiture, so that a residuary devisee or heir came in of his own right, it was early determined and consistently maintained that a condition subsequent in partial restraint of marriage, when annexed to a bequest of personalty, was ineffective to destroy the gift unless the will in question contained an explicit gift over of the legacy to another legatee. And for this purpose a mere residuary bequest was not treated as a gift over.

One thing at least is certain about this rule: it exists. As early as 1737 a Court consisting of Comyns, J., Willes, L.C.J., Lee, L.C.J., and Hardwicke, L.C., thought it settled law that, in the absence of a gift over, such a condition was ineffective to defeat a bequest (*Harvey* v. *Aston*, 1 Atk. 361); and the note appended by Mr. Sanders, the editor of the reports (*loc. cit.* p. 381) shows how abundant the authority was for that proposition. When it was referred to again in 1746 in the case of *Wheeler* v. *Bingham* 3 Atk. 364 Lord Hardwicke reaffirmed it as a settled rule of the Court that the condition was void without a gift over. There are many other cases in which it has been asserted and at least several in which the rule or the general branch of the law to which it belongs has been criticised as being undesirable and unsatisfactory (see e.g. *Re Dickson's Trusts* 1 Sim N.S. 37 at 44. *Re Catt's Trusts* 2 H. & M. 46 at 52. *Stackpoole* v. *Beaumont* 3 Ves. jun. 89. *Re Whiting's Settlement* 1905 1 Ch. 96) Lord Loughborough indeed thought it "beyond imagination" how a Christian country could have adopted the rule of the Roman law with regard to conditions as to marriage and complained that it was "impossible to reconcile the authorities or to range them under one plain general rule" (*Stackpoole* v. *Beaumont* supra). But Lord Loughborough did not have the occasion to propound a plain general rule of his own: and his observations in the case were later characterised by Mr. Jarman as failing to "evince that respect for authority and established principles which has characterised his successors" (Jarman, Wills, 7th Ed. Vol. II, 1503). So, with this possible exception, it would be true to say that not even the critics have doubted the validity of the rule, so long as it is confined to the limited terms in which it has been stated above.

It is a more difficult task to rationalise such a rule or to ascertain precisely what are its limits or of what exceptions it may permit. And that is the difficulty which has led to the difference of opinion in the present case. It is commonly said that such a condition is treated by the Courts, in the absence of a gift over, as being "merely *in terrorem*" (*see* e.g. Theobald, Wills, 11th Ed. 534, Jarman, Wills, 7th Ed. Vol. II, 1442). The phrase is scarcely a happy one if its only purpose is to describe a situation in which the law will not permit the legatee to have anything to be afraid of.

In any event the phrase merely describes the effect of the rule: it does not account for it. Not unnaturally, judges have from time to time sought to explain its basis. But they have not always agreed in their explanations. Willes, L.C.J., thought that it was "laid down as a rule to construe the testator's intention", treating the gift over as being one, but not necessarily the only, way by which a testator could unequivocally express his intention that the condition he imposed should be effective (*Harvey* v. *Aston* 1 Atk. 361 at 377). But an explanation that is based on the testator's presumed intention does not offer any satisfactory answer to the query why, in that case, adequate evidence of serious intention is not provided by the very condition that the legacy is to be forfeited : a condition which, in the case of realty, effectively performs its apparent purpose. So, in *Wheeler* v. *Bingham,* 3 Atk. 364, Lord Hardwicke, L.C., dealt with the matter rather differently. In his view "the strength of evidence of the testator's intent that the legacy should cease . . . is not the reason that has governed the Court. . . . There have been abundance of cases here where the intention of the testator was full as strong that the legacy should cease . . . yet the intent only did not prevail." He concluded therefore that the true ground for making the condition effective as a forfeiture was not intention, but the right of a third party to come in and claim his bequest, if there was a gift over.

In their Lordships' opinion it is not possible, at this stage of its history, to give an account of the origin of the rule that is wholly logical. It is known that the general conception of public policy upon which is based the invalidity of any conditions tending in restraint of marriage was derived by the Ecclesiastical Courts of this country from Roman law by way of the Civil Law and the Courts of Chancery related their own rules to the rules of the Ecclesiastical Courts. But this general conception was never adopted by English law as a whole, and all that can be said is that the Courts of this country settled for themselves within what limits and under what conditions they would treat bequests of personalty in English wills as subject to the principle of the civil law. Once the rule had become established, it was probably convenient to attribute its operation to an intention ascribed to the testator himself rather than to the influence of a principle of public policy adopted from the civil law and never more than partially recognised in this country. At the same time it is obvious that it is only in a special sense that the presumed intention of the testator can be treated as the ground of the matter, for in truth the intention is forced upon him by the law rather than displayed by himself. No doubt it is quite satisfactory to say that, if the will contains an express gift over, that gift shows beyond doubt that the testator did not intend that the condition should be merely *in terrorem.* But it is equally satisfactory, and perhaps less complicated an approach, to follow Lord Hardwicke in saying that it is the presence in the will of the express gift over that determines the matter in favour of the forfeiture. So, it has been suggested, would an express revocation of a bequest that is bound by a similar condition. In any event, in so far as the rule is rested on intention, their Lordships do not feel any doubt that the intention relied upon must be found within the four corners of the will itself and extracted from the contents of the will. To introduce any method of ascertaining the intention which goes beyond this and allows it to be found or guessed at from extraneous circumstances or on a balance of probabilities is to introduce a principle which is foreign to the very basis of testamentary construction, and their Lordships know of no authority in support of it. Certainly the judgment of Willes, L.C.J., in *Harvey* v. *Aston* 1 Atk. 361, which was cited by the respondent's counsel in this connection, is not to be treated as such an authority : for when the report in Atkins is compared with the report in Willes, which was prepared by Mr. Durnford from the actual manuscript of Willes, L.C.J., it is seen that the learned judge's reference to "other ways" of discovering intention relates to expressions of intention contained in a will and not evidence of intention imported *aliunde* (see 1 Atkins at 377 and Willes 95, 96).

If the rule is applied in this sense to the testator's will, it does not appear to their Lordships that there can be any doubt as to the result. The bequest that is in question is the share of residue originally destined for Lim Beng Sai but given over in the event to the appellants, his widow and daughter. To this bequest is annexed the simple proviso that the widow is to remain a widow and lead a chaste life. There is no gift over in the event of that condition not being fulfilled: nor does the share fall back into residue, if forfeited. As a lapsed share of residue it would pass on intestacy as undisposed of by the will. The condition or proviso must therefore be treated as " merely *in terrorem*," that is as intended merely in a monitory sense, and the appellants are entitled to take the share equally between them, notwithstanding the remarriage of Sally Leong.

This conclusion is in accordance with the Order of the High Court at Penang dated 15th April, 1952, in disposing of Question 2 of the Originating Summons, and, in their Lordships' view, the learned judge, Spenser Wilkinson, J., correctly applied the relevant law. It is necessary now so say something as to the reasons which led the three members of the Court of Appeal at Penang to take a different view and to reverse his order on this point.

The reasons given by the learned judges were not in all respects the same. All of them however were impressed by the fact that, taking the will and its many separate provisions as a whole, they could feel confident that the testator did not intend the proviso at the end of clause 13 to be " merely *in terrorem*." He " meant what he said." It is, of course, true that in several places in the will the testator showed a wish that widows should not remarry or that their interests should be forfeited if they did, in one case expressly giving over a share in such event. In fact, the provisions vary in expression and, possibly, in result. But their Lordships do not see how it is possible to deduce from the different provisions attached to other bequests in other parts of the will anything more that throws light upon the testator's intention than what is afforded by the particular provision itself. And that is a provision that a widow is not to remarry. The question still remains what legal effect is to be given to such a provision ; and, as Lord Hardwicke pointed out long ago, mere weight of intention, in the absence of a gift over or something equivalent to it, is not sufficient to displace the rule. Indeed it might be argued with equal force that the fact that the testator did attach a gift over to a similar condition in another part of clause 13 but did not make any gift over after this proviso tells against an intention to make an effective forfeiture of Lim Beng Sai's share. Their Lordships think that the method of construction thus adopted is an unsound one when a rule such as the " *in terrorem* " rule is in question.

Pretheroe, J., supported his conclusion by treating Lim Beng Sai's share as returning to the general fund of residue on the widow's remarriage and so as avoiding a partial intestacy and any necessity for a gift over. But this conclusion is based on a mistaken view as to the law, since the share, if forfeited, could not go back to residue: it must go as on intestacy. Murray-Aynsley, C.J., attached special importance to the fact that the testator was a Chinaman and that, as he said, the remarriage of widows is contrary to custom among Chinese of the old-fashioned kind. From this he drew the inference that the testator did not intend his provision to be " merely *in terrorem* " and did intend an effective forfeiture. But this approach appears to their Lordships to be open to the serious objection that, even supposing intention to be the sole determining consideration, it derives its evidence of intention from a speculation as to what the testator would have been likely to intend, and not from any particular expressions that are found in the will itself. And the reasons relied upon by Mathew, C.J., are open to the same criticism, although he supports his conviction as to the testator's intention not so much by reliance on racial custom as on the fact that his basic intention was to preserve his estate for those members of his family who remained within it.

Having regard to what has been said earlier as to the origin and scope of the rule, it does not appear to their Lordships that considerations such as those which weighed with the learned members of the Court of Appeal are sufficient to affect its application. To determine the construction of a will by them is to open the door to the uncertainty of what is not unfairly called speculation as to a testator's intentions and in the long run it is not in the interest of testators or their beneficiaries that this should be permitted. Nor is this particular rule one that can be simply dismissed as a rule for ascertaining and giving effect to intention.

It is not difficult to see that the considerations which have influenced the Court of Appeal can be plausibly restated in the proposition that the rule of English law ought not to be applied by the Courts in Malaya, having regard to the differences of race and social custom that separate the one country from the other. Something like this proposition was indeed advanced by the respondent's counsel in his argument on the appeal. The rule in question, it was said, was a rule of construction only, which, originating with an attempt to correct a social malady that prevailed in one period of the Roman Empire, had found an ambiguous and rather restricted lodging in one part of the law of England. It would be wrong to resort to it when dealing with the construction of wills made by residents of Malaya, many of whom inherit customs and traditions very different from those of the English race.

Their Lordships are far from denying that there is force in an argument on these lines. It is very natural to see something anomalous in the introduction into Malaya of a special rule of English law of this kind. But English law itself has been introduced into Penang, as part of the Straits Settlement, " so far as it is applicable to the circumstances of the place " (*Yeap Cheah Neo* v. *Ong Cheng Neo* L.R. 6 P.C. 381 at 393); and, while so much of that law as can be said to relate to matters and exigencies peculiar to the local condition of England and to be inapplicable to the conditions of the overseas territory is not to be treated as so imported, Their Lordships are of opinion that the process of selection cannot rest on anything less than some solid ground that establishes the inconsistency. And it is any solid ground of that sort which is lacking in this case; not the less when it is recalled that the testator made his will in the English language, and employed in it forms and legal conceptions that are wholly derived from English law. In fact, if the English law was so far imported into Penang as to nullify through the rule against perpetuities a Chinese lady's testamentary disposition relating to a family burying place and a house for performing religious ceremonies to the memory of her dead husband (see *Yeap Cheah Neo* v. *Ong Cheng Neo* supra), it would be very hard to say why there was not also imported the English rule as to the effect of conditions in partial restraint of marriage.

It was said that the rule against perpetuities was a rule of law, whereas the rule now in question was no more than a rule of construction. But the distinction proposed does not appear to their Lordships to be a significant one. This rule too is a rule of law in the sense that every Court is bound to apply it and give effect to it, once it is clearly ascertained what are its terms and under what conditions it is required to operate. It is not merely a rule of construction, since its history shows that it owes its existence to a particular conception of what public policy required, even though that conception never prevailed in the English law as a whole. Yet there is nothing that is peculiar to the local conditions of England or, for all that appears, anything necessarily inappropriate to the circumstances of Malaya in a reluctance on the part of courts of law to allow a person's decision whether or not to enter the state of matrimony to be overhung by a condition that forfeits his or her interest in property according to the decision or in a rule that requires any forfeiture, if it is to be enforced by the Courts, to be carried through in explicit terms by a gift of the forfeited property to some other person. And this, where it is applicable at all, is what the "*in terrorem*" rule in effect amounts to.

Their Lordships note, for the purposes of record, that the appellants' counsel desired to argue that the provision against remarriage was also void as infringing the rule against perpetuities. As no such point appears to have been raised in the Courts below and their Lordships would not have had the benefit of the opinions of the Courts in Malaya upon it, they did not think it right to allow it to be argued for the first time before them.

With regard to the Question 2*a* raised by the summons, the appellants' counsel stated that he did not wish to dispute the propriety of the order made in the High Court, if the decision on the main question were to go in their favour. There is no cross-appeal on the point and their Lordships therefore assume, without deciding, that the decision of the High Court was correct.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed so far as relates to that part of the order of the Court of Appeal that declares that the appellants are not entitled to the share of the residue of the estate of the testator bequeathed to Lim Beng Sai, deceased: and that in lieu of that declaration there should be substituted the declaration that appears under subhead (1) in the order of the High Court dated 15th April, 1952. Both the appellants and the respondent are willing that the costs of this appeal, taxed as between solicitor and client, should be paid out of the testator's estate, and their Lordships direct accordingly.

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In the Privy Council

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v.

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[DELIVERED BY LORD RADCLIFFE]

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