Leo Teng Choy v Leo Teng Kit and Others
[2000] SGCA 63

Case Number : CA 26/2000

Decision Date : 17 November 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; L P Thean JA

Counsel Name(s) : Harry Elias SC and Kesavan Nair (Harry Elias Partnership) for the appellant; Molly Lim SC and Lim Chee Kiang (Lim & Ching) for the respondents

Parties : Leo Teng Choy — Leo Teng Kit

Succession and Wills – Construction – Principles of construction of wills – Whether ordinary trust or trust for sale created – Whether interest of beneficiaries contingent in nature

Trusts – Trustees – Powers – Whether s 56(1) Trustees Act (Cap 337) conferred powers on trustees – Whether s 56(1) subject to s 2(2)- Whether court should invoke s 56(1) to authorise sale – Whether sale expedient and consonant with overriding intention of testator – ss 2(2) & 56(1) Trustees Act (Cap 337)

(delivering the judgment of the court): ***Introduction***

This is an appeal against the decision of Lai Siu Chiu J, on the construction of a Will, where she authorised the sale of a property of a testator located at No 42 Phillips Avenue (`the property`).

The facts

The testator was one Leo Ann Peng (LAP). LAP made his Will on 26 March 1970 and died some 19 years later on 28 September 1989. He left behind his widow and five sons. Four sons are involved in this proceeding but not the fifth (the eldest), as the latter was given only $1 under the Will. In his Will, LAP appointed two sons, Leo Teng Kit (the first respondent) and Leo Teng Choy (the appellant) to be his trustees.

LAP purchased the property in 1956. He resided there until his death. The property was his only substantial asset. During much of his lifetime, the family lived together at the property, but as the sons grew up and got married and due to overcrowding, one son, Leoh Teng Hee (the second respondent) and his wife moved out of the family home in 1980 and have since lived on their own.

Sometime in 1992, the first respondent and his family moved out of the property. In September 1992, LAP`s widow, who was also the children`s mother, Heng Took Kin, suffered a stroke and was hospitalised. It would appear that after Mdm Heng`s discharge, the appellant refused to take her back. Instead, she went to live with the second respondent. Another son, Leo Tang Foh (the third respondent) moved out of the property in about the same year, leaving the appellant (together with his wife and children) in sole occupation.

In December 1996, the first respondent visited the property and found that the appellant had thrown away all the furniture and belongings of the respondents and their mother, which were at the property. The appellant said he threw them away because they were infested with termites. A survey report was furnished in support thereof. In view of the fact that everybody had moved out except the appellant, the first respondent tried to sort out with the appellant on how to deal with the property, without success.

Eventually, the three respondents decided, together with their mother, that the best course would be to sell the property and to distribute the proceeds equally between the four sons (the appellant and the three respondents). Thus, in April 1999 the respondents filed an originating summons for an order to sell the property. The respondents also filed a statutory declaration, made by their mother about two years earlier on 5 July 1997, in support of their application. At the time the mother made the statutory declaration, she was examined by a consultant psychiatrist who certified that she was mentally fit to make the declaration. On 7 July 1999, the mother passed away.

The statutory declaration was made by the mother in anticipation that litigation would ensue between the four sons. In it she confirmed the allegations made by the first respondent that the appellant had a violent temper and a violent disposition towards his brothers and their families.

On 15 February 2000, after hearing arguments and considering the affidavits filed by the parties, the judge below ordered that the property be sold at a price of not less than $3.75m and that the proceeds were to be divided equally between the four brothers. In coming to her decision, Lai Siu Chiu J held that the Will created a trust for sale of the property and that cl 3 merely postponed the sale.

The clauses in the Will which are pertinent to the present proceeding are the following:

> *2 I give and devise my land and house No 42, Phillips Avenue, Singapore unto my trustees upon trust to stand possessed of the same and to allow my wife Heng Took Kin and my sons Leo Teng Kit, Leoh Teng Hee, Leo Teng Choy and Leo Tang Foh to reside therein free of rent provided each of my said sons shall pay one-fourth share of all rates, taxes, charges and expenses on repairs as shall from time to time be incurred.*
>
> *3 I direct that my said land and house No 42 Phillips Avenue, Singapore, shall not be sold, rented out or in any way converted into cash unless and until unanimously agreed upon by my said sons Leo Teng Kit, Leo Teng Hee, Leo Teng Choy and Leo Tang Foh in which event the net proceeds of sale from the said land and house shall be distributed to my said sons in equal shares.*
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> *4 In the event of the death of any of my aforesaid sons either before my death or after my death but before the said land and house is sold his share shall be divided among his children in equal shares and if there be no children his share shall revert to the surviving beneficiaries in equal shares.*
>
> *...*
>
> *6 Subject to the payment of my debts, funeral and testamentary expenses, I devise and bequeath all the residue and remainder of my real and personal estate whatsoever and wheresoever situate to my said sons, Leo Teng Kit, Leoh Teng Hee, Leo Teng Choy and Leo Tang Foh in equal shares absolutely.*

The appeal

The appellant is dissatisfied with the order made on 15 February 2000 and has therefore appealed to this court. He challenged the ruling of the court below that there is here a trust for sale. His

contention is that there could be no sale until and unless all the four beneficiaries agreed. Each of the four beneficiaries, together with their mother, had the right to reside therein.

Trust for sale

In coming to her decision that there was here a trust for sale, but only that the sale was postponed, Lai Siu Chiu J relied upon the cases, **Duke of Marlborough v A-G (No 2)** [1945] Ch 145 and **Rajabali Jumabhoy & Ors v Ameerali R Jumabhoy** [1998] 2 SLR 439 .

However, there is a significant difference between the clauses in ***Marlborough*** , and the clauses in the Will of LAP. In ***Marlborough*** , cl 3 of the deed provided that land was conveyed to and was held by trustees upon an express trust `to sell the same`. Such a provision is missing in the Will here. Furthermore, cl 11 of the deed in ***Marlborough*** provided that:

> *Notwithstanding anything herein contained, no sale of any hereditaments for the time being subject to the trusts hereof ... shall (except in pursuance of an order of the court) be made by the trustees or trustee without the previous consent in writing of the present Duke during his life and after the death of the present Duke without the previous consent in writing of the person in whom the Dukedom of Marlborough settled by the said Act ... shall for the time being be vested thereunder if such person shall be of full age.*

It was in view of the express provision in cl 3 that Morton LJ said that the consent of the Duke was intended to regulate the exercise of the trust for sale but not to prevent the trust for sale from being an immediate trust. He also declared `if there is an immediate trust for sale, whether subject to consent or not, the trust operates at once to effect a conversion ... It is also well settled that the existence of a power to postpone sale does not prevent conversion taking place.`

Marlborough was applied in ***Rajabali Jumabhoy*** where there was also an express provision of a trust for sale. There, the relevant clauses of the settlements read as follows:

> *1 The settlor hereby conveys unto the trustees ... property ... upon trust that they shall with the consent of the settlor ... and with the consent of the survivor of them ... sell the same in such manner as they may think proper with power nevertheless to postpone the sale so long as in their discretion they may think fit.*
>
> *2 The trustees shall hold the net proceeds of sale of the said property ... upon trust that they shall invest the same.*

This court held that a trust for sale was created. Applying ***Marlborough*** we also said in that case:

> *Although a power was given to the trustees to decide when the property should be sold, such power would not prevent a trust for sale from being created. Equally, the requirement of Rajabali`s consent for the sale made no significant impact on whether or not the settlement created a trust for sale, as this related to the timing of the sale and did not affect the overriding direction that the property should be sold.*

It will be seen from [para] 9 above, that the Will does not expressly state that there shall be a trust for sale. Clause 2 confers upon the four sons and their mother a right to reside in the property. Clause 3 provides that the property `shall not be sold` and it may only be sold if all the four sons agreed. The latter can hardly be construed to be a direction to the trustee to sell. This is wholly unlike the situations in ***Marlborough*** and ***Rajabali Jumabhoy*** which were really concerned with the question whether the provisions in the deed requiring the consent of a specified person precluded the express provision of a trust for sale from having its usual effect and the courts held it did not. Here, the Will created only an ordinary trust, with the trustees being directed to hold the property for the use of the four sons and their mother but if all the four sons agreed they could cause the property to be sold. There is no direction by the testator that the trustees sell the property. Accordingly, and with the utmost respect, we would disagree with the judge below that there is here a trust for sale. On this point, we accept the submission of the appellant.

Counsel for the parties also referred to **Re Herklots` Will Trusts** [1964] 2 All ER 66[1964] 1 WLR 585. But there again, like ***Marlborough*** and ***Rajabali Jumabhoy*** , the testatrix expressly provided that the residue of her property be held on trust for sale, and at the same time also provided that the income of the residue was to be given to G for life `without prejudice to the trust for sale herein contained` with permission `to reside in my said house during her life for so long as she wishes.` Subject to that life interest, the residue was given, as to one third to the plaintiff and the remaining two-thirds to others. By a codicil the testatrix directed that her trustees should transfer the house to the plaintiff absolutely if he so wished to have it in part settlement of the one-third share to which he would be entitled under the Will. The testatrix further provided that if the value of the house was greater than one-third of the residue, the shares of the other beneficiaries were to be reduced. After the testatrix died, G proposed to sell the house, which was worth more than a third of the residue, without the consent of the plaintiff. Ungoed-Thomas J held that, on a true construction of the Will, the permission given to G to reside in the house for so long as she wished was not inconsistent with the trust for sale. He also held that as the plaintiff was, under the codicil, given the option of obtaining the house for himself, the sale proposed by G could not be effected without the consent of the plaintiff. Nothing in ***Re Herklots`*** advances the decision in ***Marlborough*** any further with regard to this particular point.

Nature of interest

What then is the interest created by the Will in favour of the four sons? Counsel for the appellants argued that as the Will confers upon the four sons a right to reside in the property rent-free, and as the appellant would like to continue to reside thereon, the interest of the sons, as beneficiaries, in the property is only a contingent interest. We are unable to accept this submission. An interest is contingent only when it is liable to be defeated on the happening or non-happening of an event. Here, there is no specified condition which the beneficiaries need to fulfil before they are entitled to the interest spelt out in the Will. There is no question of the interest of any beneficiary being devolved to someone else on the happening/non-happening of an event. Each son is entitled to his share. However, as provided in cll 2 and 3 of the Will, their right to realise their shares in the property is subject to a unanimous agreement to do so. Their right to a share in the property is not in question. The only matter is whether they could arrive at a unanimous agreement to realise the property. Therefore, the only matter is as to the timing of them agreeing unanimously to the sale and thus realising their shares. If all four of them agreed, they could direct the trustees to dispose of the property as they seem fit, and extinguish the trust: see **Saunders v Vautier** [1841] 4 Beav 115(Unreported) .

Scope of s 56(1)

So what we have here is a ***trust simpliciter*** and not a trust for sale. The next question that arises for consideration is whether in view of cll 2 and 3 of the Will, and the objection of the appellant, this is a case which falls within s 56(1) of the Trustees Act (Cap 337) (`the Act`) and if the answer to that question is in the affirmative, whether the discretion granted to the court in that section should be exercised in favour of the respondents and a sale be ordered.

Section 56 (previously numbered s 59) of the Act provides as follows:

> *(1) Where in the management or administration of any property vested in trustees, any sale, lease, ... is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may -*
>
> *(a) by order confer upon the trustees, ... the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit; and*
>
> *(b) direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.*
>
> *(2) ...*
>
> *(3) An application to the court under this section may be made by the trustees, or by any of them or by any person beneficially interested under the trust.*

The present application to court for an order was made by the three respondents, who are beneficiaries. By virtue of s 56(3), they undoubtedly have the locus standi to do so.

In construing s 56, there is a need to consider s 2(2) to determine, if at all, the powers of the court in s 56 are qualified by s 2(2), which reads:

> *The powers conferred by this Act **on trustees** are in addition to the powers conferred by the instrument, ... but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument.`*

It would be noted that s 2(2) relates to `powers conferred by the Act on trustees`. So does s 56(1) confer powers on the court or on the trustees? It is clear that s 56(1) confers powers on the court to make orders authorising, inter alia, the sale of a trust property when it is expedient to do so and where `the same cannot be effected by reason of the absence of any powers for that purpose vested in the trustees by the trust instrument.` It is plain that s 56(1) does not confer powers on the trustees. The fact that an order of court granted under s 56(1) would, in effect, enable the trustees to do an act which they would not otherwise be authorised by the instrument of trust to do

did not mean that the power is conferred on the trustee by the Act. Examples in the Act of powers being conferred on trustees are s 33 (power to apply income for maintenance) and s 34 (power of advancement). It is significant to note that s 56 falls under Part V of the Act, intitled `Powers of Court` whereas Part III is intitled `General Powers of Trustees and Personal Representatives`. Therefore, we hold that s 56 is not subject to s 2(2).

In **British & Malayan Trustees Ltd v Abdul Jalil bin Ahmad & Ors** [1990] SLR 1066 [1991] 1 MLJ 465 , the High Court seemed to have thought that s 2(2) applied to s 56(1). This court had in ***Rajabali Jumabhoy*** ruled that that was an error.

Should the discretion be exercised in favour of a sale

The power of the court to authorise sale of trust property under s 56 can only arise where, in the `management or administration` of any property, a sale of the property is in the opinion of the court expedient and the same cannot be effected by reason of the absence of any power for that purpose. In ***Rajabali Jumabhoy*** this court endorsed the views of the Court of Appeal in **Re Downshire Settled Estates** [1953] Ch 218 which held that those two words meant `the managerial supervision and control of trust property on behalf of the beneficiaries.` We also held that s 56(1) cannot be invoked to sanction or authorise an act or transaction where there is an express prohibition against such act or transaction contained in the trust instrument. The power of the court should only be exercised for the benefit of the whole trust: **Re Craven`s Estate (No 2); Lloyds Bank v Cockburn** [1937] Ch 431. But it does not mean that the proposed transaction must be for the benefit of each and every individual beneficiary; rather a broad view of the matter should be taken: **Re Dawson** [1959] NZLR 1360.

The argument of the appellant is that reading cll 2 and 3 together, it is clear that the testator had directed that the property not be sold until and unless all the four sons agreed. Thus, it may be appropriate to determine what was the overriding intention of the testator. For that purpose, it is necessary for the court to look not only at cll 2 and 3 but also other clauses of the Will: **Re Evan`s Settlement** [1967] 3 All ER 343[1967] 1 WLR 1294. Clauses 2 gives the four beneficiaries and their mother the right to reside therein. Clause 3 authorises a sale if all the four beneficiaries agree and in the event of a sale, the proceeds are to be shared equally. While the clause also states that the property `shall not be sold ... or in any way converted into cash`, the object is not to prohibit sale but rather that the beneficiaries should act jointly. Clause 4 provides that if a beneficiary should die, his share would devolve to his children but if he should be without children, his shares would go to the surviving beneficiaries equally. Clause 6 provides that the residue of the estate shall be shared equally among the beneficiaries.

It is a general principle of construction of a Will that the court should ascertain the intention of the testator from the Will as a whole in the light of any extrinsic evidence admissible for the purpose of its construction. The picture that emerged clearly from these clauses is that of a testator who wanted to treat his four sons evenly. Each son is to have the same rights to reside therein and to share in the proceeds. The overriding consideration was not so much to prohibit the sale of the property but to ensure that they shall benefit equally from his estate. The following passage of Knight Bruce LJ in **Kay v Kay** [1853] 4 De GM & G 73 at pp 84-85 explained why a strict literal construction must, in appropriate circumstances, give way to a construction which is in accord with the broad objective of the testator:

> *In common with all men, I must acknowledge that there are many cases upon the construction of documents, in which the spirit is strong enough to*

> *overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorised and bound to construe the writing accordingly.*

The plan of the testator, which was the basis upon which he wrote his Will, was that all the four sons and their wives (and children) should share the same roof in harmony. That was his basic premise. Therefore, in cl 2, he provided that each son has to bear one-fourth share of all rates, taxes, charges and expenses on repairs. He did not anticipate a situation where one son might not be residing there. What then would be the position of a son who has moved out? Is he obliged to contribute? While any fair-minded person would naturally have said that in that situation that son would not be required to contribute, the absence of a provision to that effect merely underscores what was primarily in the mind of the testator, namely, that all the four sons should share the same roof. He would not contemplate otherwise.

In our opinion, the court in sanctioning the sale would not only not be acting contrary to the directions expressed in the Will, but would, in fact, be carrying out the overriding intention of the testator. Indeed, to allow the appellant to enjoy the property solely would run counter to what was the basic intention implicit in his Will. It is hardly necessary for us to go into the cause or causes why the four sons could no longer share the same roof or to determine who were at fault. It should surprise no one that a house which was adequate for one family should be found to be inadequate for four families and that friction would, as a result, arise between the families and the best course was to split and move out. One may ask: why didn`t the testator think of that possibility. He might perhaps have hoped that his children and their families would stay in peace and harmony under the same roof, and the Will was to encourage them doing so.

However, there is one feature which we must refer to. The second respondent moved out of the property in 1980, well before the death of the testator. The question may well be asked why did the testator not make the necessary alteration to his Will, if his overriding consideration was that everyone should reside in the property and should share in it. We must emphasise that the overriding consideration which is relevant here is his overriding consideration at the time he made his Will. Any answer to that question would necessarily be purely speculative because there is no single answer. On the one hand, it could be that he did not think of the implications to the Will when that son moved out. On the other hand, it could also be that he thought no change need be made, and if this should be the case, the question that follows is why did he think no change need be made. Only the testator would know the answer. There may well be other reasons. But, in any case, for the purposes of construing a Will, it is the circumstances prevailing at the time the Will was drawn that were relevant. Therefore, the fact that the testator made no alteration to his Will in 1980 is quite immaterial to determining his overriding intention in 1970.

Having regard to the foregoing, the authorising of the sale would not only be expedient but would be wholly in consonance with the overriding intention of the testator. While the sale would mean that the appellant would not be able to reside in the property any more, he would be entitled to a share of the proceeds. The impasse between the parties should not be allowed to drag on any further.

Judgment

In the result, the appeal is dismissed with costs. The security for costs (with any accrued interest) shall be paid out to the respondents or their solicitors.

Following the decision of the court below, there was a further consent order that execution of the order of 15 February 2000 be stayed. We now lift the stay order and direct that the property be sold within 90 days from the date hereof, subject to the reserved price specified by the court below.

Outcome:

Appeal dismissed.