Privy Council Appeal No. 40 *of* 1960

Austin Richter Coleman - - - - - - - - *Appellant*

v.

Emma Kwaley Shang alias Emma Kwaley Quartey - - *Respondent*

FROM

THE COURT OF APPEAL, GHANA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH MARCH, 1961

Present at the Hearing

LORD TUCKER
LORD HODSON
MR. L. M. D. DE SILVA

[*Delivered by* LORD TUCKER]

This is an appeal from the judgment of the Court of Appeal of Ghana dated 23rd November, 1959, allowing an appeal from the High Court, Eastern Division, dated 23rd March, 1959, in proceedings for the grant of letters of administration in respect of the estate of Stephen Coleman, deceased. The High Court had made a grant in favour of the appellant who was the plaintiff in the action. The Court of Appeal revoked the grant and ordered that letters of administration be granted jointly to the present appellant and the respondent who was the defendant in the action. The appellant now seeks to restore the judgment of the High Court.

The following statement of the relevant facts is taken from the judgment of the Court of Appeal.

The deceased Stephen Coleman, an Osu man, first married a woman called Adeline Johnson and had three children by her all of whom survived him. Later he married the present appellant's mother Wilhelmina under the Marriage Ordinance and had five children by her of whom the appellant is the sole survivor, Wilhelmina having died in 1940. During the lifetime of Wilhelmina the deceased lived and co-habited with the present respondent and had ten children by her. After the death of Wilhelmina the deceased married the respondent in accordance with customary law.

The above recital of facts can be accepted for the purpose of deciding the important question which arises in this appeal namely whether the respondent is entitled either solely or jointly to a grant of letters of administration. They are described in the judgment as facts which were not in dispute. The accuracy of this statement was challenged by counsel for the appellant and reference will be made hereafter to his submission on this matter, but as already stated their Lordships are accepting them for the purpose of construing the relevant Acts and Ordinances which require to be considered.

The issue for determination at the trial was settled on the summons for directions as follows:—"Whether the plaintiff or the defendant is

the proper person entitled to the grant of letters to administer the estate of the above named deceased". The contest was therefore between the sole survivor of the deceased's marriage under the Marriage Ordinance and the lady whom he had married under customary native law on the death of his former wife.

Section 48 of the Marriage Ordinance ch. 127 is as follows :—

"*Section* 48

(1) Subject to the provisions of the succeeding subsection where any person who is subject to native law or custom contracts a marriage, whether within or without (Ghana), in accordance with the provisions of this Ordinance or of any other enactment relating to marriage, or has contracted a marriage prior to the passing of this Ordinance which marriage is validated hereby, and such person dies intestate on or after the 15th day of February, 1909, leaving a widow or husband or any issue of such marriage; (Amended by 13 of 1951, s. 2).

And also where any person who is issue of any such marriage dies intestate on or after the said 15th day of February, 1909, the personal property of such intestate, and also any real property of which the said intestate might have disposed by will, shall be distributed or descend in manner following, viz.—

Two-thirds in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates in force on the 19th day of November, 1884, any native law or custom to the contrary notwithstanding; and one-third in accordance with the provisions of the native customary law which would have obtained if such person had not been married under this Ordinance:

Provided—

(i) That where by the law of England, any portion of the estate of such intestate would become a portion of the casual hereditary revenues of the Crown, such portion shall be distributed in accordance with the provisions of the native customary law, and shall not become a portion of the said casual hereditary revenues;

(ii) That real property, the succession to which cannot by the native customary law be affected by testamentary disposition, shall descend in accordance with the provisions of such native customary law, anything herein to the contrary notwithstanding.

(2) . . .

(3) . . ."

The first submission of counsel for the appellant was to the effect that on the proper construction of the Ordinance the only persons entitled to any portion of the two-thirds share of the personal estate of a deceased person dying intestate are his widow whom he had married under the Ordinance or the issue of such marriage, and any persons claiming under a marriage contracted by native customary law are relegated to such share of the remaining one-third as they can establish under that law.

This is the construction which appears to have been put upon the section in some decisions of the Courts in Ghana from time to time and would seem to have been adopted by the trial Judge towards the end of his judgment where, referring to the present respondent, he said "her status being that of a wife married according to native custom cannot override the claim of the plaintiff".

Their Lordships are unable to accept this construction of the section. In the case of intestacy of a person married in accordance with the Ordinance there are two conditions precedent to the application of the law of England relating to the distribution of the personal estates of intestates in force on 19th November, 1884. They are (1) a valid marriage under the Ordinance, (2) the survival of a widow or husband or any issue of such marriage. Once these conditions are satisfied it

remains only to see how the two-thirds portion was distributable under English law in 1884. In the present case there was a valid Ordinance marriage between the deceased and Wilhelmina and there is surviving issue of that marriage, viz., the appellant. Wilhelmina had died during the lifetime of the deceased. We find therefore both conditions precedent satisfied and it remains only to apply the provisions of the Statute of Distribution (1670) which provides that if a man dies intestate leaving a wife and issue the wife is entitled to one-third of the personal estate and the children to two-thirds. The question then arises whether on the facts in this case the respondent, who was married under customary native law, qualifies as "a wife" within the meaning of that word in the Statute of Distribution as applied to marriages in Ghana which are lawful in that country but were not contracted in accordance with the provisions of the Marriage Ordinance and are potentially polygamous. This leads to the second submission by counsel for the appellant to the effect that the words "wife" and "widow" in an English statute cannot be construed as including the plural as this would be repugnant to the legal conception of marriage in England which does not recognise a potentially polygamous union as a marriage.

Before proceeding to consider this submission it will be convenient to set out parts of the relevant statutes and ordinances, and it may be observed at this stage that the most immediately relevant statute is 21 Henry 8, ch. 5, as this is the statute which provides for the proper person to whom administration should be granted, as distinct from the persons entitled to share in the distribution, but it raises precisely the same question namely whether the "widow" referred to in the statute of Henry 8 or the "wife" mentioned in the Statute of Distribution in the application of these statutes to Ghana includes a "widow" or "wife" of a potentially polygamous marriage.

Section 2 of 21 Henry 8, ch. 5, provides:—

> "In case any person die intestate . . . then the ordinary . . . shall grant the administration of the goods of the . . . person deceased to the widow of the same person deceased, or to the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good."

In England prior to the passing of the Supreme Court of Judicature (Consolidation) Act, 1925, the Court in the exercise of its discretion granted administration to the widow of the intestate, to the exclusion of the next of kin or heir at law, except for good cause shown. (See Mortimer on Probate Law and Practice (second edition) p. 293.)

The Statute of Distribution (1670) 22 and 23 Car. 2, C. 10, section 3, enacts that:—

> "All ordinaries and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate shall distribute the whole surplusage of such estate or estates in manner and forme following, that is to say one third part of the said surplusage to the wife of the intestate."

The *Courts Ordinance* (*ch. 4 of the Laws of the Gold Coast*) provides:—

> Section 83. "Subject to the terms of this or any other Ordinance, the common law, the doctrines of equity, and the statutes of general application which were in force in England on the 24th day of July, 1874 shall be in force within the jurisdiction of the Courts."
>
> Section 85. "All Imperial laws declared to extend or apply to the jurisdiction of the Courts shall be in force so far only as the limits of the local jurisdiction and local circumstances permit, and subject to any existing or future ordinances of the Colonial Legislature; and for the purpose of facilitating the application of the said Imperial laws, it shall be lawful for the said Courts to construe the same with such verbal alterations, not affecting the substance, as may be necessary to render the same applicable to the matter before the Court; . . ."

The *Interpretation Ordinance (ch. 1 of the Laws of the Gold Coast)* provides :—

> Section 3. " The following words and expressions shall, if inserted in any ordinance, order, proclamation, rule, regulation, or bye-law be understood as hereinafter defined or explained, unless it be otherwise expressly provided, or there be something in the subject or context repugnant to such definition or explanation, that is to say :—
>
> (31) " Ordinance " shall include . . . an Order of Her Majesty in Council or an Act of the Imperial Parliament applicable to the Gold Coast and in force . . .
>
> (45) Words in the singular include the plural and vice versa."

It is no doubt true that Lord Brougham's Act (13 and 14 Vict. C. 21) applied only to enactments after 1850 and so did not include the Statute of Distribution and that the English Interpretation Act, 1889, was not in force in 1874 so that for the purpose of construing the Act of Henry 8 and the Statute of Distribution in an English Court prior to 1889 it would not have been permissible as a matter of construction or in accordance with the common law as applied to the distribution of property within the jurisdiction of the English Court to read " wife " or " widow " as including " wives " and " widows ". But it seems to their Lordships that entirely different considerations arise by reason of the provisions of the Courts Ordinance and the Interpretation Ordinance referred to above, the effect of which is that the Act of Henry 8 and the Statute of Distribution are included in the definition of " Ordinance " as being " Acts of the Imperial Parliament applicable to the Gold Coast and in force ". Those statutes therefore are to be construed in their application to Ghana so that words in the singular include the plural unless there is something in the subject or context repugnant to such construction which is clearly not the case, the subject and context being the distribution of the personal property of an intestate validly married by the native law and custom of Ghana which recognises the existence of more than one wife or widow.

Their Lordships would not, however, desire to rest their decision solely upon the language of the Interpretation Ordinance, more especially as this was not referred to in the judgment of the Court of Appeal in Ghana who decided the case in favour of the present respondent on broader grounds with which their Lordships are in general agreement. They do not, however, think that the Privy Council judgments referred to in the Court of Appeal, i.e., *Cheang Thye Phin & ors.* v. *Tan Ah Loy* [1920] A.C. 369, *Khoo Hooi Leong* v. *Khoo Hean Kwee* [1926] A.C. 529 and *Bamgbose* v. *Daniel* [1955] A.C. 107 can be regarded as authorities conclusive in favour of the respondent. In the last mentioned case the Board was dealing only with the position of children and in their judgment it was expressly stated that they proposed to say nothing as to what rights, if any, widows would have in the event of a claim being made in a case such as that with which they were then concerned and the following observations of Lord Phillimore in *Khoo Hooi Leong* v. *Khoo Hean Kwee* (supra) were quoted :—In deciding upon a case where the customs and the laws are so different from British ideas a Court may do well to recollect that it is a possible jural conception that a child may be legitimate, though its parents were not and could not be legitimately married. This principle was admitted by the canon law which governed western Continental Europe till about a century ago and governed still later, if it does not govern still, the countries of Spanish America."

In the case of *Cheang Thye Phin & ors.* v. *Tan Ah Loy* (supra) the position of secondary wives (call t'sips) as contrasted with principal wives (called t'pais) was the only issue and at the outset of the judgment delivered by Viscount Finlay he said " With regard to Chinese settled in Penang the Supreme Court recognises and applies the Chinese law of marriage. It is not disputed that this law admits of polygamy. By a

local Ordinance the Statute of Distributions has been applied to Chinese successions, and the Courts have treated all the widows of the deceased as entitled among them to the widows' share under the Statute. No question has been raised on the present appeal as to the propriety of this practice; the only question is whether Tan Ah Loy was one of the widows."

Nonetheless having regard to the attitude of the Courts of this country to the status of parties validly married by the laws of the country of their domicile as exemplified by such cases as *Re Goodman's Trust* [1881] 17 Ch. Div. 266, *The Sinha Peerage Claim* (the opinion of Lord Maugham in which case is to be found as a note in [1946] 1 A.E.R. at p. 348) and *Baindail* v. *Baindail* [1946] P. 122 their Lordships are of opinion that in dealing with personal property in Ghana of an intestate domiciled in Ghana, and validly married in that country in accordance with its laws the Courts of Ghana are not precluded from making a grant of letters of administration to a lady who was validly married to the intestate at his death by reason only of the use of the words "widow" and "wife" in the singular in the Act of Henry 8 and the Statute of Distribution. Apart from the Interpretation Ordinance their Lordships would hold that in the application of those Statutes to Ghana the Courts of that country would be entitled to apply the words "wife" and "widow" to all persons regarded as lawful wives or widows according to the law of Ghana. In this connection reference may be made to the following observations by Lord Greene, M.R. in the case of *Baindail* v. *Baindail* (supra):—Referring to a man married by Hindu law in India he said:—"What was his status on May 5th, 1939? Unquestionably . . . it was that of a married man. Will that status be recognised in this country? English law certainly does not refuse all recognition of that status. For many purposes quite obviously the status would have to be recognised. If a Hindu domiciled in India died intestate in England leaving personal property in this country the succession to the personal property would be governed by the law of his domicile; and in applying the law of his domicile effect would have to be given to the rights of any children of the Hindu marriage and of his Hindu widow, and for that purpose the Courts of this country would be bound to recognise the validity of a Hindu marriage so far as it bears on the title to personal property left by an intestate here."

Later on he said:—"The practical question in this case appears to be: Will the Courts of this country in deciding upon the validity of this English marriage give effect to the status possessed by the respondent? That question we have to decide with due regard to common sense and some attention to reasonable policy. . . . I think it is certainly a matter to bear in mind that the prospect of an English Court saying that it will not regard the status of marriage conferred by a Hindu ceremony would be a curious one when very little more than a mile away the Privy Council might be sitting and coming to a precisely opposite conclusion as to the validity of such a marriage on an Indian appeal."

Their Lordships recognise that there may be cases in which special circumstances exist which necessitate a distinction between the position of the children of a potentially polygamous marriage and the wives or widows of such marriage as indicated in the passage referred to above in the judgment of the Board delivered by Lord Phillimore as well as in the passage towards the end of the judgment delivered by Lord Keith of Avonholm in *Bamgbose* v. *Daniel* (supra). There are no such special circumstances in the present case and their Lordships can find no valid reason for distinguishing in principle between the children and the widow of the marriage which is in question in the present appeal. Difficulties may no doubt arise in the application of this decision in cases where there are more than one widow both in dealing with applications for the grant of letters of administration and in the distribution of the estate, but they can be dealt with as and when they arise. Their

Lordships are for the reasons indicated above in agreement with the decision arrived at by the Court of Appeal in making a joint grant to the appellant and the respondent upon the footing that the latter is the widow of the deceased. They would, however, observe that the Court of Appeal appear to have gone rather further than was necessary for the decision of the application for a grant of letters of administration in setting out in some detail the shares of those who will be entitled in the distribution. Such matters are more appropriate to administration proceedings, and the appellant contends that there was no evidence or admission that the children of the deceased's first marriage to Adeline are now surviving. Their Lordships do not think that any persons entitled in the distribution should be precluded by the judgment of the Court of Appeal from contending in the appropriate proceedings that their shares of the personal estate are larger than those indicated in the judgment provided that it must be accepted that the respondent is entitled to a wife's proportion of the two-thirds of the personal estate over and above any share of the remaining one-third to which she may be entitled by the relevant native customary law.

Their Lordships made reference earlier in this opinion to the challenge by the appellant to some of the facts which were stated as being "not in dispute". It was said that there was no proper proof of either of the marriages by native customary law, or that the deceased was an Osu man, or that the respondent was validly appointed to represent the family. When the Court from whose judgment an appeal is brought states that certain facts were admitted or were not in dispute it would, in the absence of agreement by counsel on both sides, require very strong evidence or exceptional circumstances before their Lordships would be disposed to go behind such a statement in a judgment or to judge of its accuracy merely from a perusal of the notes taken in the Courts of the country from which the appeal comes. There is nothing in the present case to justify their Lordships questioning the accuracy of this statement subject only to the reservation referred to above as to the effect, if any, of such findings on the shares of those proved to be entitled to participate in the distribution.

For these reasons their Lordships will report to the President of Ghana as their opinion that this appeal should be dismissed and that the appellant should pay the costs thereof.

(39456) Wt. 8019—53 '60 3/61 D.L

In the Privy Council

AUSTIN RICHTER COLEMAN

v.

EMMA KWALEY SHANG
alias EMMA KWALEY QUARTEY

DELIVERED BY LORD TUCKER

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