

25/83

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

- 1. LAM WAI HWA
- 2. TONG BAN MOOI

10 Administratrixes of the Estate
of Tong Poh Hwa alias Tong Chit
deceased

- and -

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

CASE FOR THE RESPONDENTS

- | | | <u>Record</u> |
|----|--|-------------------------------|
| 20 | 1. This is an appeal from a judgment dated the 21st day of February 1981 and a supplementary judgment dated the 13th day of April 1981 of the Federal Court of Malaysia (Appellate Jurisdiction) Raja Azlan Shah, C.J., Chang Min Tat and Salleh Abas F.JJ.) dismissing an appeal from the judgment of the High Court in Malaya at Kuala Lumpur (Tun Mohamed Suffian L.P.) dated the 16th day of April 1979. | p.33-37
p.40-43
p.22-27 |
| | 2. The Federal Court decided as follows:- | |
| 30 | (i) That as a matter of law the First Respondent was lawfully married to the late Tong Poh Hwa (hereinafter called the deceased) despite the fact that the deceased had previously married the First Appellant who was still alive and not divorced from him. | p.35-36 |
| | (ii) That the Respondents, as the widow and lawful children of the deceased were | p.37 |

Record

therefore entitled to claim a share in his estate of which the Appellants were the Administratrixes thereof.

p.37 L.
1-11

(iii) That the Respondents were not barred by the Limitation Ordinance 1953 from bringing their claim against the Appellants.

p.11 L.4-
29;
p. 22 L.
27-32

3. The material facts giving rise to this appeal are that on the 11th day of May 1947 the deceased married the First Appellant according to Chinese customary law in Kuala Lumpur. There were seven children of the marriage.

10

p.7-8

4. On the 3rd day of December 1952, whilst the first marriage was still subsisting, the deceased entered into a Marriage Agreement with the First Respondent. The Agreement contained, inter alia, the following terms :-

(i) That the deceased would pay the First Respondent at least \$300 a month maintenance.

(ii) That the deceased would execute a marriage settlement in favour of the First Respondent entitling her to a share in the property of the deceased or alternatively that the deceased would devise and bequeath a share of his property to the First Respondent for her own use. The deceased died without making any such agreement.

20

(iii) That in the event of the deceased deserting the First Respondent he would nevertheless continue to pay the First Respondent this monthly allowance.

30

p.6

5. On the 17th day of December 1952, whilst the first marriage was still subsisting, the deceased married the First Respondent. The marriage was conducted according to Buddhist rites in Kuala Lumpur and was registered on the 21st day of February 1953 under the Registration of Marriage Enactment 1912. The other four Respondents are the children begotten of this marriage.

p.15 L.
14-15;
p.23 L.
18-19

6. Section 8 of the Registration of Marriage Enactment 1912 provides as follows :-

40

p.35 L.6

"8. Neither the registration of nor the omission to register any marriage shall affect the validity of the marriage nor shall any error in the particulars recorded nor any omission to record any particulars which ought to have been recorded affect the validity of the registration of the marriage."

7. Section 9 of the Enactment provides as follows:-

Record

10 "9. An extract from any register certified by the Registrar under his hand to be a true extract from the register shall be admissible in all Courts as evidence that a marriage was contracted between the parties therein named and at the place and time therein specified and in the presence of the persons therein stated to have been present thereat but not of the validity of such marriage; but the Court may in the absence of evidence to the contrary presume any marriage registered under this Enactment to have been valid and the onus of proving that there was no such valid marriage shall be on the person who asks the Court to believe that there was no such valid marriage."

p.24 L.34-
p.25 L.6

8. The deceased died on the 22nd day of December 1960, and Letters of Administration were granted to the Appellants on the 24th day of August 1961.

p. 4 L.24-
27; p.23
L.20-22

30 9. Thereafter the First Respondent received \$300 per month as maintenance for herself and the other four Respondents. This sum was increased to \$700 per month from 1972. There were no further payments from the 24th day of July 1975. From 1961 until 1971 the payments were made from the estate of the deceased.

p.4 L.28-
33; p.23

40 10. During this time the First Appellant lived at 11 Fort Road, Klang. The Comptroller-General of Inland Revenue sent the First Respondent's income tax return forms not to her address but to 11 Fort Road, Klang. The forms were brought to the First Respondent, who signed them in blank as she could only sign her name. Some person connected with the First Appellant then took the forms back to 11 Fort Road, Klang, filled in the blank spaces and forwarded the forms to the Comptroller-General of Inland Revenue.

p.26 L.18-
37

p.15
L.8-9

50 11. From 1968 until 1970 inclusive, the First Respondent's income tax return forms show that amongst the income declared as received was money from "Estate of Tong Poh Hwa (deceased)." These entries on the forms were made by someone with authority over the deceased's estate and therefore acknowledgements that the First Respondent was a widow entitled to a share in the estate.

p.26
L.27-37

<p><u>Record</u> p.26 l.39-44; p.27 L.1</p>	<p>12. From 1971 until 1975 inclusive the payments were made by a company in which the deceased was probably a shareholder. There was no evidence as to the extent of his holding or of the holding, if any, of the First Appellant and other members of the deceased's family.</p>	
<p>p.1 l.17- p.3 L.21</p>	<p>13. By an Originating Summons dated the 24th day of March 1978 the Respondents sought various relief including declarations that the First Respondent was the lawful wife and the other four Respondents were the lawful children of the deceased and that all five Respondents were the beneficiaries of the Estate of the deceased and were entitled to share in it according to Section 6 of the Distribution Ordinance 1958.</p>	<p>10</p>
<p>p.13 p.21 p.22-27</p>	<p>14. The Originating Summons was heard by the Honourable Lord President Tun Suffian in the High Court in Malaya at Kuala Lumpur on the 13th day of February 1979 and the 8th day of March 1979. Judgment was delivered on the 16th day of April 1979. The Honourable Lord President held as follows:-</p>	<p>20</p>
<p>p.24 L.28- p.29 L.15</p>	<p>(i) That the registration of the marriage between the First Respondent and the deceased under the Registration of Marriages Enactment 1912 was evidence that a marriage was contracted between those parties and in the absence of sufficient evidence to the contrary the marriage was a valid one.</p>	<p>30</p>
<p>p.29 L.16- L.43</p>	<p>(ii) That the claim brought by the Respondents was a claim to share in the personal estate of a deceased person which should be brought within 12 years from the date when the right to receive the share accrued. The 12 year limitation period is provided for by Section 23 of the Limitation Ordinance 1953.</p>	
<p>p.29 L.39- 43 p.28-29</p>	<p>(iii) That the Respondents' right to receive their share of the deceased's estate accrued in 1968 or 1975. The Originating Summons was therefore brought in time.</p>	<p>40</p>
<p>p.26 L.1-14</p>	<p>15. The Honourable Lord President accordingly gave judgment for the Respondents and made declarations that the First Respondent was the lawful widow and the other Respondents the lawful issue of the deceased and that they were entitled to share in his estate in law. The costs of the application were to be paid out of the Estate.</p>	

16. The Appellants appealed against the decision of Suffian L.P. and set out various grounds in their Notice of Appeal. Record
p.30-32
17. The appeal was heard by the Federal Court of Malaysia (Appellate Jurisdiction) (Raja Azlan Shah, C.J., Chang Min Tat and Salleh Abas F.JJ.) on the 1st day of October 1980. Judgment was delivered on the 21st day of February 1981 and a Supplementary Judgment was delivered on the 13th day of April 1981. The Federal Court dismissed the appeal with costs. p.33-37
p.40 -
p.43 L.7
18. On the question of the marriage the Federal Court held that as a matter of law Chinese marriages are not monogamous: Tan Ah Bee v. Foo Koo Thye and Anor (1947) MULR 72; In Re Lee Gee Chong (deceased) (1965) 31 M.L.J. 102. It was further held that on the evidence the First Respondent had entered into a permanent union with the deceased and that there was a valid secondary marriage with him which had been registered under the Registration of Marriages Enactment 1912. p.41 -
p.43 L.7

p.35 L.3-
-.36 L.27
19. On the question of the period of limitation the Federal Court held that as the First Respondent was not paid any maintenance allowance since the 24th day of July 1975 it was from that date that the 12 year limitation period under Section 23 of the Limitation Ordinance 1953 began to run. Alternatively the time began to run from 1970 (not 1968) when the maintenance allowance ceased to be paid by the estate. As the Originating Summons was issued on the 22nd day of April 1978 it was still within the 12 year limitation period. p.37
L.1-11
20. On the 2nd day of November 1981 the Federal Court (Appellate Jurisdiction) (Raja Azlan Shah, Ag. L.P., Lee Hun Hoe C.J., and Mohamed Azmi J.) granted the Appellants leave to appeal to His Majesty the Yang di-Pertuan Agong. p.43 L.28-
p.45 L.21
21. It is respectfully submitted that the order of the Federal Court was the proper order, for the reasons given by Salleh Abas F.J. and that these reasons were wholly correct. It is further submitted that the order of the Federal Court ought to be upheld, and the appeal dismissed with costs, for the following, among other

R E A S O N S

- (1) BECAUSE as a matter of law Chinese marriages are not monogamous.

Record

- (2) BECAUSE the First Respondent had entered into a lawful secondary marriage with the deceased which had been registered under the Registration of Marriages Enactment
- (3) BECAUSE the First Respondent was paid a maintenance allowance from the estate of the deceased from 1968 to 1970 inclusive which was an acknowledgement by the Appellants that the First Respondent was a widow entitled to a share in the estate of the deceased. 10
- (4) BECAUSE the First Respondent was paid a maintenance allowance by a company in which the deceased was a shareholder which was an acknowledgement that the First Respondent was a widow entitled to a share in the estate of the deceased.
- (5) BECAUSE the judgment of the Federal Court was right and ought to be affirmed.

WILLIAM BIRTLES

20

IN THE PRIVY COUNCIL

O N A A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

LAM WAI HWA and
TONG BAN MOOI

- and -

TOH YEE SUM
TONG MEI WAN
TONG KIN MUON
TONG MEI CHAN
TONG KIN PIN

CASE FOR THE RESPONDENTS

MESSRS. GASTERS
44 Bedford Row,
London WC1R 4LL.

Solicitors for the Respondents