

Cheang Kok Sang - - - - - *Appellant*

v.

Lam Kin Sang and others - - - - - *Respondents*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT
OF PENANG)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 19TH FEBRUARY, 1931.

Present at the Hearing :

LORD BLANESBURGH.

LORD RUSSELL OF KILLOWEN.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

The questions raised for decision by this appeal are two in number, viz. :—

(1) Whether on the true construction of the will of Cheang Keng Quee (hereinafter referred to as the testator), and in the events which have happened, he died intestate as to eight-eighths of the corpus of his residuary estate, and

(2) Whether the respondent Lam Kin Sang is estopped on the footing of *res judicata* from alleging that the testator died so intestate.

By reason of the opinion which their Lordships have formed in relation to the first question, it has become unnecessary to decide or consider the second.

The testator died on the 13th December, 1901, possessed of considerable property, having executed a will which bears date the 17th July, 1894, and which was duly proved in the Straits Settlements.

By clause 1, he appointed executors and trustees.

By clause 4 he defined the word "sons" as including nine named sons, one named adopted son and also such other sons as might be born to him by either of his wives Lim Ah Chen and Tan Gek Im, or by any concubine who then was or thereafter might be living with him.

For brevity's sake the nine named sons may be referred to as Yin, Git, Peng, Cheong, Seong, Hin, Fong, Kam, and Gan : and the named adopted son may be referred to as Yong.

By clause 5 he bequeathed certain annuities and by clause 6 he made certain specific bequests.

By clause 7 he devised and bequeathed all his real and personal estate not thereby otherwise disposed of unto his trustees upon trust, out of ready money or income to pay his funeral and testamentary expenses, debts and legacies and to invest the surplus, if any, as therein mentioned, and "to stand possessed of my said real and personal estate so devised to them as aforesaid, and of the said surplus money and the investment thereof (hereinafter called the trust property) in trust to divide the income thereof into twenty equal shares and to stand possessed of such shares in trust as follows namely . . ." Eighteen of the twenty shares are then allotted for the following people for their respective lives :—

- 2 shares for the wife Lim Ah Chen.
- 2 shares for the wife Tan Gek Im.
- 2 shares for the son Yin.
- 2 shares for the son Git.
- 2 shares for the son Peng.
- 2 shares for the son Cheong.
- 2 shares for the son Seong.
- 1 share for the son Yong.
- 1 share for the son Hin.
- 1 share for the son Fong.
- 1 share for the son Kam.

The testator then provided that the two remaining shares should be held in trust "for the purposes hereinafter mentioned."

It will be observed that Clause 7 only declares trusts of the income of the trust property, and does not contain the name of the testator's son Gan.

By clause 8 the testator directed that if a son of his died in the testator's lifetime leaving a son or sons who should survive the testator, such son or sons should take the share of income to which his or their parent would have been entitled. He further directed that if any son of his so dying should leave a widow but no son, and such widow during the testator's lifetime or within six months after the testator's death adopted one of the testator's grandsons as the son of the deceased son, the last direction should apply to such adopted son. He further directed that if any son so dying should have married, but should leave no widow or son, the trustee should adopt one of his grandsons in the name of such deceased son, and that the said direction should apply to such adopted grandson.

Clause 8 concludes in the following words:—

“ And I further direct that the share of income hereinbefore given to any son shall if he shall predecease me without having married fall into and form part of the income of the said Trust Fund and be distributed accordingly the number of shares into which the said income and the said Trust Fund itself (when ultimately distributed) is to be divided being proportionately reduced.”

Clause 9 provides that after the death of each of the said wives her share of income should be held in trust for her child or children by the testator in like manner as if the same had been bequeathed by the will in trust for such child or children as in Clause 7 thereof.

Clause 10 made the following provision:—

“ After the death of each of my said sons who shall survive me and attain 21 or marry under that age I direct that the share of income given to him for his life shall be held in trust for his son or sons (and if more than one in equal shares) in like manner as if the same had been bequeathed in trust for such son or sons as in clause 7 hereof. And I further direct that in the case of any of my said sons dying leaving a widow but no son or dying after having attained 21 without having married the same provisions as are contained in clause 8 hereof as to the adoption of a son in the name of a deceased son dying in my lifetime shall apply, and such adopted son shall be treated in all respects as an actual son of such deceased son.”

It may be at once stated that no adoption as contemplated by Clauses 8 and 10 was ever made. So far, no disposition of corpus has been made by the testator. The trusts relating to corpus are contained in Clause 11 which runs thus:—

“ On the death of the survivor of all my said sons the said trust property shall be held by my said Trustees in trust for all the sons of my said sons (including adopted sons as above provided) who shall attain the age of 21 years or marry under the age the said son or sons of each of my said sons taking (and if more than one equally between them) per stirpes and not per capita a share proportionate to the share of the income of the said trust property to which his or their parent (or adopted parent) may have been entitled during his lifetime under this my will but the said Trust Fund shall not be distributed or any share thereof paid out to the persons entitled until the youngest of the said grandsons (or adopted grandson) shall have attained 21 or married under that age.”

By Clause 12 the testator declared the trusts of the two shares of the income of the trust property which by Clause 7 he had directed to be held “ for the purposes hereinafter mentioned.” The trusts consisted of the performance of certain yearly ceremonies, the provision of certain amounts for marriage expenses of sons and daughters, and benefits for the testator’s son Gan, who, however, died in the lifetime of the testator.

Before considering the question of intestacy it is necessary to state the events which have happened, in order to make clear the rival contentions.

Two of the testator’s sons, viz., Hin and Fong, died before the testator, without ever having been married. By virtue of the last sentence in clause 8 of the will, the number of shares into

which the income were divisible under Clause 7 became eighteen instead of twenty. The testator's wife, Tan Gek Im, died in the year 1905. Her only child was the testator's son Seong. By virtue of Clause 9, his share of income was increased by the addition of his mother's two-eighteenths to his own original two-eighteenths. He died in 1907 without leaving any son.

By an order of the said Court of Appeal dated the 9th April, 1914, it was declared that, subject to the trustees retaining specified sums under clause 12, there was an intestacy with regard to the income of the two shares referred to in that clause, and it was further declared that the gift of the two shares of income to the said Tan Gek Im during her life and to her children after her death under Clauses 7 and 9 and also the gift of two shares of income to the said Seong during his life under Clause 7 had already failed and that the said four shares of income passed on the death of the said Seong to the testator's next of kin.

In 1920 the testator's son, Cheong, died without leaving a son. There was accordingly an intestacy in regard to his two shares of income.

The testator's said wife Lim Ah Chen is still living. The testator's sons Yin, Git, and Yong are dead, but sons of their's are alive. His sons Peng and Kam are alive. Peng has sons alive, Kam has no son.

In these circumstances the present action was commenced by writ, by Lam Kin Sang, who is the legal personal representative of two of the testator's next of kin.

The defendant Cheang Kok Sang (the appellant here) was appointed to represent the class of sons of sons referred to in Clause 11 of the will. The other defendants are the trustees of the will.

The relief sought by the statement of claim was payment of the plaintiff's proportion of eight eighteenths of the testator's residuary estate upon the footing that the testator had died intestate in respect of the corpus which had produced the eight-eighteenths' share of income as to which he had died intestate as aforesaid.

Whether this claim is well founded or ill founded depends entirely upon the true construction of Clause 11 of the said will, which is the only clause purporting to dispose of corpus.

The action was tried by Stevens J., who dismissed the action. Upon construction he held that there was no intestacy. He construed Clause 11 as containing a clear gift of the whole corpus to the sons of specified sons of the testator, who attained the age of 21 years or married. This, he held, was not cut down by the subsequent words, which he thought merely denoted the proportions in which the beneficiaries were to take the whole corpus *inter se*.

The Court of Appeal took a different view. The order, as drawn up, of the Court of Appeal, declared that on the deaths of Seong and Cheong, "the bequest of corpus of four shares and

two shares respectively lapsed, and similarly, two shares of corpus corresponding to two shares of income held to have failed by the Court of Appeal under order dated the 9th day of August, 1914, also failed and passed to the next of kin of the testator." The reference is presumably to the said order of the 9th April, 1914.

Their Lordships find it difficult to follow the basis of the decision of the Court of Appeal. It seems to have depended upon the question whether the trust in favour of "all the sons of my said sons . . . who shall attain the age of 21 years or marry under the age" was or was not, within the authorities, truly a gift to a class.

This appears to their Lordships, as indeed it appeared to counsel on both sides who argued the case before them, to be of little moment.

The only relevant question seems to be whether by Clause 11 (upon its true interpretation) the testator intended to give to the designated grandsons the entirety of his estate in certain shares and proportions; or whether he intended only to give to each stirpital group of grandsons, the share of corpus which produced the income which had been enjoyed by the father of the group.

Their Lordships feel no doubt as to the correct answer. The trust is a trust of "the said trust property" in favour of the designated grandsons, and is clear and unambiguous. The beneficiaries to take are free from doubt: the subject matter of the trust is the whole residuary estate. It is sought to cut down the subject matter of the trust by means of the subsequent words. These words, however, only relate to the manner in which the trust estate is to be divided among the beneficiaries: and as their Lordships read them, their natural meaning is that the groups are, *inter se*, to share the entire corpus in the same proportions as the parents of the groups shared, *inter se*, the income.

Thus, if the only designated grandsons to attain the age of 21 years or marry are sons of Yin, Git, Peng and Yong, the position would be this:—

These sons of the testator having enjoyed income to the extent of two-eighteenths, two-eighteenths, two-eighteenths and one-eighteenth respectively, the corpus would be held upon trust as to two-sevenths for the sons of Yin in equal shares, as to two-sevenths for the sons of Git in equal shares, as to two-sevenths for the sons of Peng in equal shares and one-seventh for the sons of Yong in equal shares.

It was argued that the words following the trust for the designated grandsons, showed that the testator intended that the fraction of corpus taken by a group should only be the same fraction of the whole corpus, as the fraction of income taken by the father of the group was of the whole income. Reliance in support of this view was placed on the last sentence of clause 8, which has been set out above. The reference in that sentence to corpus seems misconceived: it does not fit in with the form of gift under

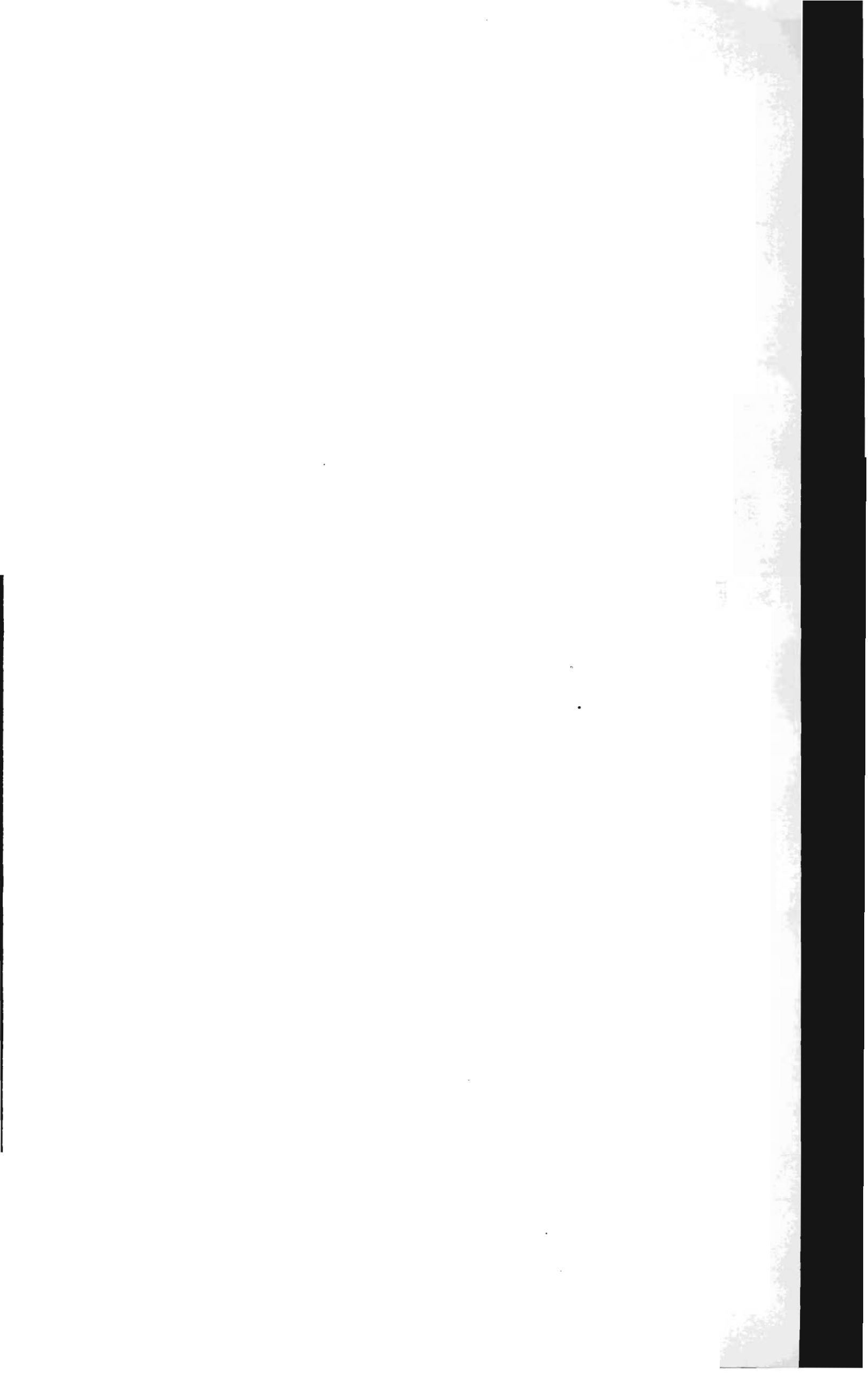
clause 11: but from any point of view it indicates that the testator intended the whole of "the said Trust Fund" to be divided under clause 11.

Putting the case for the respondents at its highest, and assuming that the later words of clause 11 might admit of the construction for which they contend, they certainly admit equally of the construction indicated above. Of the two possible constructions, that one should be adopted which alone is consistent with the original words of gift, under which the entirety of the estate is to be held in trust for all the designated grandsons.

Their Lordships agree with the construction of clause 11 which was adopted by Stevens J. and are of opinion that in dismissing the action, he adopted the right course.

In their Lordships' opinion this appeal should succeed, the order of the Appeal Court should be discharged, and the order of Stevens J. restored. Their Lordships will humbly advise His Majesty accordingly.

The respondent Lam Kin Sang must pay the costs of all parties of the appeals in the Court of Appeal and here.



In the Privy Council.

CHEANG KOK SANG

v.

LAM KIN SANG AND OTHERS.

DELIVERED BY LORD RUSSELL OF KILLOWEN.

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