DE SILVA AND OTHERS

v.

SENEVIRATNE AND ANOTHER

COURT OF APPEAL
RANASINGHE, J. AND VICTOR PERERA, J.
C. A. (S.C.) 26/77 (F)—D.C. BALAPITIYA 418/T.
JANUARY 22, 23, 26, 1981.

Appeal—Finding of fact by trial judge—Principles applicable to the review of such findings by Appellate Court—Constitution of Sri Lanka, 1978, Article 138 (1).

Last Will—Burden on propounder—Suspicious circumstances—Duty of Court in considering such question.

The petitioner instituted these proceedings on 25.5.1971 praying for Probate of a Last Will dated 31.8.1966 which he claimed to have been executed by his deceased brother and attested by five witnesses. This Last Will left the entirety of the deceased's estate to his brother and sisters leaving out the deceased's widow and the minor children of the deceased. The said children were however born after this Will had been executed. The widow had herself instituted proceedings on 11.5.1971 praying for Letters of Administration in respect of this same estate. The learned District Judge held that the said Will had been duly executed and that the petitioner was entitled to Probate thereof.

It was contended on behalf of the appellants that the learned District Judge had wholly failed to address himself to the important rule that when there are suspicious circumstances the Court should be vigilant and view the evidence with jealousy and should not pronounce the Last Will to be valid unless the conscience of the Court is satisfied that it is the act and deed of a free and capable testator. On the other hand, it was contended for the original petitioner (respondent in appeal) that no suspicious features arose in regard to the Last Will sought to be propounded and the learned District Judge had therefore not been called upon to consider the Principles applicable to such a case. It was contended that the Appellate Court should not interfere with the findings of the learned District Judge on what were all questions of fact.

Held

(1) Where an Appellate Court is invited to review the findings of a trial judge on questions of fact, the principles that should guide it are as follows :—

(a) Where the findings on questions of fact are based upon the credibility of witnesses on the footing of the trial judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration and will be reversed only if it appears to the Appellate Court that the trial judge has failed to make full use of his advantage of seeing and listening to the witnesses and the Appellate Court is convinced by the plainest considerations that it would be justified in doing so;

(b) That however where the findings of fact are based upon the trial judge's evaluation of facts, the Appellate Court is then in as good a position as the trial

judge to evaluate such facts and no sanctity attaches to such findings of fact of a trial judge;

(c) Where it appears to an Appellate Court that on either of these grounds the findings fact by a trial judge should be reversed then the Appellate Court "ought not to shrink from that task".

(2) The propounder of a Last Will must prove that the document in question is the act and deed of a free and capable testator; that the testator was not only aware of but also approved of the contents of the said document; that the testator intended the document to be his Last Will; that the said document had been duly executed according to law.

(3) If there exists facts and circumstances which arouse the suspicion of the Court in regard to any matter which has to be proved by the propounder then it is the duty of the propounder to remove all such doubts and prove affirmatively the various elements which must be proved by him and the Court should then scrutinize the evidence led by the propounder with jealousy and should pronounce the alleged Last Will to be valid only if its conscience is satisfied in regard to the said matters. As to whether the evidence so placed before the Court is such as to satisfy the conscience of the Court is ultimately a question of fact for the trial judge.

(4) The learned District Judge in the present case had rightly answered the issues in favour of the petitioner and held that the said Last Will had been duly executed and the petitioner entitled to Probate thereof. Even though he had not considered this a case in which there are suspicious features, yet a consideration of the entirety of evidence led at the trial and the facts and circumstances revealed by such evidence showed that even if there were circumstances generating such suspicion, still the learned District Judge had he properly directed himself would have found in favour of petitioner and held that he was entitled to Probate of the Last Will.

Cases referred to

(1) *Fradd v. Brown & Co. Ltd., (1918) 20 N.L.R. 282.*
(2) *Powell v. Streatham Manor Nursing Home, (1935) A.C. 243.*
(3) *Munasinghe v. Vidanage, (1966) 69 N.L.R. 97.*
(4) *Watt v. Thomas, (1947) 1 All E.R. 582.*
(5) *Benmax v. Austin Motor Co. Ltd., (1955) A.C. 370; (1955) 2 W.L.R. 418; (1955) 1 All E.R. 326.*
(6) *Attorney-General v. Gnanapiragasam, (1965) 68 N.L.R. 49.*
(7) *The Glannibanta (1876) 2 P.D. 45; 46 L.J.P. 75; 36 L.T. 27*
(8) *Coghlan v. Cumberland, (1898) 1 Ch. 704*
(9) *Falalloon v.Cassim,(1918) 20 N.L.R. 332.*
(10) *K. M. Perera v. Martin Dias, (1957) 59 N.L.R. 1.*
(11) *Yuill v. Yuill, (1945) 1 All E.R. 183; 29 C.L.W. 97.*
(12) *Gunawardena v. Edirisinghe, (1960) 64 N.L.R. 279; 60 C.L.W. 40.*
(13) *S. S. Hontestroom v. S. S. Sagaporack, (1927) A.C. 37.*
(14) *Mahavithana v. Commissioner of Inland Revenue, (1962) 64 N.L.R. 217.*
(15) *Abdul Sathar v. Bogstra, (1954) 54 N.L.R. 102.*
(16) *Selvaguru v. Thaialpagar, (1952) 54 N.L.R. 361.*
(17) *Barry v. Butlin, 2 Moore P.C. 480; 12 E.R. (P.C.) 1089.*
(18) *Tyrrel v. Painton, (1894) P.D. 151.*
(19) *The Alim Will case, (1919) 20 N.L.R. 481.*
(20) *Guardhouse v. Blackburn, (1866) L.R. 1 P. and D. 109.*
(21) *Atter v. Atkinson, (1869) L.R. 1 P. and D. 665; 20 L.T. 404; 33 J.P. 440.*
(22) *Peries v. Perera, (1947) 48 N.L.R. 560.*
(23) *Samarakone v. The Public Trustee, (1960) 65 N.L.R. 100.*
(24) *John Pieris v. Wilbert, (1956) 59 N.L.R. 245.*
(25) *Meenadchipillai v. Karthigesu, (1957) 61 N.L.R. 320.*

(26) *Robins v. National Trust Co., Ltd., (1927) A.C. 515; (1927) All E.R. Rep. 73.*
(27) *Harmes and another v. Hinkson, (1946) 62 T.L.R. 445.*
(28) *Davis v. Maynew, (1927) 96 L.J.P. 140; 137 L.T. 612; 43 T.L.R. 648.*
(29) *Sithamparanathan v. Mathuranayagam, (1970) 73 N.L.R. 53.*

APPEAL from the District Court, Balapitiya.

C. Ranganathan, Q.C., with *E. D. Wikramanayaka, L. R. Candappa* and *C. Selvaratnam*, for the 7th, 8th, 9th respondents-appellants.

H. W. Jayewardene, Q.C., with *Bimal Rajapakse, Miss P. Seneviratne* and *Lakshman Perera*, for the petitioner-respondent.

Cur. adv. vult.

March 11, 1981.

RANASINGHE, J.

These proceedings, which relate to the Estate of a deceased named Mawathage Victor Perera Seneviratne, who had been carrying on business as a hard ware merchant at Elpitiya for quite some time prior to his death on 15.3.1971, have been instituted on 25.5.1971 by the petitioner-respondent, (who will be referred to hereinafter as the petitioner) a brother of the said deceased, praying for Probate in respect of a last will, dated 31.8.1966, and attested by five witnesses and which said document has been produced marked "A". According to "A" the entirety of the deceased's Estate has been left to his brothers and sisters, who are the petitioner and the 1st to 6th respondents-respondents.

The petitioner's application for Probate is opposed by the 7th, 8th and 9th respondents-appellants who are, admittedly, the widow and the two minor children of the said deceased. The 7th respondent-appellant (hereinafter referred to as the appellant) had herself instituted proceedings on 11.5.1971 for the grant of Letters of Administration to her in respect of the Estate of the deceased on the basis that the deceased had died intestate leaving behind her and their two minor children, the 8th and 9th respondents-appellants, and of whom the 9th respondent-appellant was born on 11.11.1971, after the death of the deceased, as his only heirs.

The two issues which the learned trial judge was called upon to consider were :—

(1) Did Mawathage Victor Perera Seneviratne die leaving (as set out in paragraph 3 of the petitioner's petition dated 26.10.71) a last will duly executed on 31.8.1966?

(2) If so, is the petitioner entitled to Probate of the said last will?

After trial the learned District Judge has answered both issues in favour of the petitoner.

Learned Queen's Counsel appearing for the appellants has contended that the learned District Judge has misdirected himself in law in that he has wholly failed to address himself to the important rule that, when there are suspicious circumstances the Court should be vigilant and view the evidence with jealousy and should not pronounce the last will to be valid unless and until the propounder satisfies affirmatively the conscience of the Court that the said last will is the act and deed of a free and capable testator: that the learned District Judge has misdirected himself on the facts: that several facts and circumstances, which tend to throw considerable amount of suspicion in regard to whether the deceased did sign the said document "A" intending that it should be his last will, have been brought to light by the evidence: that the petitioner has completely failed to dispel and remove the doubts and suspicion so raised: that the petitioner has thereby completely failed to discharge the burden which, in law, rested upon the petitioner.

The position taken up by learned Queen's Counsel appearing for the petitioner on the other hand, is: that this is not a case where any suspicious features arise in regard to the last will sought to be propounded: that, therefore, the learned District Judge was not called upon to consider the principle applicable in a case where there are suspicious features: that in this case the capacity of the deceased at the relevant time was not in doubt and was unchallenged: that the signature of the deceased on the document in question was unchallenged; that therefore all that the petitioner had to prove was the due execution of the said document, which in this case amounted to the proof of the deceased, and each one of the five witnesses, having signed the said document at one and the same time in the presence of one another: that the learned District Judge has accepted the evidence of the witnesses who testified on behalf of the petitioner, and rejected the evidence of the witnesses called by the appellants: that the questions which arose for consideration by the learned District Judge were all questions of fact: that the findings of the learned District Judge are supported by the evidence placed before him: that therefore this Court should not interfere with the judgment of the learned District Judge.

I shall at the very outset, consider the principles which should guide an appellate Court reviewing the findings of a trial judge in regard to what are clearly questions of fact, as both learned Queen's Counsel addressed this Court at length on this question.

Article 138 (1) of the Constitution which deals with the jurisdiction of the Court of Appeal provides that:

> "The Court of Appeal shall have and exercise subject to the provisions of the constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance. . . . . .
>
> Provided that no judgment decree or order of any Court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

The nature and the extent of the authority attached to the findings of fact of a trial judge were set out by the Privy Council in the case of *Fradd vs. Brown & Co. Ltd.* (1) at p. 283:

> "It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and so specific as these, a Court of Appeal will overrule a Judge of first instance."

In the case of *Powell vs. Streatham Manor Nursing Home* (2), it was stated that the appellate Court:

> "will not depart from the rule it has laid down that it will not over-rule the decision of the Court below on a question of fact in which the Judge has had the advantage of seeing the witnesses and observing their demeanour unless they find some governing fact which in relation to others has created a wrong impression."

In the case of *Munasinghe vs. Vidanage* (3) where the findings of a trial judge had been set aside by the Supreme Court, the Privy Council, in restoring the judgment of the original court, stated: that it was a case of rather complicated and difficult facts and

there was a good deal to be said on each side: that, upon an examination of the evidence and the judgments, the findings of the trial judge were not found to be unreasonable: that, as the trial judge had the very material advantage of seeing and hearing the witnesses, the Supreme Court should not have set aside the findings of the trial judge. Their Lordships of the Privy Council quoted with approval an extract from the speech of Viscount Simon in the decision of the House of Lords in the oft-quoted case of *Watt vs. Thomas* (4), at p. 583-4:

"Apart from the class of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate Court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given".

Lord Thankerton did, in the course of His Lordship's judgment in the same case at page 587, analyse the principle embodied in the earlier judgments of the House of Lords dealing with this question and stated it in three propositions, viz:

(i) Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an Appellate Court which is disposed to come to a different conclusion on the printed evidence should not do

so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

(ii) The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

(iii) The appellate Court, either because the reasons given by the trial judge are not satisfactory or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court.

Viscount Simon did, in the case of *Benmax vs. Austin Motor Co. Ltd. (5)* at *373,* elucidate the guiding principle in regard to this matter as follows:

"This does not mean that an appellate Court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found or, as it has sometimes been said, between the perception and evaluation of facts."

H. N. G. Fernando, S. P. J. (as His Lordship the Chief Justice then was) in the case of *The A. G. vs. Gnanapiragasam (6)* quoting the observations of Lord Reid, in the case of *Benmax vs. Austin Motor Co. Ltd. (supra),* that: "where the point in dispute is the proper inference to be drawn from proved facts, an Appeal Court is generally in as good a position to evaluate the evidence as the trial judge and ought not to shrink from that task", interfered with the findings of fact of the trial judge, where such findings were in "no way based upon credibility or demeanour and were referable solely to inferences and assumptions . . .".

It has however to be noted that, whilst the authoritative nature of the findings of a trial judge upon questions of fact have been stressed, qualifications of this principle have also been laid down.

Having quoted with approval the judgment in the case of *The Glannibanta (7)* where it was stated:

> "Now we feel the great weight that is due to the decisions of a judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in that respect,"

and also the judgment in the case *Coghlan vs. Cumberland (8)* where Lindley M. R. observed:

> "Even where the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must consider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from over-ruling it, if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the the Court of Appeal always is and must be guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge even on a question of fact turning on the credibility of witnesses whom the Court has not seen".

Bertram C. J. stated, in the case of *Falalloon vs. Cassim (9)* at page 335:

> "With regard to this contention, it is sufficient to say that, while a Court of Appeal will always attach the greatest possible weight to any finding of fact of a Judge of first instance based upon oral testimony given before that Judge, it is not absolved by the existence of these findings from the duty of forming its own views of the facts, more particularly in a case where the facts are of such complication that their right interpretation depends, not only on any personal impression which a Judge may have formed by listening to the witnesses, but also upon documentary evidence, and upon the inferences to be drawn from the behaviour of these witnesses, both before and after the matters upon which they gave evidence."

The circumstances in which an appellate Court would interfere with the findings of a trial judge were also considered by the Privy Council in the case of *K. M. Perera vs. Martin Dias (10)* where Their Lordships recalled the "wise words" of Lord Greene M. R. in *Yuill vs. Yuill (11)* at p.188-9:

> "We are reminded of certain well-known observations of the House of Lords dealing with the position of an appellate Court when the judgment of the trial judge has been based in whole or in part on his opinion on the demeanour of witnesses. It can, of course, only be on the rarest occasions and in circumstances where the appellate Court is convinced by the plainest considerations that it would be justified in finding that the trial judge has formed a wrong opinion. But when the Court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction."

That the appellate Court may reverse the trial judge's conclusion on a pure question of fact if the reasons given by the trial judge are not satisfactory, or if it unmistakably so appears from the evidence, was laid down by the Supreme Court in the case of *Gunawardena vs. Edirisinghe* (12). Basnayake, C. J. in the course of the judgment in the said case also referred to the approach adopted by Lord Sumner to this question in the case of *S. S. Hontestroom vs. S. S. Sagaporack*, (13), at p. 50:

> "The material questions to my mind are: (1) Does it appear from the President's judgment that he made full use of the

opportunity given him by hearing the *viva voce* evidence? (2) Was there evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation? (3) Is there any glaring improbability about the story accepted, sufficient in itself to constitute 'a governing fact which in relation to others has created a wrong impression', or any specific misunderstanding or disregard of a material fact, or any 'extreme and overwhelming pressure' that has had the same effect".

Another authority, which needs must be referred to in considering this question, is the judgment of (H.N.G.) Fernando, J. (as His Lordship the Chief Justice then was) in the case of *Mahawithana vs. Commissioner of Inland Revenue* (14) where in dealing with the question as to when an appellate Court would interfere with the findings of a tribunal on the primary questions of fact, at page 223, it was stated that it was open to an appellate Court to reconsider such findings of fact only:

"*(a)* If that inference has been drawn on a consideration of inadmissible evidence or after excluding admissible and relevant evidence,

(b) If the inference was a conclusion of fact drawn by the Board but unsupported by legal evidence, or

(c) If the conclusion drawn from relevant facts is not rationally possible, and is perverse and should therefore be set aside."

This question was once again considered by the Privy Council in the year 1952 in two cases which went up in appeal from our Courts: In *Abdul Sathar vs. Bogstra* (15), it was stated that, where the disbelief of a witness is based on the ground that the witness has contradicted himself and where on examination the contradictions do not amount to anything more than an incapacity to explain or remember certain facts, an appellate Court is entitled to examine the evidence afresh and arrive at an independent decision, but that, where the trial judge's acceptance of the story told by one of the parties is based largely on his impression of the demeanour of that party and not solely on the ground that the opposite party has contradicted himself the appellate Court will not disturb the finding of fact of the Court of first instance: in *Selvaguru vs. Thaialpagar* (16) it was laid down

that an appellate Court will set aside the findings of a trial judge when the reasons given by him for accepting a party's story are contrary to what is plainly proved by documents produced in evidence by the opposite party.

On an examination of the principles laid down by the authorities referred to above, it seems to me: that, where the trial judge's findings on questions of fact are based upon the credibility of witnesses, on the footing of the trial judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration, and will be reversed only if it appears to the appellate Court that the trial judge has failed to make full use of the "priceless advantage" given to him of seeing and listening to the witnesses giving *viva voce* evidence, and the appellate Court is convinced by the plainest consideration that it would be justified in doing so: that, where the findings of fact are based upon the trial judge's evaluation of facts, the appellate Court is then in as good a position as the trial judge to evaluate such facts, and no sanctity attaches to such findings of fact of the trial judge: that, if on either of these grounds, it appears to the appellate Court that such findings of fact should be reversed, then the appellate Court "ought not to shrink from that task".

I shall now proceed to consider the legal principles relevant to the submission made on behalf of the Appellant that this is a case where there are several suspicious features surrounding the said last will "A" which required the learned trial judge to view the evidence, led on behalf of the petitioner in order to propound the said last will, with "great jealousy" and to call upon the petitioner to prove affirmatively that the said document "A" was executed, in accordance with the relevant provisions of law, by the deceased of his own free will not only with a full knowledge of its contents but also intending it to be his last will.

The earliest discussion, according to the authorities cited to us by learned Counsel, of the relevant "well established" rule has been by Baron Parke in 1838 in the case of *Barry vs. Butlin* (17) where His Lordship stated:

> "The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal and they have been acquiesced in on both sides. 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 that ought generally to excite the suspicion of the Court, and call 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."

This principle was discussed in 1893 in the case of *Tyrell vs. Painton* (18) where Lindley, L. J. stated, in respect of the second of the two rules laid down by Parke, B (*supra*), that it is not "confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court."

This principle was considered by the Supreme Court in 1919 in *The Alim Will Case* (19) where Bertram, C. J. at page 494 whilst elucidating the said principle, as set out in the English decisions of, inter alia, *Barry vs. Butlin (supra)* and *Tyrrell vs. Painton (supra)*, stated:

"... The principle does not mean that in cases where a suspicion attaches to a will a special measure of proof or a particular species of proof is required. (See *Barry vs. Butlin* (supra).) It means that in such cases the Court must 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.' ..... but the principle is that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed."

Bertram, C. J. did also, at page 495, refer to the case of *Guardhouse vs. Blackburn* (20) which, the Chief Justice stated, was not concerned with that class of case to which the above discussed

principle applied, and that there Lord Penzance considered only those cases "where a will had been admittedly executed and admittedly read over to the testator, and where the real question to be determined was whether the testator knew and approved what he had signed, or to speak more precisely, the whole of what he had signed." The Chief Justice also proceeded, at page 496, to observe that what Lord Penzance really meant to lay down has been expressed concisely by Lord Penzance himself in the later case of *Atter vs. Alkinson* (21). "Once get the facts admitted or proved that a testator is capable, that there is no fraud, that the will was read over to him, and that he put his hand to it, and the question whether he knew and approved of the contents is answered".

The principles set out in the said judgments of *Barry vs. Butlin* and *Tyrell vs. Painton* were also referred to by Canekaratne, J. in the case of *Peries vs. Perera* (22). At page 567 His Lordship quoted from *Barry vs. Butlin* as follows:

> "It is clear, first that the onus of proving a will lies upon the party propounding it and, secondly, that he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. To develop this last rule a little further, he must show that the testator knew and approved of the instrument as his testament and intended it to be such.
>
> In all cases the onus is imposed on the party propounding a will, it is in general discharged by proof of capacity and the fact of execution from which the knowledge of and assent to the contents of the instrument are assumed.
>
> The question is whether the testator knew the effect of the document he was signing. The circumstances attending the execution of the document may be such as to show that there is a suspicion attaching to the will, in which case it is the duty of the person propounding the will to remove that suspicion, this is done by showing that the testator knew the effect of the document he was signing."

and, at page 568, quoted from Lindley, J. :

> "The rule in *Barry vs. Butlin* extends to all cases in which circumstances exist which excite the suspicion of the Court;

and whenever such circumstances exist, and whatever their nature may be it is for those who propound the will to remove such suspicion and to prove affirmatively that the testatrix knew and approved of the contents of the document."

The observations of Lindley, J. in *Tyrell vs. Painton* (18) were cited with approval by Weerasooriya, J. in the case of *Samarakone vs. The Public Trustee* (23) at p. 115:

"... where there are features which excite suspicion in regard to a will, whatever their nature may be it is for those who propound it to remove such suspicion. Suspicious features may be a ground for refusing probate even where the evidence which casts suspicions on the will, though it suggests fraud, is not of such a nature as to justify the Court in arriving at a definite finding of fraud. It has also been stated that the conscience of the Court must be satisfied in respect of such matters."

In the case of *John Pieris vs. Wilbert* (24) Gratiaen, J., following the principles set out in the aforementioned cases of *Barry vs. Butlin and Tyrell vs. Painton,* held that upon the evidence the petitioner in that case had failed to discharge the burden of removing the suspicions attendant on the making of the will, and further held that it is no part of the duty of Court to see that a testator makes a just distribution of his property, and so long as it is proved that the testator executed the will intending it to be his will the Court cannot refuse to grant probate on the ground of suspicious circumstances.

In the case of *Meenadchipillai vs. Karthigesu* (25) at p. 321, Sansoni, J. stated:

"The rule of law is clear enough. In all cases where circumstances exist which excite the suspicion of the Court, whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence or whatever else they rely on to displace the case made for proving the will"...

and at page 324:

"Ultimately of course, it is a question of fact for the trial judge to decide whether the suspicion surrounding the will was removed and the adverse presumption affecting the will rebutted; unless he was finally satisfied that his initial suspicion were unfounded the burden of proof which lay on the propounder of the will remained undischarged".

Viscount Dunedin, in *Robins vs. National Trust Company* (26) at 519 pointed out:

". . . . Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases if there is no suggestion to the contrary any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity but the moment the capacity is called in question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity. Moreover, if a will is only proved in common and not in solemn form, the same rule applies . . . ."

The Privy Council did also, in the case of *Harmes and another vs. Hinkson* (27) lay down that:

" 'The conscience of the Court' must be satisfied. Whether or not the evidence is such as to satisfy the conscience of the tribunal must always be, in the end, a question of fact."

That the circumstances which excite the suspicion of the Court must primarily be circumstances existing at the time when the alleged will was executed, and have a direct bearing on the question whether the testator then knew and approved of its contents was laid down in the case of *Davis vs. Mayhew* (28) at 148.

This principle was once again discussed by Their Lordships of the Privy Council in the case of *Sithamparanathan vs. Mathuranayagam* (29) where it was held that: where, in a application for probate of a will, the testamentary capac or disposing mind of the testator at the time of the execution o will is called in question, the onus lies on those propo the will to affirm positively the testamentary capacity, the absence of a plea of undue influence or fraud: whet the evidence is such as to satisfy the conscience of the

the will was the act and deed of the deceased in the sense that he was competent to make the will, is a pure question of fact.

On a consideration of the principles elucidated in the judgments referred to above, it is clear: that the propounder of a last will must prove that the document in question is the act and deed of a free and capable testator: that the testator was not only aware of but also approved of the contents of the said document: that the testator intended the document to be his last will: that the said document has been duly executed according to law: that, if there exist facts and circumstances which arouse the suspicion of the court in regard to any of the matters referred to above, which have to be proved by the propunder, then it is the duty of the propounder to remove all such doubts and prove affirmatively the various elements which must be proved by him: that, in such a case even though there is no requirement of a special measure of proof or a particular species of proof, the Court should scrutinize the evidence led by the propounder with jealousy and should pronounce the alleged last will to be valid only if its conscience is satistied that the said document is in fact the voluntary act and deed of the deceased, who was in law capable of executing a last will and that the said document has been executed by the deceased with the full knowledge of its contents and intending that it should be his last will and testament: that whether the evidence so placed before the Court is such as to satisfy the conscience of the Court is ultimately a question of fact for the trial judge.

As already stated, learned Queen's Counsel for the appellant submitted that there were in this case several suspicious circumstances which raise a doubt as to whether the document "A" was signed by the testator intending it to be operative as his last will. The circumstances so relied on are: the deceased not having had the said document formally executed before a notary: the alleged last will being an unnatural will in that the widow and the two minor children of the deceased get absolutely nothing from the deceased's estate, which has, in the petition filed by the petitioner, been valued in May, 1971 by the petitioner himself at Rs. 114,899/91: the circumstances in which the said document is stated to have been found and the failure to inform the appellant of the finding of the said document: the delay in producing the said document before court: the beneficiaries under the alleged last will being persons who had all opposed the deceased's marriage

with the appellant: that, whilst there is nothing to show that there had been any discord between the deceased and the appellant, the deceased and the appellant had, admittedly, been always living together right up to the time of the death of the deceased.

It will be useful to set out certain facts and circumstances which have emerged from the evidence led at the trial, before I proceed to consider the aforementioned circumstances relied upon by the appellant. The evidence had disclosed: that the deceased had, for several years prior to his death, been carrying on a business, which by local standards was considered as being successful, at the Elpitiya bazaar: that the deceased married the appellant, who was then a school teacher of about 38 years of age, on 24.4.1964 at the Galle Kachcheri: that the Petitioner and the 1st to 6th respondents, who are the brothers and sisters of the deceased, had not approved of the said marriage: that, apart from Anton, the 6th respondent, who was assisting the deceased in the management of the deceased's business, the petitioner and the 1st to 5th respondents had had very little to do with the petitioner after the said marriage and had visited the deceased thereafter only about twice or thrice: that two daughters were born to the deceased by the appellant, the elder (the 8th respondent) on 14.10.67 and the younger (the 9th respondent) posthumously on 11.11.1971: that, after the marriage, the deceased lived with the the appellant in her parental house about 10 miles from Elpitiya: that thereafter the deceased built a house, also a few miles away from Elpitiya, in which he lived with the appellant right upto the 15th March, 1971, the day on which the deceased suffered the fatal heart attack: that the deceased's funeral took place three days later, on the 18th March, 1971: that the appellant went to the deceased's shop which had remained closed ever since the deceased died, on 24.3.71 and opened the safe and noted the cash which was inside the safe and thereafter handed over the key of the safe to Anton, requesting Anton to look after the shop "now that the deceased is no more": that the appellant herself instituted testamentary proceedings, praying for the issue of Letters of Administration in respect of the Estate of the deceased in case No. 417/T of the District Court of Balapitiya, on 11.5.71, which is only a fortnight before the petitioner himself commenced these proceedings.

Ariyadasa Sri Wijayananda, a Notary, who had been practising for a period of about 18 years, and who was called by the petitioner, stated that: he had known the deceased for about 10

years: the deceased once asked him whether it was possible to write a last will in any manner other than by writing a deed: he did inform the deceased that it was possible to do so in the presence of five or more witnesses and that, in such an event, he (the deceased) and such witnesses should all sign at one and the same time: he then prepared a draft last will, embodying the particulars supplied by the petitioner himself, and which was to be signed in the presence of five or more witnesses: that the said draft is the document which has been produced marked "A": that the body of the said document, together with the jurat, is all in his own handwriting, whilst certain blanks, which were left by him such as for the date, have since been filled in by someone whose handwriting he cannot identify. The evidence of this witness, which has been accepted by the learned District Judge, quite clearly shows that, sometime prior to 31.8.1966, the deceased had wanted to execute a last will, and that the contents of "A" were known to and approved of by the deceased, and that the deceased had been advised by this witness as to how a last will could, in law, be executed otherwise than in the presence of a notary. The express inquiry made by the deceased in regard to the possible ways of executing a last will is an indication of his desire to know whether such an act could be done without giving it publicity. Even if the fact that the deceased in this case had, even after contacting a Notary, proceeded to execute a last will in the presence of five lay witnesses is a circumstance which should be considered to be suspicious, yet, it appears to me that, having regard to the evidence of the Notary, any such suspicion has, in the circumstances of this case, been dispelled.

There is no question but that, if the document "A" is held to be the last will and testament of the deceased, then the deceased's widow the appellant and her two minor children, the 8th and 9th respondents, who are without doubt the only children of the deceased, would stand completely disinherited and receive nothing from the estate of the deceased, and that it must, therefore, be treated as an unnatural will. It must, however, be noted that neither of these two children had been born at the time the document "A" is said to have been signed on 31.8.66. Both children were born only thereafter, with the younger child in fact being born only after the death of the deceased. Thus, at the relevant time, only the appellant, whom the deceased had married about two years prior to that and who would then have been about 40 years of age, was in existence. The petitioner contended

that there had in fact been discord and dissension between the deceased and the appellant at about the time the deceased did execute the said last will. The Petitioner had pointed to three instances in support of this contention. One was where the deceased had got down his meals from outside consequent upon an incident between the deceased and the appellant on the occasion a relative of the deceased called on them. The learned District Judge has, however, held that this particular item has not been proved. The other two instances are of two brothers of the appellant instituting proceedings before the Labour Tribunal against the deceased, and the deceased wanting to sell the house he had recently built and in which he had only shortly before that taken up residence with the appellant. These two items standing by themselves are such that there is considerable substance in the submission made on behalf of the appellant that they do not tend in any way to show the existence of such a degree of displeasure between the deceased and the appellant as would make the deceased to take steps to disinherit the appellant, particularly where the deceased has, admittedly, continued to live with the appellant even after such incidents. Even so, it appears to me that there is an item of evidence which quite clearly shows the state of the relationship, at any rate at or about the time the document "A" is said to have been executed, between the deceased and the appellant. The witness Upaneris Silva, who is said to be one of the five attesting witnesses to "A" and who, though on the list of witnesses for the petitioner was called to testify at the trial only on behalf of the appellant, stated in his evidence that, when he questioned the deceased as to why he was so executing the said last will, the deceased told him...

"අද ගෙදර කිබෙන තත්ත්වය අනුව අවදඟර කිබෙනවා. ඒ නිසා මං සමඟ කරුවා මගේ සහෝදර සහෝදරියන්ට දෙනවා"

It is no doubt true that the learned District Judge has rejected the evidence of this witness in regard to the signing of the document "A". Even so, it appears to me that, as this witness was called to testify at the trial by the appellant and has not been treated as an adverse witness at any stage of his testimony, the petitioner is entitled to the fullest benefit of any item of evidence, which is favourable to him, given by this witness whilst testifying at the inquiry as a witness for the appellant. It may well be that subsequently, as time went on and a child was born, the deceased's feelings towards, and his relations with the appellant underwent a change; yet, as far as the issue in this case is concerned,

the relevant point of time is the time at or about the day on which "A" is said to have been executed. The deceased may have, with the passage of time, wanted to revoke the document "A"; but, if he had not done so, then the said document—which upon Anton's evidence was in the custody of the deceased at the time of his death—if it was, in law, valid at the time of its execution on 31.8.1966 would then continue to retain its validity and become operative upon the death of the deceased—however hard it may be by the appellant and her minor children.

It is the position of the petitioner that the document "A" was found by his brother, the aforesaid Anton, on the evening of the 24th March, 1971, in the safe which was in the deceased's shop and which said safe Anton had opened with the key which the appellant had handed to him earlier that evening when she came to the shop to have the shop re-opened for business. The appellant has attacked this evidence as being wholly unworthy of credit. The evidence shows that, when the appellant came to the shop that evening, she had brought the key of the safe, which had been with the deceased, and that the appellant had opened the safe. The evidence of Anton on this point is:"

"ඇවිල්ලා (i.e. the appellant) සේප්පුව ඇරල බැලුවා. අයියාගේ ලියවිලි වගයක් සහ රිවර්ස් වෙච්ච වෙක්පත් වගයක් තිබුණා. සල්ලි වගයක් නෝට් කර ගත්තා. සල්ලි ගෙනගියේ නැහැ. නැනා 7 වැනි වගඋත්තරකාරිය විනාඩි 20ක් 30ක් සිටියේ නැහැ. ඒ හැර සාමාන්‍යයෙන් කථා කර කර හිටියා. ඇය මට උපදෙස් දුන්නේ නැහැ. අයියා නැති නිසා බලා ගයාගා ගන්න කීවා. පැයකට විතර පස්සේ ඇය ගියා. මට සේප්පුවේ යතුර දී ගියා. ඇය ගියාට පසු මා සේප්පුව ඇරලා බැලුවාම ලියුම් කවරයක් තිබුනා. ඒකෙ තිබුනා අන්තිම කැමති පත්‍රය කියා."

According to Anton after he so discovered the said document "A" he had immediately taken it to his brother, the petitioner, who was residing at Ratmalana. It has to be remembered that, in the Appellant's own admission, Anton was one who had maintained very cordial relations both with her and the deceased at a time when the other brothers and sisters were not favourably disposed towards them. Anton, it must be noted, seems to have continued to maintain his previous good relations with the appellant even after the death of the deceased, so much so that, on the 24th March, 1971, the appellant had not only requested Anton to continue to be in charge of the deceased's business but had also entrusted the safe together with the money, which was in it, to Anton. According to the evidence it would appear that the

relations between the appellant and her brothers-in-law and sister-in-law even after the death of the deceased and upto the date of the finding of the document "A" were the same as they had been prior to the date of the death of the deceased. There does not seem to have been even the hint of a claim by the petitioner, and or his brothers and sisters, to the Estate of the deceased prior to the 24th March, the date on which, according to Anton, he found the document "A". The conduct of Anton after he says he found "A" is quite consistent with that of a person who had not been upto that time aware of the existence of such a document. The non-communication of the finding of a document such as "A" to the appellant herself is quite understandable, particularly in view of the relations which existed at that time as between the Petitioner and all the brothers and sisters of the deceased, excepting Anton, on the one hand and the appellant on the other. Furthermore, it cannot be said that there has been any inordinate delay in the part of the petitioner to bring the document "A" before Court. The document "A" is said to have been found on 24.3.71. The testamentary proceedings have been instituted by the petitioner on 25.5.71, only 14 days after the commencement of proceedings by the appellant herself. The deceased, as already stated, had passed away on 15.3.1971. I do not think that there is room for suspicion on these grounds either.

It was also contended that it is most unlikely that the deceased would have chosen as his beneficiaries a group of persons who had opposed his marriage. Although it is in evidence that the deceased's brothers and sisters did not approve of the deceased marrying the appellant, there is no evidence that their attitude had gone beyond the stage of mere passive disapproval. There is no evidence of any untoward incidents between the deceased and his brothers and sisters over his marriage. There is, however, evidence of visits even though they had been few and far between, paid by the deceased's brothers and sisters to the deceased and the appellant. Besides, Anton, had, admittedly, continued as earlier indicated to be very close and helpful to the deceased right upto the death of the deceased. Furthermore, there is also the evidence of the aforesaid witness Upaneris Silva, already referred to, of what the deceased himself had told Upaneris Silva as to why he, the deceased, was executing the document "A". That statement of the deceased clearly shows what the deceased's relations with his brothers and sisters were at and about the time "A" was signed by the deceased.

Even though the learned District Judge has not considered this case as one in which there are suspicious features, yet, on a consideration of the entirety of the evidence led at the trial and the facts and circumstances revealed by such evidence, and about which there can be little or no doubt, it appears to me that any suspicion generated by the circumstances relied on on behalf of the appellant have been dispelled, and that, had the learned District Judge properly directed hemself, he could and would still have found: that "A" is a document which had been drafted on the instructions of the deceased himself: that "A" was signed by the deceased in the presence of the five witnesses referred to therein all of whom had also signed it at the same time and place as the deceased and in the presence of one another: that the deceased had the requisite testamentary capacity: that at the time the deceased so signed "A", he was not only fully aware of and did approve of the contents of "A", but did also intend the said document to be his last will: that the deceased died without having revoked the said last will. Viewing the case as a whole, I am of opinion that the document "A" does express the true wishes of the deceased, as on 31.8.1966, in regard to how his Estate should devolve on his death, and that the aforementioned failure on the part of the learned District Judge has not, in the circumstances of this case, either prejudiced the substantive rights of the appellant, and of her two minor children, or occasioned a failure of justice.

For these reasons, I am of opinion that the appeal must fail. The judgment of the learned District Judge is affirmed and the appeal of the appellant is accordingly dismissed, but, having regard to the circumstances of this case, without costs.

(VICTOR) PERERA, J.—I agree.

Appeal dismissed.