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/ 3

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE FEDERAL COURT OF MALAYSIA

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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 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

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RECORD OF PROCEEDINGS

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PHILIP CONWAY THOMAS & Co.  
61 Catherine Place  
London SW1E 6HB

Solicitors for the Appellants

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GASTERS  
44 Bedford Row  
London WC1R 4LL

Solicitors for the  
Respondents

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE FEDERAL COURT OF MALAYSIA

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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 Appellants

- and -

- 10
1. TOH YEE SUM (f)
  2. TONG MEI WAN (f)
  3. TONG KIN MUON
  4. TONG MEI CHAN
  5. TONG KIN PIN

Respondents

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RECORD OF PROCEEDINGS

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No. 1

Originating Summons

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR  
ORIGINATING SUMMONS NO: 179 OF 1978

In the High  
Court

No. 1

Originating  
Summons

20

In the matter of the Estate of Tong  
Poh Hwa alias Tong Chit deceased

24th March  
1978

And

In the matter of the Administration  
and Probate Act, 1959

And

In the matter of Order 53 Rule 3(1)  
of the Rules of the Supreme Court  
1957

In the High  
Court

          
No. 1

Originating  
Summons

24th March  
1978

continued

Between

1. Toh Yee Sum (f)
  2. Tong Mei Wan (f)
  3. Tong Kin Muon
  4. Tong Mei Chan (f)
  5. Tong Kin Pin
- Applicants

And

1. Lam Wai Hwa (f)
  2. Tong Ban Mooi (f), Administratrixes  
of the Estate of Tong Poh Hwa alias  
Tong Chit deceased.
- Respondents

10

ORIGINATING SUMMONS

LET LAM WAI HWA (f) and TONG BAN MOOI (f) both of No. 11, Fort Road, Klang the Respondents above-named within eight (8) days after service of this Summons on them, inclusive of the day of service, cause appearances to be entered for them to this Summons which is issued on the application of the abovenamed Applicants.

By this Summons the Applicants seek the following relief, namely :-

20

1. A declaration that the 1st Applicant is the lawful widow of the above said deceased;
2. A declaration that the 2nd, 3rd, 4th and 5th Applicants are the lawful issues of the above said deceased;
3. A declaration that the Applicants are also the beneficiaries of the Estate of the abovesaid deceased and are accordingly entitled to share in the said Estate according to Section 6 of the Distribution Ordinance, 1958;
4. An Order that the Respondents shall deliver to the Applicants a full statement of the assets and liabilities of the Estate as at today; and
5. An Order that the Respondents shall deliver to the Applicants statements of Accounts and Balance Sheets of the Estate from the date of death of the deceased to the last completed Accounts for the year ending 31/12/1976;
6. Further or other relief as the Court deems fit; and

30

7. That provisions be made for costs of this Application.

In the High Court

Dated this 24th day of March, 1978.

No. 1

Sgd.

Originating Summons

Senior Assistant Registrar,  
High Court, Kuala Lumpur.

24th March  
1978

Note :-

continued

10 If the Respondents do not attend in person or by their Advocate & Solicitor at the place and time above-mentioned such order will be made and proceedings taken as the Judge may think just and expedient.

Where entry of appearance is required an appearance shall be entered within eight (8) days from the date of service thereof.

This Originating Summons will be supported by the Affidavit of Toh Yee Sum affirmed on the 28th day of February, 1978 and filed herein.

20 This Originating Summons is taken out by Messrs. CHOOI & COMPANY, Solicitors for and on behalf of the Applicants whose address for service is at Bangunan Ming, Penthouse, Jalan Bukit Nanas, Kuala Lumpur.

-----  
No. 2

No. 2

Affidavit of Ton Yee Sum with Exhibits thereto

Affidavit of  
Ton Yee Sum  
with Exhibits  
thereto

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING SUMMONS NO: 179 OF 1978

28th February  
1978

In the matter of the Estate of Tong  
Poh Hwa alias Tong Chit deceased

And

30 In the matter of the Administration  
and Probate Act, 1959

And

In the matter of Order 53 Rule 3(1)  
of the Rules of the Supreme Court  
1957

In the High Court

Between

No. 2

Affidavit of Ton Yee Sum with Exhibits thereto

28th February 1978

continued

- 1. Toh Yee Sum (f)
  - 2. Tong Mei Wan (f)
  - 3. Tong Kin Muon
  - 4. Tong Mei Chan (f)
  - 5. Tong Kin Pin
- Applicants

And

- 1. Lam Wai Hwa (f)
  - 2. Tong Ban Mooi (f), Administratrixes of the Estate of Tong Poh Hwa alias Tong Chit deceased
- Respondents

10

A F F I D A V I T

I, Toh Yee Sum (I/C No. 3991732) of No. 78, Coronation Road, Singapore 10 make oath and say as follows :-

- 1. I am the 1st Applicant in this action.
- 2. I am at all material times a lawful widow of Tong Poh Hwa alias Tong Chit deceased who passed away on 22.12.60. A Copy of the Certificate issued by the Registrar of Marriages, Selangor, is enclosed herewith and marked "A". A copy of the Marriage Agreement dated 3.12.52 between I, Toh Yee Sum and the said deceased is also enclosed and marked "B".
- 3. The said deceased died intestate on 22.12.60.
- 4. Grant of Letters of Administration was granted to the Respondents on 24.8.61 vide Kuala Lumpur High Court Petition No. 196 of 1961.
- 5. Since 1961 I have been receiving a sum of M\$300.00 per month as maintenance for myself and my children from the Estate of the deceased and which sum was increased from time to time. This sum for maintenance was increased to M\$700.00 per month as from 1972 onwards.
- 6. On or about 24.7.1975 the sum of M\$700.00 was no longer coming and on or about the same date I made enquiries through my Solicitors with regard to my and my children's position under the Estate of the said deceased. A copy of the letter dated 24.7.1975 from

20

30

my Solicitors addressed to the Respondents abovenamed is attached hereto and is marked "C".

In the High Court

7. I have been informed by my Solicitors M/s. Chooi & Company that I and my children have been left out negligently or deliberately as beneficiaries of the deceased's Estate in the Respondents' Petition for Letters of Administration.

No. 2

Affidavit of Toh Yee Sum with Exhibits thereto

8. In the circumstances I respectfully request this Honourable Court to grant the relief prayed by the summons therein.

28th February 1978

10

continued

AFFIRMED by the said )  
TOH YEE SUM (f) at )  
Singapore this 28th day )  
of February, 1978 at )  
3.45 a. m. /p. m. )

Before me,

Sgd.

Notary Public,  
Singapore.

20

This Originating Summons was taken out by M/s. Chooi & Company, Solicitors for the Applicants abovenamed whose address for service is at Bangunan Ming, Penthouse, Jalan Bukit Nanas, Kuala Lumpur.



In the High  
Court

No. 2

Affidavit of  
Toh Yee Sum  
with Exhibits  
thereto  
28th February  
1978

continued

Exhibit "A"

REGISTER OF MARRIAGES

REGISTRATION OF MARRIAGES ENACTMENT, CAP. III

SCHEDULE A

Folio No:	37/53	
Date of Registration:	21.2.53	
Name in full and residence of husband:	Tong Poh Hwa (JNo.147165) No.30 Main Street, Klang.	
Age of husband at date of marriage:	26 years	
Birth-place of husband:	Banting, Kuala Langat	10
Name of husband's father:	Scout Tong (Deceased)	
Religion professed by husband:	Buddhist	
Name in full of wife:	Toh Yee Sum (SL 121935)	
Age of wife at date of marriage:	18 years	
Birth-place of wife:	Kuala Lumpur	
Name of wife's father:	Toh Chum Kum	
Religion professed by wife:	Buddhist	
Place at which the marriage was contracted:	Kum Leng Resturant, Kuala Lumpur	20
Date on which the marriage was contracted:	17th December 1952	
Nature of religious ceremony, if any:	Buddhist Rites	
Whether husband has any other wife living and, if so, names and residences of all such wives:	Nil	
Names and residences of persons stated to have been present at the marriage:	Toh Chan Kam (SL 048207) No. 13A Bk. Bintang Rd., K.L. (Father of Wife)	30
Names and residences of witnesses examined by the Registrar or who signed the declaration for registration of the marriage:	Chee Kong Foo Choy Yik (SL 485089) Heng (f) No.27 N. (PK 504667) Village Jemetak 13A Bk. Bintang Rd. Kuala Lumpur	

(SIGNED) SD.E. BROWN  
REGISTRAR OF MARRIAGES, SELANGOR. 40  
M.F. No: 34/53  
Rec:No: Rt.C.487851 for \$1/- 10.8.53

This Marriage Agreement is made this 3rd day of December, 1952, between TONG POH HWA, Identity Card No. J 147165 (hereinafter called the Husband) of No. 30, Main Street, Klang, of the one part and TOH YEE SUM (f), Identity Card No. SL 121935 (hereinafter called the Wife) of No. 13A, Bukit Bintang Road, Kuala Lumpur, of the other part:

In the High Court

\_\_\_\_\_  
No. 2

Affidavit of Toh Yee Sum with Exhibits thereto

28th February 1978

continued

Exhibit "B"

10           Whereas the Husband and Wife both of full age are desirous of contracting a marriage according to Chinese rites and traditions and have mutually expressed their affection for each other :

          And Whereas the Husband and Wife are willing to become husband and wife with the full consent of their respective parents and upon the following terms and conditions :

          NOW THIS AGREEMENT WITNESSETH and IT IS HEREBY DECLARED by the parties hereto as follows :-

20           1.     In pursuance of the above premises and in consideration of the Wife marrying the Husband, the said Husband hereby covenants with the Wife as follows :-

(a)     Firstly, that the Husband will pay to the Wife a minimum monthly allowance of \$300/- (Dollars Three hundred only) for her support and maintenance subject to such further increase as the financial circumstances of the Husband may permit.

30           (b)     Secondly, that the Husband shall within a reasonable time execute a marriage settlement in favour of the Wife whereby the Wife shall be entitled to a share of the property of the Husband, or alternatively that the Husband shall undertake to devise and bequeath a share of his property to the Wife for her own use and enjoyment.

(c)     Thirdly, that in the event of the Husband forsaking and deserting the Wife the Husband shall nevertheless continue to pay to the Wife the aforesaid minimum monthly allowance of \$300/- (Dollars Three hundred only) as alimony.

40           2.     The Wife covenants with the Husband that she will consummate the marriage with the Husband upon execution of this agreement and shall thereupon live with the Husband as husband and wife as on and from the date hereof.

In the High Court

-----  
No. 2

Affidavit of Toh Yee Sum with Exhibits thereto

28th February 1978

continued

Exhibit "B" continued

3. In the event of the Husband forsaking or deserting the Wife as aforesaid, the Wife shall be at liberty to pursue her own way of life with complete freedom without let or hindrance from the Husband.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first above written.

Signed by the said TONG )  
POH HWA in the presence ) (Sgd.) TONG POH HWA  
of :- )

10

(Sgd.)

Advocate & Solicitor  
Kuala Lumpur.

Signed by the said TOH )  
YEE SUM (f) in the ) (Sgd.) TOH YEE SUM  
presence of :- )

(Sgd.) Illegible

CMS/TYS/75  
24th July, 1975

In the High  
Court

\_\_\_\_\_  
No. 2

Affidavit of  
Toh Yee Sum  
with Exhibits  
thereto

28th February  
1978

continued

Exhibit "C"

Madam Lam Wai Hwa and  
Madam Tong Ban Mooi,  
No. 11, Port Road,  
Klang.

Re: Estate of Tong Poh Hwa @ Tong Chit, Deceased

Dear Mesdames,

10 We act for Madam Toh Yee Sum and have been instructed  
to write to you in respect of the above matter.

Our client is a lawful wife and one of the next of kin of  
Tong Poh Hwa, the deceased abovementioned.

We note that you have taken out Letters of Administration  
to the estate of the said deceased vide K.L. High Court  
Petition No. 196 of 1961. We have made a search in the  
High Court and note that you have left out the name of our  
client and that of her children (who are lawful children  
of the Deceased) in your Petition for Letters of Admini-  
stration.

20 Our client further states that since the death of the  
Deceased she has been paid regular maintenance from  
one of the family companies to which the Deceased was a  
share-holder. She has however never been given any  
statement of accounts relating to the Estate of the  
Deceased or otherwise.

As instructed we are to request you to let us have the  
following :-

- 30 (1) Your assurance that you will forthwith treat  
our client and her children as the beneficiaries of  
the Estate of the said Deceased:
- (2) A full statement of the assets and liabilities  
of the Estate as at to-day: and
- (3) Statements of accounts and the balance sheets  
of the estate from the date of death of the Deceased  
to the last completed accounts for the year ending  
31.12.74.

Kindly let us have your reply within fourteen (14) days  
hereof.

Yours faithfully,

40 (Sgd.) Illegible  
c. c. client.  
CMS/jm

In the High  
Court

No. 3

-----  
No. 3

Affidavit of  
Lam Wai Hwa  
and Tong Ban  
Mooi

5th May 1978

Affidavit of Lam Wai Hwa and Tong Ban Mooi

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING SUMMONS NO: 179 OF 1978

In the matter of the Estate of Tong  
Poh Hwa alias Tong Chit deceased

And

In the matter of the Administration  
and Probate Act, 1959

And

In the matter of Order 53 Rule 3(1) 10  
of the Rules of the Supreme Court  
1957

Between

1. Toh Yee Sum (f)
  2. Tong Mei Wan (f)
  3. Tong Kin Muon
  4. Tong Mei Chan (f)
  5. Tong Kin Pin
- Applicants

And

1. Lam Wai Hwa (f) 20
  2. Tong Ban Mooi (f), Administratrixes  
of the Estate of Tong Poh Hwa alias  
Tong Chit deceased
- Respondents

AFFIDAVIT-IN-REPLY

We, Lam Wai Hwa (f) and Tong Ban Mooi (f) Res-  
pondents abovenamed and Administratrixes of the Estate  
of Tong Poh Hwa alias Tong Chit deceased, make oath  
and say as follows :-

1. We aver the Applicants have no cause of action  
against the estate of the deceased for the simple reason  
any claim against the estate ought to have been brought  
up within six months from the date of taking the Letters  
of Administration and the Applicants failed to do so. 30
2. Furthermore, the First Applicant is not the lawful  
widow of Tong Poh Hwa as averred in para two of the  
Affidavit, in fact this marriage contracted by the First

Applicant is bigamous and the marriage was registered before the Registrar of Marriages under false pretences for reason the alleged husband of the First Applicant Tong Poh Hwa alias Tong Chit was already married to the First Respondent according to Chinese customary rights on the 11th day of May, 1947 and reception was held at Wong Kee Restaurant in Kuala Lumpur in the midst of several respectable witnesses, Exhibit A1 and A2 annexed herein will be referred to.

In the High Court

—  
No. 3

Affidavit of  
Lam Wai Hwa  
and Tong Ban  
Mooi

5th May 1978

continued

10 Through the said marriage the 1st Respondent has seven children whose ages and names are given as follows :-

	<u>NAMES</u>	<u>AGES</u>
	1. Tong Mee Ling @ S.G. Tong (f) (NRIC. No. 2266180)	30
	2. Tong Mee Yoke (f) (NRIC No. 2167636)	29
	3. Toong Kim Wai @ Tong Kim Wai (M) (NRIC No. 4324598)	25
20	4. Tong Mee Mee (f) (NRIC No. 4476091)	24
	5. Tong Kim Sin (M) (NRIC No. 5195590)	21
	6. Tong Mei Fong (f) (NRIC No. 5257501)	20
	7. Tong Mei Kian (f) (NRIC No. 5728846)	18

refer Exhibit A3.

30 3. The 1st Applicant's marriage was illegally contracted on the 17th day of December, 1952 nearly 5 years after the first marriage and this fact of first marriage was deliberately concealed by the deceased and the 1st Applicant particularly when the Registrar of Marriages under para 16 of the Exhibit 'A' of the Applicant's Affidavit questioned the Applicant whether the husband has any other wife living and the answer given was "No".

Had the fact of the 1st marriage was declared the

In the High Court

-----  
No. 3

Affidavit of Lam Wai Hwa and Tong Ban Mooi

5th May 1978  
continued

Registrar of Marriages would not have registered the said marriage, in the premises the alleged marriage before the Registrar of Marriages is null and void and bigamous.

4. The facts averred by the Applicants in para 5, 6 and 7 are not true in any event the Applicants were not entitled to receive any beneficial interest from the deceased estate.

5. In the premises above the Respondents pray that the Applicants request for declarations and orders as enumerated in the Originating Summons para 1 to 7 be dismissed with costs.

10

AFFIRMED by the said LAM )  
WAI HWA (f) and TONG BAN )  
MOOI (f) Administratrixes of ) Sgd. Lam Wai Hwa  
the Estate of TONG POH HWA )  
@ TONG CHIT deceased at ) Sgd. Tong Ban Mooi  
Klang this 5th day of May, )  
1978 at 2.00 p. m. )

Before me,

20

Sgd. David Anthony

Commissioner for Oaths.

This Affidavit-In-Reply is filed by M/s. G.T. Rajan & Co., Solicitors for the Respondents abovenamed whose address for service is at No. 17, Jalan Sultan (Top Floor), Kelang, Selangor.

The Exhibits A1, A2 and A3 to this Affidavit have not been reproduced.

No. 4

Proceedings

In the High  
Court

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING SUMMONS NO: 179 OF 1978

No. 4

Proceedings

13th February  
1979

In the matter of the Estate of Tong  
Poh Hwa alias Tong Chit deceased

And

In the matter of the Administration  
and Probate Act, 1959

And

In the matter of Order 53 Rule 3(1)  
of the Rules of the Supreme Court  
1957

10

Between

1. Toh Yee Sum (f)
2. Tong Mei Wan (f)
3. Tong Kin Muon
4. Tong Mei Chan (f)
5. Tong Kin Pin

Applicants

And

1. Lam Wai Hwa (f)
2. Tong Ban Mooi (f), Administratrixes  
of the Estate of Tong Poh Hwa alias  
Tong Chit deceased

20

Respondents

NOTES OF SUFFIAN, L.P.

Tuesday, 13th February, 1979

Coram: Suffian, L.P.

S.C. Loh for applicants.

Rajan for respondents.

Rajan

30

We concede there were acknowledgements by the  
estate until 1968 - but we contend there were none there-  
after and therefore the claim is statute-barred. If  
applicants prove acknowledgements after 1968, i.e., with-



In the High  
Court

-----  
No. 4  
Proceedings  
13th February  
1979  
continued

in 6-year period, then their claim is not statute-barred.

Section 6 (2), Limitation Ordinance - this action  
for accounts.

Section 23 - not material.

Loh calls

Applicants'  
Evidence

No. 5  
Miss Sarasvathy  
Examination

No. 5

Miss Sarasvathy

PW.1 Sarasvathy affirmed states in English :

Assessment Officer, Inland Revenue, Malaysia.

Section 6, Income Tax Ordinance, 1947.

10

Section 138, Income Tax Act, 1967.

Note Later in Chambers in presence of counsel -  
adjourned by consent to Thursday, 8.3.79, 9.30 a.m.,  
at request of Rajan for personal reason.

Signed M. Suffian 13.2.79.

8th March  
1979

Thursday, 8th March, 1979

Coram : Suffian, L.P.

K.L.H.C. O.S. 179/78

Continued from 13.2.79.

S.C. Loh for applicant.

20

G.T. Rajan for respondent.

Loh calls

PW.1 Miss Sarasvathy affirmed states in English :

I am Assessment Officer, Inland Revenue  
Department.

I have here income tax file of estate of the  
deceased - Ref. T/764412 - for period 1968 onwards.

The persons who submitted the returns ? - I am not allowed by Section 138 (3) (b) of Income Tax Act, 1967 to identify them.

In the High Court

-----  
Applicants' Evidence

No. 5

Miss Sarasvathy

Examination continued

8th March 1979

Q. Were beneficiaries of the estate disclosed in the returns for years 1968 onwards?

A. No.

I have income tax file of the applicant Toh Yee Sum, its ref. No. is 219933-05. Her address given on it as 11 Fort Road, Klang.

10

No. 6

No. 6

Toh Yee Sum

Toh Yee Sum

Examination

PW.2 TOH YEE SUM affirmed states in Cantonese :

I am the applicant. Aged 45, living in Singapore.

I am the widow of the deceased. We have four children.

When my husband was alive, he and I lived in P.J. He died in motor accident in Sungai Way, 19 years ago. After his death I stayed at Jalan Dua, Ang Aun Estate, Klang. In 1965 I moved to new house 27 Jalan Merpati, also on the estate.

20

After my husband's death from 1961 to 1975 I was given \$300 a month by Chin Kon Pui, he is in court. Later increased to \$700. In 1975 payments stopped. I became suspicious and went to counsel. Chin Kon Pui was staying at 17 Jalan Merpati in the same row.

He works in a pawnshop in Klang.

My husband's grandmother owned the pawnshop, my husband ran the business.

I never went to school. I don't know how to type or read Malay and English.

30

Blank income tax forms were brought to me by Chin Kon Pui. Since I was getting maintenance, I had to sign the forms provided. Shown photocopies. These were my signatures. I signed at places indicated to me by crosses.

In the High Court

Applicants' Evidence

No. 6

Toh Yee Sum

Examination continued

8th March 1979

(Loh: These forms show that applicant had received income as salary and wages as well as money from estate of the deceased during 1968, 1969, 1970. None received during 1971, 1972 and 1973).

Loh

I tender these photocopies as exhibits.

Rajan

I object.

Witness continues

I never worked.

10

I never lived at 11 Fort Road, Klang.

No. 7

Miss Sarasvathy (recalled)

Examination

No. 7

Miss Sarasvathy (recalled)

PW.1 Miss Sarasvathy on former oath recalled states

To Loh

I have a set of certified photocopies of income tax returns submitted by PW.2.

Cross-examination

Cross-examined

Ref. section 138 (3) (b) - I am not prohibited from giving these certified copies because of section 138 (2)(c).

20

(Rajan does not agree).

Court rules: Certified copies admitted and marked as A1.

(Brief adjournment at Rajan's request to consult clients re Exhibit A1).

PW.2 on former oath

Cross-examined by Rajan

Blank forms were given to me to sign, I don't know

what they were. Given by Lam Wai Hwa. Not correct when I said just now given by Chin Kon Pui. Chin Kon Pui was the man who brought maintenance to me and that was done monthly.

In the High Court

Applicants' Evidence

No. 7

P.W.2

Toh Yee Sum

Cross-examination continued

8th March 1979

My house was quite far from Lam Wai Hwa's.

She brought the forms to me.

Q. All the forms?

A. Mostly.

I don't know if she was Chinese educated.

10 I agree it's wrong to sign blank forms but I was told they were for maintenance - I signed them because my children were very young.

Q. Do you know that your husband had a lot of property?

A. I did not know at time of his death when I was young.

I did not go to a lawyer in 1962 to get a share on my husband's death because I was given maintenance throughout. It stopped in 1975.

Q. But in Exhibit A1 you said you received nothing from the estate in 1971 and onwards.

20 A. The returns were not submitted by me. When I signed them, the forms were blank. I admit they were signed by me.

Q. Can you produce evidence that the pawnshop belonged to your husband's grandmother?

A. She is the famous Madam Chee Leong. I cannot produce the evidence.

From 1962 to 1975 I took no action to claim share in the estate.

Re-examination

Re-examination

30 In 1969 I was 35. In Exhibit A1 I said I was 24. The contents were not filled in by me.

In the High  
Court

No. 8

Chin Kon Pui

Applicants'  
Evidence

PW. 3 affirmed states in Hakka :

No. 8

Chin Kon Pui.

Chin Kon Pui  
Examination

Age 43, living at 17 Jalan Merpati, Ang Aun  
Estate, Klang.

8th March  
1979

I am a pawnshop assistant at Leong Aun pawnshop,  
30 Main St., Klang. Have worked there since 1963,  
about 16 years ago. It is owned by Madam Chee Leong.  
The deceased had died before I started work there.

10

Q. Madam Chee Leong and deceased related?

A. I am not sure.

When I started work there, he had died.

Toh Yee Sum lived in same road as I did. I know  
her, I addressed her as Ah Soh (= brother's wife).

Not true I paid money to her. I never delivered  
money to this lady.

The pawnshop is managed I don't know by whom.  
It is owned by Madam Chee Leong.

Q. Who is in charge of money?

20

A. Formerly the late Mr. Yong. Today Mr. Ho.

I know Madam Lam Wai Hwa. She is in charge of  
the pawnshop. She looks after the shop. She is not the  
manager. Mr. Ho is the manager. He listens to her,  
not the other way round.

Cross-  
examination

XD Rajan

I don't know the set up of the shop.

Q. Do you know that it belongs to Chee Leong  
Sendirian Bhd., not to Chee Leong?

A. Yes.

30

The company is responsible, not Madam Lam Wai Hwa. I am responsible to its directors, not to her.

I confirm that I delivered no money to PW.2.

In the High Court

Applicants' Evidence

No. 8

Chin Kon Pui

Cross-examination continued

8th March 1979

Re-examination

Re-examination

I don't know if Madam Lam Wai Hwa is a director of the company.

No. 9

Tong Mei Wan

No. 9

Tong Mei Wan

Examination

PW.4 Tong Mei Wan affirmed states in English :

10 (Rajan: This witness has been in Court all the time. I object to her giving evidence or alternatively her evidence should be discounted).

Objection overruled.

Court: Witness is a party, being applicant No. 2 - therefore entitled to be in Court.

I am 25, daughter of PW.2, living with her in Singapore.

My father has died.

20 Every month mother received maintenance from his estate - brought in cash by Chin Kon Pui (points to PW.3). He was then working in a pawnshop which used to be managed by my father and it was one of the many concerns of Chee Leong.

To Rajan

Most times, about 98% of the times, money brought

Cross-examination

In the High  
Court

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Applicants'  
Evidence

No. 9

Tong Mei Wan

Cross-  
examination  
continued

8th March  
1979

by Chin Kon Pui - initially \$300, later increased to  
\$700 p.m. Sometimes I received it personally, I am  
the oldest in the family.

Loh

I close my case.

Respondents'  
Evidence

No. 10

Lam Wai Hwa  
Examination

No. 10

Lam Wai Hwa

Rajan calls

Lam Wai Hwa (respondent No. 1) affirmed states in Hakka.

Lam Wai Hwa, age 54, living at 11 Fort Road, now 10  
renamed Jalan Kota, Klang.

I am widow of deceased.

I never asked PW. 2 to sign A1 in blank. The driver  
took them to her house. I did not receive them back  
from her.

I can't read and write English. I can't type.

Cross-  
examination

To Loh

No one returned the forms to me.

My income tax returns were done by the Secretary  
of the company.

20

Re-examination

To Rajan

I did not do my income tax returns myself.

I did not do the returns A1.

Rajan

That is my case.

No.11  
Addresses of Counsel

In the High  
Court

          
No.11

Addresses of  
Counsel

8th March 1979

Rajan submits

Claim barred by limitation.

Refers to Originating Summons enclosure (2).

Action demanding accounts.

Section 6 (2), Limitation Ordinance - 6 years is  
time limit.

10 Section 23 does not apply because no claim made  
by PW.2 for share from 1962 to 1978 - almost 15 years.

Fraud not pleaded.

Even if fraud pleaded, no proof here.

Acknowledgement? Payment of maintenance I con-  
cede up to 1968 but made not by respondent No. 1 but by  
the company - vide letter dated 24.7.75, para. 3 - and  
purely on compassionate grounds. So no acknowledgement  
by the estate.

Loh addresses

20 This not action for accounts - but to determine  
statutes, whether applicants entitled to share in the estate.  
Accounts incidental.

1. Section 23, Limitation Ordinance, applies.

True claim for share made in 1978. Good reason  
given by PW.2 - she was paid maintenance until 1975.  
Rajan conceded up to 1968. If so, time ran from 1968 -  
within 12 years within time.

2. Fraud not pleaded, I agree.

But 1976 White Book, p.457. O.28, r.8.

30 Submit fraud has been proved - therefore time ran  
from 1975 when PW.2 for first time discovered she had  
been left out as beneficiary.

If maintenance paid by company, it was company in  
which deceased had an interest.

3. Section 22(1), Limitation Ordinance, "trust".  
Administrators are trustees: 38 Halsbury's Laws, 3rd  
edition, p.811, para. 1347; also Chokalingam 4 (1935)  
MLJ 45.

Section 22 (2), Limitation Ordinance, applies only in  
absence of fraud. Subsection (1) applies in case of fraud.

C.A.V.



In the High  
Court

No. 12

Judgment

16th April 1979

No. 12

Judgment

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR  
ORIGINATING SUMMONS NO: 179 OF 1978

In the matter of the Estate of  
Tong Poh Hwa alias Tong Chit  
deceased

And

In the matter of the Administration  
and Probate Act, 1959

10

And

In the matter of Order 53, Rule  
3 (1) of the Rules of the Supreme  
Court, 1959

Between

1. Toh Yee Sum (f)
2. Tong Mei Wan (f)
3. Tong Kin Muon
4. Tong Mei Chan (f)
5. Tong Kin Pin

Applicants

And

1. Lam Wai Hwa (f)
  2. Tong Ban Mooi (f)
- Administratrixes of the Estate of Tong  
Poh Hwa alias Tong Chit deceased Respondents

20

JUDGEMENT OF SUFFIAN, L.P.

I am dealing with this matter sitting alone in the  
High Court.

On 11th May, 1947, the deceased married the  
first respondent according to Chinese customary rites  
and a reception was held at the Wong Kee, a well-known  
restaurant in Kuala Lumpur.

30

Subsequently they had seven children, now aged  
between 18 and 30.

About five years later on 3rd December, 1952, the  
deceased entered into a Marriage Agreement with the

first applicant. The Agreement contained the following among other terms - that the deceased would pay the first applicant at least \$300 a month maintenance (clause 1(a)), and that in the event of the deceased deserting the first applicant he would nevertheless continue to pay the first applicant this monthly allowance (clause 1(c)) and the wife would be at liberty to pursue her own way of life with complete freedom from the husband (clause 3).

In the High  
Court

—  
No. 12

Judgment

16th April 1979

continued

10 On 21st February, 1953, this marriage was registered under the Registration of Marriages Enactment, FMS Cap. 111. The Certificate of Registration stated that the religion of both the deceased and the first applicant was Buddhism, that their marriage was celebrated in accordance with Buddhist rites, that the marriage was contracted at the Kum Leng, another well-known restaurant in Kuala Lumpur. It is also stated in the Certificate that the deceased had no other wife living.

By this marriage the deceased had four children, applicants No. 2 to No. 5.

20 The deceased died on 22nd December, 1960, and Letters of Administration were granted to the first and second respondents on 24th August, 1961.

Thereafter the first applicant received \$300 as maintenance for herself and the other applicants (her children) from the estate of the deceased. This sum was increased to \$700 per month from 1972. From 24th July, 1975, the money stopped coming.

30 The first applicant's Solicitors on enquiry found that she and her children had been omitted from the list of beneficiaries of the deceased's estate in the respondents' petition for Letters of Administration.

On 24th March, 1978, the applicants took out an Originating Summons for a declaration that they were beneficiaries of the estate.

The application is opposed by the two respondents on the following grounds as submitted orally before me :-

40 (1) that any claim against the estate ought to have been brought within six years from 1968, when payments by the estate ceased and that accordingly the applicants' claim dated 24th March, 1978, is statute-barred (originally it was submitted that

In the High  
Court

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No. 12

Judgment

16th April 1979

continued

time ran 1961 when letters of administration were granted, but this submission was later abandoned);

- (2) that the deceased's declaration in the Certificate of Registration that he had no other wife living clearly showed that he intended to "marry" her as a principal wife (not a secondary wife), that a Chinese may have only one principal wife (not two), that the declaration being false, this second "marriage" was bad in law and that therefore the first applicant was not lawfully married to the deceased; and
- (3) that clause 1(c) of the Marriage Agreement shows that the "marriage" was intended to be a conditional one, that if at all the first applicant has a right, it is a contractual one under the Agreement, not as a secondary wife, and that at the most she could have sued the estate under the Agreement, which she should have done within six years, which she has not done.

10

Thus there are two issues. First, was the first applicant the lawful wife of the deceased? If she was, then she is entitled to share in his estate, and likewise her children (it is not disputed that they are her children by him).

20

Secondly, if the applicants are beneficiaries of the estate, have they made their claim too late?

#### First issue

As to the validity of the first applicant's marriage to the deceased - I am satisfied that it was a valid marriage. The parties being Chinese not of the Christian or Muslim religion, and the marriage having been registered under FMS Cap. 111, section 9 thereof applies. That section reads :-

30

"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

40

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".

In the High Court

—  
No. 12

Judgment

16th April 1979

continued

10 Applying that section, it is clear that the Certificate of Registration is evidence that a marriage was contracted between the first applicant and the deceased, and in the absence of sufficient evidence to be contrary I presume and find the marriage valid.

I do not agree that the marriage was a conditional one nor do I agree that it was null and void because of the non-disclosure by the deceased of the marriage to his first wife.

Second issue

20 As regards limitation, Mr. Rajan (counsel for the respondents) submitted that section 23 of the Limitation Ordinance, 1953, did not apply as there was no claim made by the first applicant for a share in the estate from 1962 until 1978, a period of fifteen years; and that section 6(2) of the Ordinance applied (namely that the action should have been brought within six years, this being partly an action for an account). Finally Mr. Rajan submitted that while it was true that the estate paid the first applicant, that was so only until 1968 and that payments made to her after that were made, on the first applicant's own admission set out in her letter of 30 24th July, 1975, by "one of the family companies to which the deceased was a shareholder", a legal person distinct from the estate.

Reference was made during submissions to sections 6(1), 6(2), 22(1), 22(2), 23 and 25 of the Limitation Ordinance.

40 In my judgement this claim falls squarely within section 23, being a claim to share in the personal estate of a deceased person which should be brought within twelve years from the date when the right to receive the share accrued, which at worst was some time in 1968 or at best some time in 1975; and in either case this Originating Summons, being brought in 1978, was brought well within time. This claim has not therefore been brought too late.

In the High  
Court

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No. 12

Judgment

16th April 1979

continued

Accordingly there shall be judgement for the applicants. It is hereby declared that the first applicant is the lawful widow and the other applicants the lawful issue of the deceased and that they are entitled to share in his estate according to law.

As regards prayers 4, 5 and 6 - at this stage I decline to make any order, hoping that the parties will come to an amicable arrangement following this judgement, except to say that there shall be liberty to apply on or before 16th July.

10

Finally I order that costs of this application shall be paid out of the estate, the quantum to be decided by me on or before 16th July unless the parties agree it before then.

In case there is an appeal, I set out my findings of fact on other aspects of the case as placed before me.

On the evidence produced before me in open court, I am satisfied that the first respondent lived at 11 Fort Road, Klang; that the Comptroller-General of Inland Revenue ("CGIR") sent the first applicant's income tax return forms ("Form B") not to her address but to 11 Fort Road, Klang; that the forms were brought to the first applicant, who signed them in blank; that she could only sign her name; that some one connected with the first respondent took them back to 11 Fort Road, Klang and filled in the blanks and forwarded the forms to CGIR. Reference to the forms as regards the years of assessment 1968 onwards shows that among the income declared as having been received by the first applicant during the years 1968 until 1970, both years inclusive, was money from "Estate of Tong Poh Hwa (deceased)", namely from the deceased's estate. As the first applicant cannot read or write Malay and English or type, I am satisfied that these entries in the forms were filled in by some one with authority over the deceased's estate, and accordingly acknowledgements that the first applicant was a widow entitled to a share in the estate.

20

30

I am further satisfied that as alleged by the first applicant there were further payments made to her between 1971 and 1975, both years inclusive and that these payments were made not by the estate as such but 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

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respondent and other members of the deceased's family.

In the High  
Court

Sgd.

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No. 12

(Tun Mohamed Suffian)  
LORD PRESIDENT, MALAYSIA

Judgment

16th April 1979

Delivered in High Court,  
Kuala Lumpur, on 16th  
April, 1979.

continued

Notes:

10 1. Hearing in High Court, Kuala Lumpur, on 12th June,  
1978 (before Syed Othman J.); on 13th February  
and 8th March, 1979 (before Suffian, L.P.)

2. Counsel:

For applicants - Mr. S.C. Loh.

Solicitors: M/s. Chooi & Co. Kuala Lumpur.

For respondents - Mr. G.T. Rajan.

Solicitors: M/s. G.T. Rajan & Co., Klang.

3. Authorities cites :

(1) 38 Halsbury's Laws of England, 3rd  
edition, p. 811, para. 1347.

20 (2) Chokalingam 4 (1935) MLJ 45.

Certified true copy.

Sgd.

Setiausaha kepada Ketua Hakim Negara  
Mahkamah Persekutuan,  
Malaysia  
Kuala Lumpur.

18 APR 1979.

In the High  
Court

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No. 13

Order

16th April 1979

No. 13

Order

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING SUMMONS NO: 179 OF 1978

In the Matter of the Estate of Tong  
Poh Hwa alias Tong Chit,  
Deceased

And

In the Matter of the Administration  
and Probate Act, 1959

10

And

In the Matter of Order 53 Rule  
3(1) of the Rules of the Supreme  
Court, 1957.

Between

1. Toh Yee Sum (f)
2. Tong Mei Wan (f)
3. Tong Kin Muon
4. Tong Mei Chan
5. Tong Kin Pin

Applicants

20

And

1. Lam Wai Hwa (f)
2. Tong Ban Mooi (f),  
Administratrixes of the Estate of  
Tong Poh Hwa alias Tong Chit,  
Deceased

Respondents

BEFORE THE HONOURABLE LORD PRESIDENT,  
SUFFIAN IN OPEN COURT

THIS 16TH DAY OF APRIL, 1979.

ORDER

UPON HEARING Mr. Loh Siew Cheang of Counsel  
for the abovenamed Applicants and Mr. G.T. Rajan of  
Counsel for the abovenamed Respondents AND UPON  
READING the Originating Summons dated the 24th day of  
March, 1978 and the Affidavits of Toh Yee Sum  
affirmed on the 28th day of February, 1978 and Lam

30

Wai Hwa (f) affirmed on the 5th day of May, 1978 all filed herein IT WAS ORDERED that the matter do stand adjourned to Open Court and the same coming on for hearing in Open Court on this 14th day of November, 1978 in the presence of Mr. Loh Siew Cheang of Counsel for the abovenamed Applicants and Mr. G.T. Rajan of Counsel for the abovenamed Respondents AND UPON HEARING the argument of Counsel aforesaid IT WAS ORDERED that the matter do stand adjourned for further hearing and the same coming on for further hearing on this 5th day of January, 1979 in the presence of Mr. Loh Siew Cheang of Counsel for the abovenamed Applicants and Mr. G.T. Rajan of Counsel for the abovenamed Respondents IT WAS ORDERED that the matter do stand adjourned for further hearing and the same coming on for further hearing on this 8th day of March, 1979 in the presence of Mr. Loh Siew Cheang of Counsel for the abovenamed Applicants and Mr. G.T. Rajan of Counsel for the abovenamed Respondents IT WAS ORDERED that Judgement be reserved and the same coming on for Judgement on this day in the presence of Mr. Loh Siew Cheang of Counsel for the abovenamed Applicants and Mr. G.T. Rajan of Counsel for the abovenamed Respondents IT IS ORDERED as follows :-

1. that the 1st Applicant is the lawful widow of the above said Deceased;
2. that the 2nd, 3rd, 4th and 5th Applicants are the lawful issues of the above said Deceased;
3. that the Applicants are also the beneficiaries of the Estate of the above said Deceased and are accordingly entitled to share in the said Estate according to Section 6 of the Distribution Ordinance, 1958;
4. that there be no Order as to prayer 4, 5 and 6 with liberty to apply on or before the 16th of July, 1979;
5. that the costs of this application to be paid out of the Estate and if not agreed to be decided on the 16th of July, 1979.

GIVEN under my hand and the Seal of the Court this 16th day of April, 1979.

(Sgd.)

Senior Assistant Registrar,  
High Court, Kuala Lumpur.

In the High  
Court

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No.13

Order

16th April 1979

continued

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In the Federal  
Court

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No. 14

Memorandum  
of Appeal  
Undated

No. 14

Memorandum of Appeal

IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 97 OF 1979

BETWEEN

1. Lam Wai Hwa (f)
  2. Tong Ban Mooi (f),  
Administratrixes of the Estate of  
Tong Poh Hwa alias Tong Chit,  
Deceased
- APPELLANTS 10

AND

1. Toh Yee Sum (f)
  2. Tong Mei Wan (f)
  3. Tong Kin Muon
  4. Tong Mei Chan
  5. Tong Kin Pin
- RESPONDENTS

(In the Matter of Kuala Lumpur  
High Court Originating Summons  
No. 179 of 1978

In the Matter of the Estate of Tong  
Poh Hwa alias Tong Chit, deceased 20

And

In the Matter of the Administration  
and Probate Act, 1959

And

In the Matter of Order 53 Rule 3(1)  
of the Rules of the Supreme Court,  
1957

Between

1. Toh Yee Sum (f)
  2. Tong Mei Wan (f)
  3. Tong Kin Muon
  4. Tong Mei Chan
  5. Tong Kin Pin
- Applicants 30

And

1. Lam Wai Hwa (f)
  2. Tong Ban Mooi (f)  
Administratrixes of the Estate  
of Tong Poh Hwa alias Tong  
Chit, Deceased
- Respondents)

In the Federal  
Court

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No. 14

Memorandum  
of Appeal

Undated

continued

MEMORANDUM OF APPEAL

10 LAM WAI HWA and Tong Ban Mooi administratrixes  
of the Estate of Tong Poh Hwa alias Tong Chit (deceased),  
the Appellants abovenamed, appeal against the whole  
decision of the Honourable Lord President Tun Suffian  
given at Kuala Lumpur on the 16th day of April, 1979 on  
the following grounds :-

1. The learned trial Judge failed to consider the laws  
pertaining to Chinese Customary marriages and further  
failed to consider that Certificate of Registration of  
Marriage under FMS Cap 111 Section 9 was obtained under  
false pretences, in the premises the 1st Respondent to be  
declared as lawful wife and 2nd, 3rd, 4th and 5th Respon-  
dents as lawful issues is wrong in law and fact.
- 20 2. That the marriage between the 1st Respondent and  
the deceased was by way of written contact subject to  
specific conditions agreed between the parties and by  
virtue of the said conditions the 1st Respondent and the  
issues of the 1st Respondent can only proceed against the  
estate for claim of agreed allowances and damages from  
the estate and not a claim for a share of the estate, the  
learned trial Judge failed to consider this aspect of the  
case and therefore erred in law and fact.
- 30 3. The learned trial Judge failed to consider the pro-  
visions 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.
- 40 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 com-  
pany'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.

In the Federal  
Court

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No. 14

Memorandum  
of Appeal

Undated

continued

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 presumption cannot destroy the operative provisions of the Limitation Ordinance 1953.

10

6. The learned trial Judge was wrong in law and fact in giving judgement in favour of the Respondents under Section 23 of the Limitation Ordinance 1953.

Dated this        day of        1979.

1.

(Sgd.)

2.

(Appellants)

(Solicitors for the  
Appellants)

To:

(1) The Chief Registrar,  
Federal Court of Malaysia,  
KUALA LUMPUR.

20

(2) The Senior Assistant Registrar,  
High Court,  
KUALA LUMPUR.

(3) Messrs. Chooi & Co.,  
Advocates & Solicitors,  
Bangunan Ming,  
Penthouse,  
Jalan Bukit Nanas,  
KUALA LUMPUR 04-01.

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(Solicitors for the Respondents)

This Memorandum of Appeal is filed by Messrs. G.T. Rajan & Co., Solicitors for the Appellants above-named whose address for service is at No. 17, Jalan Sultan, (Top Floor), Kelang, Selangor.

No. 15

Judgment

In the Federal  
Court

No. 15

Judgment

21st February  
1981

IN THE FEDERAL COURT OF MALAYSIA  
(APPELLATE JURISDICTION)  
FEDERAL COURT CIVIL APPEAL NO. 97 OF 1979

BETWEEN

- 10
1. Lam Wai Hwa (f)
  2. Tong Ban Mooi (f),  
Administratrixes of the Estate of Tong  
Poh Hwa alias Tong Chit, Deceased 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

(In the Matter of Kuala Lumpur High  
Court Originating Summons No. 179  
of 1978

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In the Matter of the Estate of Tong  
Poh Hwa alias Tong Chit, deceased

And

In the Matter of the Administration  
and Probate Act, 1959

And

In the Matter of Order 53 Rule 3(1) of  
the Rules of the Supreme Court, 1957

Between

- 30
1. Toh Yee Sum (f)
  2. Tong Mei Wan (f)
  3. Tong Kin Muon
  4. Tong Mei Chan
  5. Tong Kin Pin
- Applicants

And

1. Lam Wai Hwa (f)
2. Tong Ban Mooi (f)  
Administratrixes of the Estate of Tong  
Poh Hwa alias Tong Chit, Deceased Respondents)

CORAM: Raja Azlan Shah, C.J. Malaya,  
Chang Min Tat, F.J.,  
Salleh Abas F.J.

JUDGMENT OF THE COURT

The appellants are the administratrixes of the estate

In the Federal  
Court

No. 15

Judgment

21st February  
1981

continued

of one late Tong Poh Hwa (hereinafter called the deceased) who died on December 22nd 1960; Letters of administration having been granted to them on 24th August, 1961 in K.L. High Court Petition No. 196 of 1961. The first appellant is the widow of the deceased. He married her on 11th May, 1947 according to Chinese rites. There are seven children, two boys and five girls born out of this marriage.

Five years later on 17th December, 1952 whilst the marriage was still subsisting the deceased married the first respondent. The marriage was conducted according to Buddhist rites and was registered on 21st February, 1953 under the Registration of Marriages Enactment (F.M.S. Cap 111). The other four respondents are the children begotten of this marriage. In contemplation of the marriage the deceased and the first respondent signed a marriage agreement on 3rd December, 1952, whereby the deceased undertook to pay at least \$300/- monthly allowance for her maintenance and support, and would continue to pay this sum even if he had forsaken or deserted her. The deceased also undertook to execute a marriage settlement to provide her with a share of his property. The deceased died without making such settlement.

10

20

After the deceased died the first respondent regularly received the maintenance sum of \$300/- per month from the estate of the deceased and from 1968 this was paid from the fund of one of the family companies of which the deceased was a shareholder. Generously enough in 1972 this sum was increased to \$700/- per month and the maintenance was regularly paid until 24th July, 1975, after which no more allowance was received by her. On discovering that she and her children were left out as beneficiaries of the deceased's estate, the first respondent and her children applied to the Court by Originating Summons for a declaration that they are entitled to share in the said estate and for an order that the appellants do deliver full financial statements and accounts of the estate from the date of the deceased's death to the present date.

30

40

Replying to the respondents' application, the appellants contended that the first respondent's marriage to the deceased was null and void and as such she and her children (the other respondents) are not entitled to share in the estate. The appellants also contended that the originating summons was caught by the statue of

limitation. These contentions were overruled by the Lord President, who heard the summons in the court below, sitting as a High Court Judge.

In the Federal Court

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No. 15

Judgment

21st February 1981

continued

10 Before us counsel for the appellants repeated these submissions. He argued that the deceased's marriage to the first respondent was invalid because the marriage certificate contains a false statement to the effect that the deceased at the time of his second marriage had no other wife. This statement could not have been true because his marriage to the first appellant was still subsisting. It was therefore submitted that had the Registrar of Marriage known this fact he would not have registered the deceased's second marriage, and so this false statement renders the marriage invalid. In our view this submission completely runs counter to the scope and effect of the Registration of Marriages Enactment. Under the Enactment validity of a marriage does not depend upon its registration. This is clearly stated in Section 8 of the Enactment, which is as follows :-

20 "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."

30 The Enactment does not purport to make any marriage (other than Christian and Muslim marriages) to be compulsorily registered on pain of being declared invalid. Registration is purely optional at the instance of the parties. The benefit of registration is obviously to provide a ready means of proving such marriage. This is declared in Section 9 of the Enactment, as follows :-

40 "9. An extract from any register 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

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who asks the Court to believe that there was no  
such valid marriage."

No. 15

Judgment

21st February  
1981

continued

As to the application of this section to the present case, we agree with the view of the 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. The deceased or any one else who furnished the false statement appearing in the marriage certificate may well commit an offence under the Enactment, because he is required to state the truth, but such statement does in no way effect the validity of the marriage. Under Section 7, if the Registrar had discovered the true nature of this statement, at the most he would either have refused or postponed registration and might afterwards register it when grounds of objection would have been removed. His refusal to register a marriage does in no way effect the status of the marriage. Only where the marriage is prohibited by the religion of the parties or where it is a Christian or Muslim marriage would the registrar refuse registration. 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.

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Further the appellants never denied that the deceased married the first respondent. Indeed they could not possibly deny the existence of the marriage in view of the marriage certificate, the marriage contract entered into by the deceased before his marriage to the first respondent and also the regular payments of maintenance allowances for 14 years and the signing of the income tax returns by the first respondent at the request of the first appellant. What they denied, however, is that the marriage was a valid one; but no attempts were made by them to show us other than the erroneous statement in the marriage certificate which we have discussed above that the marriage was invalid. Thus for the reasons stated above we agree with the Lord President that the submission on the invalidity of marriage fails.

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As regards the second argument, we agree with the Lord President that this case is a claim to share in the personal estate of the deceased Tong Poh Hwa, who

10 in his time had two wives. 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.

For reasons stated above, we dismiss the appeal with costs.

(Sgd.) Tan Sri Dato' Mohd. Salleh  
Bin Abas

(Salleh Abas)  
Judge  
Federal Court.

20 Kuala Lumpur.  
21st February, 1981.

Hearing on Wednesday, 1st October, 1980.

Counsel:

For Appellants: Mr. G. T. Rajan  
c/o Messrs. G. T. Rajan & Co.,  
Advocates & Solicitors,  
Klang.

30 For Respondents: Mr. Wong Soon Foh  
c/o Messrs. Chooi & Co.  
Advocates & Solicitors,  
Kuala Lumpur.

In the Federal  
Court

\_\_\_\_\_  
No. 15

Judgment

21st February  
1981

continued



In the Federal  
Court

No.16

Order

21st February  
1981

No.16

Order

IN THE FEDERAL COURT OF MALAYSIA  
(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 97 OF 1979

BETWEEN

1. Lam Wai Hwa (f)
  2. Tong Ban Mooi (f),  
Administratrixes of the Estate of  
Tong Poh Hwa alias Tong Chit,  
Deceased
- APPELLANTS 10

AND

1. Toh Yee Sum (f)
  2. Tong Mei Wan (f)
  3. Tong Kin Muon
  4. Tong Mei Chan
  5. Tong Kin Pin
- RESPONDENTS

(In the Matter of Kuala Lumpur  
High Court Originating Summons  
No.179 of 1978

In the Matter of the Estate of Tong  
Poh Hwa alias Tong Chit, deceased 20

And

In the Matter of the Administration  
and Probate Act, 1959

And

In the Matter of Order 53 Rule 3(1)  
of the Rules of the Supreme Court,  
1957

Between

1. Toh Yee Sum (f)
  2. Tong Mei Wan (f)
  3. Tong Kin Muon
  4. Tong Mei Chan
  5. Tong Kin Pin
- Applicants 30

And

1. Lam Wai Hwa (f)
2. Tong Ban Mooi (f)  
Administratrixes of the Estate of Tong  
Poh Hwa alias Tong Chit, Deceased Respondents)

CORAM: RAJA AZLAN SHAH, CHIEF JUSTICE, HIGH COURT, MALAYA;

SYED OTHMAN, JUDGE, FEDERAL COURT, MALAYSIA;

SALLEH ABAS, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

THIS 21ST DAY OF FEBRUARY, 1981.

In the Federal Court

\_\_\_\_\_  
No. 16

Order

21st February 1981

continued

O R D E R

10            THIS APPEAL coming on for hearing on the 1st day of October, 1980 in the presence of Encik G.T. Rajan of Counsel for the Appellants abovenamed and Encik Wong Soon Foh of Counsel for the Respondents abovenamed AND UPON READING the Appeal Record filed herein AND UPON HEARING the submissions of Counsel aforesaid IT WAS ORDERED that this Appeal do stand adjourned for judgment AND the same coming on for judgment this day in the presence of Encik Khoo Eng Chin of Counsel for the Appellants abovenamed and Encik Wong Soon Foh of  
20            Counsel for the Respondents abovenamed IT IS ORDERED that this Appeal be and is hereby dismissed with costs AND IT IS LASTLY ORDERED that the sum of Dollars Five hundred (\$500-00) only paid into Court by the Appellants abovenamed as security for costs of this Appeal be paid to the Respondents abovenamed towards their taxed costs.

GIVEN under my hand and the Seal of the Court this 21st day of February, 1981.

(Sgd.) K.S. Tan

30            SENIOR ASSISTANT REGISTRAR,  
FEDERAL COURT, MALAYSIA,  
KUALA LUMPUR.

In the Federal  
Court

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No. 17

Supplementary  
Judgment

13th April 1981

No. 17

Supplementary Judgment

IN THE FEDERAL COURT OF MALAYSIA  
(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 97 OF 1979

BETWEEN

1. Lam Wai Hwa (f)
  2. Tong Ban Mooi (f),  
Administratrixes of the Estate of  
Tong Poh Hwa alias Tong Chit,  
Deceased
- APPELLANTS 10

AND

1. Toh Yee Sum (f)
  2. Tong Mei Wan (f)
  3. Tong Kin Muon
  4. Tong Mei Chan
  5. Tong Kin Pin
- RESPONDENTS

(In the Matter of Kuala Lumpur  
High Court Originating Summons  
No. 179 of 1978

In the Matter of the Estate of Tong Poh Hwa alias Tong Chit, deceased 20

And

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Between

1. Toh Yee Sum (f)
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  5. Tong Kin Pin
- Applicants 30

And

1. Lam Wai Hwa (f)
2. Tong Ban Mooi (f)  
Administratrixes of the Estate of Tong  
Poh Hwa alias Tong Chit, Deceased Respondents)

CORAM: Raja Azlan Shah, C.J. Malaya.  
Syed Othman, F.J.,  
Salleh Abas, F.J.

In the Federal  
Court

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No. 17

SUPPLEMENTARY JUDGMENT OF THE COURT

Supplementary  
Judgment

13th April 1981

continued

10 After the judgment in the above case was delivered we feel bound to write this supplementary judgment by correction slip in view of a letter written by counsel for the appellant pointing out to an error in our judgment wherein we said that no submission was addressed to us on the validity or otherwise of respondent's marriage to the deceased under the customary law of the parties when in fact counsel said he did make such submission. Upon consideration of the submission we do not think that it makes any difference to the conclusion we have already reached in this Appeal.

20 The gist of the counsel's submission is that the respondent's marriage to the deceased was not valid as a secondary wife because she did not fulfil the conditions of secondary wife as stated in re Lee Kee Chong (deceased).<sup>(1)</sup> He also submitted that the relationship of the deceased with the respondent was a bigamous relationship rendering the deceased liable to be prosecuted for an offence of bigamy under section 494 of the Penal Code. In short, the marriage of the respondent was not valid.

30 As regards bigamous relationship, the submission was based on an old case of The King v. Sim Boon Lip<sup>(2)</sup> wherein it was held that a Chinaman could be convicted of bigamy if the prosecution could prove by Chinese Law that the second marriage was void by reasons of taking place during the lifetime of the first wife. In that case the Chinese Law which was proved by the prosecution was the law which was in practice and observed in China and the evidence was given by Acting Council General for China stationed at Singapore. According to this witness whose evidence was accepted by the jury, the Chinese Law did not allow polygomy although it permitted concubinage. It was on this basis that the jury found the accused guilty. In our view this case is of doubtful value and cannot be  
40 an authority for the proposition that a Chinaman's marriage is monogamous because in a number of cases decided in this country a Chinaman can validly take secondary wives besides the principal wife and concubines provided a certain condition is fulfilled. It is sufficient for this

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(1) (1965) 31 M.L.J. 102

(2) (1901) 7 SSLR 4

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No. 17

Supplementary  
Judgment

13th April 1981

continued

purpose to refer to the following two cases. The first case is *Tan Ah Bee v. Foo Koo Thye and Anor.* (3) in which Carey J. said :

"It is established that a Chinese man may have as many wives as he may be disposed to. Usually he has a principal wife and may have several secondary wives as well. No precise ceremony of marriage is requisite in the case of a secondary wife, but there must be some evidence of intention and some recognition of the status of wife in order that a secondary marriage may be established."

10

The second case is *In re Lee Gee Chong (deceased).* (4) This is the decision of the Federal Court at a time when Singapore was part of Malaysia. In this case Wee Chong Jin, C.J. (Singapore) after reviewing exhaustively the cases on the subject summarised the position as follows :

"This judgment clearly lays down that the true principle upon which our courts have for almost a century consistently recognised the custom among the Chinese here of polygamous marriage is to prevent injustice or repercussion which would result from a failure to do so."

20

Thus this is a clear statement of the law that Chinese marriages are not monogamous as accepted in *The King v. Sim Boon Lip*, but polygamous. *Sim Boon Lip's* case therefore must be rejected.

The next question is whether the appellant was the secondary wife of the deceased and what evidence must there be in order to constitute her a secondary wife. It now seems settled that all that is necessary to establish the appellant as the secondary wife of the deceased is for her to show that her union with the deceased was intended to be a permanent one. Although no form of marriage ceremony was necessary to create the position or status of a secondary wife, where such formalities were observed they had weight to support the exercise of such position or status.

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In this case not only did the parties celebrate their marriage in a restaurant according to the Buddhist rites and registered the same, they also wrote an agreement.

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(3) (1947) MULR 72 & 73  
(4) (1965) 31 M.L.J. 102

10 It is clear from this agreement in which they described themselves as husband and wife that they intended no other union than a permanent one. The agreement recited that the respondent and the deceased desired to contract a marriage according to Chinese rites and traditions and had mutually expressed their affection for each other. After the marriage was celebrated in December, 1952 the parties lived together in Petaling Jaya. Their union was only severed by the death of the deceased in a road accident on the 22nd December, 1960. Their union resulted in the birth of four children. It was never disputed that these children were fathered by the deceased. In our view a union which lasted for so long and produced not one child but four children could not be other than proof of their intention that they desired a permanent union when they signed the agreement in December, 1952. Any other conclusion will be to fly in the face of the evidence. Thus such being the case, in our view the union of the respondent with the deceased constituted a valid secondary marriage, and the respondent was therefore a secondary wife of the deceased.

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(Sgd.) Tan Sri Dato' Mohd. Salleh B. Abas

(Salleh Abas)  
Judge  
Federal Court.

Kuala Lumpur.  
13th April, 1981.

No.18

Order granting Final Leave to Appeal  
to H.M. the Yang di Pertuan Agong

30 IN THE FEDERAL COURT OF MALAYSIA  
(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 97 OF 1979

BETWEEN

1. Lam Wai Hwa (f)
2. Tong Ban Mooi (f),  
Administratrixes of the Estate of  
Tong Poh Hwa alias Tong Chit,  
deceased

APPELLANTS

40 AND

In the Federal  
Court

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No.17

Supplementary  
Judgment

13th April 1981

continued

No.18

Order granting  
Final Leave to  
Appeal to  
H.M. the  
Yang di Pertuan  
Agong

2nd November  
1981

In the Federal  
Court  
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No. 18  
Order granting  
Final Leave to  
Appeal to  
H. M. the  
Yang di Pertuan  
Agong  
2nd November  
1981  
continued

1. Toh Yee Sum (f)
2. Tong Mei Wan (f)
3. Tong Kin Muon
4. Tong Mei Chan
5. Tong Kin Pin

RESPONDENTS

(In the Matter of Kuala Lumpur  
High Court Originating Summons  
No. 179 of 1978

In the Matter of the Estate of Tong  
Poh Hwa alias Tong Chit, deceased 10

And

In the Matter of the Administration  
and Probate Act, 1959

And

In the Matter of Order 53 Rule 3(1)  
of the Rules of the Supreme Court  
1957

Between

1. Toh Yee Sum (f)
2. Tong Mei Wan (f)
3. Tong Kin Muon
4. Tong Mei Chan
5. Tong Kin Pin

20

Applicants

And

1. Lam Wai Hwa (f)
2. Tong Ban Mooi (f)  
Administratrixes of the Estate  
of Tong Poh Hwa alias Tong  
Chit, deceased

Respondents)

CORAM: RAJA TAN SRI AZLAN SHAH, AG., 30

LORD PRESIDENT, FEDERAL COURT,  
MALAYSIA;

LEE HUN HOE, CHIEF JUSTICE, HIGH COURT,  
BORNEO;

MOHAMED AZMI, JUDGE, HIGH COURT,  
MALAYA.

IN OPEN COURT

THIS 2ND DAY OF NOVEMBER, 1981.

O R D E R

UPON MOTION made unto Court this day by Encik 40

10 G.T. Rajan of Counsel for the abovenamed Appellants and Encik K.P. Tan of Counsel for the Respondents herein AND UPON READING the Notice of Motion dated the 15th day of June, 1981 and the Affidavit of the abovenamed Appellants affirmed on the 11th day of June, 1981 and filed herein AND UPON HEARING Counsel as aforesaid for the parties IT IS ORDERED that final leave be and is hereby granted to the Appellants to appeal to His Majesty the Yang di-Pertuan Agong against the Judgment of the Federal Court given on the 21st day of February, 1981 AND IT IS ALSO ORDERED that the costs of this application be costs in the cause.

GIVEN under my hand and the Seal of the Court this 2nd day of November, 1981.

Sgd.

SENIOR ASSISTANT REGISTRAR,  
FEDERAL COURT,  
MALAYSIA.

20 This Order is filed by Messrs. G.T. Rajan & Co., Solicitors for the Appellants herein whose address for service is at No. 17, Jalan Sultan, Kelang, Selangor.

In the Federal Court

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No. 18

Order granting Final Leave to Appeal to H.M. the Yang di Pertuan Agong

2nd November 1981

continued



IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE FEDERAL COURT OF MALAYSIA

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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 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

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RECORD OF PROCEEDINGS

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