RATNAYAKE
v.
CHANDRATILLAKE AND OTHERS

COURT OF APPEAL.
M. JAMEEL J. AND T. N. ABEYWIRA J.
C. A. 162/77.
D.C. MATARA 15 MISC.
17 G 20 ABD 23, MARCH 1987.

Last Will–Probate–Instigation and undue influence–Coercion– Fraud– Appointment of married woman as guardian-ad-litem– S. 495 C.P.C.–Letters of Administration–Onus of proof.

Appointment of a married woman as a guardian-ad-litem is irregular and contravenes the provisions of s. 495 of the Civil Procedure Code.

Where probate is being sought of a last will two rules are applicable:

1. The onus probandi lies in every case upon the party propounding the will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable Testator.

2. If a party writes or prepares a Will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which, it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does represent the true will of the deceased.

This rule extends to all circumstances exciting suspicion whenever such circumstances exist and whatever their nature may be it is for those who propound the will to remove such suspicions and prove affirmatively that the testator knew and approved of the contents of the will.

It is only when this is done that the burden falls on those who oppose the will to prove fraud and undue influence or whatever they rely on to displace the case made out for proving the Will.

Hence although fraud, undue influence or coercion was not proved the failure of the propounder to discharge the burden that lay upon him to remove the suspicious circumstances when there was material to trouble the conscience of the Court, entitles the Judge to hold that the will has not been proved.

The fact that one evening the deceased left the hospital where he was under treatment for alcoholism without informing the hospital authorities and had gone the same evening to meet the petitioner's lawyer and on the following day (3.8.71) executed six deeds five of them transfers (for a total consideration of Rs. 31,000 previously received) in addition to the impugned will, the fact that there is a contradiction between the evidence of the Notary and that of the petitioner as to where the deeds and the Will were executed, the fact that an available witness to the Will was not called and the fact that the petitioner himself or his children are grantees on the deeds, and in the Last Will the petitioner himself is a beneficiary along with his children were suspicious circumstances.

On a point of pure fact the Court of Appeal will only rarely overrule the original court but the Appeal Court can rescrutinize the evidence to see if the inference drawn from the facts are correct and the burden of proof appropriately placed.

Cases referred to:

(1) *Fernando v. Fernando [1966] 68 NLR 503.*
(2) *Perera v. Perera [1901] AC 354.*
(3) *Parker v. Felgate (1883) 8 PD 171.*
(4) *Battan Singh v. Amirchand [1948] 1 All ER 152.*
(5) *Sithamparanthan v. Mathuranayagam (1970) 73 NLR 53 PC.*
(6) *Banks v. Goodfellow (1870) LR 5 QB 549.*
(7) *Graig v. Lamoureux [1920] AC 349.*
(8) *Barry v. Butlin (1838) 2 Moore PC 480.*
(9) *Tyrrell v. Painton [1894] Probate 151, 159.*
(10) *Pieris v. Wilbert (1956) 59 NLR 245.*
(11) *Robins v. National Trust Co. [1927] AC 515.*
(12) *Walt (or Thomas) v. Thomas [1947] 1 All ER 582.*
(13) *Harmes and another v. Hinkson (1946) 62 TLR 445, 446.*
(14) *Sangarakkita Thero v. Buddarakkita Thero (1957) 53 NLR 57.*
(15) *Samarakone v. The Public Trustee (1960) 65 NLR 100.*
(16) *The Alim Will Case (1919) 20 NLR 481.*
(17) *Pieris v. Pieris (1906) 9 NLR 14.*
(18) *Pieris v. Pieris (1904) 8 NLR 779.*
(19) *Davies v. Mayhew (In the Estate of Lavinia Musgrove) [1927] Probate Div. 264.*
(20) *Fradd v. Brown & Co. Ltd. (1918) 20 NLR 282 (P.C.).*
(21) *Abdul Sathar v. Bogtstra (1952) 54 NLR 102.*

APPEAL from the judgment of the District Court of Matara.

Dr. H. W. Jayewardene Q.C. with *J. E. P. Deraniyagala, L. de Alwis* and *Miss Keenawina* for petitioner-appellant.

A. A. de Silva with *Miss Kanapathypillai* for intervenient-respondent.

Cur. adv. vult.

May 5, 1987

JAMEEL, J.

The deceased Wimalasena Ratnayake who died on 6.1.1974 was the brother of both the Petitioner-Appellant as well as the Intervenient-Respondent. The 1st Respondent-Respondent is the minor son of the Petitioner-Appellant by his wife the 2nd Respondent-Respondent.

The Petitioner came into court in this case to prove the last will of the Deceased and to obtain Probate thereon. The last will marked 'A' is numbered 15807 and is dated 26.6.1971. It was attested by Dannister Serasinghe N.P. and by it all the remaining property of the deceased was bequeathed to the 1st Respondent-Respondent.

The challenge to the will comes from the elder brother of the deceased and that too on two (2) grounds, namely,

(1) That the deceased was an alchoholic and as such could be easily influenced by anyone who offered him drinks or actually gave him drinks–Instigation and undue influence.

(2) Fraud.

In the light of the circumstances surrounding the execution of the last will, the Intervenient-Respondent contended that the suspicions of the court were correctly roused and that the propounder of the last will could not and had not dispelled those doubts. He had urged that the last will should not be admitted to Probate. The Learned District Judge, after a full inquiry did not grant Probate on that last will. It is from that order that the propounder has filed this appeal.

There appears to be a defect in the procedure adopted in this case. The Petitioner-Appellant is the father of the 1st Respondent-Respondent, a minor, while the 2nd Respondent-Respondent is his wife and the mother of the minor. In the circumstances, the appointment of the 2nd Respondent-Respondent a married woman, as guardian-ad-litem over the minor seems to be irregular and contrary to the express provisions of Section 495 of the Code of Civil Procedure. Vide:–*Fernando v. Fernando* (1).

This application, to have the last will proved, was made to the Probate Officer of the High Court of Matara under the Administration of Justice Law and that officer at the request of the parties, had forwarded to the Learned District Judge the following Issues for decision by the court:–

(1) Is the last will bearing No.: 15807 dated 3.8.1971 executed by D. Serasinghe N.P. the 'Act & Deed' of Wimalasena Ratnayake the deceased?

(2) Or else, is it one got executed by undue influence by coercion or fraudulently?

(3) Is the applicant entitled to get Probate issued to himself?

(4) Is the applicant bound to include in the inventory properties that were not owned by the deceased at the time of his death?

(5) If issue one (1) is answered in the negative, should these properties be considered as at intestacy and administered accordingly?

(6) If so, is it the Petitioner or the Intervenient who has more claims to get Letters of Administration issued to him?

The will in question is a notarially executed document. Its propounder, the Petitioner-Appellant initially led the evidence of the Notary, Mr. Serasinghe, and rested his case. It is alleged that both attesting witnesses are since dead though one of them is said to have been alive at the time of the trial. Yet, that witness was not called to testify.

Besides giving evidence himself, the Intervenient called witness Premadasa Witharanage Gunapala Hettiarachi, and Somapala Mirusuge.

Mr. Withanage was from the Land Registry and produced six (6) deeds attested by Mr. Serasinghe, all on 3.8.1971 and numbered 15801 to 15806 respectively.

Marking	Nature	Number	Lands	Value	Recipient
V15	Transfer	15801	20	12,500	Ananda Gamini Ratnayake
V16	Transfer	15802	5	5,000	Wimal Ashok Ratnayake
V17	Transfer	15803	7	10,000	Pushpakumar Chandratillake Ratnayake
V18	Transfer	15804	2	2,500	Hemachandra Ratnayake
V19	Transfer	15805	1	1,000	Mahindapala Ratnayake
				31,000	
V20	Gift	15806	1	10,000	Sriyani Mangalika Ratnayake

The last will which bears No. 15807 was attested at the same time and place as the above mentioned five (5) transfers and the above mentioned gift V20. 3.8.1971 was a Tuesday and not a public holiday.

V18 is in favour of the propounder Appellant himself, while all the other deeds are in favour of his children. So also the last will 'A'. Both V17 and the last will are in favour of the minor 1st respondent. The deceased has appointed the appellant as the executor of the last will. According to Mr. Serasinghe, all 7 documents were executed and attested by him at his residence. On this however, he is contradicted by the appellant who says that they were done at the office of the Notary. This discrepancy assumes some considerable proportion when co-related with the fact that the two (2) attesting witnesses to all these documents are the same and were the two clerks of the Notary, Mr. Serasinghe. As Mr. Serasinghe was himself quite unable to remember the exact time and date at which he received instructions to prepare these documents, including the will, and as his instructions book has not been produced in evidence the absence of supporting testimony from one or other of these two (2) attesting witnesses assumes added significance. This is particularly so because the preparation of these deeds and the last will would have taken considerable time, for they had to include in the various schedules descriptions of thirty-six (36) lands. According to the appellant these instructions had been given by the deceased personally, on the second (2nd) itself. Accordingly, the state of health of the deceased and more particularly his state of mind on that day would be very significant. (*Perera v. Perera* (2). Also, *Parker v. Felgate* (3) and *Battan Singh v. Amirchand* (4)).

In the second (2nd) of these cases, the Privy Council made reference to its decision in the earlier case of *Perera v. Perera* (supra) and held:

> "Even if persuaded that the testator was unable to follow all the provisions of the will at the time of signing, yet they (The Privy Council) could not hold that the last will was invalid in view of the law as stated in *Parker v. Felgate* (supra)."

Learned Queen's Counsel for the appellant contended that as on the second (2nd) of August the deceased was in good health and in a sound mental state. He stressed that Mr. Serasinghe had testified to the state of mind of the deceased as at the time of the execution of all those documents, and that there was not suffcient or justifiable reason to reject his evidence on this point. While, no doubt, this is an important factor to reckon with, it is pertinent to bear in mind that the evidence of the Proctor who prepared the last will is not to be taken as conclusive as to the mental capacity of the testator. *Sithamparanathan v. Mathurainayagam* (5).

Besides the evidence of the appellant and that of the Notary there is also the evidence of Dr. Buultjens. On the evidence led, the Learned District Judge has come to the finding that the deceased was an alcoholic. It is common ground that the deceased had been the worse for liquor on the 31st of July 1971. He had to be admitted to the Tangalle Hospital that day by one of the sons of the appellant. The relevant Bed-Head Ticket (D1) shows that the patient Wimalasena Ratnayake was a married man though it is common ground that he died unmarried and issueless. His guardian or relation named in this Bed-Head Ticket is A. G. Ratnayake, the transferee on deed V15. For the 'Alcoholism' diagnosed he had been given Vitamin B and allowed to sleep it out. He died 2 1/2 years later on 6.1.1974. This Bed-Head Ticket reveals that he was found missing from the ward at about 10 a.m. None can say as to the exact time at which he left the ward nor whether he left it of his own free will or was removed or induced to leave. Dr. Buultjens says that after the morning of the 1st the deceased's temperature returned to normal and that in all respects he was back to normal except for a slight swelling of the feet which the doctor attributed to the possible beginnings ot 'cirrhosis' of the liver. The doctor had ordered the necessary tests and it was for that reason alone that the deceased was being detained at the hospital. The deceased had left without a word to the authorities

There is no compulsion in the law that a patient such as the deceased should remain in the hospital until he is discharged by the doctors. He is free to leave whenever he wishes to do so and cannot be kept against his will. But it is rather irresponsible for an adult to do so without informing the authorities. Irresponsible actions alone will not warrant a declaration against the will on the ground of insanity. The courts have not treated 'slowness, feebleness and eccentricities' as sufficient to prove insanity in the context of the law relating to the proof of wills. *Banks v. Goodfellow* (6).

Dr. Buultjens went on to state that although the deceased had returned to normal by the 1st and was normal on the 2nd, although he could have attended to the execution of the deeds and the Last Will on the 3rd with full knowledge and understanding, yet there was the possibility that he could have been made to act on the suggestions of or to the dictates of another if that other tempted him with a drink or gave him access to alcohol. It is the suggestion of the Intervenient that this kind of influence was wielded and brought to bear on the deceased not only to induce him to leave the hospital but to do so without going through the normal formalities of a discharge.

In this context, it is useful to bear in mind that in the case of wills, the presumption is against forgery and in favour of sanity. (Walter Pereira-Laws of Ceylon pg: 421). It has been held in *Craig v. Lamoureux* (7) that the onus is on the person who attacks the will on the ground of fraud or undue influence to prove their existence. However, Walter Pereira goes on to state,

> "....but when on opposition, an issue is raised as to the unsoundness of mind of the testator, the burden of proof is on the propounder."

This is the classical view of the law and is laid down in the leading cases of:

(1) *Barry v. Butlin* (8) and

(2) *Tyrrel v. Painton* (9), and

on the basis of which the Privy Council extracted and restated it in the following manner in *Sithamparanathan v. Mathurana yagam* (supra):

"These rules are two. *The first* that the onus probandi lies in every case upon the party propounding a Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator. The *second* is, that if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased."

A similar expression of the law is to be found in *Pieris v. Wilbert* (10) Lindley, J. in *Tyrrel v. Painton* (supra) extending the second rule to all circumstances exciting suspicion said at p. 159.

"Whenever such circumstances exist and whatever their nature may be it is for those who propound the will to remove such suspicions and prove affirmatively that the testator knew and approved of the contents of the document and it is only when this is done that the burden is on those who oppose the will to prove fraud and undue influence or whatever they rely on to displace the case made out as proving the will."

The question of the burden of proof was very succinctly propounded by Lord Dunedin in *Robins v. National Trust Co. (II)*.

"But, onus as a determining factor can only arise if the tribunal finds the evidence pro and con so evenly balanced, that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing evidence comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered."

Thus, we have the dictum of the House of Lords, in *Watt v. Thomas* (12).

When the trial court judge (without a Jury) finds on facts, the Appeal Court will not interfere if there has been no misdirection on the question of fact."

Learned Queen's Counsel contended that the District Judge has misdirected himself because he failed to appreciate that such suspicions as are said to have existed were only flimsy and ethereal in nature and not well grounded.

Vide: Mathuranayagam's Case (supra) :–

"If a will is propounded under such circumstances which raise a well founded suspicion that it does not express the mind of the testator the court ought not to pronounce in favour of it unless those suspicions are removed."

Dr. Jayewardene's contention is that such circumstances as are disclosed in the evidence do not afford a firm grounding for a reasonable suspicion. It is quite within the jurisdiction of this court as the first Court of Appeal to rescrutinize the evidence with a view to determining whether the inferences drawn by the Learned District Judge from the established facts are so available, and also as to whether the burden of proof has been appropriately placed.

It is well settled law that should the Court of Appeal find that the conclusions arrived at by the trial judge are fair and sustainable on the evidence, then the Court of Appeal will not substitute its own view on those facts for that of the judge of first instance. In this case, the Learned Trial Judge found that the evidence did not warrant a conclusion that the deceased was insane on 03.08.1971, although his brother Amparapala who lived with him had at one time been certified and successfully treated at Angoda.

The deceased was a shareholder in a large number of lands which he had inherited from his father. The Intervenient-Respondent too had shared in that inheritance. However, quite a large part of that inheritance had been sold under decrees entered against him and the Appellant had bought up those lands so as to keep the property within the family. On the evidence, the Learned District Judge concluded that even if the will be declared not proved, still, the Intervenient-Respondent is not a fit and proper person to whom the court would entrust the administration of the deceased's estate. This finding, is certainly compatible with the evidence on record.

Dr. Buultjens giving evidence has stated, 'My inference is that this patient is suffering from heavy alcohol consumption. If alcohol is not given to such a person his desire for alcohol will be very great.

Due to that desire, such a patient might go to any length to obtain liquor. He would do anything for it. Such a patient might lose control of his mental faculties in respect of certain matters. A patient suffering from a desire for liquor, will do whatever thing he is asked to do by a person who gives him liquor. Such a person who develops such a desire to drink liquor, might start shivering etc., but his mental strength will not decrease.'

That is to say, he would be pliable in the hands of a person who could control his access to liquor or its quantity, but otherwise his mental capacity will not be diminished.

The evidence is that the deceased was found missing from the hospital on the second (2nd). There is no evidence that he was removed or induced to leave. As stated by the doctor, it may be that he wanted a drink and so left the hospital. Even so, there is no evidence that he was tempted with liquor or given liquor. There is no evidence that he had taken liquor at any time in the first three days of August. The deceased was on the evidence a man of means, and as such, could have bought his own liquor. He need not have been in the clutches of anyone including his brother, the petitioner. There is hardly any reason to believe that he was unduly influenced by the petitioner to make this will either by being offered or by being denied or by being tempted with liquor.

But there is sufficient material on record which could have and did trouble the conscience of the court—material such as:—

(*a*) The way in which the deceased left hospital,

(*b*) The fact that he went (according to the petitioner) that very same evening to meet the petitioner's lawyer.

(*c*) The fact that he did not appear to have nor is shown to have had, at the time, any serious illness,

(*d*) The inordinate hurry in which this transaction appears to have taken place,

(*e*) The fact that on this day six deeds were executed in addition to the last will,

(*f*) That of these six deeds, only one was a gift, and that too, to the daughter of the petitioner, with no plausible explanation for it,

(*g*) That the other five deeds were all Transfers, for consideration, totalling Rs. 31,000, the whole of which was acknowledged to have been previously received, with no details as to when, where, how, or why;

(*h*) The discrepancy between the evidence of the Notary and the petitioner as to the place of execution,

(*i*) That all the beneficiaries on the deeds and so also on the last will are either the petitioner himself or his children,

(*j*) That the only surviving witness (at the time of the trial) was not called to give evidence.

(k) That Mr. Serasinghe was not sure as to who had given him instructions to write all these deeds and the Last Will nor when.

All these factors do afford ground for reasonable suspicion and the court, very rightly, looked to the propounder to remove those suspicions and when he failed to do so refused to grant probate on the document 'A'. In the case reported in *Harmes and another v. Parkinson (13)* Lord du Parcq has stated:

"Whether or not the evidence is such as to satisfy the conscience of the court must always be a question of fact."

In *Banks v. Goodfellow* (supra) the court went on to hold:

"The mere fact of the testator being able to recollect things or to manage some business would not be sufficient to show that he was sane ....."

Another feature of this case which strikes one as rather unusual is that in his attestation the Notary states that the last will was read over and explained by him to the deceased in the presence of the two attesting witnesses all being present at the same time. The Notary's evidence is that the deceased had been accompanied by the petitioner and all the members of his family in order to have all these deeds and documents including the last will executed. It is most likely that all the documents were read out and explained and that the signatures were

obtained thereafter. If this was done in respect of the last will also then it would be other than the usual practice. Lord Hodson has said in *Sithamparanathan's* case (supra) at page 60:

> "The reading of the will aloud was regarded by the Judge as unusual. He commented that he could not understand the testator wanting the last will read aloud, especially after he had read it himself. He would not, the judge thought, have been in his proper senses if he made that request."

There is no doubt that the signature on the document 'A' is that of the deceased. That is not in dispute, not was it challenged at all. In this context, we were invited to consider the decision in *Sangarakkita Thero v. Buddarakkita Thero* (14) where it has been held that in the case of a deed which on the face of it appears to have been duly executed, the mere framing of an issue as to due execution followed in due course by a perfunctory question or two on the general matter of the execution of the deed without specifying in detail the omissions and illegalities which are relied upon, is insufficient to rebut the presumption of due execution. However, I do not think that this presumption can be unreservedly applied to or extended to the case of a last will although it be notarially executed, for, on a challenge being made, strong counter presumptions come into play and the propounder is called upon to erase those suspicions before he can expect probate to issue on the document he propounds. Vide–*Samarakone v. Public Trustee* (15); also *The Alim Will Case* (16). This is true even in the case of Undue Influence being the challenge thrown out. Vide–*Pieris v. Pieris* (17) and also the earlier case of *Pieris v. Pieris* (18).

It is quite normal and natural that the deceased should have possessed, until his death, all the lands and properties bequeathed on the last will. Had it been otherwise then that may have aroused suspicion. But the fact that he also continued to possess, till his death, all the lands dealt with by him in those deeds V15 to V20 is a matter of surprise, particularly, as it is alleged that he had already received the consideration thereon. Yet, this is a matter which arose after the execution of the last will and should not be treated as a suspicious circumstance pertaining to the execution of the last will–*Davies v. Mayhew (In the Estate of Lavinia Musgrove)* (19)–except, may be, to the extent that when combined with the fact of the great haste shown

in the execution of these deeds and, should there be other cogent evidence to that effect, then one may pay attention to the possibility arising from the suggestion made that these transactions were never intended to be acted upon at least not until his death.

The Learned District Judge did not accept the evidence of the Petitioner. He was disbelieved when he attempted to claim ignorance of the fact that the deceased, his brother, was addicted to liquor. His demeanour has been taken into account. So also the fact that he was contradicted by the Notary on the question as to the place where these documents were executed. The lack of detail with regard to the consideration on these deeds and the absence of any cogent reason for the execution of five (5) deeds of transfer and one (1) deed of gift have all contributed to the rejection of his testimony.

> "When the question is about the veracity of witnesses, immense importance attaches not only to his demeanour but also to the course of the trial and the general impression on the mind of the judge of first instance who saw and noted everything that took place in regard to what was said."

> "It is rarely that the decision of a judge of first instance is overruled on a point of pure fact only by a Court of Appeal." Vide—*Fradd v. Brown and Co. Ltd.* (20) and also *Abdul Sathar v. Bogtstra* (21).

The learned District Judge was also not impressed by the evidence of the Notary Mr. Serasinghe. In the circumstances, one cannot fault his finding that the petitioner had failed to remove those suspicions. Thus, even though the Intervenient-Respondent failed to prove fraud, undue influence or coercion, still the court was justified in holding that the last will was not duly proved.

In the light of his findings, the question of appointing an Administrator came up for determination. The learned District Judge has found that neither the Intervenient-Respondent nor the petitioner is suitable for this task. The Intervenient-Respondent has not appealed from that order. We are not inclined to interfere with the findings of the Learned District Judge on this point either. Accordingly, the appeal is dismissed with costs.

ABEYWIRA, J.—I agree.

Appeal dismissed