IN THE COURT OF APPEAL OF MALAYSIA

Coram: Tengku Maimun Tuan Mat, JCA; Mary Lim, JCA; Stephen Chung Hian Guan, JCA

Gurmit Singh A/L Lal Singh v Sarjit Singh A/L Lal Singh and Another

Citation: [2018] MYCA 331 **Suit Number:** Civil Appeal No. W-02(NCVC)(A)-1414-07/2017

Date of Judgment: 14 September 2018

JUDGMENT

Background facts

[1] Lal Singh A/L Ganga Singh was the registered owner of a property described as Geran No. 45832, Lot No. 24727, Mukim Stapak, Daerah Kuala Lumpur (property). He died on 27.1.1996 leaving his spouse Pritam Kaur A/P Lashman Singh and his children namely the Appellant and the two Respondents and two other children. The Appellant contended that his mother was entitled to one-third (1/3) share and the Appellant and the Respondents were entitled to two-thirds (2/3) shares in the property. Their mother Pritam Kaur died on 26.3.1999.

[2] In 2015 the Appellant filed an Originating Summons (OS) (Enclosure 1) pursuant to the **Probate and Administration Act 1959** that Letters of Administration to the Estate of Pritam Kaur A/P Lashman Singh (deceased) be granted to the Appellant as the lawful son and heir of the deceased.

[3] By Enclosure 9, the 3rd and 4th Respondents in the OS (the two Respondents in this appeal) applied that they be appointed as Co-Administrators of the estate of the deceased and for consequential orders. Both Encl. 1 and Encl. 9 were heard together. After reading the cause papers and hearing submissions, the High Court Judge ruled that (i) there is no asset for administration as the Respondents have produced cogent and indefeasible proof that the property has been transferred and registered in the name of the 4th Respondent; (ii) the Appellant failed to discharge the burden on him that the property or any share therein belonged to the deceased; and (iii) Encl. 1 is an abuse of process and a tactical manouvre to circumvent the time bar. Therefore the High Court Judge dismissed Encl. 1 with costs and struck out Encl. 9 as being academic.

[4] The Appellant has filed an appeal against the decision of the High Court Judge. The Respondents did not file any appeal or cross-appeal.

The Appellant's case

[5] The Appellant submitted that the property was part of the estate of their late father and that their mother was entitled to 1/3 share and the Appellant and Respondents are jointly entitled to 2/3 shares in the property whereas the 2nd Respondent in the appeal contended that the property is registered in her name. The Appellant submitted that the 2nd Respondent did not produce any evidence as to how the property came to be registered in her name so soon after their father's death and without any administration of their late father's estate. He submitted that sans any evidence as to the circumstances that led to the registration of the property in her sole name, the estate of their mother is entitled to a share in the property.

[6] It was submitted that the estate of their late mother has a chose in action in 1/3 interest in the property and this chose in action is the property in the estate of their late mother. The Appellant submitted that he is merely applying for Letters of Administration in the estate of their late mother to be granted to him.

[7] The Appellant admitted that although there is a delay of 13 years in filing the OS, he explained it was only in early 2015 that he obtained legal advice from his solicitors in respect of the need to file the OS to administer the estate of their late mother. He said she passed away on 26.03.1999 and the 3 year period would expire on 26.03.2002. He submitted that notwithstanding the OS was filed almost 13 years later, under O. 71 r. 5(6) of the **Rules of Court 2012**, it merely requires the applicant to state a reason for the delay and nothing more and in the absence of a reason, his application will fail. He submitted that he has given an explanation for the delay.

[8] It was submitted that the delay does not in any way prejudice the Respondents as the Appellant is applying for the Letters of Administration of the estate of the deceased for the benefit of all the beneficiaries of the estate and the fact that the Respondents had indicated their wish to be made Co-Administrators together with the Appellant is evidence that there is merit in the OS and that the Respondents are not at all prejudiced by the application.

[9] The Appellant submitted that a beneficiary under an intestacy has no interest or property in the estate until administration and distribution of the estate is complete in accordance to the law, citing the case of **Lee Kim Lan & Anor v Tan Cheang Heang & Anor** [2018] 1 LNS 254. It was submitted that the Respondents should not have transferred the property before the administration of their late father's estate had been completed and that therefore the deceased's estate has a legitimate right to a 1/3 share in the property.

<u>The Respondents' case</u>

[10] The Respondents submitted that the property is owned and registered in the name of the 2nd Respondent and all the beneficiaries did not dispute this since 1999 they never challenged her ownership of the land.

[11] The Respondents submitted in August 2000 the Appellant entered a private caveat on the property but in September 2005 he withdrew the caveat. They submitted that if their late mother did

own a 1/3 share in the property, it was incumbent that the Appellant should have commenced proceedings then but he did not do so. It was submitted that the burden was on the Appellant to demonstrate how their late mother came to own a 1/3 share in the property or alternatively, why the 2nd Respondent does not own the property.

[12] It was submitted that under the Torrens System, the party in whose favor the registration has been affected obtains indefeasible title, thus it is apparent that the 2nd Respondent owns the property and that the Appellant cannot attempt to usurp her ownership.

[13] It was submitted that any delay of more than 3 years in seeking a grant of letters of administration must be satisfactorily explained but crucially, the Appellant failed to explain (i) why he never sought advice for the past 17 years; (ii) what were the reasons that hindered him from seeking advice in the past 17 years; (iii) what were the events that transpired in the past 17 years; and (iv) why he seeks to administer the estate only now after 17 years. It was submitted that the Appellant is time barred by reason of s. 23 of the **Limitation Act, 1953**.

The Court's decision

[14] A beneficiary under an intestacy has no interest or property in the personal estate of a deceased person until the administration of the latter's estate is complete and distribution is made according to the law of distribution on the intestate's estate: **Chor Phaik Har v Farlim Properties Sdn Bhd** [1997] 3 MLJ 188.

[15] Under s. 6(1)(e) of the **Distribution Act 1958**, if an intestate dies leaving a spouse and issue but no parent or parents, any property of the intestate's estate, after due administration, the surviving spouse shall be entitled to one-third of the estate and the issue, the remaining two-thirds.

[16] On the facts, which are not in dispute, their late father died on 27.1.1996 intestate, leaving Lot 24727 (the property). Their mother died in 1999. At all material times the property belonged to their late father or at least to his estate, upon his passing. Pursuant to s. 6(1)(e), their late mother, who survived their late father, would be entitled to a one-third share and the Appellant and Respondents to two-thirds shares in the estate of their late father. Letters of Administration should but was not taken out in the estate of their late father. There was no proof that it had been done and that the estate had been distributed according to the law.

[17] However, based on a land search marked as "M-1" annexed to the affidavit of the 2nd Respondent, on 12.11.1996, a charge was registered on the property by the 2nd Respondent in favour of Malayan Banking Bhd (Maybank) as security for a loan given to the 2nd Respondent, before any Letters of Administration were applied for either by the Appellant or the Respondents. This transaction took place about 6½ months after the death of their late father. The land search showed that the property was registered in the name of the 2nd Respondent but there is no endorsement of the date when it was transferred to or registered in the name of the 2nd Respondent. This raised questions on the propriety of those transactions.

[18] From the record of appeal, there was no satisfactory explanation given by the Respondents as to how and why the 2nd Respondent was able to register the property in her name or the charge registered against the property bearing in mind that no Letters of Administration had been taken out in the estate of their late father. She also never said that it was given to her by her late father before he died. Further, she did not say that she bought the property from her late father. There was no proof that she had paid for it. She did not inform her mother or her brother about the transactions after their father passed away. The Appellant only found out subsequently.

[19] In respect of the delay, under O. 71 r. 5(6) of the **Rules of Court 2012**, where an application for a grant is made after a lapse of three years from the death of the deceased, in this application their late mother, the reason for the delay shall be set out in the affidavit in support of the OS which the Appellant had done. O. 71 does not provide any limitation period to defeat the application for the grant of administration of the estate of their late mother. The Appellant had accounted for his delay. The learned Judge had rejected his explanation, describing it as an abuse of process and a tactical manoeuvre to circumvent the time bar. With respect, we disagree. We cannot see how the Appellant's candid explanation of having only obtained legal advice in 2015 is a bare averment. We do not see any prejudice to any of the Respondents and we agree that the Respondents application to be made Co-Administrators supports this conclusion.

[20] Although no Letters of Administration were taken out in the estate of their late father, the Appellant by way of the OS applied for letters of administration of the estate of their late mother in respect of her beneficial interest in the one-third share in the estate of their late father's estate pursuant to s. 6(1)(e) of the **Distribution Act**. In our view and for the purpose of the Probate and Administration Act 1959 read together with section 6(1) of the **Distribution Act 1958**, there is asset in the deceased's beneficial share in the property which asset (chose in action) formed the estate. Based on the circumstances of the case, the Appellant has the necessary locus standi to apply for the Letters of Administration in the estate of his late mother: see **Al Rashidy bin Kassim & Ors v Rosman bin Roslan** [2007] 4 MLJ 297. We took note that the Respondents by Encl. 9 had applied to be made Co-Administrators of the estate of their late mother which application was struck off by the High Court on the ground that it became academic and there was no appeal against that decision. The Respondents application to be made Co-Administrators of the estate of the deceased contradicted their arguments that there were no assets in the deceased's estate to administrator.

[21] For the reasons given, we allowed the appeal with no order as to costs. The decision of the High Court was set aside and we granted order in terms of prayers (a) and (b) of the OS. The deposit was refunded.

Dated: 14th September 2018

sgd

STEPHEN CHUNG HIAN GUAN
Judge, Court of Appeal
Putrajaya

COUNSEL

For the Appellant: Jadadish Chandra, Messrs. Arbain & Co

For the Respondents: Dinesh Praveen Nair and Jaqdesh Singh Johal, Messrs. Dinesh Praveen

LEGISLATION REFERRED TO:

Distribution Act 1958, Sections 6(1), 6(1)(e)

Limitation Act 1953, Section 23

Probate and Administration Act 1959

Rules of Court 2012, Order 71, Order 71 Rule 5(6)

JUDGMENTS REFERRED TO:

Al Rashidy bin Kassim & Ors v Rosman bin Roslan [2007] 4 MLJ 297

Chor Phaik Har v Farlim Properties Sdn Bhd [1997] 3 MLJ 188

Lee Kim Lan & Anor v Tan Cheang Heang & Anor [2018] 1 LNS 254