

Privy Council Appeal No. 64 of 1960

Chua Chee Chor - - - - - Appellant

v

Chua Kim Yong Administrator of the estate of Chua Ah Chee  
alias Chua Kee Peng deceased and others - - - Respondents

FROM

THE SUPREME COURT OF THE FEDERATION OF MALAYA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 20TH NOVEMBER, 1962

*Present at the Hearing:*

LORD MORTON OF HENRYTON.

LORD KEITH OF AVONHOLM.

LORD PEARCE.

[*Delivered by* LORD PEARCE]

This is an appeal by the defendant from a Judgment of the Court of Appeal in the Supreme Court of the Federation of Malaya upholding (in all respects material to this appeal) an order of Neal J. made in the High Court at Kuala Lumpur.

The plaintiffs on behalf of the estate of Chua Ah Chee alias Chua Kee Peng deceased made claims to property in the possession of the defendant. All the plaintiffs are sons of the deceased except the second plaintiff who is widow and administratrix of another son who died. The defendant also is a son of the deceased. The plaintiffs claimed *inter alia* that a bicycle shop in the possession of the defendant and 242 shares in the Trengganu Bus Company Ltd. registered in the defendant's name, are part of the estate of the deceased. The defendant denied the claims and asserted that he himself was the owner.

At the trial before Abdul Hamid J. 17 witnesses were called and submissions of counsel were made on nine days between the 6th October 1954 and the 15th December 1955. On the latter date the learned Judge reserved judgment. He afterwards retired without having delivered judgment. The case was then heard before Neal J. on the 2nd and 3rd June 1958. Both parties made application that he should decide the case on the evidence as recorded by Abdul Hamid J. who had taken a full note. Neal J. was also provided with copies of the exhibits and of the previous submissions of counsel. He had however seen none of the witnesses. He fully recognised the undesirability of basing a judgment on such material and referred specifically to *Bolton v. Bolton* [1949] 2 All E.R. 908. He realised that he was faced with a choice of two evils. He was clearly much influenced by the great hardship which would be caused to the parties if he insisted on a proper rehearing. He therefore decided in accordance with the wishes of the parties to act under section 75 of the Trengganu Civil Procedure Code, and to give judgment on the defective material which the parties offered to him. Section 75 provides as follows:—

“Where evidence in any suit has been taken and recorded by a Judge or Magistrate and a postponement has become necessary the further hearing of such suit shall only be continued before the same Judge or Magistrate; Provided that if such Judge or Magistrate is unable to sit by reason of leave, sickness or transfer the further hearing of the suit may be continued before another Judge or Magistrate.

A Judge or Magistrate continuing the hearing of a suit as provided above may adopt the evidence taken by his predecessor and proceed with the suit from the stage at which his predecessor left it, or may recall the witnesses and hear the suit."

The learned Judge then decided that since (*inter alia*) the bicycle shop and the shares were specified in the letters of administration to the estate of the deceased, he was bound thereby to hold that they were the property of the deceased. But in case he was wrong in law in so holding he went on to decide as a fact that the shop and the shares in the Trengganu Bus Company Ltd. were the property of the deceased.

The Court of Appeal rightly held that the learned Judge had erred in law in thinking that the matter was decided by the letters of administration. By a majority however it came to the same conclusion of fact as had the learned Judge. Thomson C.J. (with whom Smith J. agreed) felt grave doubts as to the regularity of the unusual course taken by the Judge in acceding to the parties request that he should "give judgment on evidence as recorded by his predecessor". After referring to the English cases of *Bolton v. Bolton* [1949] 2 All E.R. 908, *Coleshill v. Manchester Corporation* [1928] 1 K.B. 776 and *Re British Reinforced Concrete Engineering Co. Ltd.'s Application* 45 T.L.R. 186, the learned Chief Justice concluded:—

"Before us neither party has taken the point of irregularity and in the circumstances for myself I am not disposed to take the point although I would express my very strong view that the precedent is not one to be followed."

On appeal to your Lordships' board the defendant now seeks to argue first that Neal J. had no jurisdiction to act as he did, and secondly that even if he had jurisdiction, the course which he adopted (albeit at the parties' request) was so contrary to the principles of justice that the judgment should be set aside and a new trial ordered.

The first argument is founded on the words of Rule 75. It is contended that they cannot cover a case where (as here) there were no depositions and therefore no recording of the evidence save in the Judge's notes, and where a hearing was not being "continued" but had already been concluded save in so far as judgment remained to be delivered.

In their Lordships' opinion however the evidence in this case had been "taken and recorded by a judge" within the meaning of the section. They cannot accept the contention that a Judge's notes cannot suffice to satisfy the section. The words are, at the least, as apt to include a Judge's notes as a shorthand transcript. If therefore, the defendant's contention were correct, the section could only apply to criminal cases where formal depositions are made. The whole tenor of the section seems to their Lordships to denote an intention that it should apply to civil and criminal cases alike. Nor can their Lordships accept the argument that because counsels' speeches were concluded before Abdul Hamid J., the suit could not be "continued" before Neal J. In fact he heard further submissions by counsel on the question whether he was bound by the fact that the items in dispute were listed in the letters of administration as being the property of the deceased.

As to the second argument, their Lordships would adopt the observations of the learned Chief Justice quoted above. The course adopted by Neal J., considered *in vacuo*, was plainly undesirable. But the circumstances were very unusual. A rehearing of oral evidence would have entailed even further delay and great expense. Some of the many witnesses were several hundreds of miles away. The learned Judge had before him a full note of the sworn evidence of witnesses who had been examined and cross-examined. It was a very insecure foundation for disputed questions of fact. Nevertheless it was the material on which the parties, in the unhappy state of affairs, asked to have their case decided, and its inadequacy affected each party alike. The defendant sought the hazard and, having lost, complains of it. Their Lordships cannot now regard as a denial of justice the procedure which the defendant himself (together with the plaintiffs) requested and of which he has made no complaint in the Courts below.

The defendant has further contended that the evidence did not support the conclusions of Neal J. and the Court of Appeal, and in particular that the plaintiffs failed to satisfy the onus of proof laid upon them by section 110 of the Evidence Ordinance which provides that "when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner". The defendant relies on the judgment of Ong J. who after a careful analysis of the evidence, thought that the statutory onus was not discharged and gave a dissenting judgment in the Court of Appeal. Their Lordships however find no justification for investigating the question of fact. The principles applied by the Board where there are concurrent findings of fact have been clearly enunciated in *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy & Others* [1946] A.C. at p.521. The fact that there was a dissent in the Court of Appeal, does not affect the matter (*ibidem*). Those principles are not inflexible and their Lordships' Board may in special circumstances vary their application in some degree. In the present case however there are no circumstances that justify any departure from their strict application.

Their Lordships will therefore report to the Head of the Federation of Malaya that in their opinion the appeal should be dismissed.

In the Privy Council

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DELIVERED BY  
LORD PEARCE