

Khaw Joo Jeang - - - - - Appellant

v.

Khaw Joo Chye 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 12TH DECEMBER, 1941

Present at the Hearing:

LORD ATKIN
LORD THANKERTON
LORD ROMER
SIR GEORGE RANKIN
SIR SIDNEY ABRAHAMS

[Delivered by LORD ROMER]

By a settlement dated the 10th April, 1905, certain property, both moveable and immoveable, forming part of the residuary estate of one Khaw Soo Cheang, deceased, was transferred by his then surviving executors to themselves and four other persons as trustees upon trust during the lives of the 16 persons therein named (several of whom are still living) and the life of the survivors and survivor of them and for 21 years after the death of such survivor to collect the rents, profits and other income of the property so conveyed. Out of such income after payment thereof of the cost of necessary improvements and repairs and other outgoings the trustees were to expend the sum of \$4,080 annually for certain purposes therein specified and were then to divide the surplus income into two equal shares. Of these two shares, one was to be held upon certain trusts for the male members of the 6 branches of the family of Khaw Soo Cheang. With the trusts affecting that share the present appeal is not now concerned. But as regards the other of the two shares of surplus income (hereinafter referred to as the "marriage and funeral share") the trustees were to "invest and apply" it and also "the income derived from the investments thereof" in accordance with a declaration in the following words:—

AND it is hereby also declared that upon the marriage of any male or female member of any of the said six branches of the said Khaw Soo Cheang's family however remote who shall bear the surname of "Khaw" the Trustees shall pay out of the Corpus or income of the share of the surplus income hereinbefore directed to be invested the sum of Dollars forty (\$40) as a gift upon the express condition that such member shall on his or her marriage day worship the "Sin Choo" of the said Khaw Soo Cheang in the manner prescribed by the Chinese religion. AND IT IS HEREBY ALSO DECLARED that upon the death of any male or female member or the wife of any member of any of the said six branches of the said Khaw Soo Cheang's family however remote who shall bear the surname Khaw and if such male or female member or such wife so dying shall be in indigent circumstances the trustees or if they shall fail to agree the majority of the Trustees may in their dis-

cretion pay out of the Corpus or income of the share of the surplus income hereinbefore directed to be invested a sum not exceeding dollars five hundred (\$500) for the funeral expenses of such male or female member or wife of such male member.

No trusts were declared by the settlement of the corpus of the property thereby transferred to the trustees.

The settlement has been the subject of considerable litigation between the members of Khaw Soo Cheang's family, in the course of which it has been finally established (1) that the settlement is binding upon the family and cannot now be impeached, (2) that the trust declared of the marriage and funeral share is a good and valid trust, (3) that the provision for the accumulation of the surplus income of that share not required for marriage gifts and funeral expenses was void as from the 7th December, 1927, that being the date of the death of the last surviving settlor, (4) that since that date there was a resulting trust of such surplus income in favour of a number of people of whom the present appellant is one, (5) that subject to the trusts both original and resulting affecting the income thereof there was a resulting trust in favour of the same people of the corpus of the share, and (6) that there was a similar resulting trust of the corpus of the accumulations not required for the purposes of the trust. All these matters except the first were determined in the present action which was begun just over 10 years ago. In that action the first respondent is plaintiff and the remaining respondents and the appellant are defendants.

After the existence of the resulting trusts had been established and the names of the persons entitled under them had been duly certified by the Registrar, the action came on for further consideration on the 9th November, 1935, before Gordon Smith J. (as he then was), when the learned judge directed the making by the Registrar of the Court of three enquiries of which the only one material to be now mentioned was the 3rd, which was as follows:—

(c) An enquiry as to what capital moneys are sufficient to carry out the trusts for payment of marriage and funeral expenses under the said deed of settlement.

Their Lordships are not informed at whose instance this enquiry was directed, but the reasonable supposition is that its object was to lay the foundation for some such application as was made by the summons hereinafter mentioned. But before that summons was issued an affidavit by Khaw Joo Paik (one of the then trustees and respondent No. 2 to the present appeal) was filed in which the deponent affirmed, after giving certain particulars regarding the then members of the six branches of the family of Khaw Soo Cheang, that in the course of the next 20 or 30 years the class of persons entitled to marriage gifts and funeral expenses might amount to 800.

The summons to which reference has just been made is dated the 5th August, 1937, and asked in effect that it should be determined amongst other things whether the trustees might make a distribution of any part of the corpus of the marriage and funeral share or the investments representing the valid accumulations of the income thereof among the persons that had been found to be entitled under the resulting trusts above mentioned. The summons also asked by paragraph 2 thereof as follows:—

(2) if the Court is of opinion that such a distribution is proper, for an order that enquiry No. 3 directed by the judgment herein dated 9th November, 1936, be not proceeded with further . . .

Their Lordships have some difficulty in understanding why such an order as is mentioned in this paragraph should have been asked for. How in the world the Court could order a distribution of the corpus *not* required for carrying out the marriage and funeral trusts without having ascertained how much of it *was* so required is beyond their Lordships' comprehension. It is only fair, however, to state that the summons was not issued at the instance of the present appellant.

On the same day that the summons was issued Khaw Joo Paik made another affidavit in which he stated that "enquiry (c) has not been completed owing to the difficulty of ascertaining with any degree of accuracy the amounts which are likely to be required for marriage gifts and funeral expenses until the settlement comes to an end". He also stated in considerable detail what the trust property then in the hands of the trustees consisted of and what gross income it produced, and then deposed as follow:—

"To arrive at the net income it must be remembered that a large part of the house property is very old and considerable expense in repairs and rebuilding must be anticipated. In the opinion of the trustees at least 50 per cent. should be deducted from the gross income to arrive at the future net income after paying for all assessments, quit rents, repairs and rebuilding. The net income would thus be \$9,600 per annum from which must be deducted the payments to be made . . . of \$4,080 per annum leaving a net total of \$5,520 per annum. Of this one half is available for marriage gifts and funeral expenses. An income of \$2,700 per annum would enable the trustees to provide for 5 funerals and 5 marriage gifts in a year."

In this passage the deponent apparently did not include the income derived from the accumulations.

The summons came on for hearing before Gordon Smith J. on the 29th September, 1937. He declined to authorise the trustees to make any distribution either of the corpus or of the accumulations of the income of the marriage and funeral share. It followed that he made no order on paragraph 2 of the summons.

From this decision the present appellant appealed to the Supreme Court, who affirmed the judgment of the learned Judge and dismissed the appeal. It is from such dismissal that the appellant now appeals to His Majesty in Council.

Both before the Supreme Court and before their Lordships the appellant based his claim to have an immediate distribution of part of the corpus and of the accumulations of income of the marriage and funeral share upon the well established practice of the Court, recognised and applied in the case of *Harbin v. Masterman* [1896] 1 Ch. 351. That practice may be stated thus. Whenever there is a trust to make annual payments out of the income of property and the income is larger than is required for the purpose, the Court will sanction the setting aside and retention of so much of the corpus of the property as will be sufficient by its income to meet the annual payments in every contingency that is reasonably possible, and will permit the distribution of the rest of the corpus among the persons who, subject to the payment of the annual sums, are absolutely entitled to it. But this, of course, can only be done when the total amount of the sums payable out of the income is known, or the maximum amount that can ever be so payable can be ascertained with some degree of certainty. Unfortunately for the appellant that is not the case here. The trust for payment of the marriage and funeral expenses will continue until the death of the survivor of several persons still living and for 21 years thereafter. No one therefore can say with any approach to certainty when the trust will come to an end. Still less is it possible to say, even approximately, how many persons there will be towards the end of the duration of the trust who will be eligible to receive benefits from it. As to this Gordon Smith J. said: "I agree that it is unlikely that either the whole income of the $\frac{1}{2}$ share will ever be required to carry out the terms of the trust or that it will ever become necessary to have recourse to the corpus at any time for such purpose, but it is impossible to say definitely that such will always be the case". (The corpus to which the learned Judge was here referring was, of course, the property in which the accumulations had been invested.) The Supreme Court took the same view. They said that as the amount which might be required in the future for the purposes of

the trust was "indefinite, speculative and entirely unascertainable" the trial Judge was right in refusing to approve the distribution of the corpus.

Their Lordships respectfully agree.

It only remains to mention one other matter. When the case was before the Court of Appeal the appellant complained that the learned Judge below had not ordered that enquiry (c), as directed in his judgment of the 9th November, 1936, should be proceeded with. One very good and sufficient reason for this was that he had not been asked to do so. But in any case, the Court of Appeal pointed out, such an enquiry would now serve no useful purpose, by which their Lordships understand them to have meant that it would serve no useful purpose at the present time. And this is plainly right. It might indeed have been put even more strongly. Not only would it serve no useful purpose, it would be quite impossible at the present for the Registrar to answer it. But the Court of Appeal did not say and did not mean to say that a somewhat similar enquiry might not usefully be embarked upon at a later date. A time must come when the length of the further duration of the trust will be known or when it can be ascertained with some approach to certainty, and when some reliable estimate can be made of the maximum number of the persons capable of receiving the benefits of the trust. An enquiry could then be properly directed to ascertain what part of the corpus of the marriage and funeral share and of the valid accumulations is reasonably required to provide by the income thereof and by the accumulations a security sufficient in all reasonable contingencies for the payment during the further subsistence of the trust of the marriage and funeral expenses. Their Lordships see no reason why, after such enquiry has been answered, the Court should not authorise the trustees to distribute the remainder of such corpus and accumulations among the persons entitled.

But for the reasons already given this appeal should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The costs of the appeal as between solicitor and clients of the 2nd, 3rd, 4th and 5th respondents (who represent the trustees of the settlement and who are the only respondents appearing on the appeal) should be paid or retained by them out of the income of the marriage and funeral share.



In the Privy Council

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DELIVERED BY LORD ROMER

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