

**DI DALAM MAHKAMAH RAYUAN MALAYSIA  
(BIDANGKUASA RAYUAN)**

**RAYUAN SIVIL NO: P-02-1085-2005**

**Antara**

- 1. Eu Boon Yeap**
- 2. Eu Siew Cheng**
- 3. Ong Sin Kheng** ..... **Perayu-perayu**

**Dan**

**Ewe Kean Hoe** ..... **Responden**

**(Di dalam Mahkamah Tinggi Malaya di Pulau Pinang  
Guaman Sivil No. 22-290-1996)**

**Antara**

**Ewe Kean Hoe** ..... **Plaintif**

**Dan**

- 1. Eu Boon Yeap**
- 2. Eu Siew Cheng**
- 3. Ong Sin Kheng** ..... **Defendant-Defendant)**

**CORAM:**

**MOKHTAR BIN SIDIN, J.C.A.  
LOW HOP BING, J.C.A.  
MD RAUS BIN SHARIF, J.C.A.**

## **JUDGMENT OF LOW HOP BING, J.C.A.**

### **I. APPEAL**

**[1]** On 16 September 2005, the learned judge of the Penang High Court (“the trial court”):

- (1) allowed with costs the claim of the plaintiff – respondent (“the plaintiff”) and decreed the grant of probate (“the probate”) for the will of one Eu Chin Eow, deceased, (“the deceased”) dated 26 November 1990 (“the will”); and
- (2) dismissed with costs the counterclaim of the first, second and third appellants – defendants (“the defendants”) seeking inter alia to set aside the probate.

**[2]** This is the defendants’ appeal against the aforesaid orders.

## **II. THE PARTIES**

[3] The plaintiff, the deceased's nephew, is the sole executor, trustee and beneficiary under the will.

[4] The first, second and third defendants are respectively the deceased's son, daughter and wife.

[5] The deceased died on 10 December 1995 at the age of 80.

## **III. BURDEN OF PROOF**

[6] Defendants' learned counsel Mr. JA Yeoh (Mr. JJ Chan with him) submitted that there was misdirection by the trial court in placing upon the defendants the burden of proving the deceased's testamentary incapacity when the defendants were only required to question the deceased's mental capacity. They relied on *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* (2003) 2 MLJ 97 CA.

**[7]** Learned counsel Mr. Ooi Soo Jit contended for the plaintiff that the trial court quite clearly has appreciated the law as it stood, referring also to *Lee Ing Chin*, supra.

**[8]** It is to be noted that the trial court followed the judgment of Gopal Sri Ram JCA delivered for the Court of Appeal in *Lee Ing Chin*, supra, at p.113G-H, which where relevant merits reproduction as follows:

“It is settled law where the validity of a will is challenged, the burden of proving testamentary capacity and due execution lies on the propounder of the will as does the burden of dispelling any suspicious circumstances that may surround the making of the will. However, the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lies on those who challenge the will.”

[9] In this context, the meaning of the expression “testamentary capacity” has been set out by the Federal Court in *Udham Singh v Indar Kaur* (1971) 2 MLJ 263 at pp 264 – 265 in the following words:

“ A person has testamentary capacity when he understands the nature of his act and its effect; the extent of the property of which he is disposing; the claims to which he ought to give effect; and, with a view to the latter object, no disorder of the mind must poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, and no insane delusion must influence his will in disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made. (*Bank v Goodfellow* (1870) LR 5 QB 565).”(See also *Lee Ing Chin, supra* at p.114 A – C).

**[10]** The burden of proof in testamentary cases may shift from one party to another, as evident in the succinct statement delivered by Lord Brougham in *Waring v Waring (1848) 13 ER 715 at p. 720* as follows:

“The burden of the proof often shifts about in the process of the cause, accordingly as the successive steps of the inquiry, leading to inferences decisive, until rebutted, casts on one or the other party the necessity of protecting himself from the consequences of such inferences; nor can anything be less profitable as a guide to our ultimate judgment than the assertion which all parties are so ready to put forward in their behalf severally, that, in the question under consideration, the proof is on the opposite side. Thus, no doubt, he who propounds a matter will undertake to satisfy the Court of Probate, that the testator made it, and was of sound and disposing mind. But very slight proof of this, where the factum is regular, will

suffice; and they who impeach the instrument must produce their proofs, should the party actor, the party propounding, choose to rest satisfied with his prima facie case, after an issue tendered against him. In this event, the proof has shifted to the impugner; but his case may easily shift it back again. “ (See also *Lee Ing Chin, supra, at p114 D – F*).

**[11]** The Federal Court *in Gan Yook Chin & Anor v Lee Ing Chin & Ors (2004) 4 CLJ 309 FC* heard the appeal from *Lee Ing Chin, supra, .* At p.322 b-c Steve Shim CJ (S & S), delivering the judgment of the Federal Curt held that the Court of Appeal had quite rightly stated the settled law. The Federal Court additionally adopted the instructive approach taken by the High Court of Australia (which is the apex court there) in *William Henry Bailey & Ors v Charles Lindsay Bailey & Ors (1924) 23 CLR 558*, where Issacs J stated in para (8) that, once the proponent establishes a prime facie case of sound mind, memory and understanding with reference to the

particular will, for capacity may be either absolute or relative, the *onus probandi* lies upon the party impeaching the will to show that it ought not to be admitted to proof.

[12] In the light of the above authorities, I am of the view that there was no misdirection by the trial court in holding that the defendants bear the burden of establishing the deceased's testamentary incapacity as an extraneous vitiating element. It needs also to be observed that such burden of proof may shift from the challenger or impugner to the propounder as explained in *Waring, supra*.

#### **IV. TESTAMENTARY INCAPACITY, DUE EXECUTION AND FORGERY**

[13] The defendants alleged that the deceased's execution of the will was a result of testamentary incapacity, as the deceased was not of good health, sound mind, memory and understanding, being 75 years

old and was suffering from senile dementia aggravated by his ill-health, and that the will has been forged.

**[14]** The plaintiff responded that the trial court had undertaken a tedious examination of the evidence and arrived at a correct finding that the will has been duly executed by the deceased.

**[15]** The plaintiff added that in the light of, inter alia, *Kameswara Rao v Suryaprakasarao A.I.R (1962) AP 178*; and *Lee Ing Chin, supra*, the opinion of the handwriting expert SD3 must be treated with great caution.

**[16]** In the instant appeal, it is best to consider all the aforesaid issues together, as they are related but yet opposing to each other.

**[17]** The trial court had accepted the evidence adduced for the plaintiff through five witnesses viz SP2 to SP6. The cumulative effect of their evidence is that the

deceased had given instructions for the will to be drawn up and that the deceased had duly executed the will.

**[18]** In particular, Mr. Lim Cheng Chuan (SP6), the solicitor who prepared the will, testified that the deceased had given instructions for him to prepare the will.

**[19]** Mr. Lim Eu Keng (SP3), another solicitor, testified that on 26 November 1990, he witnessed the execution of the will and that a few days before the execution thereof, three persons viz the deceased, his brother Eu Chin Sam and Eu Chin Sam's wife (ie the deceased's sister-in-law) went to the law firm of SP3 and SP6 to give instructions to SP6 to prepare, inter alia, the will. The content of the will was explained by SP3 in the Hokkien dialect to the deceased in the presence of SP4 who is SP3's clerk. The deceased then executed the will.

**[20]** SP5 who was a friend of the deceased testified that he saw the execution of the will by the deceased in the presence of two attesting witnesses viz SP3 and SP4. SP5 also confirmed that SP2, the plaintiff's mother, was present at the same time.

**[21]** The defendants were not present when the will was executed by the deceased. However, they testified that the deceased's signature on the will could not have been affixed by the deceased.

**[22]** The trial court had evaluated the entire evidence adduced for the defendants to the effect that in 1990 at the time of the execution of the will, the deceased was neither in good health, nor of sound mind, memory and understanding being in depression, and had developed forgetful habits as he had started collecting rubbish, bottles, used cans and so on. The defendants however did not tender any medical evidence to support the deceased's testamentary incapacity, mental delusion,

senile dementia or insanity at the time of the execution of the will. On the contrary, the deceased's daughter (SD1) under cross-examination confirmed that in November 1990, the deceased could walk around and could still go to the bank.

**[23]** SD2, another witness for the defendants, confirmed that from 1989 to 1991, the deceased was still able to go to the bank and record his banking transactions, and that the deceased went by himself to see his doctor in the 1990s.

**[24]** SD4's evidence was that on 24 November 1990 which was two days before the execution of the will on 26 November 1990, the deceased had signed Public Bank forms for the purpose of opening a fixed deposit account.

**[25]** Upon a careful consideration of the entire evidence adduced for both the plaintiff and the defendants, the trial court accepted as credible the evidence adduced for

the plaintiff relating to the preparation and due execution of the will, there being no reason for the two solicitors viz SP3 and SP6 to tell lies in court.

**[26]** Next, the trial court considered the evidence of the handwriting expert SD3 who gave evidence for the defendants. SD3 testified that the deceased's signature in the will was forged, being of different authorship "because of similarity in general form but difference in fine details".

**[27]** The trial court found that the procedure adopted by SD3, in examining the samples given to him, revealed the following weaknesses:

- (1) only one specimen signature ("the specimen signature") E1 was available for comparison with the signature on the will given to SD3 for examination;

- (2) the specimen signature and the signature on the will were not signed at the same time; the former in 1995, while the will was signed in 1990, and SD3 confirmed that a person's signature varies slightly from time to time and that there would be subtle changes over a period of time;
- (3) the specimen signature was affixed by means of a ballpoint pen while the signature on the will was not written by means of a ballpoint pen; and
- (4) SD3 admitted that the author's signature may be affected by many factors such as "temporary or permanent physical disorders, eyesight, degree of self-control, aesthetic taste, mental disturbances, changes due to sanity" as advocated in the article "Examination of Handwriting and Signatures" by *Harcharan*

*Singh Tara (1995) 3 MLJ i*; but SD3 had not taken any of these factors into consideration when forming his opinion.

**[28]** The trial court also found that the defendants had failed to make a police report in connection with the alleged forgery of the will and so was not convinced of the credibility of the evidence adduced for the defendants.

**[29]** The immediate question that arises for determination herein is whether there is any appealable error on the part of the trial court to warrant appellate interference.

**[30]** In my judgment, it is to be noted that the question of whether the will has been forged is one of fact. The learned trial judge had the audio visual advantage of evaluating the evidence of the plaintiff's witnesses, in particular SP3, SP4, SP5 and SP6, who are disinterested witnesses testifying for the plaintiff. All these four

witnesses have given direct evidence that it was the deceased who had executed the will. It is immensely important to specifically analyse the respective role of these witnesses.

**[31]** SP6 was the solicitor to whom the deceased had given instructions to prepare the will. He had testified that due execution of the will by the deceased was witnessed by two persons viz SP3, also a solicitor and the solicitor's clerk, SP4. The deceased's due execution of the will was at the same time effected in the presence of SP5 who was a friend of the deceased and was with the deceased. There was no evidence that any of these four witnesses were actuated by any ulterior motive or collateral purpose to induce them to concoct half-truths or untruths in relation to the respective role played by them as adumbrated above.

**[32]** By way of comparison and contrast, the trial court found that the evidence adduced for the defendants were at best bordering on conjectures and speculations.

**[33]** I am of the view that the trial court's specific finding of facts based on the acceptance of the evidence adduced for the plaintiff as credible, in preference to the evidence adduced for the defendant, is free from any error.

**[34]** The trial court is correct in holding that the plaintiff, as the propounder of the will, has discharged the burden of proving due execution of the will.

**[35]** I shall now consider whether the defendants as the challengers or impugners of the will have succeeded in discharging the onus of establishing forgery as a vitiating element.

**[36]** In this regard, SD3's evidence as a handwriting expert must be viewed in the light of the evidence of the plaintiff's disinterested witnesses who had actually seen the signing of the will by the deceased and that the trial court has found these witnesses to be credible witnesses.

**[37]** A case in point is *Lee Ing Chin, supra*, where the Court of Appeal after referring to *Newton v Ricketts (1861) IIR 731*; and *Kameswara Rao v Suryaprakasarao AIR 1962 AP 178* enunciated the principle at p. 137 E as follows:

“We consider it to be well established general guide to the judicial appreciation of handwriting evidence that where there is a sharp conflict between the direct testimony of a disinterested witness on the one side and that of a handwriting expert on the other as to the genuineness of the execution of a

document, then it is a safe course for a court to prefer the direct evidence.”

[38] On appeal, the Federal Court in *Gan Yook Chin, supra*, affirmed the above sentiment expressed by the Court of Appeal.

[39] The trial court had therefore correctly declined to accept SD3’s evidence, and rightly held that the defendants had failed to discharge the burden of proving forgery.

**V. PRINCIPLES OF APPELLATE INTERVENTION**

[40] The trial court had meticulously embarked upon a sufficient appreciation of the evidence adduced at the trial, by assessing, weighing and for good reasons, accepting the evidence of due execution adduced for the plaintiff as credible and meanwhile finding that the defendants have not discharged the burden of proving

the testamentary incapacity of the deceased and forgery of the will.

**[41]** For this purpose, in *Lee Ing Chin, supra*, at 116 E – F, the Court of Appeal re-affirmed that:-

“ .....an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think, appropriate that we say what judicial appreciation of evidence involves.

A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when

deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. He must also test the evidence of a particular witness against the probabilities of the case.”

**[42]** On appeal, in *Gan Yook Chin, supra*, it was argued that the Court of Appeal had applied a new technique of “insufficient judicial appreciation of the evidence” which was quite different from the established “plainly wrong” test which merely required the court to look at the substance of the judgment as a whole and not a minute examination of the evidence of all the witnesses. The Federal Court at p.320 f – g held that the Court of Appeal “had clearly borne in mind the central feature of appellate intervention ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phase

“insufficient judicial appreciation of evidence” merely related to such a process. This is reflected in the Court of Appeal’s restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on issues of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.”

**[43]** On the issues of testamentary incapacity, due execution and forgery, I apply the aforesaid principle and hold that there is no appealable error on the part of the trial court to warrant any appellate interference.

## **VI. KNOWLEDGE AND APPROVAL**

[44] The defendants complained that the trial court had failed to appreciate that the plaintiff has to prove affirmatively that the deceased knew and approved of the contents of the will, particularly:

- (1) when the deceased could not understand the will which was written in the English language;
- (2) the deceased's address in the will differed from that in his identity card;
- (3) the deceased's property was described as "undivided share in the rubber estate in Teluk Bahang, Penang known as Lot 83 and Lot 488 Mukim 2 South West District, Penang", when the property was not a rubber estate and the deceased owned the whole property; and

(4) the deceased's daughter SD4 testified that the deceased could not have given the particulars of the property to the lawyers as the deceased did not have the title deed.

**[45]** The plaintiff stressed that the trial court had considered the evidence of the witnesses and correctly arrived at the conclusion that the deceased knew and approved of the contents of the will.

**[46]** The essence of the trial court's finding is that the solicitor SP6 had prepared the will accordingly as instructed by the deceased who came to his office a few days before 26 November 1990. The attesting solicitor SP3 had explained the contents thereof in the Hokkien dialect to the deceased. The deceased replied that he agreed with the contents and then signed the will. SP4 also confirmed this. The trial court found as illogical the suggestion that after residing in largely Hokkien-

speaking Penang for almost 50 years, the deceased could not speak and understand Penang Hokkien. Further, the deceased's son, SD1, communicated with the deceased in simple Hokkien.

**[47]** In my judgment, the description of the property as ‘rubber estate’ and ‘undivided share’ and the different addresses alluded to above are minor discrepancies which do not give rise to any doubt in relation to the identity of the property, as the material particulars such as the lot numbers, the mukim and the district have been accurately and specifically stated in the will. There is no uncertainty or ambiguity in the contents of the will. Hence, the validity of the will is in no way negated.

**[48]** The trial court's finding is based on the credibility of witnesses after embarking upon a proper judicial appreciation of the evidence adduced at the trial. I am unable to find any misdirection in this respect and so I must refrain from any appellate interference.

## **VII. SUSPICIOUS CIRCUMSTANCES**

[49] The defendants outlined the following circumstances to vitiate the will:

- (1) SP6 who was instructed to prepare the will did not open any file and the deceased did not make any appointment with him;
- (2) Witnesses SP3 and SP6 could not describe the appearance of the deceased;
- (3) The will was purportedly signed by the deceased in a coffee shop;
- (4) The will was not in the possession of the deceased's family members but was instead in the possession of the plaintiff's mother;

- (5) The plaintiff was merely a nephew of the deceased and had attempted to present himself as the deceased's adopted son;
- (6) The deceased was poor, reserved and thrifty;  
and
- (7) The deceased was a devoted husband and father to the defendants' respectively.

**[50]** The plaintiff relied on *Lee Ing Chin, supra*, and contended that the plaintiff's burden of dispelling suspicious circumstances has been discharged by showing that the deceased knew and approved of the contents of the will.

**[51]** The trial court had dismissed the defendant's contentions as mere conjectures and speculations.

**[52]** In this regard, I am of the view that the answer to the defendant's submission is to be found in the followings passages.

(1) "A court of probate must first be satisfied that a testator understood the dispositions of a will, and that it was duly executed by him as his will. Once so satisfied, it is not concerned with the fairness of the will. A court must resist the natural temptation to set aside a will on the ground that it does not appear to be fair, equitable or just." ( *Lee Ing Chin, supra*, at p.140E CA);

(2) "It is not for us to fathom the motivations of a man. His actions and reactions are unpredictable as they depend upon so many circumstances. There is, however, always some dominant and impelling circumstances which motivate a man's action though in some

cases even a trivial and trifling cause impels him to act in a particular way which a majority of others may not do. At times psychological factors and the frame of mind in which he is , may determine his action.” (per *Jaganmohan Reddy J in Surendra Pal v Saraswati Arora AIR 1974 SC 1999*); and

- (3)** “A man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing the court will not interfere with the exercise of his volition.” ( *Motibai Hormusjee v Jamesetjee AIR 1924 PC 28 at p.33 PC*)

**[53]** As alluded to above, the plaintiff as propounder of the will bears the burden of dispelling any suspicious circumstance that may surround the making of the will.

**[54]** This burden may be discharged by showing that the deceased being of competent mind, had his will read over

to him (*Fulton v Andrew* (1875) LR 7 HL 448) or that the deceased knew and approved of the contents of the will (*Tyrrell v Painton* (1894)P 151).( see *Lee Ing Chin, supra*, where at p. 116B),

[55] Since the trial court had accepted the evidence of SP2 to SP6 and arrived at a specific finding of fact that the will has been read over to the deceased and the deceased understood the dispositions of the will, after which he had executed the will as his will, there is an end to any and all of the so-called suspicious circumstances and indeed all other collateral issues raised against the validity of the will (see *Lee Ing Chin, supra*, CA, at p. 138 G – H).

### **VIII. CONCLUSION**

[56] On the foregoing grounds, I hold that the defendants' appeal is devoid of merits and is dismissed with costs. The orders of the trial court are hereby

affirmed. Deposit to the plaintiff on account of taxed costs.

**DATUK WIRA LOW HOP BING**  
Court of Appeal Judge  
PUTRAJAYA

Dated this 19 September 2007

**Counsel for Appellants**

Mr. J.A. Yeoh (Mr. JJ Chan with him)

**Counsel for Respondent**

Mr. Ooi Soo Jit

## **REFERENCES:**

1. **Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor (2003) 2 MLJ 97 CA;**
2. **Udham Singh v Indar Kaur (1971) 2 MLJ 263 at pp 264 – 265;**
3. **Bank v Goodfellow (1870) LR 5 QB 565);**
4. **Lee Ing Chin, supra at p.114 A – C;**
5. **Waring v Waring (1848) 13 ER 715 at p. 720;**
6. **William Henry Bailey & Ors v Charles Lindsay Bailey & Ors (1924) 23 CLR 558;**
7. **Kameswara Rao v Suryaprakasarao A.I.R (1962) AP 178;**
8. **Harcharan Singh Tara (1995) 3 MLJ 1;**
9. **Newton v Ricketts (1861) IIER 731;**
10. **Jaganmohan Reddy J in Surendra Pal v Saraswati Arora AIR 1974 SC 1999**
11. **Motibai Hormusjee v Jamesetjee AIR 1924 PC 28 at p. 33 PC;**
12. **Fulton v Andrew (1875) LR 7 HL 448);**
13. **Tyrrell v Painton (1894) P 151;**