Kamla Lal Hiranand v Harilela Padma Hari and Others
[2000] SGCA 40

Case Number : CA 4/2000

Decision Date : 08 August 2000

Tribunal/Court : Court of Appeal

Coram : Lai Kew Chai J; L P Thean JA

Counsel Name(s) : SH Almenoar and Elaine Seow (Tan Rajah & Cheah) for the appellant; Davinder Singh SC and Cavinder Bull (Drew & Napier) for the first and third respondents; Jeffrey Beh (Lee Bon Leong & Co) for the second respondent

Parties : Kamla Lal Hiranand — Harilela Padma Hari

Civil Procedure – Summary judgment – Determination of question of law – Whether question suitable for determination under O 14 r 12(1) – O 14 r 12 Rules of Court

Civil Procedure – Affidavits – Affidavits of testamentary script – Whether such affidavits must be served on any party – O 72 r 9 Rules of Court

Probate and Administration – Foreign domicile grants – Whether foreign grant of probate conclusive proof of due execution and validity of will – Petition for grant of probate in Singapore – Whether petitioner required to prove will – Fraud or collusion alleged – Whether foreign grant of probate unimpeachable – ss 43 & 46 Evidence Act (Cap 97, 1997 Rev Ed)

Trusts – Secret trusts – Half-secret – Creation of trusts – Document testamentary in nature – but invalidly as will – Whether document wholly inoperative – Whether document regarded as declaration of trust over assets of estate of testator – Whether intention of testator relevant – Whether knowledge of executors or trustees or beneficiaries of the testator's intention relevant

Trusts – Secret trusts – Half-secret – Creation of trust – Whether trust expressly or tacitly accepted by beneficiary or trustees

(delivering the judgment of the court): This appeal concerns the validity of a certain document (referred to in the court below as the `1988 Will`) which the appellant claims is valid for the purpose of creating and/or evidencing a trust in the estate of the late Manghanmal Hiranand Ramchandani [commat] Manghanmal Hiranand. Both the assistant registrar and judicial commissioner Tay Yong Kwang held that the document is not valid for such purpose. Against the decision of the learned judicial commissioner this appeal has now been brought.

The parties

The late Manghanmal Hiranand Ramchandani [commat] Manghanmal Hiranand (`the deceased`) at all material times was a resident of Hong Kong. He passed away at the Mount Elizabeth Hospital in Singapore on 30 August 1994, and at the time of his death, he was domiciled in Hong Kong. The appellant is his daughter-in-law; the first respondent his daughter; the second respondent his son and the husband of the appellant; and the third respondent is the husband of the first respondent. All the three respondents were defendants in the proceedings below. Before the learned assistant registrar all three of them were represented by the same counsel. Thereafter, prior to the hearing of the appeal before the learned judicial commissioner, the appellant and the second respondent reached a settlement and thenceforth the second respondent has been separately advised and represented by counsel.

Relevant facts

Prior to his death, the deceased, on 24 April 1986, made a will appointing the first and third respondents the executors and trustees of the will, and on 16 October 1987 he made a codicil. Under the will and codicil (collectively referred to as `the 1986 Will`) the second respondent is the sole beneficiary. On 6 May 1998 the High Court in Hong Kong granted probate of the 1986 Will to the first respondent with liberty to the third respondent to apply for a like grant. Later, the first respondent petitioned to the District Court in Singapore in Probate 1641/98 for a grant of probate of the 1986 Will, but in the meanwhile the appellant had filed a caveat against any grant of probate in the estate of the deceased. Accordingly, an order was made on 27 October 1998 for the appellant to take out a writ joining all the three respondents as the defendants. Pursuant to the order, proceedings were then commenced by the appellant in the District Court in DC Suit 51362/98 against the respondents.

In her statement of claim, the appellant claimed that the 1986 Will was not executed by the deceased and was a forgery. She relied on a competing document, said to be executed by the deceased on 22 November 1988 (the `1988 document`) in Los Angeles in the State of California, which was declared to be his last will and testament. The document was not witnessed, and it bore the stamps of `Law Offices Berris, Seton & Bishton` and `Berris, Seton & Bishton, Notary Public`. The appellant did not produce the original of this document in evidence but attested that she had seen the original of this document among the deceased`s belongings. The 1988 document named the first respondent and one Ram G Hiranand as the executors and trustees of the will. Under the terms of this document, upon the second respondent attaining the age of 45, the principal and undistributed income of the trust were to be distributed as follows: 25% to the second respondent, 25% to the appellant, 15% to each of their three children and 5% to all the managers of the deceased`s business worldwide who had served him for ten years or more. The appellant claimed that the respondents were aware, prior to the deceased`s death, of his intention to distribute his properties in the manner stated in the 1988 document. Further or in the alternative, it was claimed that the respondents were aware of the declared intention and wishes of the deceased, which amounted to the creation of a trust, to have the estate distributed among the appellant and the second respondent and their three children.

The appellant sought the dismissal of the first respondent`s petition for the probate of the 1986 document. She also sought a declaration that the estate of the deceased be subject to a trust in accordance with the 1988 document, or in the alternative, `in accordance with such terms of the trusts created by the deceased to be determined` by the court. In addition, the appellant sought an inquiry as to intermeddling of the estate of the deceased by the respondents and for an order that the respondents provide an account of all such intermeddling.

In defence, the respondents averred that the 1986 Will was duly executed by the deceased. They relied on the grant of probate by the Hong Kong High Court and claimed that the 1986 Will had been duly proved. The respondents denied any knowledge of the 1988 document and averred that no trust existed in the estate of the deceased. The respondents counterclaimed for a pronouncement against the 1988 document and a dismissal of the appellant`s claim. The respondents also sought a pronouncement in favour of the 1986 Will and a declaration that the probate of the 1986 Will be granted to the first respondent (with leave to the third respondent to come in and prove the same) and a declaration that the second respondent was the sole beneficiary under the 1986 Will. At or about the time of the filing of the defence and counterclaim, an affidavit of testamentary script pursuant to O 72 r 9 of the Rules of Court was filed by each of the three respondents affirming, among other things, that no testamentary script of the deceased had come into his or her possession other than the 1986 Will, and that the 1986 Will was prepared on the instruction of the deceased by a firm of solicitors in Hong Kong, whose solicitor and employee also witnessed the execution of the will and codicil by the deceased. Under O 72 r 9(5) a testamentary script means:

> *a will or draft thereof, written instructions for a will made by or at the request or under the instructions of the testator and any document purporting to be evidence of the contents, or to be a copy, of a will which is alleged to have been lost or destroyed.*

After the close of the pleadings, the proceedings were transferred by consent to the High Court. Thereafter, the respondents applied for a determination of questions of law and for a dismissal of the appellant`s claim under O 14 r 12 and/or O 18 r 19 of the Rules of Court. In support of their application, the respondents adduced affidavits of various expert witnesses, attesting that the 1988 document was invalid as a will under the laws of the relevant jurisdictions of California, Hong Kong and India. The respondent also adduced affidavits, showing that the deceased was in Hong Kong on 22 November 1988 (and as such, could not have signed the 1988 document as alleged) as well as affidavits by former partners of the firm of Berris, Seton & Bishton, supporting the respondents` position that the 1988 document was a forgery. According to these witnesses, the firm was not in existence in 1988 and did not use any of the two stamps which appeared on the 1988 document. They further affirmed that no lawyer from the firm had prepared or witnessed the execution of the 1988 document.

The proceedings below

At the hearing of the application before the learned assistant registrar and the subsequent appeal before the learned judicial commissioner, the appellant conceded that the 1988 document did not satisfy the formal requirements of a will and was not valid as a will in Singapore or in any other relevant jurisdictions. At the conclusion of the hearing on 27 April 1999, the learned assistant registrar held that the 1988 document is not valid for the purposes of creating and/or evidencing a trust in the estate of the deceased, and that the defendants do not have to prove the 1986 Will, as it has been filed, proved and registered in the High Court of Hong Kong, and the Grant of Probate No HCAG010147/97 has been obtained thereof. The learned assistant registrar therefore dismissed the appellant`s claim and allowed the respondents` counterclaim.

Against the decision of the learned assistant registrar, the appellant appealed to a judge in chambers. A week before the hearing of the appeal, the appellant`s solicitor filed an affidavit producing a statutory declaration made by the second respondent on 18 August 1999, in which the second respondent took a position which differed from that taken by the other two respondents and contrary to his previous stand. He now supported the appellant`s claim that the 1986 Will was a forgery and was not signed or executed by the deceased. He also stated that he did not wish to continue with the legal proceedings. In addition, he exhibited, among other things, a deed executed on 28 May 1999 made between the appellant and himself, in which, among other things, the parties declared that the terms of the deed `shall constitute the full and final settlement of all matters arising out of the said action as between them and all their present differences`. The deed by cl 2 provided that the second respondent would undertake to settle all matters in dispute with the appellant and in particular the disputes relating to the estate of the deceased, and in that regard would undertake as follows:

> *to implement and faithfully carry out all the wishes of the deceased as manifested and executed by the deceased in the 1988 Will both in substance and according to the spirit of the 1988 Will notwithstanding that the 1988 Will may in any way be defective or unenforceable in law.*

Both the statutory declaration and the deed were made after the decision of the learned assistant registrar

At the hearing of the appeal before the learned judicial commissioner, the second respondent was separately represented by counsel, and his counsel informed the court that the second respondent and the appellant had reached an agreement as stated in the statutory declaration and the deed, and the second respondent`s stand was that he was agreeable to comply with his father`s wishes as stated in the 1988 document. The hearing nonetheless proceeded and at the conclusion, on 8 December 1999, the learned judicial commissioner dismissed the appeal. He upheld the learned assistant registrar`s decision that the 1988 document was invalid for the purpose of creating and/or evidencing a trust in the estate of the deceased, but disagreed with the learned assistant registrar`s determination that the respondents did not have to prove the 1986 Will. He held that the grant of probate by the High Court of Hong Kong was not unimpeachable, and he therefore called for the affidavit evidence of the attesting witnesses to be filed on an urgent basis. Following that direction, affidavits were filed, and on the basis of the affidavit evidence, the learned judicial commissioner found that there was no reason to doubt the validity of the 1986 Will. Accordingly, he affirmed the consequential orders made by the assistant registrar dismissing the claim and allowing the counterclaim. [See [2000] 2 SLR 479.]

In the course of the appeal before the learned judicial commissioner, the appellant took out an originating summons (OS 1893/99) against the second respondent for an order that, on the basis of the deed executed on 28 May 1999, the latter was to be bound by the trusts set out in the 1988 document. An order by consent was made by the learned judicial commissioner at the conclusion of the appeal.

The appeal

As a result of the settlement reached between the appellant and the second respondent, the latter is obviously not resisting the appeal. Before us, Mr Beh, counsel for the second respondent, informed us that he had been instructed not to make any submission on behalf of his client. The substantive respondents before us, as were before the learned judicial commissioner, are the first and third respondents. For convenience, we shall hereafter refer to both of them jointly as `the respondents`.

Order 14 r 12

Before us, the first issue is whether the following question, namely:

> *whether the 1988 document, not being valid as a will, is nonetheless valid for the purposes of creating and/or evidencing a trust in the estate of the deceased,*

is a proper one for determination under O 14 r 12 of the Rules of Court. Mr Almenoar, counsel for the appellant, submits that such a question is outside the purview of O 14 r 12 on the ground that it is one of mixed fact and law, and cannot be determined without a full trial. He further submits that the issue as framed is wrong and that the real issue is whether a trust exists in respect of the assets of the estate as evidenced by the 1988 document and other evidence, which will be adduced at the trial. The 1988 document is not the only evidence to be relied on in establishing the existence of the

trust, and there will be other evidence which will be adduced and which is capable of evidencing the trust, for example, evidence showing that the respondents were at all material times aware of the existence and terms of the 1988 document and that they were aware of the deceased`s intentions to distribute his properties amongst the appellant and the second respondent and their three children. In counsel`s submission, these facts are presently in dispute and can only be determined after a full hearing and evaluation of evidence by the court.

We turn first to the provisions of O 14 r 12 which are in the following terms:

> *(1) The court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that -*
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> *(a) such question is suitable for determination without a full trial of the action; and*
>
> *(b) such determination will fully determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.*

To come within O 14 r 12(1) the question must first be one suitable for determination without the need for a full trial The question here is a narrow one, and it is this: whether the 1988 document, being an unattested testamentary document and therefore invalid as a will, is in law capable of creating and/or evidencing a trust in relation to any property in the estate of the deceased. In considering this question we proceed on the assumption that what the appellant has pleaded is true, that is, that the 1988 document was executed by the deceased and is a genuine document. Our consideration of this question, therefore, does not entail any investigation of any facts. Hence, the absence or presence of other evidence capable of showing the existence of a trust in the estate of the deceased is completely irrelevant to this specific question.

Secondly, O 14 r 12 does not require that the determination will fully determine the entire cause or matter in the action. It may be invoked to determine any claim or issue raised in the action. In **Payna Chettier v Maimoon bte Ismail** [1997] 3 SLR 387 at [para] 34 and 35, Chao Hick Tin J (as he then was) said:

> *34 ... **It does not follow that an application under O 14 r 12 should only be made if the decision would finally determine the entire cause or matter. This is clear from the express wording of r 12(1)(b) itself - `such determination will fully determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein`** .*
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> *35 The English Court of Appeal had the opportunity to review the scope of O 14A in the unreported 1994 case **Korso Finance Establishment Anstalt v John Wedge** . The principles which it laid down are set out in para 14A/1-2/4 of the **Supreme Court Practice** and they are as follows:*
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> *1 **An issue is a disputed point of fact or law relied on by way of claim or defence** .*

2 A question of construction is well capable of constituting an issue.

3 If a question of construction will finally determine whether an important issue is suitable for determination under O 14A and where it is a dominant feature of the case a Court ought to proceed to so determine such issue.

4 ... [Emphasis added]

This passage of the judgement was quoted with approval by this court in **Microsoft Corporation & Ors v SM Summit Holdings Ltd & Anor** [1999] 4 SLR 529 , 554. There the plaintiffs claimed against the defendants damages for defamation based on a press release which the latter had published or caused to be published. The plaintiffs pleaded that certain words in the press release, in their natural and ordinary meaning, meant and were intended to mean that the plaintiffs were guilty of criminal conduct. The Court of Appeal agreed that the natural and ordinary meaning of the alleged defamatory words was a question which was suitable for determination under O 14 r 12(1), and said at [para] 49:

In our opinion, there is no impediment to the application of O 14 r 12 in the present case, as the determination of the meaning (or meanings) of the words complained of would fully resolve the issue as to the meaning of the words in the action.

In our judgment, the question whether the 1988 document is valid for the purpose of creating and/or evidencing a trust in the estate of the deceased is one suitable for determination under O 14 r 12(1). The determination of this question will fully resolve the issue as to whether an unattested testamentary document can in law create and/or evidence a trust in the estate of the deceased. On the basis of the pleadings that have been filed, this is clearly a disputed point of law involved.

The 1988 document

Solely for the purpose of determining the question in issue, we proceed on the assumption that the facts alleged in [para] 18 and 23 of the statement of claim are true. These two paragraphs in substance averred (i) that on 22 November 1988 the deceased executed a document entitled `The Last Will of Manghanmal Ranchandani` which declared `the same to be his last irrevocable Will and Testament` and further declared `all previous Wills and Codicils as cancelled`, and (ii) that the three respondents `were well aware prior to the death of the deceased of his intention that his properties should be distributed in the manner as stated in the 1988 Will` or in the alternative, the three respondents `were aware of the declared intention and wishes of the deceased amounting to the creation of a trust to have his properties distributed amongst` the appellant and the second respondent and their three children. For our purpose we need not be concerned with the affidavit filed by or on behalf of the respondents alleging that the 1988 document was a forgery and could not have been executed by the deceased.

It is common ground that the 1988 document is not valid as a testamentary disposition under any relevant law. So far as Singapore law is concerned, that document cannot operate as a will under the Wills Act. Nor can it operate as a will under the law of Hong Kong or the law of the State of California where the document was said to have been executed. It is settled law that a document of a

testamentary nature, which has not been validly executed as a will, is completely inoperative and cannot be perfected by being regarded as a declaration of trust binding upon the assets of the estate of the maker of that document. This is the position regardless of whether the failed disposition provided for an outright transfer or for a declaration of trust, and regardless of whether the executors or trustees or beneficiaries were aware of the failed disposition at the time of its execution.

In **Warriner v Rogers** [1873] LR 16 Eq 340, a testatrix signed a document in writing purporting to give to the plaintiff certain real and personal property. Later, she executed a will whereby she gave the residue of her real and personal property to the defendant. It was held that the earlier document did not amount to a valid declaration of trust in favour of the plaintiff. Sir James Bacon V-C described the document thus at pp 351-352:

> *Now, to a man of common sense nothing can be clearer than that whatever was intended by this memorandum it was not to take effect until after the death of the person who wrote and signed it. There was no intention of parting at present with anything ... There is not a word like a donation by means of a deed of gift. But when the last part of the memorandum is looked at, the matter is put beyond the possibility of a doubt ... That, if it is anything, is a legacy which is not to take effect until after her death. There is no suggestion that it is anything but that.*

and further said at pp 353-354:

> *It is hardly necessary to observe (indeed it has not been argued to the contrary) that* ***if the character of the paper is testamentary then of course it is impossible to enlarge or convert it into a declaration of trust. The danger is great if such an attempt were to succeed; because then the result of such a transaction as this would be, that the solemn disposition of property which the law requires to be made in the shape of a will, would be entirely lost sight of****, because this would be as good a disposition, or perhaps better, than any will which could be made.*
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> *...*
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> *Upon the whole, finding, as I do, that the law upon the subject is clear and distinct, ... I think that this does not amount to a declaration of trust; ... in my judgment, the* ***papers themselves, or the letters, must be taken as purely testamentary, that is to say, that they were to have no effect during the life of [the testatrix], and therefore, they are of no validity or effect to support the plaintiff`s title****. [Emphasis is added]*

Next is the case of **Cross v Cross** [1877] 1 LR Ir 389, which concerned a dispute involving a failed testamentary gift by the donor to his daughter, namely, the cancellation of a debt for which a promissory note was issued by the daughter to the donor. The donor signed an endorsement on the promissory note to the effect that the promissory note was to be delivered up for cancellation after his death to the intent that his daughter would be exonerated from payment of the debt. But this endorsement was attested by only one witness. The donor`s intention of making the gift was well known to the intended beneficiary of the gift as well as one of the two executors prior to his death. It was held that there was no gift inter vivos and the endorsement failed as a testamentary disposition. The Master of the Rolls said at pp 400-401:

In truth, no matter how the contention is viewed, it comes back to the point, what is the true construction of the endorsement on the note? The more I have considered that endorsement, the more I have been convinced that it is only consistent with the plain construction which its words express, viz that it is a direction to his executors to give up the note to his daughter on his death, so as to save her from paying the amount due thereon. In other words, I think the terms of the endorsement are a testamentary disposition of the note in his daughter`s favour. Unfortunately, Mr Cross` signature is attested by only one witness, and, therefore, as such a disposition it cannot take effect, and I do not think that, consistently with the rules of law, I can make it operative in any other way.

I cannot but say that it seems to me that some mischief has been caused by endeavouring to sustain the gifts of donors where they fail in the way they were intended to take effect, by making them valid in some other manner, for instance, by turning the donor into a trustee under an imputed declaration of trust. ... Mr Cross, I think, plainly intended to keep the debt on the promissory note alive in his lifetime; he only intended that his daughter should be released therefrom on his death. That intention cannot be carried out in the manner he desired, as he made no valid testamentary disposition of the note in her favour. To hold that the note was a present gift inter vivos, or that Mr Cross constituted himself a trustee of it for his daughter, would appear to me to go not merely straight in the face of the endorsement, but to reverse all the acts and conduct of himself, and also of his daughter, bearing on the note itself.

His Lordship then concluded at p 402 as follows:

In truth, Mr Cross endeavoured to make a testamentary gift of the note in a manner which the law does not permit. The gift must therefore fail, ...

In that case, the legacy, namely, the cancellation of a debt, was intended to be given by way of a testamentary disposition. It failed for want of formalities and could not be rectified by simply treating the failed disposition as a declaration of trust. Thus a failed testamentary disposition cannot be effectuated simply by imposing a declaration of trust, and the fact that the failed testamentary disposition itself provides for the creation of a trust is, in our view, immaterial.

In **Towers v Hogan** [1889] 23 LR Ir 53 a letter written by the testator and commencing: `This is my last will and letter to you, viz ...` and purported to transfer some of his personal property as well as to create a trust of other personal property upon his death. Some of the beneficiaries named sought to claim under this document. The question which arose was whether the letter was a declaration of trust or an instrument of a testamentary character. Monroe J held that the document relied on as a declaration of trust was a testamentary instrument, and not being executed as a will, is completely inoperative. Having considered the document in detail the learned judge said at p 60:

... The language of the instrument and all the circumstances connected with it plainly indicate that the writer intended it should operate only after his death, and that he adopted this form of disposition only to avoid the payment of duty. If a document of this character, and executed as this was, were allowed to operate as the creation of a trust, the Statute of Wills would be practically repealed.

Mr Almenoar seeks to distinguish that case from the instant case, arguing that Monroe J`s decision rested on the lack of communication of the unattested disposition by the testator to the beneficiary. We are unable to agree. From a reading of the judgment, it is clear to us that Monroe J canvassed the circumstances which led to his findings that the document in question was testamentary in character. It was in this context that the learned judge noted that the existence of the document was not communicated to the intended beneficiaries. Contrary to the submission of counsel, Monroe J did expressly say (at p 60) that communication of the document to the beneficiaries was not essential to the creation of a trust.

It is also instructive to refer to the Canadian case of **Re Pfrimmer** [1936] 2 DLR 460. There, the testator transferred certain properties to himself and three others pursuant to a plan to avoid probate costs and succession duties. At the same time, he executed a document expressly entitled `Declaration of Trust`, to which was attached a document marked `A`. Document `A` was in the form of a testamentary disposition to take effect in the event of his death and covered the disposition of all his properties. These documents purported to create a trust of his various properties and contained detailed instructions on the disposal of the testator`s estate after his death. Subsequently, the testator executed a will. However, the terms of the will could not be carried out if a valid trust was created by the earlier transfers, the `Declaration of Trust` and document `A`. The executors of the will were fully aware of the earlier declaration and were also the trustees under the declaration. Nonetheless, it was held that the purported trust was inoperative. Trueman JA said at pp 464-465:

> *The conveyances and the writings were intended by Mr. Pfrimmer to take the place of a testamentary disposition under the Manitoba Wills Act, ... in order to avoid probate expenses and succession duties, and not to create an irrevocable trust by a binding transfer of the properties. ...*
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> *The law is clear that to give validity to a declaration of trust of property, it is necessary that the donor or grantor should have absolutely parted with his interest in the property, and have effectually put such interest beyond his own reach. ...* ***Whatever may be the form of an instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigor and effect, it is not a trust****. ...*
>
> *...*
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> *Hence it is the rule that an instrument even though in the form of a deed which is not to become operative until the maker`s death is testamentary in its character, and its operation depends upon its execution complying with the Wills Act. If the execution of the writing of May 11 complied with the statute, ... probate should follow; otherwise there is an intestacy save as to the part of the estate included in the will of October 21, 1930. The necessary declaration to be made that the writings of May 8 and 11 do not create a trust. [Emphasis added.]*

Reverting to the facts of the instant case, Mr Almenoar submits that the estate is subject to the trusts declared in the 1988 document. In his submission, that document contains the three certainties which are essential to the creation of a trust, and these are:

(a) the words used on the whole are certain and imperative;

(b) the subject matter of the trusts is certain; and

(c) the objects or persons intended to have the benefit of the trust are certain.

In our opinion, the difficulty in the way is that the existence of such a trust hinges on the efficacy of the 1988 document, and the question is whether that document is capable in law of creating or evidencing a trust. The document is certainly incapable of creating a trust. A plain reading of the text of the 1988 document shows that it is unequivocally testamentary in nature. It was expressed to be the deceased`s `last irrevocable will and Testament` and it declared `all previous wills and codicils as cancelled` and further declared that the document would become `effective on the seventeenth day from the day of [his] death`. The intention of the deceased in executing the document was that it should take effect and become operative only after his death. In other words, it was intended by the deceased that the document should take effect as a will. On the basis of the authorities we have discussed, the 1988 document being invalid as a will cannot take effect as a declaration of trust in respect of any property in the estate of the deceased.

The appellant has alluded to the evidence showing that the respondents were aware of the deceased`s intentions to distribute his properties to the appellant and the second respondent, and their children. Even if the respondents were aware of the deceased`s intention as declared therein - and for our purpose we assume that the respondents were aware of such intention - the question whether there was a trust still hinges on the validity of the 1988 document as an instrument creating the trust. Knowledge on the part of the respondents alone does not create a trust.

The next question is whether a trust exists in respect of the assets of the deceased as evidenced by the 1988 document and other evidence which will be adduced at the trial. This is the question posed by Mr Almenoar, which he submits is the proper question for determination. Certainly in law that document is capable of evidencing a trust. The question then is: how or in what manner was such a trust created? There is no averment or allegation, either in the pleadings or in the affidavit - not to say any evidence - of any other instrument or document creating such a trust or of any mechanism by which such trust was said to have been created. The appellant cannot rely on the declaration contained in the 1988 document as creating a trust. If she relies on that document as evidence, she must show where the trust is and how or by what mechanism it was created. Mere intention of the deceased and not expressed in any document is not enough. As regards the other evidence, which Mr Almenoar says will be adduced at the trial, he has not shown specifically any matters (apart from the 1988 document) either in the pleadings or in any affidavit filed by or on behalf of the appellants, on which he relies, which could form the basis of an allegation of a trust.

Existence of secret or half-secret trusts

Mr Almenoar next relies on the concept of a secret or half secret trust and argues that it would be fraud on the part of the secret trustee to rely on the absence of statutory formalities in order to deny the creation of a trust. He asserts that `equity will not permit a statute to be used as an engine of fraud`, and relies on the following cases in support: **Re Snowden; Smith v Spowage & Ors** [1979] 2 All ER 172, **Re Young (No 2)** [1951] 1 Ch 344, **Re Gardner; Huey v Cunnington** [1920] 2 Ch 523, **Ottaway v Norman** [1972] Ch 698, **Blackwell v Blackwell** [1929] AC 318, **Re Stead; Witham v Andrew** [1900] 1 Ch 237. This principle and the cases relied on in support are not disputed. However, they do not assist the case for the appellant.

The essentials of the existence of a secret or half-secret trust created by the operation of equitable

principles are these:

(a) an intention of the deceased to benefit a secret beneficiary;

(b) communication of the trust to the beneficiary/trustees;

(c) express or tacit acceptance of the trust by the beneficiary/trustee, thereby inducing the testator not to execute a will or leave a will already executed unrevoked or not to draw up a will.

See ***Snell`s Equity*** (29th Ed, 1990) at p 109; ***Pettit, Equity and the Law of Trusts*** (7th Ed, 1993) at p 125, **Blackwell v Blackwell** [1929] AC 318 at pp 334 and 341, **Ottaway v Norman** [1972] Ch 698 at 711A-C. In this case, the vital element of acceptance, express or tacit, of the secret trust on the part of the respondents is absent. There has been no suggestion either in the pleadings or the appellant`s affidavit to the effect that the respondents vis-.-vis the deceased had accepted the terms of the trust as created or declared in the 1988 document, and in consequence the deceased was induced not to make a valid will to give effect to the trusts as declared in the 1988 document. All that the appellant pleaded in the statement of claim or deposed to in the affidavit was that the respondents were aware of the intention of the deceased as declared in the 1988 document. The relevant portion of the appellant`s affidavit on this point is as follows:

> *23 The deceased further declared the 1988 Will to be his last irrevocable undisclosed Will. The plaintiff will refer to the said 1988 document for its full terms and effect. The defendants were well aware prior to the death of the deceased of his intention that his properties should be distributed in the manner as stated in the 1988 Will. Further or in the alternative the defendants were aware of the declared intention and wishes of the deceased amounting to the creation of a trust to have his properties distributed amongst the plaintiff, 1st defendant and their said three children ...*
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> *24 The plaintiff in the premises say that the estate of the deceased is subject to the trust declared by the deceased in accordance with the terms of the 1988 Will; further or in the alternative, in accordance with the declared intention and wishes of the deceased amounting to a trust.*

Mere knowledge of the 1988 document, even if proved, does not suffice to create a trust. As between the deceased and the respondents, there must be acceptance of the obligation by the latter as trustees, thereby inducing the deceased not to make a valid will to give effect to the trusts he declared in the 1988 document. None of the authorities turn on mere knowledge on the part of the trustee. As stated by Lord Warrington in ***Blackwell v Blackwell*** (supra) at p 342: `It is the fact of the acceptance of the personal obligation which is the essential feature`.

Mr Almenoar relies principally on **Re Maddock; Llewelyn v Washington** [1902] 2 Ch 220. In that case, the testatrix bequeathed her real estate and residue of her personal estate to A. who was one of the executors of the will. By a subsequent written memorandum, which was not attested as a will, the testarix expressed her wish that a specified part of the residue should go to third persons. The memorandum was communicated to A. who assented to it and admitted that it created a trust binding on her. It was subsequently found that the residuary personal estate (other than that comprised in the memorandum) was insufficient for the payment of the testatrix`s debts. The Court of Appeal held that the unattested memorandum must be treated as if its contents had been contained in a will or

codicil, so that for the purpose of administration, the trust of the specified part of the residue stood in the same position as a specific bequest of that part, such that the debts of the testatrix must be first paid out of that part of the residue unaffected by the trust and the balance to be borne rateably by the specific part of the residue and the real estate.

That case does not, in our opinion, support the appellant`s case. It is amply clear in that case that the beneficiary who was one of the executors assented to the memorandum and admitted that it created a trust which was binding upon her. It is important not to lose sight of the fact that Collins MR proceeded on the basis that the essential element of acceptance of the trust must exist before the trust arises. His Lordship said at pp 225-226:

> *... The principle is well established, and is expounded in numerous cases, which were cited in argument, from Drakeford v Wilks, decided by Lord Hardwicke, onwards; but it seems to be nowhere more clearly stated in recent times than by Lord Cairns in* ***Jones v Badley****, where, adopting and enlarging the explanation given by Wood V-C in* ***Wallgrave v Tebbs****, he said: `Where a person knowing that a testator, in making a disposition in his favour, intends it to be applied for purposes other than for his own benefit, either expressly promises, or by silence implies, that he will carry the testator`s intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust, and in such case the court will not allow the devisee to set up the Statute of Frauds, or rather, the Statute of Wills, ... and for this reason: The devisee, by his conduct, has induced the testator to leave him the property, and, ... if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favour would not have been found in the will.`*
>
> *The obligation therefore, has, it would seem, as between the legatee, who under such circumstances accepts the legacy, and the persons designated by the testator as beneficiaries, the character of a trust. But the right of the latter is wholly dependent on whether the legatee accepts the legacy with knowledge of the mandate, and no right for them arises at all unless and until the legatee has, with notice, accepted the legacy. A personal relation is then established between these two parties, without reference to others, and, as between them, would seem to have the incidents of a trust.*

Similarly, Cozens-Hardy LJ expressed his view that the legatee is held to have contracted to give effect to the testator`s wishes in consideration of the testator devising the property to him or, having made the devise, not revoking it. His Lordship said at p 232:

> *... [A] person to whom the testator`s wishes are thus indicated is held, in effect, to contract that, in consideration of the testator giving him the property absolutely, or, if already given to him absolutely, not revoking the gift, he (the legatee) will give effect to the testator`s wishes, to the same extent and in the same manner as if those wishes had been formally expressed in a testamentary document admitted to probate.*

Thus ***Re Maddock*** is clearly distinguishable from the present case. There is no suggestion either in the pleading or in any affidavit filed by or on behalf of the appellant that the respondents or either of them during the lifetime of the deceased assented to the 1988 document or accepted the obligations of the trust as contained therein.

Grant of the Hong Kong probate

The 1986 Will was duly proved in the High Court in Hong Kong and the probate was granted to the first respondent on 6 May 1998. Both before the learned assistant registrar and before the learned judicial commissioner, the respondents, relying on s 43 of the Evidence Act (Cap 97, 1997 Ed), maintained that the grant was conclusive as to the due execution and validity of the 1986 Will and that there was no need for the respondents to prove the will. This submission was accepted by the learned assistant registrar. However, the learned judicial commissioner held that the grant of probate was not unimpeachable. His reasons were mainly these. First, the grant was made ex parte, and not in any contested proceedings. Secondly, the respondents were not applying for a re-sealing of the grant of probate made by the Hong Kong High Court but were seeking a grant of probate in Singapore, and under O 71 rr 9-13 he is entitled to require affidavits to be filed to prove the due execution of the 1986 Will. Thirdly, under s 46 of the Evidence Act, a party may show that the grant was obtained by fraud or collusion. Although fraud or collusion has not been pleaded by the appellant in the statement of claim, the appellant and second respondent have alleged fraud or collusion in their affidavits. After considering s 43 of the Evidence Act and the commentary in ***Sarkar`s Law of Evidence*** (15th Ed, 1999) Vol 1 at pp 827-829, the learned judicial commissioner said at [para] 47:

> *With the greatest of respect for **Sarkar`s** commentary, I am not prepared to go so far as to say that the Hong Kong grant of probate made the 1986 Will unimpeachable in a Singapore court. I would have accepted that position if the Hong Kong grant had been made after contested proceedings challenging the validity of that Will. As it turned out, the grant was made ex parte, the plaintiff being a little too late to stop it. I would also have accepted that the 1986 Will was unimpeachable here if the proceedings here were for resealing of the Hong Kong grant. That is because any resealing here is solely dependent on the probate in Hong Kong and would fall if the probate there is revoked. In our case, the first and third defendants are seeking a grant of probate in Singapore and O 71 rr 9 to 13 of the Rules of Court would entitle the Registrar hearing the petition to require evidence as to the due execution of the Will and other related matters. Accordingly, I called for affidavits to be filed by the attesting witnesses to the 1986 Will since the second defendant had joined the plaintiff in impugning it.*

This conclusion is disputed by the respondents. Mr Davinder Singh, counsel for the respondents, relies on s 43 of the Evidence Act and the same passages in ***Sarkar`s Law of Evidence*** , and submits that the Hong Kong High Court`s grant of probate is conclusive evidence as to the validity of the 1986 Will.

This issue turns on the scope of the provisions of s 43 read with s 46 of the Evidence Act. Section 43, in so far as material, is as follows:

> *(1) A final judgment, order or decree of a competent court, in the exercise of probate, matrimonial, admiralty or bankruptcy jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character or the title of any such person to any such thing is relevant.*
>
> *(2) Such judgment, order or decree is conclusive proof -*

(a) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

(b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

...

And s 46 of the Evidence Act provides as follows:

Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 42, 43 or 44, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion

In this case, it is accepted that the High Court in Hong Kong is the competent court for the grant of probate to the 1986 Will, as the deceased died domiciled in Hong Kong. The grant of probate was a final judgment and was made in exercise of the probate jurisdiction of the court, notwithstanding that it was made ex parte. The Hong Kong grant specifically declared that the 1986 Will `was proved and registered in the High Court of Hong Kong, Probate Jurisdiction`. The probate was granted to the first respondent, one of the executors and trustees, appointed under the 1986 Will. In relation to the issue before us, the grant of probate by the High Court in Hong Kong is clearly relevant, as the existence of the first respondent`s ***legal character*** as the executor and trustee of the 1986 Will is relevant. That being so, under s 43(2) of the Evidence Act, the grant of probate is conclusive proof of the legal character of the first respondent as the executor and trustee of the 1986 Will. In other words, the grant is conclusive as to the due execution and validity of the 1986 Will and the legal character conferred on the first respondent.

We find helpful the following commentary in ***Sarkar`s Law of Evidence*** at p 829:

The probate granted by a competent court is conclusive of the validity and contents of such will and the appointment of executor, until it is revoked, and no evidence can be admitted to impeach it, except in proceedings in the Probate Division, for its revocation. ... A judgment in probate proceedings regarding the genuineness of a will or its due execution and attestation is a judgment in rem. ... The grant of a probate operates as a judgment in rem and would be binding on all persons including one whose intervention by filing a caveat was refused on the ground of want of locus standi ... The title conferred on the executor by the will and the probate which is relevant evidence under s 41 by s 228 of the Succession Act ...

...

Further, at p 830 the learned commentators said:

A finding not essential to the judgment in a probate action does not operate as

*a finding **in rem**; but all that is essential to the decision that the executor was entitled to the probate must be taken to have been conclusively determined and therefore probate is the conclusive proof of the due execution of the will. ... The grant of probate is the decree of a court which no other court can set aside except for fraud or want of jurisdiction. .....*

`Probate of a will,` it was said in the House of Lords, is also conclusive that it was executed in due form according to the law of the country where the deceased was domiciled at the time of his death ...

In an application for probate the only question for determination is whether the will is genuine or not and it is not the province of the court to determine any question of title, with reference to the property covered in the will.

We now turn to consider the observations made by the learned judicial commissioner. The matter before him was one for a grant of the probate of a will in respect of which a probate had already been granted in Hong Kong. It was not an application for re-sealing of that grant. But this difference is not very material. He noted that the probate was obtained ex parte in Hong Kong. That also was probably not very material, as a grant of probate obtained ex parte is, nonetheless, a final judgment. He bore in mind the provisions of O 71 rr 9-13, although, strictly speaking, that order applies to non-contentions probate proceedings. All these considerations, though not very material, did weigh in his mind. However, what troubled him was the allegation of fraud or collusion made by the appellant and the second respondent, although he must have appreciated that all that the appellant and the second respondent had made out were only bald allegations of fraud or collusion and nothing of substance was deposed to in support. In these circumstances, what the learned judicial commissioner did was to take a further step to satisfy himself that the 1986 Will was duly and validly executed. He was obviously invoking s 46 of the Evidence Act, and in the circumstances he was entitled to do that. In our opinion, the learned judicial commissioner was not wrong in calling for further affidavits to be filed to prove the due execution of the 1986 Will.

Validity of the 1986 Will

There was overwhelming evidence that the 1986 Will was genuine and was duly executed by the deceased. First, there were the affidavits of testamentary scripts filed by all the three respondents testifying to the absence of any other testamentary script of the deceased. Secondly, before the learned judicial commissioner, there were produced the affidavit of Raymond Lee and the affidavit of Sandy Yung Sheung Tat. Both of them were the witnesses who attested the execution by the deceased of the will on 24 April 1986, and Raymond Lee was one of the witnesses who attested the execution by the deceased of the codicil on 16 October 1987. In his affidavit affirmed on 6 December 1999, Raymond Lee testified, among other things, (i) that on 24 April 1986, the deceased signed the will in his presence and in the presence of Sandy Yung, both being present at the same time, and both of them attested and subscribed the will in the presence of the deceased; and (ii) that on 16 October 1987, the deceased signed the codicil in his presence and in the presence of one Betty Yip, both being present at the same time, and both of them attested and subscribed the codicil in the presence of the deceased. Similarly, Sandy Yung in his affidavit affirmed also on 6 December 1999, testified that on 24 April 1986, the deceased signed the will in his presence and the presence of Raymond Lee, both being present at the same time, and both of them attested and subscribed the will in the presence of the deceased. Both Raymond Lee and Sandy Yung are solicitors of the High Court of Hong Kong. Raymond Lee is still practising in Hong Kong, while Sandy Yung is now in the

employ of Sung Hung Kai Group in Hong Kong. There was no affidavit filed by Betty Yip, as Raymond Yip in his affidavit explained that he was not aware of her whereabouts. Finally, there was the grant of the probate made by the High Court in Hong Kong. As against all these, the only evidence adduced by the appellant was an affidavit affirmed by her son, Shaon Lal Hiranand, in which he described two meetings he had with Raymond Lee where Raymond Lee appeared unable to remember witnessing the deceased`s execution of the 1986 Will. On this aspect of the evidence, the learned judicial commissioner said at [para] 54:

> *... As the evidence stood, I saw no reason to doubt the validity of the 1986 Will. It should not be surprising or alarming that a cold call to a solicitor asking him about events that happened some 12 or 13 years ago should elicit such replies as Raymond Lee was said to have given. To justify any suspicion that two solicitors of Hong Kong were lying on affidavit and were implicated in any fraud, I would require much more tangible evidence than a solicitor`s failure to recall having been an attesting witness more than a decade ago or another person`s perception of that solicitor`s reaction to questions.*

The learned judicial commissioner was amply justified in arriving at this conclusion and we agree with him entirely.

Testamentary scripts

We need only deal very briefly with the appellant`s claims that she was prejudiced by the non-service of the affidavits of testamentary scripts filed by the three respondents pursuant to O 72 r 9 of the Rules of Court. It is submitted on her behalf that this amounts to a serious irregularity. We have no hesitation in rejecting this submission. Under r 9 there is no requirement to serve the affidavits on any party. Further, r 9(4) provides:

> *Except with the leave of the Court, a party to a probate action shall not be allowed to inspect an affidavit filed under this Rule by any other party to the action, or any testamentary script annexed thereto, unless an affidavit sworn by him containing the information referred to in paragraph (1) has been filed.*

There is no record of the appellant having filed any affidavit of testamentary script under O 72 r 9. Thus, she would not even have any right to inspect the respondents` affidavits, except with the leave of the court.

Dismissal of the appellant`s claim

It is contended on behalf of the appellant that even if the questions of law are determined in favour of the respondents, the claim should still not be dismissed on the ground that there remains an outstanding claim for relief sought in [para] 3(a) of the prayer in the statement of claim, which is this:

> *A declaration that the estate of the deceased is subject to the trust as set out in the 1988 Will and shall be distributed in accordance with the terms of the 1988 Will; in the alternative in accordance with such terms of the trusts created by the deceased to be determined by this Honourable Court.*

The basis for the alternative declaration is the respondents` knowledge of the testator`s declared intention and wishes to distribute the estate to the appellant and the second respondent and their three children, which, counsel submits, amounted to a trust. In support, counsel relies on the appellant`s affidavit dated 23 March 1999 and attached exhibits collectively marked as `KLH-2`, which purport to point to the creation of a trust.

We find no merit in this submission. The relevant portion of the appellant`s affidavit was made in support of her contention that the respondents were aware of the existence of the 1988 document and was not made in relation to the alternative claim. Furthermore, several of the exhibits in `KLH-2` revealed no more than an intention and contemplation on the part of the deceased to transfer a percentage of the title of a real property in the United States of America and made no mention of a trust. `KLH-2` included a fax dated 29 Aug 1994 which referred to an intended transfer of the title deeds of a real property in Hong Kong and contained a vague reference to the formation of a `trust` but without specifying any particulars. The other exhibits in `KLH-2` revealed nothing about the creation of a trust.

Furthermore, the appellant did not specify or particularise the terms of such a trust whether in the statement of claim or the affidavit. The appellant is in effect, asking the court to determine or lay down the terms of the trusts without furnishing any basis upon which the court is asked to embark on this exercise. There is absolutely no certainty as to the terms or the subject matter of the trust claimed by the appellant. On this ground alone, the claim must fail.

In view of the above, there are ample reasons for the consequential orders made below dismissing the appellant`s claim in entirety and granting judgment on the respondents` counterclaim. This is a justifiable exercise of the court`s powers pursuant to O 14 r 12(2) and/or O 18 r 19(1)(b) of the Rules of Court.

Conclusion

In the result, we dismiss the appeal. We award to the first and third respondents the costs of the appeal but only one set of costs is allowed. No cost is awarded to the second respondent, as he has not played any part in this appeal. The deposit in court, with interest, if any, is to be paid to the respondents to account of costs.

Outcome:

Appeal dismissed.