

31/1962

IN THE PRIVY COUNCIL

No. 64 of 1960

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION
OF MALAYA

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
30 MAR 1963
25 RUSSELL SQUARE
LONDON, W.C.1.

5

B E T W E E N

CHUA CHEE CHOR (Defendant)

Appellant

68264

- and -

- 1. CHUA KIM YONG Administrator of the estate of Chua Ah Chee alias Chua Kee Peng deceased
- 10 2. KWONG KEH SAN (f) the Administratrix of the estate of Chua Kee Law deceased
- 3. CHUA KIM SWEE
- 4. CHUA KIM YONG
- 5. CHUA KIM HOON (Plaintiffs) Respondents

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CASE FOR THE APPELLANT

1. This is an appeal from a Judgment of the Court of Appeal at Kuala Lumpur in the Supreme Court of the Federation of Malaya given on the 26th May, 1959, 30th July, 1959 and 30th August, 1959 whereby by order dated the 22nd August, 1959 it was ordered

20 pp.114, 120 & 125 p.133

(1) that the declaration granted by Neal J. that the business of Chop Chua Ban Seng was part of the estate of Chua Ah Chee alias Chua Kee Peng deceased, (hereinafter referred to as "the Deceased") should be upheld.

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(2) that there should be an inquiry as to the composition and value of the assets of the business of Chop Chua Ban Seng at the date of the death of the deceased, that is at the 15th February, 1942.

30 pp.133/4

	(3)	that the Appellant should pay to the Administrator of the estate of the deceased the amount arrived at on such inquiry with interest at the rate of 6% per annum.	
p.134	(4)	that the Appellant should transfer to the said Administrator all the shares held by the Appellant in the Trengganu Bus Company Limited and the dividends received by the Appellant from the aforementioned shares since the formation of the said Company, and	5 10
	(5)	that there should be no order as to the costs of the appeal but that the Appellant should pay to the Respondents the costs in the court below.	
p.96	2.	The order of the Court of Appeal in part varied the order made by Neal J. in the High Court at Trengganu, which order was made after a hearing on 11 days between 31st October, 1953 and 15th December, 1955 before Abdul Hamid J. The latter Judge was obliged to retire on medical grounds after the completion of the evidence but before he had delivered judgment, and by the oral consent of Counsel for both parties Neal J. on 2nd June 1958 heard legal argument and on 3rd June 1958 delivered judgment on the notes of evidence taken by Abdul Hamid J.	15 20 25
p.82 1.32 p.84	3.	The question in issue was whether certain assets in the possession of the Appellant formed part of the estate of the deceased or were the Appellant's personal property. The assets originally claimed were more extensive than those the subject of this appeal but the Respondents' claims to other assets were rejected in part by Neal J. and in part by the Court of Appeal at Kuala Lumpur and are not now in issue. The assets presently ordered to be handed over are composed of :-	30 35
p.3	(a)	the value as at the death of the deceased of the business of a bicycle dealer and repairer known as Chop Chua Ban Seng including the stock thereof, carried on at 232 Jalan Kadai Binjai, formerly known as 145 Kedai Binjai, Kuala Trengganu.	40
	(b)	all the shares held by the Appellant in the Trengganu Bus Company Limited and the dividends received by him since the	45

formation of the Company.

4. The Trengganu Bus Company Limited was
apparently incorporated in or about 1946 and 70
5 there having previously been a similar number of
shares in the firm called the Trengganu Bus Company
which were registered in the name of the bicycle
10 business, Chop Chua Ban Seng. Subsequently the
Appellant had 51 shares, was merged into the
15 Trengganu Bus Company Limited apparently providing
the Appellant with a similar number of shares. At
a later date the shareholders were called upon to
subscribe for an equal number of shares to those
already held by them and the Appellant paid for and
was allotted a further 121 shares of \$100.00 each,
making 242 in all. Later the Appellant transferred
162 shares to the person who lent him the money to
pay for the shares he was called upon to take.

5. Neal J. held that there was no evidence as to
show whose money was used to buy the Union Bus
Company shares and that the only evidence was that
they were at all relevant times in the name of the
Appellant. But he felt constrained to order that
25 those and other items claimed by the Respondents
should be transferred to the Respondents because of
the view he took that the effect of their being
included in the schedule to the Letters of
Administration of the deceased's estate was to
30 decide as a matter of law that they were the
property of the deceased. This contention was
rejected by the Court of Appeal at Kuala Lumpur by
all three Judges and need not now be further
35 considered, and it is presumed (though it is not
clear in the order) that the Appellant's shares
which derived from the Union Bus Company are to be
excluded.

6. The judgments in the Court of Appeal were all
40 based on the Court's assessment of the notes of
evidence of Abdul Hamid J. and the "reconstructed"
exhibits.

Thomson C.J. held on the facts that the
business of Chop Chua Ban Seng belonged to the
45 deceased, as did those of the shares in the
Trengganu Bus Company Limited which came into
existence in substitution for the shares in the
original incorporated Trengganu Bus Company.

p.158

p.48 1.27

p.48 1.30

p.60 11.33-38

p.93 1.11

p.93 1.19

p.86 1.48
- p.90 1.51

p.117 1.1)
- p.118 1.3)
p.120 1.30)
- p.124 1.10)
p.128 11.4-8

p.85
11.18-48

p.118)
11.17-41)
p.118 1.43)
- p.119 1.2)

p.124
11.15-38 Smith J. held that he would have held that the said business was started by the Appellant with a very great deal of help from the deceased and that during his lifetime the father was in effect the principal partner, and that he intended the Appellant to have the business on his death, but that it was necessary for him to decide whether the business belonged exclusively to the Appellant or the deceased, and in such a case the probabilities were in favour of the deceased. 5

p.124 1.33 Ong. J. held on the facts that every asset of which the Appellant stood possessed was property of which he was the sole beneficial owner, and that the Respondents had failed to discharge the onus of proof which rested on them under section 110 of the Evidence of Ordinance. In this event he would have allowed the appeal. 10

pp.125-132

p.128
11.23-27 15

7. Section 110 of the Evidence Ordinance provides :-

"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." 20

8. In the circumstances of this case it is submitted that the principle of refusing to go behind concurrent findings of fact would not obtain since no judge who gave judgment had had the advantage of seeing and hearing the witnesses. 25

pp.10-71 9. It is submitted that in view of the fact that the action so far has been tried on (1) the notes of evidence taken by Abdul Hamid J. which, though apparently fairly extensive, do not pretend to be the equivalent of depositions, and (ii) copies supplied by counsel of the original exhibits which have apparently been lost, (a) that it was not competent for the parties to consent to the course adopted of a fresh judge delivering judgment based on another judge's notes, or (b) that if it was competent for them so to agree then in the circumstances Neal J. should never have taken upon himself to decide between conflicting oral testimony on the notes of another judge of what various witnesses had given in evidence. 30
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10. On the question of competence, section 75 of the Civil Procedure Code, Trengganu, provides as 45

follows :

5 "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
10 before another Judge or Magistrate.

15 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."

20 11. It is submitted that for evidence to be
"recorded" in accordance with the said section 75
something more formal than the mere taking of notes
by the trial judge is presupposed.

12. If in the circumstances it was proper or
permissible for the case at first instance to be
continued before Neal J. then he misdirected
himself :-

25 (a) in holding that there were a number of
independent witnesses who gave evidence on
behalf of the Plaintiffs that the deceased
was the owner of the business. He
30 particularised these as being the Plaintiffs'
witnesses Nos. 7, 11, 12, and 14. p.91 1.19

35 Witness No. 7 makes the categorical
statement that Chua Ah Chee was then
proprietor of the business but without any
material which on examination supports this
statement; and he admits that he was a
signatory of the power of attorney which was
executed by the Defendant, this witness and
others which recited that the signatories
were the ex-partners of the Trengganu Bus
40 Company. p.38 1.13

Witness No.11 admitted he had never been
to the business and was clearly unreliable
for reasons explained by Ong J. in the Court
of Appeal. p.43
p.130 1.20

p.44	Witness No.12 was a nephew of the deceased and on close terms with the Plaintiffs, and	
p.45 1.17	hardly to be described as independent.	
p.50	And witness No.14 was a grandson of the deceased.	5
p.91 1.24	(b) In holding that the fact that the Defendant settled an action by the son of his deceased brother (Ah Poi) claiming that the deceased brother was a partner with the Defendant was irreconcilable with the Defendant's contention that he was the sole proprietor of the business and therefrom drawing the (it is submitted quite unjustifiable) deduction that this showed that the business must have been that of the deceased.	10
p.91 1.36		15
p.60 1.41	(c) in drawing the deduction in (b) above without resolving the conflict of evidence as to the reasons why the said action was settled - the Defendant claiming that he did so as a result of family pressure to settle a claim by a sick orphaned relative.	20
p.92 1.40	(d) in holding contrary to the weight of the evidence that the evidence of the Plaintiffs' witnesses Nos. 9, 10, and 13 established that the shares in the Trengganu Bus Company were until the Japanese occupation in the name of the son Chua Kee Iaw and then transferred into the name of the Defendant for the reasons given by witness No. 13.	25
	13. Turning to the reasons given by the Court of Appeal at Kuala Lumpur,	30
p.118 1.17	Thomson C.J.'s only reasons for his decision on the facts appear to be :-	
p.118 1.23	(i) that the written evidence showed that the business and assets were those of the deceased.	35
	(ii) that it was incredible that the deceased had been unable to set up any business of his own while one of his sons (and this was the Defendant's case) had been able to set up on his own at the age of 16.	40
p.124 1.11	Smith J's decision recited that he had read the judgment of the Chief Justice and agreed with his findings of fact although these were (as above set	

5 out) very tenuous, but that he would (if he could) have held that the probabilities were that the business was started by the Defendant with a very great deal of help by the deceased, his father, who intended that on his death the Defendant should have the business.

10 Ong. J. was the only judge to review the evidence in any detail and while agreeing with their conclusions of law he held that the Plaintiffs had failed to discharge the burden of proof, which rested upon them under Section 110 of the Evidence Ordinance, of proving that the Defendant was not in fact the owner of the two assets of which he had been in undisputed possession for at least seven years before the commencement of the action, if not since a much earlier date. 15

pp.125-132
p.128 l.4
p.132

The Appellant would respectfully adopt this learned Judge's reasoning without burdening the record by repeating it here.

20 14. The Appellant would also rely upon the reasons submitted before Neal J. by his counsel, which are not very accurately described in the Record as "Notes of Evidence before Hamid J." In particular reference is made to the allegation of acquiescence by the Plaintiffs as 25 instanced by the evidence of the first Plaintiff that he took the Plaint in the civil proceedings in 1952 (which he knew all about) to solicitors for the Defendant, who was then recovering from illness, and the First Plaintiff explained to 30 them everything they wanted to know to enable them to settle the Statement of Defence on behalf of the Defendant. The First Plaintiff also acted as witness to the deed of transfer of shares in the Trengganu Bus Company Ltd. to the Defendant in which the payment by the latter of \$450 was recited. 35

pp.75-82
p.78 l.6
p.17 ll.41-44
p.17 l.31
p.17 l.43)
& p.174)
p.23 l.1
p.162

40 15. The Appellant submits that the majority decision of the Court of Appeal should be reversed and judgment given for the Defendant on the claims that the estate of Chua Ah Chee deceased included the business of Chop Chua Ban Seng and the shares held by the Appellant in the Trengganu Bus Company Limited, with the discharge of the ancillary orders as set out in paragraph 1 hereof for the 45 following (amongst other)

R E A S O N S

(1) That on a true analysis of the evidence (the principle of not going behind concurrent findings of fact not being applicable to this case) the Appellant was entitled to judgment in his favour.

(2) That, even if there were doubt as to the correct facts to be found, judgment should have been entered for the Appellant because of 5

(a) the burden of proof stipulated by Section 110 of the Evidence Ordinance;

(b) the Plaintiffs' acquiescence in the Appellant's assumption of the ownership of the business; 10

(c) the Plaintiffs' delay in bringing these proceedings.

ALTERNATIVELY the Appellant submits that this case should be remitted to the High Court at Trengganu for a re-hearing before another judge, who should both hear the evidence and deliver judgment, for the following (amongst other) 15

R E A S O N S 20

(1) That it was not competent for the parties to consent to judgment being delivered by one judge based on the notes of evidence taken by another judge.

(2) That (if competent) in a case where the credibility of witnesses was of paramount importance such a course is so contrary to the principles of justice that it should never have been adopted by the Court even when the parties purported to consent to it. 25 30

FRANK WHITWORTH