Leo Teng Kit and Others v Leo Teng Choy
[2000] SGHC 100

Case Number : OS 589/1999

Decision Date : 31 May 2000

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Lim Chee Kiang & Ching Kim Chuah (Lim & Ching) for the plaintiffs; Kesavan Nair (MPD Nair & Co) for the defendant

Parties : Leo Teng Kit; Leoh Teng Hee; Leo Tang Foh — Leo Teng Choy

JUDGMENT:

GROUNDS OF DECISION

The facts

1. The plaintiffs and the defendant are brothers. Their father was Leo Ann Peng (the deceased) who died on 28 September 1989 leaving a Will dated 26 March 1970 (the Will). Two of the sons, namely Leo Teng Kit (the first plaintiff) and Leo Teng Choy (the defendant) were appointed trustees under the Will.

2. In 1956, the deceased purchased a property situated at No. 42, Phillips Avenue (the property) and resided there until his death; the property was his only asset. Clauses 2, 3 and 4 of the Will provided for its disposition as follows:

> 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.
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> 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.

3. After the demise of the decease, the first plaintiff and the defendant applied for grant of probate in Probate No. 1750 of 1992 which grant was extracted on 27 January 1993.

4. Although all members of the Leo family lived at the property, friction developed amongst them even during the lifetime of the deceased primarily due to overcrowding arising from space constraints; the family grew as each of the sons married and started their own families in turn. Due to the frequent quarrels amongst the family members, Leo Teng Hee (the second plaintiff) and his family moved out

sometime in 1980. His departure was followed by that of the first plaintiff with his family in 1992.

5. Sometime in September 1992, the parties' mother Madam Heng Took Kin suffered a stroke. After her discharge from hospital, the defendant refused to take her back so Madam Heng went to live with the second plaintiff. The third plaintiff moved out not long after, leaving the defendant (and his family) in exclusive occupation of the property.

6. In December 1996 when the first plaintiff visited the property, he noticed that the furniture and belongings of himself and his other siblings as well as of his mother were missing. When he inquired of the defendant, he was told that most of them had been thrown away.

7. On or about 22 December 1996, the first plaintiff (and his wife) visited the defendant to inform the latter that the first and second plaintiffs wanted to meet him to discuss the conveyance of the property to the four beneficiaries under the Will; they were concerned about the delay in conveying the property after the grant of probate was extracted and, they were not getting any younger. The first plaintiff alleged that the defendant flew into a rage when he broached the subject and threatened to assault the first plaintiff, prompting the latter to lodge a police report. That incident was followed by another on 23 December 1996 when the defendant and his son went to the first plaintiff's flat in the early hours of the morning and demanded to see the first plaintiff who refused to accede to their demand and whose son had to call for the police before the defendant would leave.

8. After the first plaintiff and the other plaintiffs had discussed the matter with their mother, they unanimously agreed to sell the property and to divide the sale proceeds amongst the four beneficiaries. Apparently, the defendant's (former) solicitors had earlier advised him that the property should be conveyed to the four beneficiaries. Subsequently however, the same solicitors (in December 1996) reversed their previous advice and said the four beneficiaries only had an interest in the sale proceeds of the property but not in the property itself. The defendant, also on the same solicitors' advice, had made a primary application to bring the property under the Land Titles Act but withdrew the application subsequently. Although reminded by the first plaintiff's solicitors in July and September 1999, the defendant refused to proceed with the application. Apparently he had also misplaced the title deeds for the property but failed to obtain a replacement.

9. The plaintiffs alleged that the defendant adopted an oppressive and hostile attitude towards them and that, he was dilatory in the discharge of his duties as a trustee of the estate, seemingly content to do nothing on his former lawyers' (erroneous) advice that the beneficiaries have no equitable interest in the property and therefore the property need not be conveyed to them. However, the property was conveyed to the first plaintiff and the defendant as trustees sometime in 1999.

10. Believing that it was not their father's intention to let the defendant or any beneficiary occupy the property to the exclusion of other beneficiaries and as their father would not have envisaged the impasse that had since arisen between his sons, the plaintiffs instituted these proceeding and applied inter alia, for the following reliefs:-

> a. that it may be determined on a true construction of the Will, whether the property is held by the first plaintiff and the defendant as executors and trustees of the Will on trust for the first, second and third plaintiffs as well as for the defendant;
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> b. that it may be determined whether the beneficiaries under the trust are beneficially interested in the property as tenants in common or as joint tenants;

c. that, if tenants in common, whether the said interests are in equal shares or in some other shares and if so, which;

d. that the first plaintiff and the defendant be ordered to sell the property being property held by them as such trustees upon sale, notwithstanding that the defendant refuses to consent to the sale or consent of the defendant cannot be obtained;

e. alternatively, that the property be sold by order of the Court.

In support of their application, the plaintiffs exhibited a statutory declaration which their mother had made on 5 June 1997 'for use in any legal proceedings in relation to any dispute which may arise in relation to [her] late husband's property'. In essence she supported the allegations made by the first plaintiff in his affidavit.

11. After making several attempts (without success) to persuade the parties to try and resolve their differences by having the defendant buy out the beneficial interests of the plaintiffs in the property (based on its current market value) if he wished to continue to reside there, I made the following orders on 15 February 2000:-

a. an order in terms of prayer (a);

b. that the plaintiffs and the defendant as beneficiaries are entitled to the property as tenants in common each holding Œ share;

c. the property be sold within 60 days (namely by 15 April 2000) with vacant possession at or above $3.75m by either public auction or by private treaty, such sale to be conducted by plaintiffs' solicitors with defendant's solicitors' cognisance;

d. costs to the plaintiffs fixed at $4,000 with disbursements on a full indemnity basis to be deducted from the defendant's share of the net sale proceeds;

e. parties to have liberty to apply.

The defendant has appealed against my decision (in Civil Appeal No 26 of 2000).

The arguments

(i) the plaintiffs' case

12. Counsel for the plaintiffs submitted that a plain reading of cll 3,4 and 6 of the Will meant that the plaintiffs and the defendant are absolutely entitled to the property as tenants in common in equal shares, contrary to the opinion of the defendant's former solicitors that the beneficiaries only had a contingent pecuniary interest in the sale proceeds. They argued that the provision under cl 3 of the Will (that the property cannot be sold without the unanimous consent of the beneficial owners) was only a super-added direction which did not detract from the deceased’s intention to give the property to the beneficiaries who, being adults and absolutely entitled, can unanimously terminate the trust and divide the property amongst themselves under the rule in *Saunders v Vautier* [1835-1842] All ER

58.

13. Counsel for the plaintiffs also submitted that the Court has a discretion to order a sale of the property under s 59(1) of the Trustees Act 1985 edition (which is now s 56(1) of the 1999 edition (Cap 337), citing various English cases to support their proposition. They argued that the pre-condition of unanimity by the beneficiaries before a sale can be effected only related to the timing of the sale, not that it was prohibited altogether, relying on *Marlborough (Duke) v Attorney-General (No. 2)* [1944] Ch 145 and *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1998] 2 SLR 439.

(ii) the defendant's case

14. Before I go into the arguments presented on behalf of the defendant, I should briefly mention the contents of his affidavit in reply to the first plaintiff's filed in support of the application herein. Like the plaintiffs, he had (by way of rebuttal) raised numerous but irrelevant issues including inter alia, the fact that he had contributed towards the construction of a proper access road (in lieu of a gravel road) to the property in or about 1966. Not unexpectedly, he denied he was on bad terms with his brothers and, that he had assaulted or attempted to assault any of his siblings (including the first plaintiff) or their children, citing various instances over the years where he had assisted his siblings and or their children financially. He pointed out that the three plaintiffs moved out because they had purchased HDB flats even before the deceased's demise, not because they could not get along with him. He further denied he refused to let his mother Madam Heng return to reside at the property after her hospitalisation due to a stroke, accusing the third plaintiff of poisoning her mind against him. He discovered subsequently that the third plaintiff had taken the mother to see a lawyer to execute a will, in September 1992, prior to her stroke. Even after the mother went to live with the second plaintiff, the defendant claimed that he visited her frequently until he was forbidden by the second plaintiff in 1994 from going to the latter's home.

15. The defendant explained that he disposed off his siblings' belongings and furniture which they left behind because they eventually resulted in termite infestation which damaged the wooden partitions of the property; he exhibited a survey report to support his contention.

16. The defendant revealed that when the first plaintiff visited him on 22 December 1996, it was to ask him to sign a Deed of Assent and Conveyance which had been prepared by the trustees' former solicitors on the first plaintiff's instructions (without consulting him although he was a joint trustee) and which would have made the four siblings joint title-holders of the property which effect (he ascertained subsequently), would have meant that the property could be sold with a majority vote instead of unanimously, as required under the Will; naturally he refused to sign as a responsible trustee. The first plaintiff then attempted to persuade him to sell the property and distribute the sale proceeds. When the defendant refused, the first plaintiff threatened to force a sale by legal means. The defendant denied he had not been diligent in the discharge of his duties as executor of the estate of the deceased. In fact, it was the first plaintiff who was derelict in his duties as a trustee (including failing to attend a trustees' meeting held on 27 December 1996 at the first plaintiff's behest), leaving it to the defendant to perform all the duties alone. He therefore questioned the first plaintiff's ulterior motive in suddenly wanting to perform his duties as a trustee ... it was to sell the property and to enrich the first plaintiff. He accused all the plaintiffs of colluding to circumvent the Will by alleging misconduct on his part.

17. Finally, the defendant alleged that the statutory declaration made by Madam Heng was done under the undue influence of the plaintiffs as, after her stroke, she was unlikely to be able to have a

considered opinion on such matters.

18. Turning now to the arguments presented for the defendant, his counsel took a stand contrary to that of counsel for the plaintiffs. Counsel submitted that the plain and literal meaning of cl 6 of the Will meant that the children only had an interest and a right to the residue and remainder of the estate without restrictions; they had no interest per se in the property, only in its sale proceeds. Consequently no tenancy in common in the property exists between the siblings. No authorities were cited by counsel for this proposition. Counsel had also overlooked the fact that the property was the only asset of the deceased's estate and as such there could be no residue and remainder in which the beneficiaries could have an interest. He pointed out that the Will imposed conditions if the siblings wished to stay at the property but no penalty if they chose not to and, expressly forbade its renting out. The plaintiffs moved out voluntarily and fortified their action by not contributing their Œ share of the charges for the upkeep of the property. The pre-requisite for a unanimous decision before a sale could be effected was to ensure that none of the siblings wanted to reside at the property any longer. Counsel said that to allow the plaintiff's proposed forced sale would be to go against the wishes of the deceased.

The decision

19. There is little doubt that the plaintiffs were prompted to make this application in their own interests and, by the same token, the defendant is resisting it for his own selfish reasons. I disbelieved both sides' claims to the noble reasons for their respective actions.

20. The only issue that needed to be determined was, does the Will expressly prohibit a sale of the property as the defendant contends or, does it merely postpone it as the plaintiffs submit? Attendant to the issue is the peripheral issue of whether the four beneficiaries under the Will only have a contingent interest in the sale proceeds of but, not in the property itself. I had, in the orders which I made, taken the view that the sale of the property was not prohibited but only postponed which postponement I terminated and in the process expedited the sale, in order to bring about an equitable solution to the existing impasse between the siblings.

21. It would be appropriate to first refer to s 56(1) of the Trustees Act Cap 337 (the Act); it states:-

> Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, 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 –
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> (a) by order confer upon the trustees, either generally or in any particular instance, 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
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> (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.

The above section has to be read with s 2(2) of the Act which states:-

> The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument.

The above two sections would help to address whatever shortcomings there may be in the Will in carrying out the wishes of the deceased so long as it did not mean going against his express wishes. Section 59(3) of the Act specifically empowers either trustees or beneficiaries under the trust to apply to court under the section.

22. Next, I turn to the cases cited. In support of their submission that the Court was empowered by s 59 of the Act to order an immediate sale of the property, the plaintiffs relied on the recent decision in *Rajabali Jumabhoy & Others v Ameerali R Jumabhoy (supra).* There, the Court of Appeal inter alia had to determine the terms of a deed of settlement relating to a property (at No. 8 Scotts Road) which expressly gave the trustees a power of sale but with the discretion to postpone the sale for so long as the trustees think fit. The appellate court, following the decision in *Marlborough v Attorney-General* (supra) held that the fact that there was a discretion vested in the trustees as to the timing of the sale did not prevent the trust for sale from arising.

23. In *Marlborough v Attorney-General* the English Court of Appeal had to interpret the following clause 11 of a deed of settlement dated 11 April 1905 made by the then Duke of Marlborough:

> Notwithstanding anything herein contained no sale of any hereditaments for the time being subject to the trusts hereof or of any right or interest therein or thereover and no purchase of any hereditaments under any power herein contained and no investment of any capital money for the time being held on the trusts hereof and no change of any investment for the time being held on 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 5 Anne Chapter 3 , shall for the time being be vested thereunder if such person shall be of full age…..

Morton LJ held that the trust for sale effected an immediate conversion notwithstanding the necessity for consent. He said (at pp 154-5):-

> The doctrine of conversion arose, no doubt from the rule of equity which considers that as being done which ought to be done, and the courts might have taken the view in the past that if a sale under the trust for sale in a deed is only to take place with the consent of AB no conversion takes place until such consent is given to the trustees. It might have been held that then, and only then, does it become the duty of the trustees to sell, and then, and only then, does conversion take place in equity. It is however, well settled that if real property is vested in trustees on trust for sale with the consent of AB, the consent is treated as intended to regulate the exercise of the trust for sale, but not to prevent the trust for sale from being an immediate trust; and if there is an immediate trust for sale, whether subject to consent or not, the trust operates at once to effect a conversion…..

24. Looking at cl 3 of the Will in its context, and bearing in mind the above extract from Morton LJ's judgment, it seems quite clear to me that a sale of the property was merely postponed, not prohibited, until all four beneficiaries unanimously agreed to the same.

25. Counsel had also relied on *Saunders v Vautier* in support of the plaintiffs' proposition that they had an immediate, not a contingent interest in the property. The headnotes in that case read:-

> By his will the testator bequeathed to his executors and trustees all the East India stock which should be standing in his name at his death on trust to accumulate the dividends until his great nephew V should attain twenty-five and then to transfer the principal, together with such accumulations, to V, his executors, administrators, or assigns absolutely. The will also contained a residuary bequest. The testator had 2,000 East India stock standing in his name at his death.
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> **Held**
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> : V took an immediate vested interest in the legacy although he was a minor at the testator's death and, the stock, with its accumulations, would be transferred to him on his attaining the age of twenty-five.

Looking at cll 2 and 3 of the Will in the above context and in the light of my decision on the main issue, I was unable to accept the argument of counsel for the defendant that the four beneficiary sons of the deceased only had a contingent interest in the sale proceeds of the property, if and when a sale was effected.

26. I had fixed the sale price of the property at or above $3.75m based on the two valuations obtained, one from the plaintiffs' valuers (at $4.3m) and the other from the defendant's valuars ($3.2m); I took the average of the two valuations ($7.5 ‹ 2). I should add that the defendant instructed his valuer to apportion the valuation figure of $3.2m between the house ($150,000) and the land ($3,050,000), an unreasonable and unjustified stance. It was clear from photographs exhibited in the affidavits that the house itself was worthless and the value of the property was in the land; any purchaser would have to demolish the existing house and rebuild. Counsel for the defendant informed the court that even based on his client's own valuation, the defendant would have difficulty obtaining a loan from any financial institution (due to his age and income level) to buy over the Ž share of his siblings. Yet, he was adamant on continuing to reside at the property. The defendant's attitude to say the least was unreasonable. Even if he succeeded in postponing the sale of the property until his death, the defendant was being short-sighted in his complacency. The day of reckoning could not be postponed indefinitely and a time would come when selling the property became inevitable either during or after, the lifetime of the defendant. The defendant and or his family would then be forced to seek alternative accommodation which can only become increasingly more expensive in land scarced Singapore.

27. Consequently, the only feasible solution in the interests of all the siblings, none of whom were particularly well-to-do, was to order an immediate sale of the property so that all the beneficiaries could obtain their Œ share of the sale proceeds either to purchase an alternative home (as in the case of the defendant) or to find some other use for their money which would be quite substantial; hence the orders which I made.

LAI SIU CHIU

JUDGE