

Toh Tian Sze v Han Kim Wah
[2012] SGHC 111

Case Number : Originating Summons No 905 of 2011
Decision Date : 23 May 2012
Tribunal/Court : High Court
Coram : Lee Seiu Kin J
Counsel Name(s) : Bernard Sahagar s/o Tanggavelu (Lee Bon Leong & Co) for the plaintiff; Sim Bock Eng and Lee Ee Yang (WongPartnership LLP) for the defendant.
Parties : Toh Tian Sze — Han Kim Wah

Land – interest in land – tenancy in common

23 May 2012

Judgment reserved.

Lee Seiu Kin J:

1 The plaintiff and the defendant are the registered proprietors of Lot No 443 V of Mukim 20 (“the Property”) as tenants in common in equal shares. In this originating summons the plaintiff applied for an order to partition the Property, and alternatively for an order that the Property be sold in the open market and the sale proceeds distributed in equal shares.

2 The Property is a residential plot of land with an area of about 745 square metres located at Lorong Tanggam. It is physically divided into two parts roughly equal in area by a wall running approximately in the middle. In each divided half is a detached house. The plaintiff has possession of the house which is assigned the address No 45 Lorong Tanggam and the defendant has possession of the house which is assigned No 49 Lorong Tanggam. The events leading to the present application for partition may be summarised as follows:

Date	Transaction
25 May 1959	The defendant and Foo Chee Toon purchased the Property from Singapore United Estates Ltd as tenants in common in equal shares.
21 September 1979	Foo Chee Toon sold his half share of the Property to Foo Yong Suan via an indenture of assignment.
14 August 1989	Foo Yong Suan sold his half share of the Property to the plaintiff via an indenture of assignment.
10 July 1992	An agreement to jointly build a pair of semi-detached houses on the Property was drafted by the plaintiff’s solicitors but not signed by either party.
10 Apr 1999	The parties signed a handwritten note to “jointly develop or to partition [the Property] into 2 lots vide a Deed of Partition”.
15 May 2000	The plaintiff and defendant entered into an agreement entitled “Partition Agreement”.

2000 – 2002	The parties sought approval for subdivision from the Urban Redevelopment Authority (“URA”) but the proposal was rejected on the ground that it would create two plots that are smaller than the minimum required plot size of 400 square metres for a detached house.
21 June 2002	The parties appointed The Architects Circle to submit design plans for a pair of semi-detached houses to URA for approval.
9 January 2003	A supplemental Partition Agreement was drafted but not signed.
November – December 2003	The Architects Circle submitted plans for redevelopment but the design was rejected by URA.
January to September 2011	The plaintiff and the defendant’s children/family friend discussed the sale of the plaintiff’s half share. No agreement on price has been reached to date.

3 The plaintiff is a businessman who had previously redeveloped another property in the same area. He had purchased the previous owner’s interest in the Property for investment purposes. The plaintiff claimed that the defendant had initially agreed to redevelop the land into a pair of semi-detached houses. However they could not agree on its exact terms and are now unlikely to agree on a particular mode of partitioning the Property. That is the reason he is making the present application as he is otherwise unable to develop the Property.

4 The defendant denied that there was any agreement to jointly redevelop the Property, and argued that there was no reason to compel her to sell her property simply for the convenience of the plaintiff.

5 It was not disputed that the parties signed and entered into a “Partition Agreement” dated 15 May 2000 (“the 2000 Agreement”). The relevant clauses of the 2000 Agreement provide as follows:

1. The parties hereto shall divide and take the Property in severalty in the manner hereinafter provided:-

(a) [Defendant] shall take in severalty 49 Lorong Tanggam; and

(b) [Plaintiff] shall take in severalty 45 Lorong Tanggam.

2. After the date hereof, the parties hereto shall make the necessary application to the competent authority for the subdivision of the Property with the intent that two (2) separate Certificates of Title (hereinafter called the “CTs”) may be issued for 49 Lorong Tanggam and 45 Lorong Tanggam and the parties hereto shall do all things necessary for and incidental to the obtaining of such subdivision approval and of the CTs.

...

8. The parties hereto further agree as follows:-

(a) to retain the existing wall which separates 49 Lorong Tanggam and 45 Lorong Tanggam;

(b) neither party may demolish the said wall Provided Always that if the [defendant] redevelops 49 Lorong Tanggam or if the [plaintiff] redevelops 45 Lorong Tanggam, the party who first redevelops may demolish the said wall and rebuild a new wall only in accordance with clause 8 (c) below;

(c) the said wall may be demolished and the new wall may be built only subject to the following conditions [\[note: 1\]](#)

...

6 A draft supplemental agreement was drawn up to replace clause 8 above (at [\[5\]](#)) with the following:

8 The parties hereto further agree to jointly develop the Property and obtain subdivision of the Property as follows:-

...

(b) the parties shall co-operate fully with each other and The Architects Circle for the demolition of the Property and the subsequent construction of a pair of semi-detached houses on the same site;

(c) the completed semi-detached houses shall each have an area of 260.62 square metres and a total area of 521.22 square metres;

...

(f) all expenses, costs, disbursements or charges arising from or in connection with the demolition of the Property, the subsequent construction of the pair of semi-detached houses, the subdivision and the issue of the CTs, shall be borne by the parties equally. [\[note: 2\]](#)

However this supplemental agreement was not signed by the parties.

7 Under the 2000 Agreement the parties had agreed to subdivide the Property by obtaining separate CTs, with each party retaining his or her original detached unit. This is corroborated by the parties' application to the URA for subdivision, which was for subdivision into two separate legal lots and not redevelopment. In the event, URA did not approve the subdivision and the 2000 Agreement could not be carried out. The 2000 Agreement makes no mention of joint redevelopment and although there are contemporaneous documents that suggest that the parties considered joint redevelopment as a real possibility – such as the engagement of an architect to submit plans to URA for approval – there is no evidence of an agreement being reached to jointly redevelop the Property.

8 There was therefore an agreement to partition the Property on particular terms, performance of which is impossible due to URA's refusal to grant planning permission. In this application, the plaintiff asked this court to order partition on different terms, alternatively to exercise its discretion to order a sale in lieu of partition.

9 The Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) provides, in s 18(2) read with para 2 of the First Schedule thereto, that the High Court shall have:

Power to partition land and to direct a sale instead of partition in any action for partition of land; and in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part of it to be sold, and to give all necessary and consequential directions.

10 The background to this provision was traced by S Rajendran J ("Rajendran J") in *Abu Bakar v Jawahir and Others* [1993] 1 SLR(R) 865 ("*Abu Bakar*"). He said at [7]-[17]:

7 At common law there was no right to compel partition. Coparceners, who took their land by descent from the former owner, were allowed to insist upon partition, for as their co-ownership was cast on them by the act of the law and not by their own agreement, it was thought right that the perverseness of one should not prevent the others from obtaining a more beneficial method of enjoying the property. This argument was, however, not applied to joint tenants or tenants in common, which necessarily arose by act of parties; but by the Partition Acts 1539 and 1540 (of Henry VIII), a statutory right to compel partition was conferred upon joint tenants and tenants in common, one tenant being entitled to insist upon a partition however inconvenient it might be (see Megarry and Wade, *Law of Real Property* (5th Ed) at p 454). The position in England prior to the Partition Act of 1868 is summarised as follows in *Halsbury's Laws of England vol 21* (1912 Ed):

Prior to the passing of the Partition Act 1868, partition was a matter of right, and the court had no discretion to refuse partition or to order sale in lieu thereof. This state of the law produced numerous inconveniences and absurdities. In *Turner v Morgan* (1803) 8 Ves 143, Lord Eldon LC decreed partition of a single house, and Mr Romilly in argument cited a case of a house at Cockermouth which was partitioned by actually building a wall up the middle. This state of the law led to the passing of the Partition Acts 1868 and 1876, under which the court has wide powers to order a sale in lieu of partition where the nature of the property or the interest of the parties makes that more convenient.

8 Thus, whilst a co-owner could obtain partition as of right under the Partition Acts of 1539 and 1540, it was only with the enactment of the Partition Act of 1868 that the court had the power to order a sale in lieu of partition.

9 In the case of *Tan Kiong v Ou Phaik* (1898-1899) SSLR 77, Hyndman-Jones J held that by reason of the Charter of 1826 the Partition Acts of 1539 and 1540 were in force in the Straits Settlements but not the Partition Acts of 1868 and 1876. The result was that while a co-owner had the right to have the property partitioned upon application to court there was no power in the court to order the property sold in lieu of partition and the proceeds distributed amongst the co-owners.

10 The absence of such power in the courts was remedied in 1902 with the enactment of the Partition Ordinance 1902 (Straits Settlements Ordinance No XX of 1902). This ordinance was in substance a re-enactment of the Partition Acts of 1868 and 1876.

11 The Partition Ordinance of 1902 was repealed in 1907 (by Ordinance No XXXIII of 1907) and its provisions were incorporated in the Civil Procedure Code 1907. It is interesting to note the following commentary to s 1018 of the Code:

This section is taken from s 3 of the English Partition Act of 1868 and s 3 of the Partition Ordinance 20 of 1902, now repealed.

Under this section the court cannot *mero mortu propriis* order a sale; it can only do so, 'on

the request of any party interested' in the property. The dissent even of a majority of the interested parties, does not prevent the court ordering a sale, if the court, in its discretion, considers a sale 'more beneficial for the parties interested than a division of the property.'

12 In 1934, the provisions relating to partition and sale were taken out of the Civil Procedure Code and incorporated, although in a different form of words, in s 11(2)(d) of the Courts Ordinance (No 17 of 1934). Section 11(2)(d) of the Courts Ordinance 1934 (which was clearly the precursor to s 18(2)(c) of the Supreme Court of Judicature Act (Cap 322)) provided as follows:

(2) The High Court shall also have jurisdiction —

...

(d) to direct a sale instead of partition in an action for partition in the manner provided and subject to the conditions contained in the Partition Acts, 1868 and 1876; and in any cause or matter relating to land, where it appears necessary or expedient, to order such land or any part thereof to be sold, and give all necessary and consequential directions;

13 Under the Courts Ordinance 1934 the right that a co-owner had to partition (under the Partition Acts 1539 and 1540) was retained and the Partition Acts of 1868 and 1876 were specifically incorporated into our law.

14 In the 1955 edition of the Laws of the Colony of Singapore (s 17(i) of the Courts Ordinance (Cap 3)), the language used in s 11(2) of the Courts Ordinance 1934 was preserved but when Singapore was in Malaysia, s 17 (and other sections) of the Courts Ordinance (Cap 3) were repealed by the (Malaysian) Courts of Judicature Act 1964. By para 3 of the First Schedule to the Courts of Judicature Act 1964 the High Court had:

3 Power to direct a sale instead of partition in any action for partition of land; and in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part of it to be sold, and to give all necessary and consequential directions.

15 As can be seen, in the Courts of Judicature Act 1964, the reference to the Partition Acts of 1868 and 1876 did not appear. By s 13 of the Republic of Singapore Independence Act (Cap 1), the Courts of Judicature Act 1964 continued to be in force in Singapore when Singapore left Malaysia.

16 The Supreme Court of Judicature Act 1969 repealed the (Malaysian) Courts of Judicature Act 1964 in its application to Singapore but retained in its First Schedule the same provisions as in para 3 of the First Schedule to the Malaysian Act. In the 1985 edition of our laws, the First Schedule to the Supreme Court of Judicature Act 1969 was removed and the powers of the court are stated within the Act itself. Powers relating to partition and sale were contained in s 18(2)(c) of the Act. There was, however, no change in the words used.

17 In my view, the effect of the repeal of s 17(i) of the Courts Ordinance (Cap 3) and the re-enactment of its provisions but without the reference to the Partition Acts of 1868 and 1876 in the Courts of Judicature Act 1964 was that the court, in directing a sale, was no longer bound by the provisions of the Partition Acts of 1868 and 1876 and was free to exercise this jurisdiction whenever it appeared necessary or expedient for the court to do so. This state of the law continued after Singapore left Malaysia and is reflected in s 18(2)(c) of the Supreme Court of Judicature Act (Cap 322). The case of *Jack Chia-MPH Ltd v Malayan Credit Ltd* [1983-1984]

SLR(R) 420 is an example of the court ordering a sale of property in lieu of partition on the grounds that it was necessary and expedient to do so.

11 The plaintiff in *Abu Bakar* sought an order for partition of a single storey house that the first and third defendants and their families were residing in. The plaintiff, first defendant and third defendants were each owners of a one-third share of the property. In view of the impracticality of partitioning the small piece of land, Rajendran J ordered it to be sold and the proceeds distributed to the co-owners in accordance with their shares.

12 The defendant objects to partition or sale. However in view of the right of the plaintiff for an order for partition, the only issue I have to consider is whether I should order partition or, if it appears necessary or expedient to do so, to order sale of the Property. Nevertheless, a consideration of the defendant's situation does not disclose much merit to her objections. The defendant is an elderly lady who had resided at No 49 Lorong Tanggam for several decades until she moved out in 2006. From 2009, that part of the Property was tenanted; however she did not provide any information on the amount of rent she obtains, other than stating in her affidavit that it gives her "some spending money". The context of this dispute is thus not "a case of a wife being evicted from her matrimonial home or an elderly person who may be put to great disadvantage if asked to leave his home" (*per* Judith Prakash J ("Prakash J") in *Chiam Heng Luan and others v Chiam Heng Hsien and others* [2007] 4 SLR(R) 305 at [97] ("*Chiam Heng Luan*"). There is really no substantial prejudice to the defendant if the Property were partitioned or sold as she has not lived there since 2006 and is only deriving rent from a rather decrepit house on the land. In her affidavit she said that she intended to pass it to her children. An order for partition or sale, by removal of the encumbrance of having a tenant in common to contend with on any decision pertaining to the Property, would enable her to realise its full economic potential during her lifetime and eventually, to pass it on to her children. In *Chiam Heng Luan*, Prakash J noted at [97] that the disputed property "was not in a good state of repair and it was a valuable asset that was not being properly exploited for the economic benefit of all the owners".

13 I turn now to consider whether I should order a sale in lieu of partition. The Property has been valued at \$4,500,000. The two houses on it are about half a century old. The land is too small for two detached houses and the only possibility is to build two semi-detached houses. Partitioning would therefore require the parties to cooperate. They have tried to do so, but have reached an impasse resulting in the plaintiff turning to the court for assistance. It is not likely that having taken the matter to court, they would fare any better at cooperation. There is really no practical diminution in the value of the land to the defendant if a sale were ordered as she does not have any plan of her own to redevelop the Property. Its value to her would be the market value of the land. I can safely presume that the sale will be conducted in such a manner that she will get the full market price for it. Even if she were to take the view that land in Singapore is a good investment at the present time, it would not be difficult for her to use her share of the sale proceeds to invest in another property in order to stay invested in this investment class.

14 I therefore order the Property to be sold on the open market with the proceeds of sale less costs to be divided equally between the parties. My order should not preclude one party from selling his or her interest to the other at a mutually agreed price. I will hear counsel if they have any submission on costs, otherwise there will be no order as to costs.

[\[note: 1\]](#) bundle of affidavits tab 1; plaintiff's first affidavit, pp 28-32

[\[note: 2\]](#) bundle of affidavits tab 3; plaintiff's second affidavit, pp 31-35

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