

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Neo Ong Hee v. Neo Ong Tew, from the Supreme Court of the Straits Settlements (Settlement of Singapore); delivered the 9th July 1902.*

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Present at the Hearing :

LORD DAVEY.

SIR FORD NORTH.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Ford North.*]

The Plaintiff and the Defendant are brothers, and in August 1897 the Plaintiff brought an action against the Defendant in which he sought relief upon three grounds; viz. 1. to have the accounts of a partnership between the two taken; 2. to establish his exclusive right to a certain sum of \$40,000; and 3. to obtain a declaration that he had a joint interest with the Defendant in certain specified investments most of which were in the name of the Defendant only; although some were in the joint names of the two.

i. With respect to the first head of complaint the Judge of the Court of First Instance in the Straits Settlements held that there was a partnership between the two, which came to an end on 6th January 1893; and that the Plaintiff was barred by limitation from having the accounts taken. This was confirmed by the Appellate Court; and from that no further appeal has been brought.

ii. With respect to the second head of complaint, a sum of \$40,000 was handed by the

Defendant to the Plaintiff in March 1893. The Plaintiff claims that this sum was paid to him on account of his share in the profits of the partnership, and belongs entirely to him. The Defendant contends that it was his own money, and was merely handed by him to the Plaintiff as agent, in order that he might invest it for the Defendant in the absence of the latter. The Court of First Instance decided in favour of the Defendant. The Appellate Court did not accept the views of either the Plaintiff or Defendant; but adopted a view not contended for by either party, and unsupported by any evidence, viz., that this sum was the joint property of the two, and was handed to the Plaintiff for investment for their joint account; and made a declaration to that effect; and from this the Defendant has appealed. It may be stated here that both Courts treated the oral evidence of the Plaintiff and of the Defendant as unreliable; and the conclusion at which their Lordships have arrived is based upon the written documents in evidence.

It appears that the Defendant afterwards desired to make investments himself, and applied to the Plaintiff to remit him money for the purpose. On the 11th April 1893 the Plaintiff wrote to the Defendant "He (Low Kim Pong) has asked me to accept his mortgage for \$20,000 at 9 per cent. interest for one year—what say you?"

"Deposit. I have placed to your credit at the Hong Kong and Shanghai Banking Corporation for \$20,000," and this sum the Plaintiff charges against the Defendant in the particulars annexed to the Statement of Claim.

On the 19th April the Plaintiff wrote to the Defendant "Mortgage. I have settled with Low Kim Pong for \$20,000 at 12 per cent. payable monthly." The Defendant agreed to this. The money advanced came out of the cash of the

Defendant; but the mortgage was effected in the joint names.

On the 3rd August the Plaintiff wrote to the Defendant (referring to a conversation with his mother) "She said you have given me \$40,000 out of the \$81,000 you brought from Saigon, therefore I can pay Howarth Erskine's bill, because I and you are the same; and in answer I said you have paid to my account \$40,000 and afterwards you asked me to pay you \$20,000 in bank notes and \$20,000 to be placed to your credit in the Hong Kong and Shanghai Bank; and I have done so."

In September 1894 Low Kim Pong paid off his mortgage. The Plaintiff received the money, being \$20,400; and in a letter to the Defendant dated 26th September furnished an account of the moneys so received and the application thereof. Of that sum \$15,148 went to the Defendant's banking account; \$1,200 went to pay for land bought in the Defendant's name alone; \$3,928 was lent on a promissory note in the joint names, for which a mortgage in the name of the Defendant alone was substituted; \$110 was charged against the Defendant for the commission on houses in Almeida Street, which the Plaintiff now says were bought on joint account; and the small balance was for personal charges the Plaintiff had against the Defendant. As the whole of the \$40,000 is thus admitted to have been repaid by the Plaintiff to the Defendant, their Lordships are unable to come to the conclusion that this sum or any part of it belonged to the Plaintiff beneficially or to draw what the Chief Justice calls the "natural inference" that the money belonged to the two jointly, or was to be invested for their joint account. Upon this point the Plaintiff has failed to make out his case.

ii. With respect to the third head of complaint, the Plaintiff asserts that he had a joint interest with the Defendant in certain investments mentioned in the pleadings; including those made in the name of the Defendant alone, as well as those in the joint names. The Defendant's case is that the Plaintiff had no beneficial interest whatever in any of them, but merely acted as the Defendant's agent in respect thereto. The Judge of First Instance decided against the Plaintiff. The majority of the Court of Appeal said the question was upon whom the burthen of proof lay; and held that the Plaintiff had failed to prove that he had any interest in the securities in the name of the Defendant only; and that the Defendant had failed to prove that the Plaintiff had no interest in the securities standing in the joint names. The Court accordingly declared that such of the investments referred to in the Statement of Claim as stood in the joint names were made for the joint account of the Plaintiff and Defendant; not giving the Plaintiff any relief in respect of those standing in the Defendant's name only. This is rather a summary mode of dealing with the case. If after all procurable evidence had been exhausted there was nothing reliable before the Court except the mode of investment, the Court might have been justified in coming to the conclusion that those in the two names were joint, while those in the Defendant's name were not. But that state of things had not been reached. There was evidence already before the Court which could not be rejected that the moneys advanced on some of the joint securities was advanced by the Defendant alone; and the Court actually went on to direct an enquiry whether the Plaintiff or Defendant or both advanced the moneys for such investments. Until such inquiry had been worked out the

declaration was premature; and if it was to stand the inquiry would be practically useless. There could be no utility in a finding that one of the parties only advanced the money, in the face of a declaration that their interests were joint. From this also the Defendant has appealed.

Of the investments to which the declaration as to joint interest would apply two were referred to by the Court of Appeal. One of such investments was of \$6,100 on 4th August 1893 on the purchase of some land and houses in Hceren Street, Malacca. It appears from the Statement of Claim that this property was sold for \$5,100, \$100 of which was paid to the Defendant; and for the balance of \$5,000 a legal mortgage was given in the joint names. The Defendant states that the interest was paid to him until action brought. And the case does not stop there; for the Plaintiff upon being interrogated (Interrogatory 9) whether the Defendant did not himself pay the purchase money in respect of this property, replied "Yes." This important admission by the Plaintiff seems to have been overlooked by the Court of Appeal; and in their Lordships' opinion it is amply sufficient to turn the scale and to prove the Defendant's case so far as relates to this investment.

The Court of Appeal also relied upon the fact of an advance of \$10,000 having been made to Tan Hoon Chiang and his two brothers by the Defendant on two promissory notes taken in the joint names; but they overlooked the fact that the Plaintiff admitted in his answer to Interrogatories 14 and 15 (*see* Answers 13, 14) that it was the Defendant who made this advance out of his own moneys. These two cases when examined do not justify the declaration founded upon them.

Another purchase in which the Plaintiff claims a joint interest is some property in Almeida Street, Singapore. It does not appear in whose name the conveyance was taken; but the purchase money was \$10,000, and the whole of that was paid by the Defendant. On 7th June 1893 the Plaintiff wrote to the Defendant that he had paid \$10,000 for the Almeida Street houses, and required about \$12,000. The Defendant sent him his cheque for the amount on 10th June; and credit for that sum is given in the particulars annexed to the statement of claim. The commission payable on the purchase was charged by the Plaintiff against the Defendant alone, as already mentioned. The property was subsequently sold for \$11,000, and a legal mortgage taken for that sum in the joint names. The balance due on that mortgage was paid off after this action was brought, and was placed to a joint account pending the settlement of the matters in dispute.

Another purchase which the Plaintiff claims to have been on joint account was of some land known as 17, Hong Lim Quay, Singapore, bought on 16th August 1893 for \$2,850. It does not appear where the price came from except that the Defendant states it was out of his money, but the conveyance was made in the joint names. This property was sold in January 1895 for \$4,150, showing a considerable profit. The purchase money was received by the Plaintiff and he paid the whole of it to the Defendant's account at the Chartered Bank. This is made clear by the Plaintiff's letter to the Defendant of 5th January 1895, and the Particulars annexed to the Statement of Claim.

It is not necessary to consider the other investments in detail; but it must not be forgotten that the Plaintiff's claim to a joint

interest extends to the investments made in the Defendant's name alone (as to which the Plaintiff has wholly failed) as well as to those in which the joint names appear.

To put the matter broadly, in conclusion. To a large extent the Plaintiff's claim has been decided to be without foundation. The only ground upon which he succeeded at all in the Court of Appeal was as to such investments as were made in the joint names. He was allowed to receive some of the rents, but this was not merely in cases of investments in joint names. It does not appear that (except as to the \$40,000 already dealt with) the Plaintiff had any money out of which he could have contributed to the investments made. On 20th June 1893 he wrote to the Defendant, referring to some small claims "I cannot afford to pay because I am poor. "Some time last year I had \$100 monthly as "salary and since then I had nothing." No investments were ever made in the Plaintiff's name alone; and in some cases where purchases or investments were in the joint names the whole proceeds of realization were paid over to the Defendant; and in every case the title-deeds of all the properties with which the Plaintiff had any concern were forwarded by him to the Defendant. In addition to this a long correspondence between the parties was read; and though there are no doubt isolated passages which standing alone might be considered favourable to the Plaintiff, yet looking at it as a whole, and seeing the constant applications by the Plaintiff for money to invest and for instructions as to investments, their Lordships have no hesitation in coming to the conclusion that the relation between the parties in these transactions was that of principal and agent only.

The result is that the Decree of the Court of Appeal dated the 21st December 1899 should be discharged, and the Decree of the Court below dated the 20th of March 1899 should be restored and the Plaintiff should pay the Defendant's costs of the Appeal to the Court of Appeal, and their Lordships will humbly advise His Majesty accordingly. The Defendant by a counter-claim asked for an account of all dealings and transactions between the Plaintiff as his agent and himself with respect to the properties mentioned in the pleadings; and that account was directed by the Decree of the 20th of March hereby restored, and will now have to be taken under that Decree.

The costs of this Appeal must also be borne by the Respondent.

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