Shiraz Abidally Husain and Another v Husain Safdar Abidally
[2007] SGCA 16

Case Number : CA 120/2006

Decision Date : 14 March 2007

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah J

Counsel Name(s) : Mirza Mohamed Namazie and Chua Boon Beng (Mallal & Namazie) for the appellants; Gopalan Raman (G R Law Corporation) for the respondent

Parties : Shiraz Abidally Husain; Mrs Salma Moiz nee Salma d/o Abidally Abdul Husain — Husain Safdar Abidally

Muslim Law – Whether agreement between children of deceased Muslim to honour deceased's wish to distribute part of his estate in equal shares between them as contained in deceased's letter of wishes binding – Whether concession to have dispute over distribution of part of deceased's estate determined in specific manner existing

14 March 2007

Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 The current appeal stemmed from a family dispute concerning the distribution of the estate of a testator who had died testate ("the Estate"). The issues were whether there was a completed agreement among the beneficiaries to distribute the inheritance in accordance with the wishes of the deceased father and, if so, what the terms of that agreement were.

The facts

2 Abidally Abdul Husain ("the Deceased"), a widower and a Muslim, died in Singapore on 16 May 2003, leaving six adult children, *ie*, two sons and four daughters, as his Islamic heirs. The appellants, who are the executor and executrix of his estate, are his elder son and second daughter respectively. The respondent is the younger son.

3 The Deceased had made a will dated 13 January 1992 ("the Will") in which, by cl 3(a), he disposed of one-third of his estate to his grandchildren and other pecuniary legacies. By cl 3(b), he directed that the remaining two-thirds of his estate be held in trust for a period of five years after his death and the net income derived therefrom, after deduction of all incidental expenses including income tax, be expended towards charity other than education either in Singapore or at his native place, Dohad, India, at the discretion of the trustees in his or his father's name. By cl 3(c), the Deceased directed the trustees to distribute, upon the expiry of the said period of five years, the two-thirds of the Estate as well as his property at Dohad (if the trustees deemed fit to do so) to his children in accordance with and as prescribed by the Shiah Dawoodi Bohra Madzhab, a Shia school of Islamic law.

4 After making the Will, the Deceased wrote and signed a note dated 5 November 2000 ("the Letter of Wishes") addressed to all his children expressing his wish that "all my Cash Balance in my POSB OUB & INDIAN BANK A/C to be distributed equally (& not according to Muslim law) amongs [*sic*]

all my 6 Childrens [*sic*]".

5 On 18 May 2003, two days after the death of the Deceased, the six children gathered at the Deceased's house and a copy of the Letter of Wishes was retrieved from a locked drawer by the second appellant and read out to them. After some discussion among the six children, they unanimously agreed that the moneys in the three joint accounts, amounting to about $2m, be distributed equally in order to comply with the Letter of Wishes. At that time, the six children had no knowledge of the existence of the Will which bequeathed one-third of the Estate to the Deceased's legacies and grandchildren.

6 On 19 May 2003, five of the six children met again at the Deceased's house, by which time the Will was discovered. The second appellant's sister, Sofi, read out the Will to the other siblings, after which the mechanics for distribution of the moneys in the three joint accounts were discussed. Later that day, the second appellant withdrew all the moneys in the three joint accounts and paid $333,000 to each of the six children.

7 Two days later, on 21 May 2003, the respondent drafted a letter of indemnity ("the Indemnity") to the second appellant which provided that upon the second appellant distributing the moneys to the other five siblings in the amounts stated in the letter, they would:

> … agree to indemnify and to refund to you [the second appellant] (or your successors) in full or in part whatever sums (but limited to the amounts that are received by each of us in this request) that may be demanded from each of us by you … in the event that this may be in conflict with any laws or in the event that any tax may be imposed on you or your successors in respect of the amounts that are received by each of us pursuant to this request.

The Indemnity was signed four days later, on 25 May 2003 and backdated to 19 May 2003, by the five siblings who had each received their share of the moneys from the three joint accounts.

8 Subsequently, the second appellant, on the advice of the solicitor handling the settlement of the Estate, sent a letter dated 14 June 2003 to the other five siblings who had signed the Indemnity, suggesting as follows:

> *A) Return of $17,000.00*
>
> The lawyer handling the settlement of the estate of Mr. A. Abdul Husain ("Daddy"), Mr Mirza Namazie, has advised that the following be carried out:
>
> 1) Deeds of acceptance shall be obtained from all the beneficiaries, i.e. the 6 children and 11 (out of 13) grandchildren, to waive the entitlement of all the grandchildren to the cash portion of the Daddy's estate, and to permit the division of the same between the 6 children in accordance with Daddy's wishes …
>
> 2) As regards the 2 grandchildren who have not yet reached 21 years ("the Minors"), a separate deed of acceptance has to be signed by their legal guardian.
>
> However until such time as the 2 Minors attain the legal age of 21, Mr Namazie advises that their share of their estate amounting to approximately $102,000.00 (i.e. [1/3 x $333,000] x 6 / 13 x 2) should be kept in safe custody of the administrator(s) of Daddy's estate. Consequently, I ask each of you to return to me the sum of $17,000.00 (i.e. $102,000 / 6)

B) Return of $16,000

Mr Namazie also advises that it was Daddy's wish that the cash portion of Daddy's estate, less $17,000 from each of you, should be invested for 5 years and the income therefrom be distributed to charities in his name. Hence taking into account a current FD rate of approximately 1% p.a. over 5 years, the estimated interest works out to approximately $16,000 from each of you (i.e. [$333,000-$17,000] x 1% x 5 years = $15,800).

Consequently, I also ask each of you to return to me the sum of $16,000 as well.

9 It would appear that after receiving this letter of 14 June 2003, the respondent began to have second thoughts about the legitimacy or legality of the equal distribution of the moneys in the three bank accounts as stipulated by the Deceased in the Letter of Wishes. Thus, on 7 August 2003, at a meeting attended by four of the six children, the respondent issued a statement, the relevant portion of which read as follows:

> It is my right to inherit as per the lawful and correctly drawn up will of my father, Abidally Abdul Husain, in accordance with the Islamic Shariah Law and I *now* wish to exercise that right to the exclusion of any other 'options' that are presented that I may consider un-Islamic or otherwise unsuitable. [emphasis added]

10 On 10 May 2005, the respondent commenced these proceedings against the appellants seeking, *inter alia*, the following orders and declarations:

(a) that under the Islamic law of inheritance the Letter of Wishes was null and void to the extent of its testamentary and distributive effect;

(b) that the Letter of Wishes evinced an intention on the part of the Deceased for the moneys which were held in the bank accounts jointly with the second appellant to form part of his estate; and

(c) that accordingly, the said moneys were to be distributed under the terms of the Will, inasmuch as the terms of the Will complied with the provisions of Islamic law.

The proceedings below

11 At the hearing below, one of the issues in dispute was whether the second appellant, as the surviving account holder of the three joint bank accounts, was beneficially entitled to the moneys in the accounts. It would appear that at one or more of the numerous meetings of the six children to determine what to do with the Will and the Letter of Wishes, the second appellant had claimed (allegedly on the advice of her solicitor) that these moneys belonged to her in accordance with the principle of survivorship, although she was prepared to willingly give up her claim in order to abide by the wishes of the Deceased as set out in the Letter of Wishes. The second appellant maintained this stand in her supporting affidavits but shortly before the hearing of the action, offered to withdraw her claim to these moneys, an offer which was accepted by the respondent. This was just as well because even if in law the presumption of advancement was applicable in a father and daughter relationship, the Deceased had made it clear in the Letter of Wishes itself that the moneys were not to go to her personally upon his death. First, the Deceased referred to the accounts as "*my*" accounts and not "*the joint accounts*". Secondly, the Letter of Wishes expressly indicated that the second appellant was not entitled to the beneficial ownership of the moneys in the joint accounts. Counsel for the respondent, in his submissions to us, suggested that the second appellant took

advantage of her position to make this wrongful claim, thereby inducing the respondent to agree to comply with the Letter of Wishes, although this was not his pleaded case. That might well have been the case, but having regard to how this dispute unfolded, it was more likely than not that the second appellant's claim of beneficial ownership was a tactical response to the respondent's claim of inheritance in accordance with Muslim law.

12 At the commencement of the trial, the parties agreed to the following legal position as the backdrop for the trial judge to determine the issue in dispute. It was agreed between the parties that:

(a) the Deceased could not dispose of more than one-third of his estate by his will;

(b) a letter of wishes was not binding on the beneficiaries, but they could agree to comply with it;

(c) the beneficiaries to an estate under Muslim law could agree to vary the apportionment of their shares that were prescribed by Muslim law;

(d) the Deceased's children could agree to vary their shares to two-thirds of the moneys in the joint accounts, but they could not agree to vary the distribution of all the moneys in the joint accounts; and

(e) in the absence of any agreement, each of the Deceased's sons would receive twice the share of each of the Deceased's daughters in two-thirds of the moneys in the joint accounts.

13 The single issue before the trial judge was whether there was an agreement among the six children that the moneys in the joint accounts would be distributed equally between them in accordance with the Letter of Wishes and not in accordance with Muslim law.

14 The respondent's case was that he had not agreed to the equal distribution of the moneys in the three bank accounts. Thus, his counsel's closing submission focused on his contention that the evidence supported such a position.

15 The appellants' case was that, on the evidence, particularly the conduct of the respondent in drafting the Indemnity, in accepting the distribution of $333,000 with full knowledge of the terms of the Will and of the Muslim law of inheritance that male heirs are entitled to twice the share of female heirs, the respondent had agreed to the equal distribution. Counsel for the appellants contended erroneously (as this is conceptually impossible) that this agreement was reached over a period of time, beginning from 18 May 2003 and ending a few days after 19 May 2003 when the moneys were distributed to and accepted by all the children, including the respondent.

16 The trial judge accepted the arguments of counsel for the respondent that the respondent had not agreed to the equal distribution of the moneys in the joint accounts. The question he focused on was whether the agreement to distribute all the moneys in the joint accounts equally was the same as an agreement to distribute two-thirds of the moneys in the joint accounts equally. In this regard, he answered (see [2006] SGHC 174 at [28]) as follows:

> The answer must be no. Insamuch as all the money is not synonymous to two thirds of the money, an agreement to distribute all the money is not an agreement to distribute two thirds of the money. If one of the siblings had said on 18 May: "Although the letter of wishes says 'all my cash balance' let us change that to 'two thirds of the cash balance' instead", someone might

have disagreed on the ground that that was not what the deceased had wished, or on the ground that he was not prepared to have his share reduced again after the *corpus* had been reduced. In fact at that time no one had thought of reducing the amount to be distributed.

Our decision

Alleged concession of counsel for the respondent

17 Before us, counsel for the parties reiterated the arguments they had made before the trial judge. However, counsel for the appellants also relied on an alternative argument in the form of an alleged concession made by counsel for the respondent in the proceedings below. The argument was that counsel for the respondent had agreed that the only issue for the trial judge to decide was whether the Deceased's six children had made an agreement to distribute the joint account moneys equally and that if the court made such a finding, the agreement would be implemented as regards two-thirds of the joint account moneys available to the six children for distribution. The respondent vehemently denied that he had agreed to have the dispute determined in such manner.

18 From our perusal of the notes of evidence, we were satisfied that counsel for the respondent had made no such agreement as alleged. There was no reason for counsel to do so as it would have estopped his client from arguing that even if the court were to find that the six children had agreed to distribute the joint account moneys equally, it would only be in respect of *all* and not two-thirds of the joint account moneys. In fact, it was precisely this argument that the trial judge had accepted in deciding against the appellants. In our view, any party seeking to rely on a concession which is subsequently disputed faces an uphill task. He must be able to definitively point to a particular exchange in the record which constitutes the concession, is framed in clear terms and is explicitly agreed to by the parties. It would not suffice to reproduce lengthy extracts of the notes of evidence to allege that the totality of the extracts create the impression or allude to the fact that such a concession was made.

What did the six children agree to?

19 The substance of what the six children had agreed to on 18 May 2003 is a matter of interpretation of their assent to the Letter of Wishes. It is common ground in this appeal that at the meeting on that day, the six children unanimously agreed to carry out the wishes of their father to the effect that the moneys in the joint accounts be distributed equally as set out in the Letter of Wishes. Counsel for both parties, when queried by us, accepted the position that when the respondent agreed to comply with the Deceased's wishes, he did not know how much money there was in the bank accounts and that the only person who might or would have known was the second appellant, whose counsel had not been instructed as to the state of her knowledge at the material time. Therefore, what the parties agreed to in substance on 18 May 2003 was that there would be an equal division of the moneys in the bank accounts, and that the exact quantum available for distribution constituted a non-essential element of the agreement.

20 We accept that the agreement of the six children, in the context of the facts known to them on that day, could arguably be interpreted differently, as the trial judge's decision has shown. The trial judge applied the very logical approach that the respondent had only agreed to an equal distribution of all the moneys in the bank accounts, and not to two-thirds of such moneys. Obviously, as statements of fact, one is not the same as the other. However, as statements of intention, the larger can apply to the smaller. Admittedly, this conclusion in itself might be open to objection on the ground that the trial judge's conclusion is, logically, just as valid. Nonetheless, the events following the discovery of the Will on the next day, 19 May 2003, unequivocally support our conclusion over

that of the trial judge. In our view, four reasons serve to support this conclusion.

21 First, the Will was read out to five of the six children, including the respondent. The Will, after providing for the legacies and bequests to the grandchildren, goes on to refer to the distribution of the remaining two-thirds of the Estate in accordance with and in the shares prescribed by Muslim law. According to the evidence before us, the parties continued to discuss the mechanics of how to distribute the moneys in the bank accounts, *after* the reading of the Will, during which the six children were well aware of how much money there was in the bank accounts as well as the specific shares that each would receive. The moneys were withdrawn from the banks and distributed to the six children on the same day.

22 Secondly, the respondent accepted his share *without* voicing any concerns about the legality of allowing the two-thirds of the Estate to be distributed in a manner contrary to Muslim law and what the Deceased had earlier directed in the Will. The respondent has not alleged that on 19 May 2003 he was not aware of the position under Muslim law that he was entitled to twice as many shares in the Estate than his female siblings. In our view, there is no doubt that the respondent was agreeable to and was satisfied with the equal distribution, with full knowledge of his entitlement under Muslim law.

23 Thirdly, since the Will was made a few years before the Letter of Wishes, it would be reasonable to infer that when the Deceased referred to "All my Cash Balance in my [bank accounts]", he was referring to the balance *after* the moneys had been used to satisfy the pecuniary legacies referred to in the Will. There was no evidence that the Deceased had squirreled away separate sums of cash to pay these pecuniary legacies. In our view, when the respondent accepted his equal share of the moneys in the bank accounts on 19 May 2003, he was fully aware that part of the moneys in the bank accounts had to be used to pay the pecuniary legacies. Our conclusion was buttressed by the terms of the Indemnity which further supported our conclusion.

24 Finally, the respondent had on his own initiative drafted a letter of indemnity. It is a well-crafted indemnity, showing that the respondent was not only familiar with the nature and purpose of such a legal document, but was also clear as to what the Indemnity would cover. The Indemnity provided that the respondent and the other four siblings would agree to refund to the second appellant as executrix "whatever sums … that may be demanded from each of us … in the event that this [payment] may be in conflict with any laws or in the event that any tax may be imposed on [the second appellant]". The second event was explicable by reference to the second appellant's claim that she was entitled to the moneys in the joint accounts in accordance with the principle of survivorship and for that reason be liable for estate duty. But what was the reason for the first event, *viz*, if the payment were in conflict with any laws? In our view, since the only relevant law in the circumstances was Muslim law, and the Indemnity was drawn up in the factual context of the acceptance of payments to Muslim heirs that were contrary to Muslim law, the respondent must have had in mind the possibility that he and the other siblings would have to refund the distribution to the Estate. In other words, the Indemnity evidenced the fact that the respondent was agreeable to accepting cash in hand, even if there was any uncertainty about the legality or propriety of his acting contrary to Muslim law, as he had alleged. However, as it turned out, such was not the case as it was agreed by both counsel that Muslim law allows the male and female heirs to divide their inheritance in equal shares. In this connection, we could not help but observe that the motivation for the six children to agree to an equal distribution was driven by the undesirability of the alternative, which was to wait for five years before the two-thirds share of the Estate could be distributed to them.

25 In the light of the foregoing, we concluded that there was an agreement among the six

children on 18 May 2003 to distribute to themselves equally regardless of the quantum of moneys remaining in the bank accounts after meeting the payments of the pecuniary legacies under the Will. Such an agreement was not inconsistent with Muslim law and was binding on them.

Conclusion

26 We accordingly allowed the appeal. We decided that the order of costs in the court below should remain as this was essentially a dispute between beneficiaries of an estate. However, we decided not to award costs on appeal as the appeal was allowed on grounds at variance with those relied on by the appellants.

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