Privy Council Appeals Nos. 82 & 137 of 1936

George Hagan and others - - - - - - - *Appellants*

v.

Effuah Adum and others - - - - - - - *Respondents*

George Hagan and others - - - - - - - *Appellants*

v.

Arabah Tanuah - - - - - - - - - *Respondent*

(*Consolidated Appeals*)

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH JULY, 1939

Present at the Hearing:

LORD THANKERTON

LORD ALNESS

LORD FAIRFIELD

[*Delivered by* LORD THANKERTON]

These are two appeals, consolidated by order of the Board, against two judgments of the West African Court of Appeal, dated respectively the 19th and the 21st December, 1935, in two suits relating to the estate of the late Thomas Hagan, a native, who died at Winneba in the Central Province of the Gold Coast Colony on the 9th July, 1931.

The appellants are the brothers and sister of the deceased, and they were granted letters of administration of his personal estate by the Divisional Court of the said Province on the 22nd February, 1932. The respondents Effuah Adum and her children claim to be interested in the estate, both real and personal, as the domestic "slave-wife" and children of the deceased. The respondent Araba Tanuah claims to be interested in the estate as the head of the family of the deceased. It is common ground that the succession to the estate falls to be determined according to the native customary law.

The first suit, which may be referred to as suit A, was initiated by the issue of a summons in the Native Tribunal of Winneba on the 21st November, 1933, by the respondent Adum, on behalf of herself and her children, calling on the present appellants to declare the value of the estate of the deceased, and to show cause why her share, and that of her children, in the estate should not be designated.

On the 28th November, 1933, the appellants applied to the Court of the Provincial Commissioner of the Central Province for the transfer of the above suit to the Divisional Court on the ground that the Native Tribunal had no jurisdiction to try it, and the Native Tribunal thereupon suspended the hearing of the suit. On the 2nd February, 1934, the Court of the Provincial Commissioner dismissed the application, finding as a fact that the deceased had lived and died at Winneba, and holding that the Native Tribunal had jurisdiction. The appellants appealed therefrom to the Divisional Court of the Province, but they withdrew the appeal by leave of the Court on the 27th October, 1934, with a view to reaching an amicable settlement.

On the 21st December, 1934, hearing notices in suit A were issued, and on the 3rd January, 1935, the Tribunal granted an *ex parte* motion by the respondent Araba, as head of the family of the deceased, to be joined as co-plaintiff in the suit.

On the 8th January, 1935, the hearing before the Native Tribunal, which had been suspended, was resumed. The appellants again objected to the jurisdiction of the Tribunal, but this objection was over-ruled by the Tribunal, in view of the decision of the Provincial Commissioner's Court on the motion for transfer. The appellants thereafter refused to cross-examine or give any statement before the Tribunal, and, after hearing evidence, the Native Tribunal held that the value of the personal estate had been proved to be about £15,000, and gave judgment in favour of the respondent Adum and her children for one-fourth of the £15,000, which was £3,750, plus one-fourth of the immoveable properties, and the remaining three-fourths of the amount of the personal estate and the immoveable properties were to be under the control of the respondent Araba Tanuah, the head of the deceased Thomas Hagan's family.

The appellants appealed to the Court of the Provincial Commissioner, but, at the hearing of the appeal on the 12th July, 1935, the Court sustained an objection by the respondents that the appeal was not competent in that Court, and dismissed the appeal. On an appeal, this decision was affirmed by the West African Court of Appeal on the 19th December, 1935. This judgment is the first of the two judgments against which this appeal is taken.

Turning now to the second suit, which may be called suit B, the writ of summons was issued in the Divisional Court of the Central Province on the 6th February, 1935, by the respondent Araba Tanuah against the appellants, claiming as head of the family for herself and on behalf of other members of the family, of which she stated the appellants were members, that account should be taken of all the personal estate of the deceased, which had come into the possession of and under the control of the appellants prior to and since the grant of letters of administration by the Court to the appellants, and for an administration order to be made in regard to the estate. By judgment dated the 25th

March, 1935, the Divisional Court (Strother-Stewart J.) gave judgment for the present appellants. The learned Judge was satisfied that the respondent Araba Tanuah was head of the family, to which the appellants belong, but he held that she had not established such an interest as would entitle her to call the appellants to account, as it had not been proved that she or the members of the family, other than the appellants, were entitled to any portion of it. The learned Judge disregarded the decision of the Native Tribunal in suit A, although it had been submitted to him that that judgment constituted *res judicata*. On an appeal by the respondent Araba Tanuah, the West African Court of Appeal on the 21st December, 1935, set aside the judgment of the Divisional Court, and granted the respondent the relief claimed by her. This judgment is the second judgment here appealed against. The Court of Appeal agreed with the finding of the Divisional Court that the said respondent was head of the family, but they held that the question whether the property was self-acquired or whether the respondent had any interest in it was decided by the Native Tribunal in the respondent's favour and was binding.

In the first place, an attempt by the appellants to found on an alleged arbitration award, prior in date to the decision of the Native Tribunal, may be disposed of. It is perhaps enough to say that the contention that there was a binding award, which precluded the respondent Adum from suing on anything but the award, appeared for the first time in the body of the appellants' case in this appeal, but it does not appear among the reasons of appeal. Further, although some of the arbitrators gave evidence as to it at the hearing before the Native Tribunal, its date is not proved, and the evidence was quite insufficient to prove that the award was accepted as final and binding by the parties. It is not surprising, therefore, to find the present appellants' pleader, at the hearing before the the Divisional Court on the 20th February, 1935, maintaining that the arbitration did not eventuate into an award. Their Lordships, in these circumstances, are not prepared to entertain, at this late stage, such a contention, as they are not satisfied that the evidence establishes beyond doubt that the facts, if fully investigated would have supported the new plea. *Connecticut Fire Insurance Company* v. *Kavanagh*, [1892] A.C. 473, at p. 480.

The appellants' main contentions challenge the jurisdiction of the Native Tribunal over the subject matter of suit A. It will be noted that suit A relates to the whole estate of the deceased, both real and personal, while suit B relates only to the personal estate, but the judgment against the appellants in suit B assumes the validity of the judgment of the Native Tribunal. The jurisdiction of a Paramount Chief's Tribunal at the material date, was conferred by section 43 of the Native Administration Ordinance, cap. 111, 1928, which provided as follows:—

> 43.—(1) A Paramount Chief's Tribunal shall have and may exercise within the State of such Paramount Chief civil jurisdiction for the hearing and determination of the causes and matters hereinafter mentioned in which all parties are natives and the defendant

was at the time when the cause of action arose within such State, or in which any party not being a native consents in writing to his case being tried by such Paramount Chief's Tribunal.

Provided always that a Paramount Chief's Tribunal shall not, unless the parties shall agree thereto, have any jurisdiction in any cause or matter where it appears either from express contract or from the nature of the transactions out of which such cause or matter shall have arisen that the parties expressly or by implication agreed that their obligations in connection with such transactions should be regulated substantially according to the provisions of some law or laws other than native customary law, or where otherwise some other such law or laws as aforesaid is or are properly applicable thereto.

(2) The causes and matters hereinabove in this section referred to are the following:—

(*a*) Suits to establish the paternity of children, other than suits in which some question affecting rights arising out of any Christian marriage is or may be involved;

(*b*) Suits relating to the custody of children, other than suits in which some question affecting rights arising out of any Christian marriage is or may be involved;

(*c*) Suits relating to the ownership, possession, or occupation, of lands situated within the State of such Paramount Chief;

(*d*) Suits for divorce and other matrimonial causes between natives married under native customary law;

(*e*) Personal suits in which the debt, damage, or demand does not exceed one hundred pounds;

(*f*) Suits and matters relating to the succession to the property of any deceased native who had at the time of his death a fixed place of abode within the State; and

(*g*) Any other causes and matters by this ordinance expressly assigned to a Paramount Chief's Tribunal or to a Divisional Chief's Tribunal.

In the first place, the appellants maintained that it had not been established that the appellants were "at the time when the cause of action arose within such State". But this question of fact was decided against the appellants on their motion for transfer of suit A by the judgment of the Provincial Commissioner's Court dated the 2nd February, 1934, the appeal against which was withdrawn by the appellants, and their Lordships are not prepared to entertain this contention now.

In the second place, the appellants submitted that the letters of administration having been granted by the Divisional Court of the Province, suit A should have been instituted in that Court, which, if it had so desired, could have referred any question relating to native customary law to a Native Tribunal under section 59 (1) of the Ordinance. They further suggested that, by her part in suggesting that the appellants should be the parties to apply for the letters of administration, the respondent Araba Tanuah had elected to proceed in that Court; and, lastly, that a writ to have the estate valued and a share declared was not within the head (*f*) of section 43 (2). These points really all turn on the proper construction of head (*f*). Counsel for the appellants submitted that this head only included suits as to the right to succeed, and did not include such matters as valuation of

the estate, a declaration as to the amount of the share to which a successor was entitled, or the distribution of the estate. Their Lordships see no reason for such a narrow construction of the words "suits and matters relating to the succession to the property", as, in their opinion, distribution of the estate naturally comes within the meaning of these words, and valuation of the estate is necessarily incidental to ascertainment of the shares for the purpose of distribution. They agree with the view expressed by both the Courts in suit A that that suit is a suit relating to the succession to the property of the deceased within the meaning of head (*f*) of section 43 (2). If this be so, there can be no reason why letters of administration should not be obtained in one court, and proceedings relating to the distribution of the estate should be dealt with by another court. There can be no reason for rendering nugatory the jurisdiction conferred by head (*f*), and none of the Courts below have felt any practical difficulty in the matter. Accordingly the application for letters of administration in the Divisional Court cannot preclude any party from instituting proceedings relative to distribution before the Native Tribunal.

The appellants maintained, thirdly, that suit A was a personal suit for more than £100, and that the jurisdiction of the Native Tribunal was excluded by the terms of head (*e*) of section 43 (2), and, fourthly, it being admitted that two houses which formed part of the succession were not situated within the State, that jurisdiction was excluded by the terms of head (*c*) of section 43 (2). Both these contentions are based on a construction of section 43 (2) which their Lordships do not accept. In their opinion, while each of the heads (*a*) to (*g*) is subject to the provisions of sub-section (1) of section 43, each head in sub-section (2) affords a self-contained subject of jurisdiction, which is independent of the other heads, and it is illegitimate to import the qualifications or conditions expressed in one of the heads into any of the other heads. From this it follows that as suit A falls within head (*f*) and satisfies the provisions of sub-section (1), heads (*c*) and (*e*) of sub-section (2) are irrelevant on the question of jurisdiction. Both Courts below took the same view.

Their Lordships are therefore of opinion that the Native Tribunal had jurisdiction to deal with suit A.

Lastly, the appellants sought to have the judgment of the Native Tribunal reviewed on the merits by this Board, but their Lordships agree with the West African Court of Appeal that the judgment of the Native Tribunal is now final and binding on the appellants. That judgment was given on the 8th January, 1935, and the appellants appealed to the Court of the Provincial Commissioner, leave to appeal being granted on the 4th May, 1935. That appeal was dismissed on the ground that suit A was a suit relating to the succession of property, in regard to which the only right of appeal lay to the Court of the District Commissioner under section 74 of the Ordinance, and was not a suit or matter relating to the ownership, possession or occupation of any

lands, an appeal in which would lie to the Court of the Provincial Commissioner under section 75 of the Ordinance. As already pointed out, this judgment, the reasons for which are in conformity with the views expressed by their Lordships, is final and binding on the appellants. Under section 76 of the Ordinance, no appeal lies under section 74 unless notice of appeal is given within four months from the date of a decision by a Paramount Chief's Tribunal. The appellants did not give notice of an appeal under section 74 within the period so prescribed, and the fact that under section 29 of the Commissioners Ordinance, cap. 23, 1928, every Provincial Commissioner is *ex officio* a District Commissioner cannot avail to remedy this omission on the part of the appellants. The judgment of the Native Tribunal is therefore final and binding on the appellants, and it follows that the Court of Appeal were right in setting aside the judgment of the Divisional Court in suit B, and in holding that the respondent Araba Tanuah had sufficient interest to entitle her to an accounting by the appellants, and in granting her the relief claimed by her.

The appeal, accordingly, fails as regards both suits, and their Lordships will humbly advise His Majesty that the appeal should be dismissed and that the judgments appealed against should be affirmed. The appellants will pay to the respondents their costs in the appeal.

(18472—3A) Wt. 8075—41 110 7/39 P. St. G. 338

In the Privy Council

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v.

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ARABAH TANUAH

Consolidated Appeals

DELIVERED BY LORD THANKERTON

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