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Court : Privy Council

Decided On : Feb-19-1932

Judge : Lords Blanesburgh Russell of Killown &Amp; Macmillan

Appeal No. : Privy Council Appeal No. 61 of 1930 (From Malay States)

Appellant : Tuan Man and Another

Respondent : Che Som and Others

Advocate for Pet/Ap. : Wilford Greene and Cyril Radcliffe, for Appellants; Sir Gerald Hurst and F.O. Langley, for Respondents. Solicitors for Appellants, Mayo Elder and Rutherfords; Solicitors for Respondents, Peacock and Goddard.

Judgement :

Lord Russell of Killowen:

This appeal is brought by the defendants to an action which was tried by Burton, J., at Ipoh in the State of Perak. The action was dismissed ; but an appeal by the plaintiffs to the Court of Appeal of the Federated Malay States was allowed, and an order was made by that Court, which is set out hereafter, and from which the defendants have appealed to His Majesty in Council. For the proper appreciation of the cause of action which the plaintiffs seek to enforce, and of the methods and procedure which they adopted for that purpose, and of the relationship of the parties, it is necessary to embark upon considerable detail.

Tuan Kundor was a Rajah of Raman, in the kingdom of Siam, who died in the year 1867. He was the owner of a tin mine at Khan Hitam in Siam. He had nine children, five sons and four daughters, all of whom, according to one witness, survived him. His eldest son was Tuan Timoon, who became Rajah and entered into possession of the mine on his father's death. On the death of Tuan Timoon, in the year 1875, he was succeeded as Rajah by his brother, Tuan Jagong, who also took possession of the mine and kept it until his death in 1901. Tuan Timoon had left a widow him surviving, Raja Prernpuan, who subsequently married Tuan Jagong. She survived Tuan Jagong, and on his death she took possession of his property and of the tin mine. She continued in possession of the tin mine until her death in 1916, Letters of administration with her will annexed were granted in 1918 to the appellants, who assumed and continued in possession of the tin mine. Their title to the tin mine was called in question by the present action, which was commenced on 17-9-1927. By that time all the children of Tuan Kundor had died. The plaintiffs in the action were ;

(1) Tuan Balai Jawa, the son of Tuan Timoon ;

(2) Tuan Kalumpang, the son of Tuan Cherik (a son of Tuan Kundor) ;

(3) Nai Tuan Tandok, the son of a daughter of Tuan Kundor;

(4) Toh Nang Bayam, a daughter of Tuan Jagong ;

(5) Toh Nang Kechik, the daughter of Tuan Timoon ; and

(6) Toh Nang Keboon, a daughter of another daughter of Tuan Kundor. The firstnamed plaintiff died pendente lite, and his administrator, Che Som, was substituted as a plaintiff in his stead. A few further facts as to pedigree should be stated. Tuan Jagong left another daughter, Tuan Kembang, who was married to the said Tuan Kalumpang, and also a son, Tuan Leebeh, who had disappeared in the year 1902 and of whom nothing had since been heard.

One other fact of importance must be stated. The tin mine in question was until the year 1909 situate in the kingdom of Siam. In that year certain Siamese territory, which included the mine, was ceded by treaty to the Government of Perak. In view

of the various contentions which have at different times been raised on behalf of the plaintiffs, it is necessary to scrutinize with some care the cause of action alleged in the plaint and the nature of the relief which is therein claimed.

As their Lordships read this document, the plaintiffs claim to be entitled to the mine, or to shares therein, as persons who are entitled to shares in the estate of Tuan Kundor, as on an intestacy. Each plaintiff is claiming to assert a personal right of ownership in regard to the mine upon the footing that it belonged to Tuan Kundor, and that it still forms part of his estate. In terms, the claim of ownership is asserted in respect of the whole estate of Tuan Kundor, moveable and immovable, but the asset more specifically referred to is the mine. The relief claimed by the prayer is (1) an account of Tuan Kundor's estate with the Raja Prempuan held "as trustee for the beneficiaries of Tuan Kundor," and which had come to the hands of the administrators of Raja Prempuan ; (2) an inquiry as to "who are the beneficiaries of the estate of Tuan Kundor, deceased, and the shares to which they are entitled ;" (3) distribution and payment to the plaintiffs of their shares ; and (4) administration of the estate of Tuan Kundor.

That was the frame of the action as launched. As is apparent, it had a twofold object, and asserted a twofold claim, viz., (a) to recover" from the defendants assets alleged to belong to the estate of Tuan Kundor, and (b) to have those assets divided among the persons beneficially entitled to them.

By their defence the defendants called for strict proof of the allegation that the plaintiffs were entitled to share in the estate of Tuan Kundor. Further, they did not admit that Tuan Kundor had died intestate. At the trial the plaintiffs called fire witnesses; the defendant called none. It is of importance to note both what was proved and what was not proved. It will be convenient to state first what was not proved.

No evidence was called to establish any title in the plaintiffs. At the relevant dates the mine was situate in Siamese territory, but no attempt was made .to prove who, according to Siamese law, would become entitled to the property, assuming it to be a fact (which itself was not proved) that Tuan Kundor had died intestate. No attempt was made to establish by legal proof that the plaintiffs had any beneficial

or other interest in the mine. It is true that reliance was placed upon a document which was executed by Raja Prempuan in the year 1904, and it may be that the plaintiffs considered that the document sufficiently proved their case in these respects; but, as will hereafter appear, when the terms of the document are set out, it is quite insufficient for this purpose.

The only witness called who could speak as to events in Tuan Kundor's lifetime was an old man who had been in the service of the family. From his evidence it would appear that Tuan Kundor was in the habit of making payments out of the profits of the mine to his brothers and sisters and to his children; that on his death Tuan Timoon had possession of the mine and made similar distributions among relations; that on his death Tuan Jagong had possession of the mine and pursued the same practice; and that when Tuan Jagong died, his widow, Raja Prempuan, received the money from the mine.

There is nothing in that evidence to assist the plaintiffs in establishing the title which they claim. Indeed, it would suggest, if anything, successive ownership of the mine in Tuan Kuodor, Tuan Timoon and Tuan Jagong, coupled with some sort of benefits conferred by them upon their relatives. It would certainly appear to be inconsistent with the view that the mine still forms part of the estate of Tuan Kundor. The matter however is carried a stage further by the evidence of Tuan Kalumpang (hereinafter referred to as Kalumpang), who was the only one of the plaintiffs to give evidence. He stated that, after the death of Tuan Jagong, Raja Prempuan :

"took charge of the property and, among the rest of the property, of the mine ;" and he added "I objected before the Kathi because Che Ning" -(i. e., Raja Prempuan) "did not give the shares to the waris. We wanted the Kathi to distribute the estate according to Mahomedan law."

This evidence refers to a law suit which Kalumpang instituted in 1903 before the Kathi, or Judge, but it leaves in doubt the exact nature of the litigation. In particular, it leaves in doubt who was the ancestor whose waris are referred to and whose estate is being considered. But the litigation is of importance because in the course of it there came into existence the document above referred to. The Kathi

was called as a witness, and he deposed to the following facts: Kalumpang complained to him about the Raja Prempuan, and he issued a summons to her. The Raja Prempuan settled the case by handing a letter to the Court. It was read aloud and handed to Kalumpang. The ease was then noted in the Judge's book as withdrawn. It is impossible to gather from this evidence the nature of the action, and unfortunately the Court records have been destroyed by fire.

The letter is addressed by Raja Prempuan to Kalumpang. It is dated 8th May 1904, and runs, according to an official translation, thus:

"This letter is from your mother, Raja Prempuan of Kota Bahru, the wife of Raja Rasadin Chawang, Raja of the State of Rahman, who is now lost-may the Almighty God cause this to be seat to the presence of the assembly of my illustrious son Khun Rat Muntri Ni Ampor and his wife, my daughter, Tuan Kembang, of Kota Bahru in the State of Rahman, with safety and soundness."

"I beg to inform you and your wife that, as regards the rights of property left by Raja Rasadin Ghawang, who is lost, I shall give you and your wife some elephants and other property, as also to my daughter Tuau Bayam, for maintenance in the meantime. As to the land, Khan Itarn, this must be regarded as an ancestral mining land which still belongs to Toh Nek Kundor, the father of Raja Rasadin Ghawang. I shall apply for a title-deed (of this land) from His Majesty the King, which will be kept by me until my son, Luang Raya Phakdi, returns from Bangkok, Siam when I will divide the land, Khan Itam. and other property and give you (your share), according to the Mahomedan law of distribution ; but so long as I hold the land, Khan Itam, I shall give you your share in hard cash from the proceeds derived from the land. Such is my information to you. With many Balaams to you and your wife."

In this letter the "Raja Rasadin Chawang" referred to is Tuan Jagong ; "the illustrious son" referred to is Kalumpang, and the son Luang Raya Phakdi referred to is the son Tuan Leebeh, who had disappeared in the year 1902.

Before considering the terms of this document (hereinafter referred to as "the letter"),'it will be convenient to state shortly the subsequent history of the matter.

The letter was taken away by Kalumpang. He says that his co-plaintiffs in the present action were pleased at the letter, but nothing more seems to have been heard of it until 23 years later, when it reappeared in the plaint filed in the present action. The Raja Prempuan was granted a lease of the mine for 20 years, expiring in 1924. The lease is dated 18th February 1903, but upon the evidence must, their Lordships think, be taken to have been in fact executed subsequently to the letter of 8th May 1904. According to the evidence of Kalumpang, Raja Prempuan made payments after the letter to himself "and the other beneficiaries of Tuan Kundor"- but he adds a very curious statement, viz.:

"But I thought there must be some reason for her generosity, that I had a claim on her .... The amounts and the times of the payments she made were uncertain."

The Raja Prempuan died in the year 1916. After her death nothing seems to have been paid to Kalumpang. Letters of administration with her will annexed were granted in 1918 to, the appellants. In 1916 Kalumpang consulted his solicitor about the mine and commenced proceedings for the revocation of the above-mentioned grant, in which, however no mention was made of the letter. The proceedings proved abortive, and the next move of Kalumpang was the institution of the present action by him on behalf of himself and his co- plaintiffs, in the year 1927. The action was tried by Burton, J., who by his decree dated 26th November 1928, dismissed the action with costs. The basis of this decision was that the evidence did not establish the fact that the mine formed part of Tuan Kundor's estate. The learned Judge pointed out that the letter was the sole evidence adduced of this alleged fact, but was of the opinion that it was not consistent with the previous history of the property and was not (especially in view of the fact that it was first produced after the death of Raja Prempaun, who had knowledge, not possessed by the defendants, of the circumstances in which it was written) sufficient to establish the fact essential to the plaintiff's case. The learned Judge considered, and, as their Lordships think, correctly, that the foundation of the plaintiffs' case was the allegation that the mine still formed part of Tuan Kundor's estate. In. this connection it is to be observed that the opening Speech, at the trial, of counsel for the plaintiffs seems to have suggested that the plaintiffs were alleging that by the letter Raja Prempuan had constituted herself a trustee for the

plaintiffs, and it was pointed out by the counsel for the defendants that such a suggestion was inconsistent with the pleadings. Thereupon counsel for the plaintiffs in his reply said that the letter was not a declaration, but

"an admission that she was trustee for the specific purpose of distributing according to Mahomedan law."

From the trial judgment an appeal was made to the Court of appeal and was heard by three Judges. Counsel for the appellants, in opening the appeal, asked tot a declaration that the mine still formed part of the estate of Tuan Kundor and ought to be distributed as such, and for an inquiry as to the persons then entitled and in what shares, presumably upon that footing. Thereupon the defendant's counsel pointed out that the plaintiffs had failed to prove that they had any interest in the mine, or that Tuan Kundor had died intestate, or how the mine had devolved. In reply, notwithstanding that no evidence as to any foreign law had been given, counsel for the plaintiffs contended (1) that the letter was sufficient evidence that Tuan Kundor's estate devolved by Mahomedan law, and (2) that Tuan Kundor's representative was not a necessary party to the action, because by Mahomedan law the property of an intestate vested at once in his heirs as tenants in common. He accordingly claimed the mine as specific property, and amended the claim for relief to the following form:

"(1) Declaration that defendants as legal representatives of the Raja Prempuan hold the mine as trustees for the persons entitled by Mahometan law to share in distribution of the estate of Tuan Kundor. (2) Inquiries as to who are such persons as aforesaid? (3) Transfer to such persons in undivided shares or alternatively Bale of mine subject to incumbrances and payment into Court of proceeds of sale to credit of this suit. (4) Account of rents and profits from mine since death of Raja Prempuan. (5) Payment into Court of amount found due in pursuance of para. 4. (6) Liberty to apply."

It was suggested in argument before the Board that this amendment showed that the letter was relied upon as a declaration of trust by which Raja Prempuan constituted herself a trustee of the mine. Their Lordships cannot accept this view. It is, in their opinion, clear that the plaintiffs' case throughout has been based upon

the contention that the mine at the date of the action formed part of the estate of Tuan Kundor.

The Judges in the appeal Court, although concurring in the order which was eventually made, do not appear to have been in agreement in their views of the case. The Chief Justice treated the letter as an admission that the mine formed part of Tuan Kundor's estate and, in the absence of evidence in rebuttal, as sufficient to establish that fact. He also added however that the letter-was a contract of compromise, a view which suggests that the letter created a title, and was not merely evidence of a pre-existing title. The learned Judge however pointed out that the pedigree of the plaintiffs and their heirship to Tuan Kundor had not been proved, and that, except for the letter, no evidence had been given as to the law applicable to the distribution of Tuan Kundor's estate. As to this, their Lordships are content to observe that that letter of Raja Prempuan can in no sense be described as evidence of any law.

The learned Chief Justice however pointed out that it was necessary, since, the plaintiffs claimed administration of the mine as part of Tuan Kundor's estate, that the legal personal representative of. Tuan Kundor should be a party to the action. He appears to have overlooked the amended relief, which in the course of the hearing of the appeal had been claimed by counsel for the plaintiffs. Farrer-Manby, J., thought that the case of the plaintiffs was based on the letter, which he treated as an admission of a preexisting trust. He agreed with the order proposed by the Chief Justice. Prichard, J., simply agreed with the judgment of the Chief Justice.

Later, supplemental judgments were delivered, in the course of which the Chief Justice stated that no evidence had been tendered as to "any contractual of other effect" which the letter had on the rights of the parties under Siamese law, and that although in his view the plaintiffs' claim could be supported without resort to the contractual effect of the letter, a higher tribunal might take a different view. He thought therefore that the plaintiffs should have liberty to lead further evidence as to the effect of the letter by Siamese law. The plaintiffs formally declined to avail themselves of this liberty.

The order made by the Court of appeal must now be considered; it is, so far as material, in the following terms :

" It is ordered that the cross-appeals of the defendants-respondents be dismissed with costs to be taxed. And it is ordered that the judgment dated 26th day of October 1928 of Burton, J., be reversed. And it is ordered that the suit do stand over for six months from the data of this order or for such extended time, if any, as may be allowed by the Court of first instance, to give time for the plaintiffs-appellants to remedy the defect caused by the legal personal representatives of Tuan Kundor not being a party to the suit in such manner as they may be advised. And it is ordered that if the plaintiffs-appellants do not remedy the said defect within the time aforesaid or within such extended time as aforesaid the defendants-respondents be at liberty to apply to the Court of first instance for an order dismissing the suit with costs to be taxed, and if the suit be so dismissed with costs the plaintiffs-appellants do pay to the defendants-respondents their taxed costs of this appeal. And it is ordered that if such defect be remedied within the time aforesaid, or within such extended time as aforesaid the plaintiffs-appellants be at liberty to apply to the Court of first instance for judgment in the following terms with such variations, if any, as altered circumstances may render necessary (and with the omission of Inquiries Nos. 2 and 3 hereinafter directed if in the circumstances the Court of first instance shall consider such inquiries to be unnecessary), that is to say :

"Declare that the lease of a mining land, District of Upper Perak (Kroh), No. 1 Kroh, dated the 8th day of November 1904 issued to Che Ning binti Che Nek in lieu of the Siamese Mining Lease in the plaint mentioned, forms part of the estate of Phya Ratana Phakdi Tuan Kundor alias Phya Ratana Phakdi, in the plaint referred to as Tuan Kundor deceased, and ought to be administered by the Court accordingly."

And it is ordered that the following inquiries be made, that is to say :

(1) An inquiry whether there is any debt of the said Tuan Kundor remaining unpaid.

(2) An inquiry whether the said Tuan Kundor disposed of the mine now held under the said lease by will or died intestate in respect thereof.

(3) If the said Tuan Kundor disposed of the said mine by will, an inquiry as to the terms and effect by Siamese law of the said will and who are now entitled thereunder to the said mine ;

(4) If the said Tuan Kundor died intestate as to the said mine an inquiry as to who by

Siamese law became entitled to the said mine on the death of the said Tuan Kundor, and if any of such persons have since died, who are their respective legal personal representatives or otherwise entitled to their respective shares.

"And it is ordered that an account to be taken (making all just allowances) of the rents and profits of the said mine come to the hands of the defendants-respondents or any of them or to the hands of any other person or persons by the order or for the use of the said defendants-respondents or any of them as from the 21st day of September 1921.

And it is ordered that the said inquiries and the said account be held and taken before the Registrar of the Court and that ho do certify to the Court of first instance the result of such inquiries and account.

And it is ordered that the defendants-respondents do pay to the plaintiffs-appellants the taxed costs of the suit down to and including the hearing before Burton, J., and the taxed costs of this appeal including in such taxed costs the fees of two advocates both at the original heaving and in the Court of appeal. And it is ordered that the further consideration of the suit be adjourned.

And all parties are to be at liberty to apply.

Liberty to apply to the Court of first instance for the appointment of a receiver of the rents and profits and generally as the parties may be advised.

And lastly that the plaintiffs-appellants be at liberty to lead further evidence under S. 27 of the Courts Enactment No. 14 of 1918 by calling the witness, Haji Che Soh

bin Che Nik (Kathi) or by calling other expert evidence, as to the effect of Ex. "C" by Siamese law. In the event of the plaintiffs-appellants availing themselves of this liberty they shall notify the Registrar and the defendants-respondents at least fourteen days before the opening of the sittings of the Court of Appeal at Ipoh on the 24th day of September 1929 in which case this appeal shall be set down for further hearing at the sittings aforesaid, and the defendants-respondents shall be at liberty to lead evidence on the same issue, and shall be entitled to their costs of such further healing in any event."

This appears to their Lordships to be an unusual order the terms of which need careful consideration. Certain cross-appeals by the defendants were dismissed. Upon the main appeal the judgment of the trial Judge is reversed, the result of which is that the action no longer stands dismissed. It is then ordered that the suit do stand over for a period to enable the plaintiffs to remedy the defect caused by the legal personal representative of Tuan Kundor not being a party to the suit. If the defect is not remedied within the period the defendants may apply to the trial Judge for an order dismissing the suit. If the defect is remedied the plaintiffs may apply to the trial Judge for an order to he made by him in terms set forth by the Court of appeal. It is hardly in accordance with precedent that a Court of appeal should after sending a case back to the trial Judge for the purpose of having a necessary party brought before the Court, proceed (before the new party has been joined or heard, and without considering what defences may be available against him) to indicate the order which the trial Judge should make when he tries the case in the presence of the proper parties.

This order cannot in their Lordships' opinion, stand. Its only operative effect is to send the case back to the trial Judge for the purpose of dismissing the action if Tuan Kundor's legal personal representative is not added as a party, or (if he is added) for the purpose of making a cut and dried order. But this addition of the legal personal representative as a party is not, in their Lordships' view, the mere curing of some technical defect not affecting the substance of the dispute between the original parties to the action, In their opinion the matter goes to the substance of the plaintiffs' action.

Their Lordships as before stated are satisfied that the case of the plaintiffs is and has been throughout that the mine formed and still forms part of Tuan Kundor's estate. They seek to recover possession of that asset from the defendants and to have the assets administered when recovered. The suggestion (faintly raised at one stage before the Board) that the letter is their root of title, cannot prevail in view of the fact that not only was no evidence given of the effect of the letter according to Siamese law, but the opportunity of giving such evidence was declined.

The twofold relief sought by the appellants finds no foundation for either branch. The only proper plaintiff to recover the asset is (in default of evidence to the contrary) the legal personal representative of Tuan Kundor, and even if a beneficiary could sue in his own right, making the legal personal representative a defendant, his only claim would be an order for transfer of the asset to the legal personal representative, to which claim all defences available against the legal personal representative would be open to the present defendants. The letter could not be used (as Kalumpang might perhaps personally use it) to ground an estoppel in favour of the legal personal representative, even though Kalumpang himself became such legal personal representative. It might be used as an admission, i. e., as a piece of evidence, and if no other evidence was given it might be sufficient foundation for a judgment in favour of the legal personal representative for his recovery of the asset. There remains however for consideration the second branch of the relief claimed. No foundation has been laid for this at all. There is no shred of evidence in the case to show that any of the plaintiffs is under Siamese law or any other law, beneficially interested in the estate of Tuan Kundor. The letter is no such evidence; at the most it is a statement by a third person of her opinion as to the law applicable, and that under that law Kalumpang was entitled to some share.

As to the suggestion that the letter constitutes a root of title as being itself a declaration of trust such a contention, even if raised by the plaintiffs in the Courts below, is equally devoid of any foundation to support it. Whether the letter according to Siamese law creates what in this country would be called a trust, and whether it creates enforceable rights, are questions of fact which should be

proved, which were not proved, and which the plaintiffs have declined to prove. In the circumstances above indicated, their Lordships feel no doubt that the action of the plaintiffs failed, not from some technical defect capable of being remedied without hardship or injustice to the parties, but from matters of real substance, which it was not open to the Judges in the appeal Court to adjust as they have attempted to do.

Whether a legal personal representative of Tuan Kundor if and when constituted can after all these years successfully assert in fresh proceedings a claim to the mine against the present defendants is a matter upon which their Lordships are not only unwilling but unable to express any view; but for the reasons given, they are of opinion that this appeal succeeds. The order of the Court of appeal should be discharged and the order of the trial Judge restored. The respondents will pay the costs of the appellants both here and in the Court of appeal. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

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