Privy Council Appeal No. 151 of 1915.

Ho Chiu Lam *alais* **Ho Yiu Tong** - - - *Appellant,*

v.

Ho San Lam *alias* **Ho Ngok Lau** - - - *Respondent,*

FROM

THE SUPREME COURT OF HONG KONG.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH JULY, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.
EARL LOREBURN.
LORD SHAW.

[*Delivered by* THE LORD CHANCELLOR.]

The question in this case is whether the appellant still remains member of a partnership originally constituted between himself and his brothers, or whether he retired from the firm in July 1902. The learned Judge before whom the action was tried decided that he still remained a partner. His judgment was reversed by the Court of Appeal, and from them this appeal has been brought. The real point for decision is a simple question of fact. The law applicable is the ordinary English law relating to partnership, and the only complication introduced is that which arises from the family customs and traditions of the Chinese, which are closely interwoven with their business rights under the partnership agreement.

The appellant and respondent are the third and fourth members of a family of five brothers. In 1878 the second brother founded a theatrical business, which was carried on in different places under different names. Thus, in Canton, it was known as the "Po Cheong," and in Hong Kong as the "Wa Kee." This brother died in 1893, and, in 1894, the interests of the other brothers in the business, whatever they may have been, were reduced into writing and defined in an agreement dated the 13th April, 1894, which was

signed by all the surviving brothers, and the representative of the family of the one who was dead. This agreement was at once a combination of the business and the family arrangements of the five different families. So far as the actual business of the partnership was concerned, it was stated to be the theatrical businesses at Hong Kong and Canton, and it purported to carry out an arrangement said to have been made before the death of the second brother, by which it was stated that, when the businesses were brought to a successful termination and the money was to be divided, half should be retained for Shau Hong, who was the adopted son of the deceased second brother, and half should be equally divided between the first, third, fourth, and fifth younger brothers. It also stated that the second brother, when at the point of death, left words to the effect that the business at Canton should be handed over to the fourth brother for his control, the business at Hong Kong to the fifth for his control, and the family affairs should be entirely under the control and management of the plaintiff, the third younger brother.

The agreement then expressly confirms the arrangement as to the shares in the business, but it does not introduce in terms as part of the partnership contract the wishes of the deceased brother as to the different duties to be undertaken by each of the surviving brothers, but provides that each shall do his utmost to manage the affairs. As, however, a sum of 100 taels is allowed to the fourth family for their services, and 50 to the fifth family for the same reason, it may be accepted that the wishes of the second brother as to the management were accepted by all as part of the partnership terms.

The agreement then provides that each family should draw 10 taels a month for family expenses. Provisions are also made as to the monies that were in hand derived from hereditary property, which, by common consent, is property entirely outside the partnership, and used for the purpose of building houses and an ancestral temple, and providing for sacrificial expenses. For this purpose also, it was decided that, if the businesses became prosperous, 10 per cent. of the common money should be deducted, but that this deduction should cease when the fund reached the sum of 7,200 taels.

There are certain notable facts about this agreement. In the first place, there is no express provision for any application of the profits beyond the monthly allowances, and the sums to be set apart for ancestral worship. It would appear that it was contemplated that they should be all accumulated and form part of the general fund that was to be divisible when the partnership was wound up among the various families in the named proportions; and secondly, there is intermingled with the business arrangement the pious duties of the various members of the firm in connection with their ancestral worship. The business proceeded under this agreement and achieved a considerable success. The sum of 7,200 taels to be set aside

for ancestral rites was by common agreement exceeded, and 12,000 taels were devoted for this purpose; but over and above this sum and beyond the amounts allowed for monthly drawings, a considerable sum of surplus profits was realised, and devoted to the purchase of property in the country, which was known under the family name as the "Yung Chung Tong" property. This was managed by the plaintiff from 1894 to 1900, but in 1900 the eldest brother, Yeu Lau, took over its charge, and this he did as of right, being the elder brother to whom the charge of the family property would be properly entrusted. He continued in charge until October 1904, when ill-health compelled him to resign. Nothing further of importance took place in connection with the partnership business until 1902. In that year two things happened: the business lost the lease of a theatre known as the Koshing Theatre, a fact which the defendant alleged made the plaintiff uneasy as to the future prospects of the firm; and at the same time the plaintiff was anxious to obtain an interest in certain other businesses, and notably in a bank in which he desired to invest the sum of 10,000 taels. He therefore wished to retire from the partnership with his brothers and devote his energies to these new enterprises, into which he proposed to embark his capital. This is common ground between all the parties. The matter of dispute is as to what was done in this position as between the plaintiff and the other members of the firm.

Unfortunately the evidence is indefinite and conflicting as to what steps were taken by the plaintiff to effect his admitted desire to retire. He says that he desired to have the accounts made up and settled, to receive his share and retire from the firm, and by this his counsel argues that his actual retirement was to be contingent upon the settlement of the accounts. This position is an unusual one for a retiring partner to take up. In a partnership at will, such as the present, the retiring partner has merely to sever his connection with the firm and he can then obtain the necessary accounts and the payment of his share in accordance with the partnership agreement, and it is this that the defendant asserts that the plaintiff did. If, however, the matter were to rest on verbal evidence alone, notwithstanding the improbability of the plaintiff's story, their Lordships would certainly accept the findings of the learned Judge by whom the action was tried, though as he himself says, and their Lordships agree with him, the weight of the evidence if considered as trustworthy is against the plaintiff. Shortly after this interview, however, the plaintiff wrote two letters addressed to his brother the defendant. They are both to the same effect, and there is no need to examine each of them closely. They proceed upon the assumption stated in plain and emphatic language that the plaintiff has in fact retired from the partnership. In the first letter he uses phrases which in the agreed translation are as follows: "I have retired from the partnership in our common business,"

"I have voluntarily retired from the partnership," "I have therefore been compelled to retire from the partnership," and the whole of the letter consists in demanding the rights to which he was undoubtedly entitled upon the footing that he had in fact retired. He complains that the accounts have not been settled, and he asks for payment at once of his share of the capital for investment in a bank called the Wai On Bank, in which he was proposing to take a share, the amount of this share being stated by the second letter to be the sum of 10,000 dollars.

At this time the accounts were not made up, but the defendant in accordance with the request in this letter proceeded to make payment to the plaintiff in respect of his share, and in particular on the 29th January, 1903, paid on his account to the Wai On Bank in two sums the 10,000 dollars which he had asked for in his letter.

Further payments were made in respect of the share until, in 1904, the appellant had received the total of 33,000 dollars. Now, when these payments were begun, the accounts had not been made up, but instructions were given to an accountant named Mak Wan Hing to prepare and make out the necessary accounts as from the death of the second brother, in 1893. No balance-sheet had ever been prepared up to that time, and the preparation of the accounts took considerable time. They were ultimately completed in the early part of 1904, and they are important, both from the point of view of the plaintiff and of the defendant. They showed the total assets of the firm, to which the plaintiff was entitled to one-eighth, as 272,000 taels, so that the plaintiff's share was about 34,000 taels. Now this amount was only reached by treating the payments that were made for the purchase of the property known as the Yung Chung Tong property as a payment which the Yung Chung Tong estate was liable to pay to the partnership. The property itself was not brought into the account, but the actual payment made for its purchase was represented as a sum of 31,000 taels. If the Yung Chung Tong estate were treated as an independent concern, to which the partnership had made payments which were represented as a debt due to the firm or a charge upon the property, this method of entry would have been correct; but it would also follow that when the plaintiff had received his share, on the footing of this sum being included, that he would cease to have any further interest in the Yung Chung Tong estate. It is this fact that gives rise to the only uncertainty that their Lordships feel in the matter.

If the assets of the business had been divided without regard to the Yung Chung Tong property at all, the plaintiff, in addition to the share paid out of the partnership assets, would also have been entitled to one-eighth of the Yung Chung Tong estate, and, if this were treated as outside the partnership, so that the dissolution only took effect so far as the theatrical business was concerned, having regard to the fact that the Yung Chung Tong estate was regarded in the nature of family

property, there would be nothing unreasonable in this arrangement; but this is not what in fact occurred.

It appears that this family property, managed, as has already been stated, by the elder brother by virtue of his position as head of the family, was again taken over by the plaintiff owing to the illness of his elder brother in 1904, and he continued to manage it until these proceedings were instituted, and it is this fact, and the fact that the plaintiff received more than his share, as shown upon the accounts, which constitute the real substance of his claim to be a continuing partner. Their Lordships do not think that these facts, when viewed in the light of the peculiar family relations existing between the brothers, can have that effect. The Yung Chung Tong property was not managed by him as partner, but, owing to his position in the family, exactly as it had been managed by his elder brother, and the annual rents and profits were not divided in eighths but were, in fact, divided into fifths, and paid equally to each of the five families, with this exception, that the second family received a sum of 140,000 taels a year more than the others. Now this payment cannot be attributed to the literal terms of the partnership agreement. This only provided that 120 taels a year should be received by each family, but this was departed from in 1897, and the accounts show that each family received 480,000 taels a year, with the exception of the second family, who received 720,000.

Counsel for the appellant urged that this is quite in accordance with the partnership deed, and merely means that the 10 taels a month had been altered by the agreement to the larger sum. Their Lordships do not so regard it. They think that the Yung Chung Tong property was treated as family property, not necessarily the same as the ancestral property, but as property which formed part of the family estate managed, not by virtue of the terms of the partnership deed, but by virtue of the rights of the members of the family *inter se*, and distributed upon that basis. The accounts were kept by the plaintiff himself, and they certainly show a distinction between the ancestral property and the Yung Chung Tong property, and these accounts were delivered to the defendant, and not disputed by him. If the strict legal rights shown in the partnership agreement, and the dealing with the property were alone to be regarded, it might follow that the plaintiff had received his share of this property twice over, but this cannot constitute him a partner in the theatrical business.

Their Lordships think it would have been quite impossible after what transpired in 1902 for the defendant to have sought to make the plaintiff liable for losses had they been incurred in carrying on the partnership business. There would have been no evidence whatever to show that the retirement stated by the plaintiff in express language to have taken place in 1902, and the payments made to him of his share on the footing of his statement that he had retired, could possibly have been

defeated by the family arrangement with regard to the Yung Chung Tong property.

There are a few other facts to which reference is made by the plaintiff in support of his claim. He says that there should have been a document signed evidencing the fact that he retired; that the notice of his retirement should have been advertised, and his copy of the partnership agreement returned. These are all matters that might properly have been done if the strict legal formalities had been exactly complied with, but no advertisement had ever taken place with regard to other alterations in the firm, and the omission of these details only affords evidence of a fact plain from all the circumstances in the case that the family relationship between the different persons caused formalities to be overlooked.

From 1902 down to the time shortly before the institution of these proceedings the plaintiff made no manner of claim at all to be considered a partner in the theatrical business. He never attempted to investigate the accounts; he never interfered or assisted by advice or help; having withdrawn all his money he stood on one side and waited, with the result that, now the business is a success, he claims to be entitled to a share of the profits; whilst, as has been pointed out, he would have been immune from losses had the enterprise proved less successful.

In the view that their Lordships take of the matter, it is not necessary to decide whether the accounts were actually settled and agreed between the parties or no. There is no doubt that the account made out by Mak Wan Hing was produced to the plaintiff and handed to him in 1904. He says that he only looked at it for about five minutes and then talked of other things. Mak Wan Hing said that five copies of the balance-sheet were to be prepared for the five branches of the family to have if they wanted, and the plaintiff alleges that he told Mak Wan Hing to get the defendant to sign them, a circumstance which would be quite unnecessary if the accounts were really in dispute. He subsequently received copies of the accounts, but these were not signed and not retained by him. The information as to his position with regard to the firm was, however, clearly before him, and whether they ought to be regarded as settled or not, it is now too late to challenge accounts which at that time he would have been entitled to investigate. Their Lordships agree with the judgment of the President of the Supreme Court that there is no sufficient acknowledgment of the plaintiff's continuing right to accounts to be found in the letters of the 22nd December, 1910, and the 23rd May, 1913.

Their Lordships have dealt with these matters in detail, and particularly the circumstances surrounding the Yung Chung Tong property, since it is clear that that fact is the central pivot upon which the judgment of the learned Judge who tried the case entirely depends. It is upon the assumption that the dealings with this property showed that the partnership

was still on foot, that the learned Judge was ready to disbelieve the verbal evidence of the defendant, verbal evidence which taken alone, in his opinion, would outweigh that of the plaintiff, and also to regard the defendant as being a party to the improper insertion in the various books and accounts of a statement which occurs in three places to the effect that the plaintiff had retired in 1902. Even assuming, however, such to be the case, serious as the charge would be against the defendant, and gravely as it would affect the weight of his evidence and that of his witnesses who were parties to the transaction, their Lordships cannot place upon it sufficient reliance to overthrow the weight of the case built up against the plaintiff by the statements under his own hand made at a critical moment, and his long and silent acquiescence in a position, which, if his case were true, would amount to a denial of his rights.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

HO CHIU LAM *alias* **HO YIU TONG**

v.

HO SAN LAM *alias* **HO NGOK LAU.**

DELIVERED BY
THE LORD CHANCELLOR.

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