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No. 11 of 1982

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N:

- 1. LAM WAI HWA (f)
- 2. TONG BAN MOOI (f)
Administratrixes of the Estate of
Tong Poh Hwa alias Tong Chit deceased

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Appellants

and

- 1. TOH YEE SUM (f)
- 2. TONG MEI WAN (f)
- 3. TONG KIN MUON
- 4. TONG MEI CHAN
- 5. TONG KIN PIN

Respondents

CASE FOR THE APPELLANTS

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1. This is an Appeal from the decision of the Federal Court of Malaysia (Raja Azlan Shah, C.J. Malaya. Syed Othman, F.J. Salleh Abas, F.J.) dated 21st day of February, 1981 disallowing the Appellants' appeal from the Judgment of the High Court in Malaysia (Suffian L.P.) dated 16th day of April, 1979.

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By that Judgment, Suffian L.P., allowed the Respondents' Originating Motion by

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declaring that the 1st Respondent abovenamed is the lawful widow of the abovenamed deceased, Tong Poh Hwa; the 2nd, 3rd, 4th and 5th Respondents are lawful issue of the said deceased; and that the Respondents are also beneficiaries of the Estate of the said deceased and are accordingly entitled to share in the said Estate according to Section 6 of the Distribution Ordinance 1958. Costs were ordered to be paid out of the Estate. 10

P. 43 This Appeal is made pursuant to an Order of the Federal Court of Appeal dated 2nd day of November, 1981 granting Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong.

P. 1 - 3 2. The Respondents on 24th day of March 1978, by way of Originating Summons, claimed against the Appellants a declaration that the 1st Respondent is the lawful widow of the deceased Tong Poh Hwa @ Tong Chit; that the 2nd, 3rd, 4th and 5th Respondents are the lawful issue of the said deceased and as such are beneficiaries of his Estate and entitled to share in his Estate. It was further prayed for an Order that the Appellants deliver full statement of assets and liabilities of the Estate, statement of accounts and balance sheets of the Estate from date of death of deceased to the last completed accounts for the year ending 31st December 1976. 20

P. 4 - 9 3. An Affidavit-in-Support of the Originating Summons by the 1st Respondent of the 28th day of February, 1978 was filed on 24th day of March 1978. In the said Affidavit, the 1st Respondent claimed that at all material times she was a lawful widow of Tong Poh Hwa (the deceased) who had passed away on 22nd December 1960. Exhibited to the Affidavit was a Certificate of Marriage issued by the Registrar of Marriages and also a Marriage Agreement dated the 3rd December 1952. The Affidavit further stated that the deceased died intestate on 22nd December 1960 and that Letters of Administration were granted to the Appellants on 24th August 1961. The 1st Respondent further averred that she had received M\$300/= per month as maintenance which had been increased to M\$700/= as from 1972. 30 40

P. 10 - 12 4. On 5th day of May, 1978, the Appellants as Administratrixes of the Estate of Tong Poh Hwa @ Tong Chit, filed an Affidavit-in-Reply. In the said Affidavit the Appellants 50

10 contended that the Respondents had no cause of action against them since the said claim against the Estate was statute barred by virtue of the Limitation Ordinance No. 4 of 1953. It was further averred that the 1st Respondent was not the lawful widow of the deceased her marriage to him being bigamous, and the said marriage was registered before the Registrar of Marriages under false pretences for the reason that the deceased was already married to the 1st Appellant according to Chinese customary rights on the 11th day of May, 1947 and through the said marriage the 1st Appellants bore 7 children. The 1st Appellant averred, in the premises above stated, that the Respondents were not entitled to receive any beneficial interest from the Estate of the deceased and that the Originating Summons be dismissed with costs.

20 5. The Summons came on for hearing on the 13th February 1979 before Suffian L.P., who gave judgment in favour of the present Respondents. In his Judgment delivered on the 16th April 1979, Suffian L.P., on the first issue in the absence of sufficient evidence to the contrary and as the parties were Chinese, and the marriage had been registered under F.M.S. Cap. 111, Section 9, held that the marriage between the first Respondent and the
30 deceased was valid.

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On the second issue, relating to the Limitation Ordinance No. 4 of the 1953, the learned Judge found, under Section 23, that the Originating Summons was brought within time and declared the 1st Respondent to be a lawful widow, and the other Respondents lawful issue, of the deceased and they were entitled to share in his Estate accordingly.

40 6. On the 25th day of April 1979, the Appellants filed a Notice of Appeal to the Federal Court and a Memorandum of Appeal, which was undated, was filed as set out below :-

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"(1) The learned trial Judge failed to consider the laws pertaining to Chinese Customary marriages and further failed to consider that the Certificate of Registration of Marriage under FMS Cap 111 Section 9 was obtained under false pretences, in the premises the 1st Respondent

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to be declared as lawful wife and 2nd, 3rd, 4th and 5th Respondents as lawful issues is wrong in law and fact.

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(3) The learned trial Judge failed to consider the provisions of the Limitation Ordinance 1953 which barred the Respondents from pursuing their claims against the Estate, particularly Sec. 6(2) of the Ordinance prevents the Respondents from taking action for an account as from the date of death of the deceased.

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(4) The learned Judge was wrong in finding of fact that the Appellants admitted acknowledgement of the Estate up to the year 1968, upon reading of the Appellants' Counsel's submission, it is clearly stated that the Company's admission of payment of allowance up to 1968 is not an acknowledgement by the Estate and the Estate at no time admitted payment of allowance from its funds and the Respondents from their own pleadings are estopped from denying this fact as well.

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(5) The learned trial Judge was wrong in law and fact to admit Income Tax Return forms as evidence when the alleged author of the entries of Income Tax Returns were never called to prove its contents and the learned trial Judge's finding that the Income Tax Returns were made by someone under the direction of the 1st Respondent is one purely based on suspicion and not on legal evidence. And the learned trial Judge's presumption cannot destroy the operative provisions of the Limitation Ordinance 1953.

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(6) The learned trial Judge was wrong in law and fact in giving judgment in favour of the Respondents under Section 23 of the Limitation Ordinance 1950".

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7. On 21st February 1981 the said Appeal was heard and dismissed. The main grounds of Judgment of the Federal Court were delivered by Salleh Abas F.J. on 21st February, 1981 as follows :-

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1. "We agree with the view of Lord President, who treated the certificate as evidence of the marriage of the first Respondent to the deceased and that in the absence of any evidence to the contrary the marriage is presumed valid".

2. "Thus the question whether the marriage is valid or not will have to be determined by the customary law of the parties. No submission on this point has been addressed to us. So we take it that the personal law of the parties concerned does not prohibit such marriage".

10 3. "As the first Respondent was not paid any maintenance allowance since 24th July, 1975, it is fair to conclude that as from that date she and her children ceased to be treated as beneficiaries by the Appellants, and it is only from this date the twelve years period under Section 23 of the Limitation Ordinance No. 4 of 1953 began to run. Even if time began to run from 1968 when maintenance allowance ceased to be paid from the Estate, but paid from the fund of a family company, the claim is still well within time because the Originating Summons was instituted on 22nd April, 1978".

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20 8. Upon receipt of the said Judgement, the Appellants' Solicitors M/s G.T. Rajan & Co., protested that there was an error in the Judgment for the reason that the Appellants' Counsel did at length submit that the said marriage was invalid under Chinese Customary Marriage.

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As a result the Federal Court, under the slip rule, later delivered a Supplementary Judgment, dated 13th day of April, 1981, which confirmed the dismissal of the Appellants' Appeal.

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40 9. Against this Judgment the Appellants filed Notice of Appeal to His Majesty the Yang di-Pertuan Agong and an Order granting Final Leave to Appeal was made on the 2nd day of November, 1981.

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10. The Appellants respectfully submit that the Federal Court of Appeal was wrong in holding that the 1st Respondent is the lawful secondary wife of the deceased under Chinese Customary Marriage law and that the 2nd, 3rd, 4th and 5th Respondents are lawful issue of the 1st Respondent and the deceased.

11. The Appellants respectfully submit that the Federal Court of Appeal was wrong in holding

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that Limitation Ordinance No. 4 of 1953 did not apply.

12. The evidence adduced in Court by the Respondents' witness PW3, who said that he did not pay any maintenance money to the Respondents, proves, in the words of an own witness of the Respondents, that the claim that maintenance money had been paid is untrue.

Furthermore, there is no evidence that the Estate paid such maintenance, the evidence only suggesting that an unknown and unnamed company had paid and there is no evidence that such a company ever belonged to the Estate. In the circumstances, to arrive at the conclusion that the Estate had paid such maintenance is merely a capricious conjecture and not supported by substantive legal proof. 10

Payment by any third party company is not a payment by the Estate and therefore such payment should not bind the Estate. 20

13. The Federal Court failed to consider that the admission of Income Tax Returns by the Trial Judge, without the maker of the Returns being called, is wrong in law and fact and the trial Court ought not to have given any weight to such evidence in reaching conclusions on the issues of maintenance and operative date of the provisions of Limitation ordinance No. 4 of 1953.

14. The Appellants contend that the Federal Court of Appeal did not consider Sections 6(1), 6(2), 22(1), 22(2), 23 and 26 of the Limitation Ordinance No. 4 of 1953 in the face of evidence tendered in Court as a result there had been a failure of justice. 30

15. The Appellants second ground of appeal is that the 1st Respondent is merely a mistress and therefore under the Chinese Customary Marriage law she and the alleged issue have no legal status to claim any beneficial interest in the Estate of the deceased. 40

The leading authority in respect of this ground of appeal is the case of LEE GEE CHONG (1965) MLJ. Vol. I. p. 109, which clearly sets out the law pertaining to Chinese Customary Marriages.

Under the said authority, there is no doubt the 1st Appellant is the Principal wife, or t'sai, of the deceased and that the 1st Respondent was not taken as a secondary wife (t'sip) to entitle her to a share of the Estate.

To treat the 1st Respondent as a secondary wife the following ingredients are required :-

10 (a) a common intention to form a permanent union as husband and secondary wife and

(b) the formation of the union of the man taking the woman as his secondary wife and the woman taking the man as her husband - MLJ. (1965) Vol. I, p. 109, para. A.

16. The Federal Court failed to consider that the trial Judge was wrong in treating the 1st Respondent as a lawful widow under Chinese Customary Marriage Law as, for the reason aforesaid, there can be no two principal wives. The declaration made by the deceased clearly substantiates that in fact he was taking her as a Principal wife and the 1st Respondent entered into marriage as a Principal wife by virtue of the said declaration, whereas there was already a Principal wife. The 1st Respondent under Chinese Customary Marriage law cannot be declared as the secondary wife because the intention to take her so is not manifested in the declaration made before the Registrar of Marriages.

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17. The Appellants respectfully submit that the Federal Court's failure to consider the grounds abovementioned has caused a grave miscarriage of justice and the Appellants submit that the Federal Court Judgment ought to be set aside and that this Appeal be allowed, with costs, here and in the Courts below, for the following, amongst other :-

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R E A S O N S

1. The Respondents claim for maintenance and other claims set out in the Originating Summons are statute barred under the provisions of the Limitations Ordinance No. 4 of 1953.

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2. The Respondents own witness, PW3, denied any payment of money to the Respondents as maintainance and a third party unnamed company payment of alleged maintenance does not bind the Estate. Therefore there is no evidence to conclude that the Estate had paid the maintenance or acknowledged liability within the meaning of the provisions of the Limitation Ordinance No. 4 of 1953.
3. The 1st Respondent under Chinese Customary Marriage law cannot be a secondary wife, her status is only that of a mistress and she has no right to a share in the Estate and the 2nd, 3rd, 4th and 5th Respondents are equally precluded from claiming any beneficial interest from the said Estate as a result thereof.

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G.T. RAJAN

No. 11 of 1982

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PRIVY COUNCIL

O N A P P E A L

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Appellants

and

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4. TONG MEI CHAN
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Respondents

CASE FOR THE APPELLANTS

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