Privy Council Appeal No. 18 of 1976

Muni Deo Bidesi and others – – – – – – *Appellants*

v.

The Public Trustee of Fiji – – – – – – *Respondent*

FROM

THE FIJI COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH DECEMBER 1978

Present at the Hearing:

VISCOUNT DILHORNE
LORD KEITH OF KINKEL
LORD SCARMAN

[*Delivered by* LORD SCARMAN]

The four appellants are the sons of Bidesi, s/o Chuman, by his first marriage. Bidesi died on the 15th November 1957. A few days after his death Mr. Harry Wheatley, a trusted friend who had helped him to prepare and draft his will, assembled the appellants and the widow (Mr. Bidesi's second wife) to hear the contents read. The appellants heard that their father had left his estate to his widow and the children of his second marriage. From that day on they have engaged in what the trial judge described as a "long-drawn legal battle". The bitterness of the litigation has been matched only by its dilatoriness. It was not until the 23rd June 1966 that the appellants issued their writ claiming revocation of probate of the will, which had been granted in common form to the Public Trustee of Fiji on the 21st April 1959. Eight years elapsed before judgment was given. On the 27th November 1974 Mr. Justice Tuivaga delivered a reserved judgment in which he pronounced for the will. He was satisfied that Mr. Bidesi knew, and approved of, the contents of his will, and that the will was duly and validly executed on the 18th April 1957 in accordance with the Wills Act of 1837. On the 25th July 1975 the Fiji Court of Appeal dismissed the appellants' appeal.

That should have been the end of the case. But, exercising their right, the appellants have appealed to this Board. Their appeal has no chance of success unless they can disturb the findings of the courts below to the effect that their father knew and approved of the contents of his will and that the will was duly executed. These are questions of fact, upon which there are concurrent findings by the trial judge and the Court of Appeal. It is not the practice of this Board to review the evidence where there are concurrent findings of fact, unless there has been a miscarriage of justice or a violation of some principle of law or procedure: *Devi v. Roy* [1946] A.C. 508. There is nothing of the sort in this case.

Mr. Gidley Scott, counsel for the appellants, who has said everything that can be said for his clients, has endeavoured to counter the effect of the concurrent findings below by taking two points. First, he says that the trial judge was wrong to admit the evidence of Mr. Wheatley and that without his evidence the respondent could not have proved that Mr. Bidesi knew and approved of the contents of the will. Secondly, he says that there was no evidence that the sheets of paper on which the will was written had been joined together when it was signed and that, in the absence of such evidence, the respondent has failed to prove due execution.

Mr. Wheatley was an important witness. It was to him that the testator turned, when he wanted help in making his will. If Mr. Wheatley was to be believed, he had explained the contents of the will to Mr. Bidesi, who fully understood and approved of it. Mr. Wheatley was also present when the will was executed in the presence of the Public Trustee and the attesting witnesses. But at the time of the trial Mr. Wheatley was no longer in Fiji. He had gone to live in Sydney and was not willing (nor, of course, could he be compelled) to come to Fiji to give evidence. In September 1967 all parties agreed to his evidence being taken on commission. He gave evidence in Sydney, being examined and cross-examined: and it was recorded as a deposition. When the trial began in December 1972, application was made by the Public Trustee to read his evidence. Objection was made by the appellants but the judge exercised his discretion in favour of the admission of the deposition. It is submitted by the appellants that by so exercising his discretion the judge disregarded the requirement of R.S.C. Order 38 r.9(2) which provides that:—

> " (2) A party intending to use any deposition in evidence . . . must, a reasonable time before the trial, give notice of his intention to do so to the other party ".

In fact, the Public Trustee failed to give notice before the trial: but he did give a week's notice before the application. The point is the merest technicality. At its highest, it could be said that there was an irregularity—as to which see R.S.C. Order 2 r.1. There was no element of surprise: all parties were well aware that Mr. Wheatley's evidence, if given at all, would have to be by way of deposition. The trial judge ruled against the objection: and the Court of Appeal held that in the exercise of his discretion he was fully entitled to do so. Their Lordships agree. It was in the interests of justice that the deposition should be read.

Mr. Gidley Scott concedes, rightly, that, if Mr. Wheatley's evidence be admissible, he cannot contend before this Board that the judge erred in finding that the testator knew and approved of the contents of the will. His first point, therefore, fails.

The second point is purely a question of fact. Were the pages of the will separate sheets at the time of its execution? If they were, there was no due execution: *Lewis v. Lewis* [1908] P.1. The state of the evidence was succinctly summarised by McMullin J.A. in the course of his judgment in the Court of Appeal:—

> " An examination of the pages of the will reveals that each page other than the last, on which testator and witnesses subscribed their names, contained what would appear to be the initials of testator and the two attesting witnesses, as distinct from their full names. Mr. Koya suggested that the several sheets which were said to comprise the will did not form part of a continuous document.

> When this point was made during the course of the trial, the learned Judge called for the Register of Books in which the original of wills admitted to probate were bound together. The book was dismantled and the pages of the original will were exposed to view. Upon this being done it would appear that Mr. Koya reiterated his submissions that there was no evidence that the sheets were bound together at the time of execution. There is also no evidence that the separate sheets of the will were not together when it was signed. At best for appellants, all that can be said is that there is no evidence that the sheets were together so as to form part of the continuous document ".

The trial judge expressed himself as " perfectly satisfied that the will of the testator was executed in accordance with the Wills Act 1837 ". The Court of Appeal held that he was entitled to draw the inference that the pages were attached together so as to form one document at the time of execution. McMullin J.A. commented that " there being no evidence to the contrary, respondent is able to rely on the maxim '*omnia praesumuntur rite et solemniter esse acta*'."

Mr. Gidley Scott submits that it was wrong to invoke the maxim in support of the trial judge's inference. Where there is no evidence—so runs his argument—the lack cannot be made good by a presumption, and the burden of proof, which is admittedly on him who propounds the will, is not satisfied. The submission is contrary to authority, principle, and common sense.

When the question is, as here, whether a will was duly executed, the maxim may be invoked; *Harris v. Knight* (1890) 15 P.D. 170. The maxim is merely a way of saying (in Latin) that it is proper in the circumstances to act on a reasonable probability. It has no place where there is evidence to the contrary: in the present case there was none. Lindley L.J. put it in *Harris v. Knight* at p.180 as follows:—

> " The maxim only comes into operation where there is no proof one way or the other ".

Harris v. Knight was a case of a lost will admitted to probate. But in their Lordships' opinion, the principle applies generally where the circumstances are such as to make due execution a reasonable probability. The evidence of Mr. Wheatley and the examination of the pages of the will led both courts below to draw the inference in favour of the execution, which was one of fact. Their Lordships decline to review the evidence in face of these concurrent findings. But they will permit themselves one observation. The Court of Appeal was fully justified in commenting that

> " After the lapse which the appellants allowed to occur between 1959, when probate in common form was granted, and 1966, when this action was commenced, this Court should not in the case of a will prepared in the office of a public official who gained nothing from its terms be too astute to entertain points of this kind on mere speculation and without a scintilla of evidence ".

The appellants' second point, therefore, also fails. Since it is conceded that failure on these two points is fatal to the appellants' case, their Lordships will humbly advise Her Majesty that the appeal be dismissed with costs.

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In the Privy Council

MUNI DEO BIDESI and OTHERS

v.

THE PUBLIC TRUSTEE OF FIJI

DELIVERED BY
LORD SCARMAN

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