Mohamed Ismail bin Ibrahim and Another v Mohammad Taha bin Ibrahim (No 2) [2004] SGHC 228

Case Number : OS 601221/2001

Decision Date : 12 October 2004

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Mohamed Muzammil bin Mohamed (Muzammil Nizam and Partners) for plaintiffs; Mirza Mohamed Namazie and Chua Boon Beng (Mallal and Namazie) for defendant

Parties : Mohamed Ismail bin Ibrahim; Hasnah binti Ibrahim — Mohammad Taha bin Ibrahim

Civil Procedure – Costs – Principles – Dispute involving validity of will under Muslim law – Defendant executor of testator's estate unsuccessful in defending plaintiffs' application – Defendant an interested party in proceedings – Whether each party to bear own costs or whether costs to be paid out of testator's estate – Appropriate costs order under circumstances

12 October 2004

MPH Rubin J:

1 This is a sequel to my decision in the above originating summons delivered on 22 September 2004 ([2004] SGHC 210). The dispute in the case revolved around the construction and validity of a will made by a Malay Muslim testator and the issue was whether a particular segment of the will was in accord with Muslim law. The court was asked to resolve an apparent conflict between the principal restrictions on bequests under Muslim law and the notion that by employing an eclectic mix of words, a testator could overcome those restrictions. In the event, the plaintiffs prevailed and the decision was delivered in their favour against the defendant who is the executor of the estate of the testator. However, before I delivered my judgment, I had directed both counsel to forward to the court their written submissions on the question of costs, which they did on 21 September 2004, a day before the delivery of judgment.

2 Interestingly, the submission from Mr Namazie who appeared for the losing defendant was that regardless of the outcome of the case, his client ought to be awarded costs on an indemnity basis on the ground that the defendant is the executor of the estate. This argument was found by me to be palpably one-sided and seemed to ignore the fact that that the defendant took part in these proceedings, not just as an executor but also as an interested party with a vested interest in the outcome of the proceedings. He stood to gain if the plaintiffs did not prevail in their application. The manner in which the defendant marshalled and presented his defence through his counsel left the court with an impression that this was an "interest suit" and a contest between two factions for a larger share in the estate of the testator.

3 As stated by the authors of *Tristram and Coote's Probate Practice* (26th Ed, 1983) at p 729, "[a] party who fails to prove his case in an interest suit is, except in special circumstances, condemned in costs" (see *Wiseman v Wiseman* (1866) LR 1 P & D 351).

4 My attention was drawn, by counsel for the defendant, to the propositions set out by Austin J in a New South Wales case, *Drummond v Drummond* ([1999] NSWSC 923, 10 September 1999, unreported), referred to in Ford and Lee's *Principles of the Law of Trusts* (Lawbook Co) at para [14040], pp 25–26, where it is stated under the heading "Trustees' costs in litigation" that:

- Costs are generally in the discretion of the Court to be exercised judicially.

- The ordinary rule is that costs follow the event, except where it appears to the Court that some other order should be made.

- An order that the costs of an unsuccessful party in litigation concerning a trust or the estate of a deceased person be paid out of the trust fund or estate operates as an exception to the general rule.

- [It] is normally the case that an executor who commences or defends an action in the capacity of executor is entitled to be indemnified out of the estate for the costs incurred in doing so, even if the litigation is unsuccessful, the executor's conduct is found to have been mistaken, and the other party in the litigation is held to be entitled to an order for costs. The statements also related to trustees.

- That exception to the normal rule that costs follow the event, which permits an executor [or trustee] to recover costs from the estate, is itself subject to some sub-exceptions.

- One sub-exception relates to impropriety as where an executor or trustee takes or defends proceedings in breach of trust, conducts proceedings in such a way that the Court, on a general view of the case, regards the executor's conduct as "not honestly brought forward" … or "where the claim or defence is one which no reasonable person could say ought to have been put forward" …

- A second sub-exception is that the rule which gives an executor or trustee the prima facie entitlement to be indemnified out of the estate for costs relates only to the costs incurred in the administration and distribution of the estate. Such costs are to be distinguished from costs incurred by an executor in furtherance of a personal interest as where, for example, the executor or trustee asserts a claim as a creditor or beneficiary or a trustee who has plainly become unsuitable to remain trustee and should resign defends an action for his removal …

- There is another exception to the normal rule that costs follow the event. The Court may on some occasions permit a person who conducts litigation in a private capacity to recoup costs from a trust fund or estate. One instance is where litigation arising from a will has been caused by the conduct of the testator.

5 Counsel for the plaintiffs, Mr Muzammil, submitted initially that an appropriate order should be that the costs of both parties be paid out of the estate. In this regard, he referred the court to a passage in *Tristram and Coote's Probate Practice* (*supra* [3]) at p 726, which states that "[if] the litigation be caused by the state in which the deceased left his testamentary papers, the costs of both parties will be ordered to be paid out of the estate". However, during arguments, Mr Muzammil went on to argue that the successful party's costs should come from the estate, whereas, the losing defendant's costs should come from him and not from the estate. The final position adopted by Mr Namazie was that he would not resist an order which stated that each party should bear its own costs.

6 As stated in Ford and Lee's *Principles of the Law of Trusts* (*supra* [4]) at para [14040], p 26:

[A] trustee faced with the need to bring or defend proceedings to protect the trust property as against third persons should, as a matter of prudence, seek an indemnity from such of the beneficiaries as have capacity to give one. If such an indemnity cannot be obtained and there is real doubt as to whether the trustee should bring or defend proceedings, the trustee should, if all risk of personal liability for costs is to be avoided, seek the directions of the Court.

Although in the case concluded, the defendant, being the executor, could have applied to the Court for an indemnity, he did not do so.

7 It is provided under O 59 r 6(2) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed):

> Where a person is or has been a party to any proceedings in the capacity of trustee, personal representative or mortgagee, he shall, unless the Court otherwise orders, be entitled to the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the fund held by the trustee or personal representative or out of the mortgaged property, as the case may be; and the Court may otherwise order only on the ground that the trustee, personal representative or mortgagee has acted unreasonably *or, in the case of a trustee or personal representative, has in substance acted for his own benefit rather than for the benefit for the fund.* [emphasis added]

8 After reviewing the factual matrices of the case, I was of the view that the usual order in other types of litigation, that the costs should follow the event and the party that succeeds should be awarded costs, was not appropriate. My other immediate concern was that the court, in exercising its discretion, should not also allow cavalier litigation and abuse of process of court. In this regard, the court has a general discretion to ensure that a losing litigant is not permitted to roam free to pursue his options with impunity in the belief that at the end of the day, he can, regardless of the outcome of his actions, recoup his losses from the entitlement of the successful party on the guise that he is an executor.

9 My initial view and order was that each party should bear its own costs. However, upon further reflection, I called the solicitors for a re-hearing on costs before my earlier order could be perfected. My concern was whether my earlier order that each party should pay its own costs would be disproportionately burdensome to the executor/defendant. I also, in this regard, bore in mind *dictum* by Kekewich J in *In re Jones. Christmas v Jones* [1897] 2 Ch 190 at 197, that:

> A man who fulfils the difficult duties of an administrator, executor or trustee is, in common sense and common justice, entitled to be recouped to the very last penny everything that he has expended properly – that is to say, without impropriety – in his character of administrator, executor or trustee …

In the case at hand, no doubt, the defendant mounted a defence not merely as an administrator but also as an interested party. He was seemingly not a detached party. Nonetheless, the dispute at hand was also not his making and the advice given to him before the commencement of litigation left him with little choice but to contest the plaintiffs' claim. Conversely, since the plaintiffs also had a legitimate and valid grievance on their side, it became a contest between one perceived right against another perceived right. In the circumstances, an even-handed approach seemed appropriate.

10 Consequently, upon further consideration, I reviewed my earlier order and ordered that the costs of both parties, on a standard basis, be paid out of the estate. My concern as to possible abuse of process of court and the incidence of cavalier litigation (*supra* [5]) could, no doubt, be addressed and checked by the appropriate forum, when the occasion arose.

11 In the result, my earlier order on costs was substituted by the present order that costs of both parties, on a standard basis, be paid out of the estate.

Ordered accordingly.