

Fung Ping Shan and Another - - - Appellants,

v.

Tong Shun - - - Respondent,

FROM

THE SUPREME COURT OF HONG KONG.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 17TH DECEMBER, 1917.

Present at the Hearing :

LORD SHAW.

LORD PARKER OF WADDINGTON.

LORD SUMNER.

[*Delivered by* LORD PARKER OF WADDINGTON.]

By an indenture dated the 17th September, 1909, and made between Pang Kit Cheong (thereinafter called the vendor), of the one part, and a person therein described as "Tong Shun, of Victoria, in the Colony of Hong Kong, Trader," and thereinafter called the purchaser, of the other part, it was witnessed that, in consideration of 26,500 dollars then paid by the purchaser, the receipt whereof the vendor acknowledged, the vendor assigned unto the purchaser all that piece or parcel of land being Inland Lot No. 556, then known as No. 104, Bonham Strand, to hold the same unto the purchaser for all the residue of the term created by and subject to the payment of the rent and the performance of the lessee's covenants and conditions reserved and contained in the Crown lease therein mentioned. And the purchaser thereby covenanted with the vendor that the purchaser would during the residue of the said term pay the rent and perform the covenants in the said Crown lease reserved and contained, and indemnify the vendor against all actions, claims, and demands on account or in respect of the non-payment of the said rent or the non-performance of the said covenants and conditions, or any of them. The indenture was executed by both parties and witnessed by Mr. Hodgson, a solicitor.

The vendor was at the date of this indenture the legal owner of the leasehold property expressed to be thereby assigned

and it cannot be disputed that the effect of the indenture was to pass the legal estate in this property to the person therein referred to as the purchaser. The only question is as to the identity of this person. The respondent (who will hereinafter be referred to as the "uncle") contends that he is the person in question, and that the legal estate passed to him. The appellants, on the other hand, contend that the person in question is a person who will be hereafter referred to as the "nephew," and that the legal estate passed to the nephew.

There can be no doubt that parole evidence as to the identity of a party to a deed is always admissible, but in considering such evidence it is of paramount importance to bear in mind the indicia of identity afforded by the deed itself. In the present case these indicia are as follows: the person to be looked for is a person who—(1) is named Tong Shun; (2) resides at Victoria in the colony of Hong Kong; (3) is a trader; (4) has paid the vendor 26,500 dollars; and (5) enters into a covenant with the vendor by signing, sealing, and delivering the indenture itself. The uncle's Chinese name may properly be rendered in English as Tong Shun and he may, no doubt, be properly described as a trader. He also seems to have provided the 26,500 dollars paid to the vendor. But he was not resident in Hong Kong when the indenture was executed. On the contrary, he resided at Chicago his only connection with Hong Kong being that he was or had been a partner in certain businesses carried on in the colony. He certainly did not either personally or by a properly constituted attorney sign, seal, or deliver the indenture, or thereby enter into any covenant with the vendor. The nephew, on the other hand, has a Chinese name which may properly be rendered in English as Tong Shun; he resides in Victoria in that colony; he is a trader; he paid the 26,500 dollars, though out of money provided by the uncle; he personally signed, sealed, and delivered the indenture and he is the only person who could possibly be sued by the vendor on the covenant, on the part of the purchaser therein contained.

The facts above stated taken alone would, in their Lordships' opinion, establish beyond controversy that the person in the indenture described as the purchaser was the nephew and not the uncle, but there is one additional fact which has not yet been stated, and which is said to outweigh the other evidence, or at least to create such an ambiguity as to admit evidence of intention. As hereinbefore appears both the uncle and the nephew have Chinese names, which may be properly rendered in English as Tong Shun. To the Chinese ear the names are, however, quite distinct, because their intonation is different. They are also distinct when written in Chinese characters, because these characters indicate tonal marks. It appears that the nephew in signing the indenture made use of the Chinese characters appropriate to his uncle's name and not of those appropriate to his own name. It is said that this alone is sufficient

to identify the uncle as the person in the indenture described as the purchaser. Their Lordships cannot accept this contention. A person who signs, seals, and delivers a deed of covenant cannot avoid liability under the deed by signing a name which he represents as, but which is not in fact, his own, nor can he saddle such liability on the person whose name he uses, unless he is the duly constituted attorney of such person. The nephew was not the duly constituted attorney of the uncle. He is therefore liable on the covenant, and to argue that while the person who covenants is the nephew, the property passes to the uncle would be to contradict the deed, which clearly indicates that the property passes to the person who enters into the covenant. Even if the use of the Chinese characters appropriate to the uncle's name can be said to create an ambiguity to elucidate which evidence of intention is admissible, the uncle's position is in no way improved. For it is quite certain that the vendor intended to convey to the nephew whom alone he knew in the transaction. It is *nihil ad rem* to say that as long as the vendor got his money he did not care to whom he assigned the property. The nephew was not called as a witness, and his reasons for signing as he did are a matter of surmise, but having regard to the fact that he was about to perpetrate a series of frauds, it is not improbable that he desired to be able to assure the uncle (as he subsequently assured him) that his (the uncle's) name had been used in the transaction while he himself remained in a position to mortgage or otherwise deal with the property.

Their Lordships think that the legal estate undoubtedly passed to the nephew, though inasmuch as the transaction was one entered into on the uncle's behalf and with money provided by him, the nephew held the legal estate in trust for the uncle.

On the 12th November, 1909, the nephew created a legal mortgage on the property for 15,000 dollars. This was a fraud upon the uncle, for the mortgagee could, by virtue of the legal estate, rely on the plea of purchase for value without notice.

On the 24th July, 1913, the nephew created an equitable mortgage on the property for 16,000 dollars. This was a fraud on the equitable mortgagee, whose interest would be postponed to the prior equitable estate of the uncle.

On the 29th August, 1913, the nephew paid off the legal mortgage of the 12th November, 1909, and took a reconveyance of the legal estate.

On the same 29th August, 1913, the nephew created another legal mortgage on the property for 10,000 dollars. This mortgage was a fraud upon the uncle, over whom the mortgagee took priority by virtue of the legal estate.

On the 11th December, 1913, the nephew paid off the equitable mortgage of the 24th July, 1913, and took a reconveyance of the mortgagee's interest.

On the 24th December, 1913, the nephew created an equitable mortgage on the property in favour of the appellants

for 12,000 dollars. This was a fraud on the appellants, whose interest would be postponed to the prior equitable estate of the uncle, unless, indeed, the uncle had been guilty of conduct which in a Court of Equity would preclude him from relying on his priority in time.

In this state of affairs the uncle, having very good reason to suspect misconduct on the part of the nephew, left Chicago and came to Hong Kong, desiring to protect his interest in the property. He found as a fact that the nephew had defrauded him by creating the legal mortgage for 10,000 dollars, which undoubtedly had priority to his own equitable interest, and had defrauded the appellants by creating in their favour the equitable mortgage for 12,000 dollars which, apart from any question as to the uncle's conduct, was undoubtedly postponed to the uncle's equitable estate. The uncle and the nephew thereupon, after consulting solicitors in Hong Kong, entered on the 20th June, 1914, into the following transaction: First, the nephew paid off the legal mortgage and took a reconveyance of the legal estate. It does not appear whether the uncle or the nephew found the money for this purpose. Secondly, the nephew assigned the legal estate to the uncle subject to the indenture, creating the equitable mortgage, and the principal and interest thereby secured, the nephew covenanting with the uncle to pay him on demand the principal sum of 12,000 dollars and all interest or other monies due by virtue of the indenture of mortgage, and the costs, charges, and expenses of paying off such mortgage and obtaining a reconveyance thereof. The second point their Lordships have to decide is the effect of these transactions on the position of the appellants. The uncle contends that they do not preclude him from setting up as against the appellants the equitable estate which he undoubtedly theretofore possessed. The appellants, on the other hand, contend that such equitable interest as the uncle had prior to the transactions in question is now gone, and that his sole interest is the legal interest which he expressly takes subject to the appellants' equitable mortgage.

In considering these rival contentions, there are two points which must be borne in mind. In the first place, whatever the nephew does in carrying out the transactions in question must be taken as done by the direction of the uncle, the party beneficially interested. In the second place, the position of an equitable mortgagee may be improved by transactions to which he is not a party. Where a prior mortgage is paid off by the owners of the property, the position of a puisne equitable mortgagee is improved, although the circumstances were such that the party taking the reconveyance might, had he so chosen, have kept the mortgage alive in his own favour, so as not to benefit the puisne mortgagee. Even in the case of the creation of an equitable charge, it is not necessary that the person in whose favour the charge is created should be a party to the transaction. A conveyance by A to B, subject to a

charge in favour of C, creates such a charge, if it be the intention of the parties, even though C be not himself a party to the transaction.

If these points be borne in mind and attention be paid to the indenture by which the nephew conveyed the legal estate to the uncle, it is in their Lordships' opinion reasonably clear that the effect of the transaction was, and was intended to be, that for which the appellants contend. This indenture contains a recital of the appellants' mortgage, and no recital as to its being postponed to the uncle's equitable estate. It also recites a request by the uncle to the nephew to assign the property to him, subject to the appellants' mortgage, and to enter into the covenant thereafter contained, namely, the covenant to pay the uncle on demand the principal and interest due on such mortgage. What conceivable consideration could there be for such a covenant, unless the uncle intended to give the appellants priority in respect of their mortgage over his own equitable estate, and how can the uncle now assert such equitable estate against the appellants without destroying this consideration? Again, the conveyance is expressed to be subject to the appellants' indenture of mortgage and to payment of the principal and interest thereby secured, and not subject to any charge created by this indenture which might take effect in priority to the uncle's equitable estate, as would have been the case had the uncle intended to set up such estate against the appellants. Lastly, the nephew covenants to pay the uncle, on demand, what is secured by the appellants' mortgage, and not, as would have been the case if the uncle's contention be correct, to pay these monies to the appellants and indemnify the uncle's property for any claim to a charge in respect thereof.

In their Lordships' opinion, the effect of these transactions was that the uncle, instead of his equitable estate ranking in priority of appellants' mortgage, took the legal estate subject to the appellants' mortgage, in consideration of the nephew covenanting as above mentioned. The uncle's prior equitable estate, being co-extensive with the legal estate which he was acquiring would, *primâ facie*, merge in such legal estate. (*Selby v. Ashton*, 3 Ves. Junr. 339; *Re Douglas*, 28 C. D. 327, and *Re Selous*, 1901, 1 Ch. 921.) He might have kept it alive as against the appellants but he deliberately elected not to do so, and the result is that the appellants can claim the benefit of the transaction, although they were not parties to it.

Under these circumstances it is unnecessary to deal with the question whether the uncle had or had not been guilty of conduct disentitling him in a Court of Equity to set up his prior equitable estate as against the appellants' equitable mortgage.

Their Lordships will humbly advise His Majesty that this appeal should be allowed with costs here and in the Court below, and that the order of the Trial Judge should be discharged, and the action in which the appeal arises be dismissed with costs.

In the Privy Council.

FUNG PING SHAN AND ANOTHER

v.

TONG SHUN.

DELIVERED BY

LORD PARKER OF WADDINGTON.

PRINTED AT THE FOREIGN OFFICE BY G. K. HARRISON

1917