Toh Seok Kheng *v* Huang Huiqun
[2010] SGHC 308

Case Number : Originating Summons No 455 of 2010

Decision Date : 20 October 2010

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Jayagobi Jayaram (Grays LLC) for the plaintiff; Kuldip Singh (Yu & Co) for the defendant.

Parties : Toh Seok Kheng — Huang Huiqun

Family Law

Probate and Administration

20 October 2010

Judith Prakash J:

Introduction

1 This was an application by Mdm Toh Seok Kheng ("the plaintiff") for, *inter alia*, a declaration that the marriage entered into between Ms Huang Huiqun ("the defendant") and the late Mr Yeo Sze Heng ("the deceased") on 20 December 2005 ("the marriage") was a sham marriage. Having heard the submissions of counsel for both parties, I dismissed the application. I now give the reasons for my decision.

Background

2 The material and undisputed facts were these. The plaintiff was the mother of the deceased who died intestate on 9 June 2009. The defendant was a Chinese national. The deceased had entered into the marriage without informing his family of it although he was close to them and had been living with his parents for over forty years. After the marriage, the deceased continued to live with his family and apart from the defendant. Up to his death, he did not disclose his marital status to his family. After the deceased's unexpected demise, the defendant appeared at his funeral and revealed to his family that she was his wife. The deceased's family was shocked and did not accept the legitimacy of the marriage.

3 The plaintiff applied for a grant of letters of administration of the deceased's estate ("the estate") on 15 July 2009. On 7 October 2009, the defendant lodged a caveat in court because she too intended to apply for a grant of letters of administration. The plaintiff responded by making the present application.

Submissions, analysis and decision

4 In the plaintiff's submissions, it was argued that the marriage was a sham marriage for the following reasons. First, it was alleged that the purpose behind the marriage was to facilitate an application for Singapore permanent residency status for the defendant. Secondly, it was asserted

that even after the marriage, the deceased had conducted his life as though he was a bachelor, and had never introduced the defendant as his wife to the rest of his family. Thirdly, it was alleged that the deceased was compelled by the defendant to enter into the marriage.

5 The defendant disputed the plaintiff's allegations relating to the first and third reasons for the marriage to be declared a sham marriage. Her rebuttals, however, were irrelevant because, even assuming all the allegations and assertions made by the plaintiff were true, Singapore law does not recognise any such creature as a "sham marriage".

6 Before dealing with the plaintiff's arguments proper, a preliminary issue must be addressed. The plaintiff's counsel argued that what was being sought here was not a "declaration to *invalidate* the marriage" between the defendant and the deceased, but a declaration that the marriage was a "*sham marriage* in keeping with public policy considerations" [emphasis added]. I did not accept this artificial construction.

7 Ignoring for a moment the non-existence of a legal concept of "sham marriage" which entails legal consequences, the plaintiff had for the purposes of this application clearly argued for the existence of a sham marriage as a means to *invalidate* the marriage or to render it *void*.

8 This was apparent from a comparison between the second and third prayers of the application. The second prayer was for an order for the estate to be distributed according to s 7 r 5 of the Intestate Succession Act (Cap 146, 1985 Rev Ed) ("ISA") if the court was to find the marriage to be a sham marriage. In the alternative, the third prayer was for an order for the estate to be distributed according to s 7 r 4 of the ISA, if there was *no* sham marriage.

9 Although rule 5 is subject to the rights of the surviving spouse as provided in rule 4, its purpose is to address the situation where a deceased left behind a parent or parents but no descendants. It is rule 4 which expressly contemplates the situation where the deceased left behind both a spouse and a parent or parents. If the plaintiff thought that a declaration of a sham marriage would not amount to a declaration of a void marriage, then she would not have asked for a distribution according to rule 5 where there was a sham marriage; or where there was no sham marriage, for a distribution according to rule 4. In both cases, assuming that a sham marriage does not amount to a void marriage, it was rule 4 that would be applicable. By comparing the nature of the alternative reliefs claimed, it was clear that what was being sought was in substance either a declaration to invalidate the marriage or a determination that the marriage was void, on the ground that it was a sham marriage.

Sham marriage

10 Neither the term "sham marriage" nor its synonym "marriage of convenience" has been defined locally by statute or case law. What is certain is that it is pejorative. The concept of a sham marriage probably arises as a corollary to the socially constructed idea of an "authentic marriage". The idea that marriage has a special moral status and involves established moral obligations is both commonly held and philosophically contentious.

11 As the idea of marriage as a contract achieves prominence, questions have been posed as to how far its obligations and the motives for entering into it can be amenable to individual choice. The contractual perspective of marriage implies that spouses can choose marital obligations to suit their interests, and can choose to get married for myriad reasons. To others, however, the good of marriage consists precisely in the restrictions it imposes on individual choice. This institutional perspective of marriage holds that the purpose of the institution sets out its obligations and overrides

the spouses' wills. What these institutionally-mandated obligations consist of remains contested; and the tension between the contractual and institutional perspectives of marriage upon which the concept of a sham marriage rests cannot be resolved by the courts.

12 For present purposes, I need not enter into the debate as to what amounts to a sham marriage. Insofar as the plaintiff was relying on there being a sham marriage as a ground to invalidate the marriage, the legal position is both clear and settled – the court cannot declare a marriage void on a ground other than those provided for in s 105 of the Women's Charter (Cap 353, 1997 Rev Ed) ("the Charter"). It was held in *Tan Ah Thee and another (administrators of the estate of Tan Kiam Poh (alias Tan Gna Chua), deceased) v Lim Soo Foong* [2009] 3 SLR(R) 957 ("*Tan Ah Thee*"), that the grounds for holding a marriage to be void are exhausted by s 105 of the Charter. Those grounds do not include annulling a marriage because it was entered into pursuant to motives which some might consider improper and may therefore render it a sham marriage in their eyes. Nor do they include annulling a marriage in which spouses continue to conduct their respective lives as though they were unmarried.

13 The law as it stands abstains from prescribing the "proper" motives for marriage and does not allow the spouses' private motives to undermine the validity of their marriage. In *Vervaeke (formerly Messina) v Smith and others* [1983] AC 145, the parties married for the singular purpose of allowing the female party to continue working in England as a prostitute. The House of Lords held that, as "horrible and sordid" as the marriage was, the marriage was valid. Likewise the Singapore Court of Appeal in *Kwong Sin Hwa v Lau Lee Yen* [1993] 1 SLR(R) 90 (at [33]) approved of P Coomaraswamy J's statement in *Ng Bee Hoon v Tan Heok Boon* [1992] 1 SLR(R) 335 (at [49]) as follows:

> In my view, if a man and a woman (who are not barred from marrying each other) exchange consents to marry with due formality before a person lawfully authorised to solemnise a marriage under the Charter, intending to acquire the status of married persons, it is immaterial that they intend the marriage to take effect in some limited way or that one or both of them may have been mistaken about, or unaware of, some of the incidents of the status which they have created. To hold otherwise would impair the effect of the whole system of law regulating marriage in Singapore, and gravely diminish the value of the system of registration of marriages on which so much depends. Marriage status is … of great public concern.

14 While it might be thought legitimate to prevent an abuse of marriage, it is crucial that what amounts to actionable abuse, the measures to be taken against such abuse and whether such abuse, if it exists, impinges on the *validity* of the marriage are issues which are not to be determined by judicial fiat. These issues are matters of public policy and are non-justiciable.

15 If there should be a public policy to exclude persons from the rights they are entitled to on the basis of their marriage on the premise that their marriage is perceived as not authentic because it does not correspond to an assumed pattern of an authentic marriage, that public policy is properly reserved to Parliament for articulation, delineation and enactment. In relation to this point, counsel for the plaintiff referred to some local cases (*eg*, *Public Prosecutor v Ng Ai Hong* [2007] SGDC 68) where the parties involved were convicted for corruption for entering into "sham marriages" for the purposes of facilitating one party's acquisition of immigration or residency benefits whilst the other party obtained monetary gratification in return. The plaintiff's counsel brought up those cases to attempt to show that sham marriages are generally against public policy.

16 However, I did not find them to be relevant. Those cases are not authority for the proposition that the *validity* of a marriage, which must be determined solely according to the Charter's precepts, can be affected by the motives of the spouses for entering into marriage. Those cases did not hold

that contracting such a "sham marriage" in itself offends against general public policy and, *a fortiori*, nor did they hold that it rendered the marriages in question void. The tenor of those cases was that when parties used their validly constituted marital status to obtain something available only to authentically married couples, they might be in breach of *specific* laws which uphold *specific* public policies, which in those cases were immigration policies. The outcome in those cases depended on whether the elements of those laws were satisfied, and not on whether there was a sham marriage *per se*. The label of "sham marriage" attached to those objectionable transactions served merely a descriptive function in the course of analysis of whether those laws were breached.

17 As the discussion above indicates, while judges have used the term sham marriage, it is not a term of art and does not create any legal implications in and of itself. Whether or not there are actionable consequences flowing from a putative sham marriage would depend on the existence of other laws which prohibit its incidents. Even then, unless the particulars of the sham marriage involved the requirements stipulated by s 105 of the Charter, the *validity* of the marriage would remain unaffected.

18 Hence, the deceased's reasons for entering into the marriage and how he behaved after marriage, even if they were proved to be as the plaintiff asserted, were irrelevant in considering whether the marriage was valid or not. The argument of a sham marriage to invalidate the marriage therefore failed.

Lack of valid consent by the deceased

19 To the extent that it was alleged that the deceased did not validly consent to the marriage thereby rendering the marriage a sham marriage which was void, the argument failed for the same reasons as stated above.

20 The plaintiff's counsel did not seek to argue that the alleged lack of valid consent rendered the marriage voidable under s 106(*a*) of the Charter and should be declared void. Had he done so, the argument was bound to fail for the reasons stated in *Tan Ah Thee* (at [21], [26], [28], [30] and [31]). First, the declaratory jurisdiction of the court could not be used to declare a voidable marriage prospectively void because that would be to *alter* the status of the marriage. Secondly, s 104 of the Charter does not allow a stranger to the marriage to seek a judgment of nullity. Thirdly, a judgment of nullity only operates from the time the judgment was made final. This meant that the defendant, as the deceased's wife immediately prior to his death, qualified as his "spouse" within the meaning of s 7 of the ISA. Hence, she would still be entitled to her share of the estate even if a declaration of nullity on the basis of a voidable marriage was obtained on the plaintiff's application, and she would also retain her prior right to apply for letters of representation as the deceased's widow. Finally, the marriage between the deceased and the defendant had already been dissolved by the death of the deceased under s 7(*a*) of the Charter. Since the marriage was no longer in existence, it could not be declared void for the future.

Grant of letters of administration

21 I did not grant the relief sought by the plaintiff in her third prayer, which was to be allowed to be the sole administrator of the estate.

22 The statutory provision governing the grant of letters of administration is s 18 of the Probate and Administration Act (Cap 251, 2000 Rev Ed) ("PAA"). The relevant sub-sections state:

> **Letters of administration on intestacy**

18. – (1) …

(2) In granting such letters of administration the court shall have regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof, and in regard to land settled previously to the death of the deceased, letters of administration may be granted to the trustees of the settlement.

(3) …

(4) Without prejudice to the generality of subsection (2) —

(*a*) letters of administration may be granted to the husband or widow or next of kin or any of them;

(*b*) when such persons apply for letters of administration, it shall be in the discretion of the court to grant them to any one or more of such persons;

…

[emphasis added]

23 Although where a person dies intestate, the court has a discretion under s 18, PAA as to whom to appoint as the administrator of the deceased's estate, the starting point is that the person who is most suitable among the beneficiaries to be the administrator is determined according to the priorities of entitlement to the deceased's estate under the laws of intestate succession. This is because the beneficiary with the greatest entitlement to the deceased's estate will naturally be the person most interested in the estate of the deceased.

24 The defendant, being the deceased's surviving spouse, had priority of entitlement to the estate by virtue of s 7 of the ISA and she had a corresponding prior right over the plaintiff, who was the deceased's parent, in obtaining a grant of letters of administration of the estate.

25 In fact, the defendant had taken steps to apply for letters of administration at the time of the plaintiff's application. She had filed a caveat which gave her time to file an application for the letters to be granted to her in preference to the plaintiff, who had previously applied. The defendant had also expressed her intention to obtain the letters of administration. Hence, the plaintiff's application to be the sole administrator of the estate failed on the merits.

26 The plaintiff's application to be made the sole administrator of the estate was also wrong procedurally. If the plaintiff wished to bring an interest action to contest the suitability of the defendant to be the administrator despite the defendant's prior right, she was of course free to do so. However, a contentious action for the grant of letters of administration is a "probate action" within the definition of the Rules of Court (Cap 322, 2007 Rev Ed), O 72 r 1(2). As such, the procedural rules under O 72 which regulate probate actions must be observed. It was held in *Jigarlal Kantilal Doshi and another v Damayanti Kantilal Doshi (executrix of the estate of Kantilal Prabhulal Doshi, deceased) and another* [1997] 2 SLR(R) 167 (at [21]) that the requirement for a probate action to be begun by writ is mandatory and if the wrong procedure was adopted, it could be said to be a "fairly serious error" that would justify a striking out if such an application was made. It was thus an abuse of process for the plaintiff to apply in an originating summons for a declaration to be made the sole administrator of the estate in the face of a known contesting applicant for letters of administration. The third prayer of the application was therefore dismissed.