

GAMINI RANASAGALLA COREA
V.
ERNESTINA COREA AND OTHERS

COURT OF APPEAL
BANDARANAYAKE, J., AND VIKNARAJAH, J.
CA NO. 115 - 116/78F
D. C. CHILAW 21/T
NOVEMBER 25, 26, 27 AND 30, 1987.

*Last Will - Execution attested by five witnesses — Section 4 of the Prevention of Frauds Ordinance (Cap. 70) — Should testator sign in the presence of each and every one of the five witnesses at the same time — Presumption of due execution — Application of maxim: **Omnia praesumuntur rite esse acta.***

Shirley Corea, Attorney-at-Law, M. P. and Speaker of Parliament executed a Last Will attested by five witnesses: Hilary Fernando, Emmanuel Anthony Fernando, Walter John Fernando, Godfrey Fernando and Bandara. Harold Herat Attorney-at-law was named Executor. The principal devisee was one Gamini Corea an adopted son of Shirley Corea. On Shirley Corea's death (04.03.1974) Harold Herat applied for probate but the Will was challenged on the basis of lack of due execution. At the inquiry before the District Judge Walter John Fernando, Godfrey Fernando and Emmanuel Anthony Fernando, three of the five

witnesses to the Will and Harold Herat who was seeking to propound the Will gave evidence in support of the application while one of the witnesses to the Will Bandara gave evidence that the other witnesses did not sign the Will at the time he signed the Will but only he and the deceased testator Shirley Corea signed on that occasion. After inquiry the Judge refused Probate.

Held:

For granting Probate the rules are:

- (1) The party propounding the Will must satisfy the conscience of the Court that the instrument propounded is the Last Will of a true and capable testator.
- (2) If a suspicion attaches to the Will the Court should not pronounce in favour of it until the suspicion is removed. If a party writes or prepares a Will under which he takes a benefit that is a circumstance that ought generally to incite the suspicion of the Court. The Court must then be vigilant and jealous in examining the evidence in support of the Will though this does not mean that a special measure of proof, or a particular species of proof is required. The principle is that whenever 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 by the propounder.
- (3) In addition the Will must be executed according to law. Under Section 4 of the Prevention of Frauds Ordinance (Cap. 70) no Will attested by five witnesses is valid unless it shall be in writing and executed in manner hereinafter mentioned: that is to say it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of five or more witnesses present at the same time and such witnesses shall subscribe the Will in the presence of the testator but no form of attestation shall be necessary.

The only question was whether all the witnesses signed the Will at the same time in the presence of the testator and when he signed. In the last paragraph of the Will Shirley Corea himself had declared he signed in the presence of the five witnesses thus contradicting Bandara. The propounder Harold Herat an attorney-at-law who was present at the execution testified that all the witnesses and the testator signed on the same occasion in the presence of one another. Hilary Fernando an attorney-at-law did not give evidence. The evidence of Bandara stood uncorroborated. The presumption of due execution expressed in the maxim *omnia præsumentur rite esse acta* applicable where the Will is in regular form was not displaced.

The Will sought to be propounded was the act and deed of a free and capable testator; there were no suspicious circumstances; there was satisfactory evidence that the Will had been duly executed and as it was in regular form the maxim *omnia praesumuntur rite esse acta* will hold.

- (4) Though the appellate tribunal will not interfere with the findings of fact of the original Court yet where these are based, as here, not on the basis of seeing and listening to the witnesses but upon the trial Judge's evaluation of the facts the Appellate Court is in as good a position as the trial Judge to evaluate such facts and no sanctity attaches to the findings of the trial Judge.

Cases referred to:

1. *Barry v. Butlin* (1838) Moore's P.C. 480.
2. *Tyrell v. Painton* (1894) P.D. 151; 70LT 453.
3. *Alim Will Case* (1919) 20 NLR 481.
4. *Re Vere Wardale. Johnson* (1949) 2 All ER 250.
5. *Wright v. Rogers* LR 1 P. & D. 682.
6. *Re Denning* (1958) 2 All ER 1.
7. *In the Goods of Peverett* (1902) P 205; 87 LT 143.
8. *Re Collins deceased* (1972) 2 All ER 729.
9. *Dayaman v. Dayman* (1894) 71 LT 699.
10. *Wyatt and another v. Berry and others* (1893) 68 LT 416.
11. *Wright v. Sanderson* (1884) 50 L.T. Rep. 769; 9 P.D. 149.
12. *Lloyd v. Roberts* (1858) 12 Moore's. P.C. 158.
13. *Wimalawathie v. Opanayake* 74 NLR 308.
14. *De Silva and others v. Seneviratne and another* (1981) (1981) 2 Sri LR 7.

APPEAL from judgment of the District Court, Chilaw.

P. A. D. Samarasekera P.C. with *G. L. Geethananda* and *K. Abeypala* for 11th respondent - appellant.

Dr. H. W. Jayewardene Q.C. with *Miss J. Keenwinna* and *Harsha Amerasekera* for 2nd to 10th respondent-respondents.

Cur. adv. vult.

January 22, 1988

VIKNARAJAH, J:

This is an appeal by the 11th respondent-appellant (Gamini Corea) from an order made by the learned District Judge on 3.5.78 under section 285 (1) of the Administration of Justice Law No. 44 of 1973 whereby he held that the Last Will of

Charles Shirley Corea made on 20th September 1973 before five witnesses and produced marked P1 is proved not to have been duly executed in the manner required by section 4 of the Prevention of Frauds Ordinance.

The petitioner respondent Harold Herat the executor named in the Last Will had on 15th May 1978 given due notice of appeal against the order of the learned District Judge dated 03.05.78. Since then the petitioner respondent had informed his registered Attorney-at-Law Thajudeen that he does not propose to continue with the appeal.

The five witnesses to the Last Will P1 are (1) Hilary Fernando, Anthony Fernando, W. John Fernando, Godfrey Fernando and Bandara.

Charles Shirley Corea died on 4th March 1974.

The executor named in the Will Harold Herat made a declaration to the Public Trustee under section 278 of the A. J. L. forwarding one original of the Last Will dated 20th September 1973 and on application by the executor, the Probate Officer made an interim order under section 283 declaring Harold Herat as the executor and that probate will be issued.

The 1st to 8th respondents appearing by their Attorney-at-law, J. E. Corea filed objections to the interim order stating that the document dated 20th September 1983 was not executed in accordance with the provisions of Section 4 of the Prevention of Frauds Ordinance (Cap. 70) in that the Testator's signature was not made in the presence of each and every one of the five witnesses at the same time and averred that the matter in dispute be referred to the District Court of Chilaw under section 284 of the Administration of Justice Law to be decided on the issues suggested by them.

The Probate Officer on 17th March 1985 referred the matters in dispute under section 284(1) of the said Administration of Justice Law No. 44 of 1973 to the District Court of Chilaw on the following issues.

- (1) Is the Last Will produced in these proceedings the act and deed of the deceased?
- (2) Was the signature of the deceased made in the presence of each and every one of the five witnesses named therein all being present at the same time.
- (3) Did such five witnesses subscribe to the Last Will in the presence of the deceased and in the presence of each other.
- (4) Should the said Last Will be identified as the Last Will and Testament of the deceased by all the five persons who have already subscribed to it as witnesses.
- (5) Depending on the answers given to the above issues should the Interim Order dated 12th September 1974 made in these proceedings be made final or be vacated.

At the inquiry before the learned District Judge, Harold Herat, the executor, and three witnesses to the Will namely Walter John Fernando, Godfrey Fernando and Emmanuel Anthony Fernando gave evidence to propound the Will and the only witness called by the respondents against the proof of the Will was witness Bandara who was one of the witnesses to the Will.

The learned District Judge preferred to accept and act on the evidence of the one and only witness Bandara and held that the Will was not duly executed.

Learned Counsel for the 11th respondent-appellant submitted that there has been no proper assessment of the evidence of Harold Herat which amounts to an error of law, and that due weight has not been given to the evidence of the three witnesses to the Last Will. He further submitted that there was overwhelming evidence for the Judge to act in favour of the Will and there was a presumption of due execution.

Learned Counsel for the respondent submitted that the main question was whether the Last Will was signed and attested by

witnesses as required by law and when there are two conflicting versions as in this case it is essentially a matter for the trial Judge to come to a decision. He further submitted that the trial Judge had the inestimable advantage of seeing the witnesses and of hearing them and if having seen and heard the witnesses, the Judge disbelieves certain witnesses and there is nothing *ex facie* in the evidence which would show that the Judge had misdirected himself or drawn some wrong inference, the Court of Appeal will not interfere with the findings.

The deceased Shirley Corea was a practitioner in the District Court of Chilaw and a Notary. He had a large civil and criminal practice. He was the Speaker of the House of Representatives at one time and a well-known popular figure and he was a Minister of State.

Harold Herat an attorney-at-law gave evidence. He was the executor named in the Will. He produced three copies of the Last Will marked P1, P2 and P3 all three of which have been signed by the testator and by the same five witnesses. He also produced marked P4 the original draft of the Will in the handwriting of Shirley Corea. He also produced the earlier Wills made by Shirley Corea. P5 is a Will dated 6.5.55. P6 is a Will dated 2.4.62. This is a notarial Will. P5 bears an endorsement in the handwriting of Shirley Corea that it is cancelled by the Last Will of 22.10.72. He produced another Will dated 8.2.72, in three copies, two of which are typed and one is in the handwriting of Shirley Corea and it is witnessed by 5 witnesses. This has been produced marked P7, P8 and P9. In the typed copy P7 there is an endorsement "cancelled by will dated 22.10.72". This endorsement is in the handwriting of the deceased. Harold Herat is named as executor in P7, P8 and P9. Harold Herat stated that shortly before the 8th of February 1972 the deceased Shirley Corea visited his house and asked him to be his executor. He said he was not too keen. Then Shirley Corea told him that he was concerned about his son Gamini Corea and that it will be a straight Will and that Harold Herat had nothing to worry about it, and as Harold Herat was getting on well with Shirley Corea's brothers and sisters and with Gamini Corea too he would be the best person to be the executor and he had the highest

confidence in him. Harold Herat stated that after this discussion, he did not know anything about the Wills.

Harold Herat stated that deceased Shirley Corea always referred to Gamini Corea (11th respondent appellant) as his son. He was unable to say whether he was legally adopted. But everybody in Chilaw knew that he was the adopted son and Shirley Corea told Harold Herat that Gamini was his adopted son.

Harold Herat said that on 15.3.74 there was a meeting of the intestate heirs at Mahagedera. He stated that he did know how it came about but he was informed that the Last Will would be brought from Colombo to Mahagedera and the time was fixed at 5 or 5.30 p.m. Harold Herat said that he went to the Mahagedera the residence of the deceased. He said that apart from 1-7 respondents and Charles Corea and Gamini Corea, there was Hilary Fernando, one of the witnesses to the Will, looking after the interests of Gamini Corea. Attorney-at-Law Thajudeen was with Herat. J. E. Corea (who is the Attorney-at-Law for the respondent in this case) was present looking after the interests of the heirs. There was also Raju a very close friend of Shirley Corea present. At this meeting witness Bandara was not present.

Harold Herat stated that Raju brought a brief case which is in Court and Raju opened the brief case with the key he had. From the brief case the Will P1 was taken and was read by Herat. He took the handwritten draft and the Will was passed round.

Harold Herat stated that those present were satisfied with the devises in the Will and somebody said it was a fair Will, and he remembered Charles Corea saying that he was happy that Herat has been appointed executor. According to the Last Will the devise of the ancestral property went to the intestate heirs, the acquired property went to the son Gamini Corea. The Mahagedera was to be sold at the upset price amongst the heirs and if that fails it was to be put up for public auction and out of the proceeds of sale Rs. 50,000/- was to be given to his adopted son Gamini Corea for him to purchase a house and out of the balance if any $\frac{1}{2}$ goes to the brother and sisters of the deceased and the other $\frac{1}{2}$ to Gamini's two children. If a sale could not be effected the house was to go to Gamini Corea.

It was agreed by all that Gamini Corea should be the occupant of Mahagedera. None of the intestate heirs appeared to be willing to reside there. On the 15th some movables were taken away by those entitled to them as there was no dispute regarding the Will and as ultimately they would reach the devise.

Herat stated that some of the intestate heirs wanted some photographs and small items for sentimental reasons. Herat told them that they all went to Gamini Corea under the Will and that if Gamini Corea consents they could remove what they pleased. Gamini Corea consented and they removed the articles and he does not know what they removed. Herat stated that throughout these proceedings on 15th at the Mahagedera Hilary Fernando an attorney-at-law practising in Chilaw Court was present. Hilary Fernando was the first witness to the Will. Harold Herat said that he cannot say what Hilary Fernando's reactions to the Will were. He can only say that he did not raise any objections whatsoever. The main devisee under the Will was Gamini Corea. Hilary Fernando was watching the interest of Gamini Corea. Harold Herat stated that once all accepted the Will and when Charles Corea expressed the view about his being happy that Harold was appointed executor, he decided that he should go through with it. The lawyers present at the reading of the Will were Rajapakse, Thajudeen, J. E. Corea and Hilary Fernando. A. E. R. Corea retired Judge and husband of the 5th respondent was also present. Harold Herat said that he presumed that all five witnesses and Shirley Corea were present at the same time and signed the Will because Hilary Fernando a witness and an Attorney-at-Law did not raise any objection. He said all the lawyers present knew that Shirley Corea was a lawyer and had a large civil and criminal practice.

Harold Herat stated that he knew that he had to get affidavits from the witnesses to file papers, and that he heard before affidavits were prepared that Hilary Fernando and Bandara were not willing to furnish affidavits. Harold Herat said that he went with Thajudeen Attorney-at-Law to the house of Hilary Fernando and asked him whether it was true that he was not signing the affidavit. Hilary Fernando said that he was not signing it. Harold Herat then told Hilary Fernando that he was creating unnecessary

trouble having been present at the time that the Will was read. From there he proceeded to Bandara's house. He also said that he would not sign the affidavit. Harold Herat stated that Shirley Corea was a U.N.P. stalwart right throughout his life. The Electoral Association of the U.N.P. in Chilaw has had as its President Shirley Corea, and Hilary Fernando was one of several Vice-Presidents. Hilary Fernando was next in the running as successor to Shirley Corea. About 3 or 4 months after the death of Shirley Corea the talk went around that Gamini Corea and several others were in the field for nomination. Herat stated Bandara was the Secretary of the U.N.P. Organisation in Chilaw.

Walter John Fernando a witness to the Will gave evidence. He is a teacher in Chilaw. He stated that he along with Anthony Fernando and Godfrey Fernando signed the affidavit dated 11.9.74 which was filed by Harold Herat the executor along with the Will. John Fernando identified his signature as witness to the Last Will P1, P2 and P3. He stated that the jeep was sent by Shirley Corea to his house with Bandara in the jeep. The driver of the jeep was Cyril. He dressed up and got into the jeep and on the way Godfrey Fernando was picked up and they came to Shirley Corea's house in Chilaw. He stated that Shirley Corea signed first. Thereafter Hilary Fernando signed as witness. Anthony Fernando signed second and he signed third. Bandara and Godfrey signed thereafter but he cannot remember the order. He stated that this was signed at about 6.30 or 7 p.m. John Fernando stated that he knew Hilary Fernando well. He said that they were of the same political party and that Bandara was secretary of the Central Committee. John Fernando stated that when he went with Bandara and Godfrey Fernando to Shirley Corea's house to sign the Will Hilary Fernando and Anthony Fernando were having a chat with Shirley Corea. He further stated that Gamini Corea and Hilary Fernando are aspirants to the Chilaw seat and that he supported Gamini Corea. He said he knew Godfrey Fernando for over 10 years and he was also an active member of the party and all were supporters of Shirley Corea. John Fernando stated that Shirley Corea said that the document was his Last Will and that he was setting down his signature to it and as witnesses he wanted them to sign it. He said that after Shirley Corea signed in their presence all the

witnesses signed. It was suggested to John Fernando in cross-examination that he signed this Last Will before Shirley Corea signed it. The witness replied by saying that the suggestion was a complete falsehood.

The next witness to the Will called to give evidence is Calixtus Godfrey Fernando, an employee under a fish mudalali. He identified his signature in the Last Will P.1, P.2 and P.3 and he said that all five witnesses signed the Last Will at the same time. He also stated Shirley Corea signed first in their presence and that the signing took place between 6 and 7 p.m. He also said that he signed the affidavit dated 11th September 1974. In the affidavit the name of this witness has been given as 'Mihindakulasooriya Godfrey Calixtus Perera'. It should have been 'Calixtus Fernando'. A great deal of time was spent in cross-examination of all the witnesses with regard to this error and it was suggested that the affidavit was drawn up hastily and in a slipshod manner. I do not think one can blame the witnesses if the affidavit was drawn up carelessly. Godfrey Fernando stated that the affidavit was read over to him and explained by the J.P. but he cannot remember whether the J.P. read the whole name or said only Godfrey. This witness has signed the affidavit as Godfrey. What is sworn to or affirmed to is the contents of the statement in the affidavit. The name is only description of the person taking the oath. In any event the testator Shirley Corea cannot be responsible for the mistake made in the affidavit after his death. Godfrey Fernando also stated that he went by jeep belonging to Shirley Corea with Walter Fernando and Bandara to Shirley Corea's house to sign the Will and that the jeep was driven by a driver and that when they went to Shirley Corea's house Hilary Fernando and Antony Fernando were there.

The next witness to the Will Emmanuel Antony Fernando gave evidence and stated that he is a businessman dealing in tenders for fish. He owns two lorries and once in three months he pays about Rs. 1,000/- as Business Turnover Tax. He said he knew Shirley Corea.

He identified his signature on the Last Will as a witness. He said that Shirley Corea signed first and after that the witnesses

signed. Hilary Fernando signed first and thereafter he signed it and thereafter Walter Fernando signed third, Godfrey signed fourth and Bandara signed fifth. He said he knew all of them. He said that all were present at the same time with Shirley Corea. He said he and others signed three copies of the Last Will. He also said that later he signed an affidavit before Vernon Perera J.P. Emmanuel Antony Fernando stated that Shirley Corea sent the jeep in the evening to his place and he went in the jeep driven by Cyril and the signing took place at about 7 p.m.

As against the above evidence which was led in support of the Last Will the respondent led the evidence of Bandara who was also a witness to the Last Will. Bandara described himself as a Journalist residing in Chilaw. He said he knew Shirley Corea very well and that he was the Secretary of the U.N.P. in Chilaw from 1965 while Shirley Corea was the President. He resides within about ¼ mile distance from Shirley Corea's house. He said he visited Shirley Corea's house regularly for personal reasons and for party matters. He said he remembers the execution of the Last Will towards the end of 1973. He stated that daily in the evening he used to visit Shirley Corea at his house and when he was chatting to him Shirley Corea offered some documents for signature. He said Shirley Corea gave three copies one after another. He was seated at the dining table. There were several persons seated there. Some of whom he knew. School master Walter was also present. He is one of the witnesses to the Will and he gave evidence for the petitioner. He said there was one Appuhamy, a strong supporter of the U.N.P. He is called "Bar Appuhamy". There were several persons from Madampe. Some were seated, some were standing.

Bandara stated that amidst these people at the table, Shirley Corea gave him one document first covered with a paper and asked Bandara to sign. Bandara stated after signing the first copy, he questioned Shirley Corea when he gave the second copy for signature and Bandara asked Shirley Corea whether it was his Last Will. Then Shirley Corea told him 'do not be a pundit'. He signed the second copy also. He then asked Shirley Corea whether it was his Last Will. Then Shirley Corea smiled in order to indicate assent. Bandara signed the third copy also. All three copies were covered when he was asked to sign. Bandara

stated that he left the place after he signed. When he was there nobody else was asked to sign. He said Walter Fernando was seated opposite to him. He did not see Walter Fernando signing. Bandara stated that Shirley Corea signed in his presence. He said that Hilary Fernando was not there. Bandara stated that after he signed the Last Will as a witness, he remained in the house for about 1/4 an hour to 1/2 an hour and he left about 6.30 or 7 p.m. Bandara stated that Harold Herat asked him to sign an affidavit to the effect that all five of them signed the Last Will together and he replied saying that he would sign an affidavit to say that he signed it but he does not know about others signing it. Then Harold Herat rejoined saying trouble has arisen because respectable people had not been asked to sign the Will by his uncle.

Bandara stated he was a journalist from the beginning and from young days he wrote radio broadcasting matters and had been broadcasting lessons over Radio Ceylon.

Bandara stated that when this 'game' of signing P1, P2 and P3 was going on Walter Fernando was there. In this early part of his cross-examination he stated that Shirley Corea signed the document before Bandara signed it. But later on he stated after he (Bandara signed it) Shirley Corea signed it and that at the time he signed as a witness Shirley Corea's signature was not there. Bandara said that after signing, they all left that day together to go on a journey to Madampe that day. There were about ten people apart from Walter Fernando and Bar Appuhamy.

Bandara stated that the evidence he gave in Court he mentioned it to his lawyer Mr. Samarakoon in Colombo and it was Earle Corea the younger brother of Shirley Corea and attorney-at-law for respondent who asked him to go and meet Mr. Samarakoon in Colombo.

Bandara stated that after Shirley Corea's death Hilary Fernando and Gamini Corea were applicants for the post of organizer of the U.N.P. He said he was not happy about Gamini Corea but he did not express dissatisfaction.

Bandara stated that Harold Herat tried to insult him by saying that Shirley Corea should have got some more worthy witnesses to sign his Last Will. He mentioned this to Earle Corea and Mr. Smarakoon. It should be noted that not a single question was put to Harold Herat in cross examination about this. Earlier Walter Fernando was not questioned about Bandara signing the Last Will alone when Walter Fernando was present.

Bandara's position is that he was asked to sign the Last Will when he went there casually and that he was not asked to come there. Bandara stated that he knew Gamini Corea and that both of them were of the same age. He had known Gamini Corea from childhood and both went to the same school and Gamini Corea was going to school from Shirley Corea's house. Bandara stated about 25 years ago he realised that Gamini Corea was Shirley Corea's adopted son and that they all treated him as such. Bandara further stated when Shirley Corea was Speaker of the House of Representative Gamini Corea was his private secretary. Bandara stated that up to now he does not know the contents of the Will. He said that Earle Corea the lawyer came to his house one day about a year after the Will was written, that is before September 1974. By the time Earle Corea came and spoke to him about the Last Will, Gamini Corea had sent in his application for nomination as organizer of U.N.P. and it was at that time Bandara felt that the party was in a mess and he stepped out. Bandara stated that at the time Earle Corea came to see him regarding the Will the contesting candidates were Hilary Fernando and Gamini Corea. The respondents relied on the evidence of Bandara to show that there was no due execution.

Counsel for petitioner also led the evidence of the 11th respondent appellatant Gamini Ranasagalla Corea. Gamini Corea stated that he was the eldest of the four children of Hendrick Ranasagalla and Caroline. He said from the time he can remember he was brought up by Shirley Corea. First he was sent to school in Chilaw and thereafter to St. Thomas College, Mt. Lavinia. He stated his name was altered to Gamini Corea by an order of Court sponsored by Shirley Corea. He said he was working at the Petroleum Corporation and when Shirley Corea became Speaker, he became his private secretary. He was

seconded for service from the Petroleum Corporation. He was always living in Shirley Corea's house No. 15/1, Gower Street, Colombo 5 and he was staying there till Shirley Corea died. Gamini Corea stated that he was introduced to friends and relations by Shirley Corea as adopted son. He said Shirley Corea died on 4.3.74 at the Sulaiman Nursing Home Colombo and he looked after him right throughout. After the funeral a search was made for the Will in the Maha Gedera but nothing was found. Gamini Corea stated that the family had deputised Henry Corea, Raju and Gamini Corea to look for the Will at the Gower Street residence in Colombo. He stated that they found a brief case containing some documents and from there they went to T. B. Panabokku's house with the brief case. Gamini Corea detached the key from the brief case and gave it to Raju. Eventually the brief case was brought to Maha Gedera and the brief case was opened and the Will was read by Harold Herat. Gamini Corea stated Hilary Fernando was present at the reading of the Will and Hilary Fernando was looking after Gamini Corea's interests. Gamini Corea said after the Will was read everybody was happy. Gamini Corea stated that Earle Corea the attorney at law for respondents said that it was a fair Will.

Gamini Corea stated about 5 or 6 months after Shirley Corea's death he became interested in politics.

Issue No. 1 was whether the last will produced in these proceedings was the act and deed of the deceased.

In view of this issue the petitioner Harold Herat produced the earlier wills of Shirley Corea in order to show the consistency of the disposition made by the deceased Shirley Corea. In all the wills it was sought to be shown that Shirley Corea was concerned about Gamini Corea the main beneficiary under the will.

Counsel for respondent led the evidence of Dr. Rajaratnam Jeyaratnam who was a witness to an earlier Will P7, P8 and P9 in attempt to show that the Will was signed by witnesses not at the same time. Counsel for petitioner objected to these wills being used for that purpose, and during the course of the argument.

Counsel for respondent conceded issue 1 and admitted that the will P1, P2 and P3 was the act and deed of the deceased Shirley Corea. In view of this admission the learned District Judge ruled that the earlier Wills were not relevant, and ruled out all the earlier wills produced in the case.

The earliest discussion with regard to the proof of wills has been by Baron Parke in 1838 in the case of *Barry v. Butlin*(1), 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 as 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 that he must satisfy the conscience of the Court that the instrument so propounded in the Last Will of a true and capable testator. The second is that if a party writes or prepares a will under which he takes the 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 1895 in the case of *Tyrell v. Painton*(2) where Lindley L. J. stated in respect of the two rules laid down by Parke B 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 as set out in *Barry v. Butlin* and *Tyrell v. Painton* was discussed by the Supreme Court in 1919 in the *Alim Will case*(3) where Bertram C.J. at page 494, 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. 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".

On a consideration of the above principles it is clear that Harold Herat must prove that the document in question namely P1, P2 and P3 is the act and deed of a free and capable testator. There is overwhelming evidence in this case that the Last Will P1 is the act and deed of Shirley Corea. In fact the handwritten draft of the will in the hand of Shirley Corea has been produced marked P4. In view of the overwhelming evidence issue No. 1 was conceded by the Counsel for respondents.

The learned District Judge in the course of his judgment has stated as follows:—

"On 15.3.74 no suspicious circumstances surrounding the execution of the will existed. It is not even doubted that P1 is the act and deed of the deceased in his own handwriting on 20.9.73 when he was in full possession of all his faculties"

The only dispute in this case is whether the last Will P1 was duly executed according to law.

Under section 4 of the Prevention of Frauds Ordinance (Cap. 70) no will is valid unless it shall be in writing and executed in manner hereinafter mentioned that is to say "it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of five or more witnesses present at the same time and such witnesses shall subscribe the will in the presence of the testator but no form of attestation shall be necessary".

This section is identical with section 9 of the English Wills Act 1837, except that the minimum number of witnesses required under this section is two.

The three witnesses to the Will, viz, Anthony Fernando, John Fernando and Godfrey Fernando have testified that they and the other two witnesses, viz, Hilary Fernando and Bandara were personally present at Maha Gederā Chilaw and that they saw the deceased subscribe his signature to the Will shown to them, and that the same time and place and in the presence of the deceased and in the presence of each other the five persons named subscribed their signature thereto as witnesses. According to the evidence of these three witnesses the Will has been duly executed according to law.

As against this evidence Bandara testified that when he signed the other witnesses were not present and that Shirley Corea signed in his presence after he signed.

Hilary Fernando although he was on the respondents' list of witnesses did not give evidence. Hilary Fernando a lawyer was present when the Will was read on 15.3.74, in the presence of the heirs and the executor Harold Herat. In fact he was present looking after the interests of Gamini Corea who was the main devisee under the Will. He did not utter a word of protest that the Will was not duly executed although the others present were happy about the Will and a comment was made that it was a fair will. Hilary Fernando is not a person not acquainted with the law or the formalities necessary for the due execution of a Will. He was the first witness to the Will.

The evidence of Bandara essentially is that when he went casually to Shirley Corea's house one evening Shirley Corea offered three documents to sign and he signed it and thereafter they went on a journey to Madampe.

According to the Judge "kept in separate compartments both versions could be true. Taken together one has to annihilate the

other". Thus the Judge has not rejected the evidence of the three witnesses considering demeanour or credibility. The Judge poses the question as "which of them (that is two versions) survives".

Then the Judge begins to find out which survives.
He begins by saying as follows:—

"But why did this anxiety not prompt him to include in P1 that particular about the simultaneous presence of the five witnesses and himself notwithstanding the fact that in law it was superfluous".

It would appear from this passage that the Judge has overlooked the following witness clause in the last paragraph in the Will P1:—

"In witness whereof I Sri Kumaradasa Charles Shirley Corea have hereunto and to another of the same tenor and date as These Presents set my hand at Chilaw in the presence of five witnesses on this 20th day of September One Thousand Nine Hundred Seventy Three".

This is a statement of the deceased Shirley Corea that he signed in the presence of five witnesses.

Below the witness clause is the signature of the witnesses numbered 1 to 5. The numbers 1 to 5 are typed one under the other and each witness has signed against each number.

This witness clause indicates that Shirley Corea and the five witnesses were simultaneously present when Shirley Corea signed the Last Will.

The Judge in his judgment states that Shirley Corea had an "abiding desire to benefit and advance the 11th respondent". Then the Judge poses the question as follows:

"But if that be so could the Will executed for that purpose be as casually executed as Bandara says it was on the eve of

a trip to Madampe amidst discussions of party politics in a crowd gathered in the dining room and even seated on the dining table with them, without the presence of all five witnesses to sign it. was the execution not a solemn act and banter at that time unbecoming? Hence could Bandara's version be true?"

The Judge posed the correct question but he answered it not with reference to the evidence in the case after evaluating them but as follows:—

"It seems to me that today the Court must take judicial notice of the rush and speed of life and the permissive profanity of the age nothing is sacrosanct. Concept of a former age used now could lead to misleading inferences".

The Judge's complaint is that the evidence of the three witnesses viz John Fernando, Godfrey Fernando and Anthony Fernando is "remarkably void of detail" and he stated that the "cross examination did not co-operate to fill up anything in that portion of the evidence".

The three witnesses have spoken to the essential facts necessary to prove due execution of the Will. They were not aware as to what evidence the respondents were going to lead. It was for the cross examining Counsel to go into details in order to test the veracity of the witnesses. In fact that is the object of cross examination. Eminent Counsel appeared for the respondent and if witnesses were not cross examined in detail; the Judge cannot hold that against the three witnesses that their evidence is void of detail.

Section 151 of the Civil Procedure provides that the party beginning shall produce his evidence calling his witnesses and by questions eliciting from each of them the relevant and material facts to which such witness can speak of his own observation. In the explanation to this section it is stated that the questions should be simple and so framed as to obtain from the witnesses as nearly as may be in a chronological order a narrative of all facts relevant to the matter in issue between the parties which he has witnessed.

The three witnesses to the Will have spoken as to how they came to meet at Mahagedera, the vehicle in which they came the name of the driver and the persons who came in the vehicle and persons who were in the Mahagedera when they came and as to how they came to sign the Last Will. They have also given the time. If any further details were necessary it should have been obtained by cross examination in order to test their veracity.

Bandara's evidence is not corroborated by any other evidence. According to him when he signed the Last Will there were a number of persons present but none of them were called to give evidence. According to Bandara there were about ten persons present. If Bandara's evidence is true, Shirley Corea could have got 4 others who were present there to sign the Last Will. There is no need to postpone it for another occasion. Shirley Corea is himself a lawyer and a notary. He knew the requirements necessary to execute a five witness will. In fact he had executed wills earlier. Is it probable that Shirley Corea would have acted in the way Bandara states?

It was stated by Bandara that Shirley Corea signed the Last Will after he signed the Will and it was suggested that on a perusal of the Will it is found that Shirley Corea had signed at the bottom on the right hand side below the last signature of Bandara on the left hand side. It was submitted that this corroborated Bandara's evidence. I have perused the Will. On the left hand side the figures 1—5 are typed one under the other for the witnesses to sign against each number. Shirley Corea has signed on the right hand side little below the numbers because if the witness's signature is long the space would not be sufficient. Allowing enough space for the witness's signature Shirley Corea had signed at the end. I do not think any adverse inference can be drawn from this.

In *Halsbury Laws* of England 4th Edition Vol. 50 page 133 para 259 it is stated as follows:

"In the absence of proof that the witnesses did not see or could not have seen the signature of the testator and in the absence of fraud the courts presume when there is a proper attestation clause or when the evidence shows that the

testator knew the law that the attesting witnesses saw the acknowledged signature. Even when the attestation clause is informal, the presumption of due execution is applied if the attesting witnesses identify their signatures and that of the testator even though they have no recollection of the circumstances in which the Will was executed"

In the case of *Re Vere Wardale v. Johnson* (4) the two attesting witnesses gave evidence that they had subscribed their names to the Will before the testator appended her signature, in which case the Will would not be validly attested. The propoundess of the Will tendered evidence to show that the evidence given by the attesting witnesses was erroneous but the plaintiff contended that the evidence of the attesting witnesses was conclusive. It was held that the object of the legislature in imposing strict formalities required by the Wills Act 1837, S9 was the prevention of fraud and the duty of Court was to see that no fraud was perpetrated, the exclusion of further evidence could only increase the possibility of the perpetration of fraud and therefore it was competent for the propounders of the Will to call further evidence.

In this case Philmore J cites the following passage from *Mortimer on Law and Practice* 2nd Ed. p 127

"Even if the witnesses profess to remember the transaction and state that the Will was not duly executed, this negative evidence may not only be rebutted by the evidence of other witnesses but the Court may in this case also, from a consideration of all the circumstances of the case and of the facts and circumstances which the attesting witnesses themselves state come to the conclusion either they are not to be credited or that their recollection fails them and so the Will may be admitted to probate in spite of their testimony".

Philmore J also referred to the Judgment of *Lord Penzance* (L. R. 1 P & D 682) in *Wright v Rogers* (5) where he seemed to make it clear first that the presumption of law in favour of due execution exists, notwithstanding the wording of the attestation clause..

Philmore J then states as follows:—

“Lord Penzance then said that the presumption was enormously strengthened if there was a perfect attestation clause and he continued where both the witnesses, however swear that the Will was not duly executed and there is no evidence the other way, there is no footing for the Court to affirm that the will was duly executed”:

It would appear from this judgment even if the attesting witnesses swore that the will was not duly executed if there was other evidence the other way probate should be granted.

In the case of *Re Denning (6)* a holograph will, which was the only testamentary document found after the deceased's death consisted of a small single sheet of writing paper. On one side appeared the date and the words “I give all I possess to my cousin Mary Jane and John Harnett” followed by the signature of the deceased. On the other side and upside down two names were written in different hands “Edith Freeman” and “Dorothy Edwards” one below the other.

There was no attestation clause and no indication why Edith Freeman's and Dorothy Edward's names were on the back of the documents. The sole surviving cousin now sought to propound the will. There was no evidence as to the identity of Edith Freeman or Dorothy Edwards.

The Judge Sachs J states as follows:—

“In these circumstances the real issue for the court is whether the maxim *Omnia praesumuntur rite esse acta* can be applied. The Judge cites the case of *In the goods of Peverett (7)* where Sir Francis Jeune P. dealing with a case in which the signature of two ladies appeared on the face of the documents with certain words states as follows:—

“Two things may be laid down as general principles. The first is that the Court is always extremely anxious to give effect to the wishes of persons if satisfied that they really are

their testamentary wishes and secondly the Court will not allow a matter of form to stand in the way if the essential elements of execution have been fulfilled. Those are principles which I can act upon, although I am conscious that in this case where there is no attestation clause at all I am going to the furthest limit".

After citing this case the Judge granted probate applying the principle maxim *omnia praesumuntur rite esse acta*.

The case of *Re Colling deceased* (8) is an action to have the 1971 Will of the testator George Colling or alternatively his 1969 Will proved in solemn form. The testator died on 28th March 1971.

With regard to the 1971 will the difficulty had arisen because the testator started to write his signature in the presence of both the witnesses to the Will. He was a sick man in hospital at the time. One of the witnesses was the patient who was in the next bed to his, a Mr. Jackson and the other was a Sister Newman. Unfortunately after the testator had started writing his signature in the presence of both witnesses Sister Newman had to leave to attend another patient. She left before he had completed his signature and he completed it in her absence. Jackson then witnessed the Will in the absence of Sister Newman but in the presence of the testator Sister Newman returned and the testator and Jackson acknowledged their signatures to her and she signed as a witness.

The Judge states as follows:—

"The requirements of the Section however are established as strict and technical. Both the technicality and the effect of defeating a testator's intention are brought out very clearly if I may respectfully say so, by the observations of **Morris J in estate of Davis, Russel and Delaney**. In that case it was held that it was essential that the *testatrix* should have signed the Will or acknowledged the signature in the presence of both the witnesses before either of them had attested and subscribed to the document".

Morris: J observed,

"I am compelled to decide the case in accordance with law, even though my decision has the effect of defeating the purpose and intention of the testatrix".

The Judge in the *Re Colling* case stated "I feel with great respect driven to the same course in this case". The Judge held that the requirements of Section 9 of the Wills Act 1837 have not been complied with because it was essential that the testator should have signed the Will or acknowledged his signature in the presence of both witnesses before either of them had attested and subscribed the document.

The case of *Dayman v Dayman* (9) is a suit for revocation of probate on the ground of undue execution; both the attesting witnesses swore that the will was not duly signed by them in the testator's presence but their evidence did not coincide upon other matters.

Held that the presumption of law *omnia praesumuntur rite esse acta* must prevail.

Barnes J in this case states as follows:—

"The point made is that they did not attest and subscribe in the presence of the testator but that the Will having been executed in the bed room in which the testator was, the attestation and subscription of the witnesses was down in the parlour of the same house but not in the presence of the testator. That raises a question which has very often been before the Courts as to whether or not where a will itself is regular on its face or as in this case is fairly regular, the memory of the witnesses who have spoken to the attestation is to be trusted so as to show that the will was not properly executed in accordance with the requirements of the Statute. Several things in this case are perfectly clear; There is no doubt whatever that the Will was signed by the testator and there is no doubt that this was done in the presence of the two witnesses. There is also no doubt that the witnesses signed it. There is no doubt that the testator was perfectly

sound in mind at the time he executed it, and although the attestation clause is on the back and is not placed where if this document was perfectly regular, it would be, yet the clause itself is regular and the attestations are put in the place where on the face of this document you would expect to find them. So that everything is all right as regards compliance with the Act, except the point suggested that the Will was not subscribed by the two witnesses in the actual presence of the testator. There is more over no doubt that this was the will of the testator that it was the document which he wished to be his will and however one may look at it as a matter of commonsense it is his will. Still if it has not complied with the requirements of the Act it will not be valid".

The Judge held that the Will must be upheld:

The plaintiff appealed from this judgment to the Court of Appeal (Herschell L.C. and Lindley and Davey L. J. J.) after hearing the argument of Counsel dismissed the appeal with costs.

In the case of *Wyatt and Another v Berry and others* (10) the Court held that the evidence of the two attesting witnesses was too clear for the presumption of law *omnia praesumuntur rite esse acta* to prevail and that the will must be pronounced against on the ground that it was not executed in accordance with the provisions of the Wills Act.

Barnes J (who wrote the judgment in the earlier case of *Dayman v Daymen*) stated in the course of the judgment (at page 417) referring to two cases *Wright v Sanderson* (11) and *Lloyd v Roberts* (12) Moore P.C. as follows:—

"Those cases show clearly that where it is obvious that the testator wanted the document in question to be his will and that he was complying with the terms of the Act, the Court would presume that everything has been rightly done and would not tie itself down to accept the evidence of the attesting witnesses against that state of things. That seems to me quite clear and those decisions really go to this that where there is any doubt about the recollection of

witnesses, where there is anything from which the Court could fairly see that the Will ought to be held to be good and the recollection of the witnesses against the form of the Will itself is not to be perfectly relied on then the Court may say that the Will was, duly executed".

Having said so Barnes J. dealing with the case he had to decide stated "but the difficulty that I have felt in the present case is the witnesses seemed both to be remarkably intelligent men and to have no doubt whatsoever in their recollection as to what occurred upon the occasion in question and the Judge held against the Will as it was not duly executed."

In the case of *Wimalawathie v. Opanayake* (13) the petitioner-appellant as executrix applied for probate of Will which was executed at the General Hospital Colombo before five witnesses one of whom was a Proctor's clerk who had drafted the Will. The devisees under the Will were the three illegitimate children of the deceased. The objectors were some of the next of kin. The trial Judge refused probate on the ground that only two witnesses had signed in the presence of the testator and that the other three witnesses had affixed their signatures in the absence of the deceased at his residence. The evidence however showed that all five witnesses had signed in the presence of the testator and that no reliance could be placed on the evidence of one of the witnesses who stated that he and two other witnesses signed the Will in the absence of the testator.

It was held that in the absence of suspicious circumstances surrounding the execution of the Will the executrix who was the mistress of the deceased and the mother of the devisee was entitled to grant of probate.

In the course of the judgment Wijayatilleke J. had stated being a Proctor's clerk who drafted the Will knowing very well the legal requirements is it likely that he would have got this Will attested part in Colombo when he could have got five witnesses together without much difficulty in Colombo as this was on the eve of the operation when there would have been quite a crowd of witnesses at the hospital ?

It would appear from the foregoing cases that the burden of proving due execution is on the propounder of the Will. If there is affirmative evidence that there has been no due execution then the Court will be compelled to hold against the Will even though the document is the act and deed of a free and capable testator.

But if the Court is satisfied that the Will sought to be propounded is the act and deed of a free and capable testator and there are no suspicious circumstances and there is satisfactory evidence that the Will has been duly executed and where the Will is in regular form the Court should pronounce in favour of the Will with the aid of the maxim *omnia praesumuntur rite esse acta* even though there is conflicting evidence that the Will has not been duly executed.

Learned Counsel for respondent submitted that this being a pure question of fact that the Court of Appeal should not interfere with the findings of fact reached by a trial Judge unless there is clear misdirection on the facts.

In the Court of Appeal case of *De Silva and others v. Seneviratne and another* (14) Ranasinghe J. had exhaustively dealt with this question as to where an Appellate Court is invited to review the findings of a trial Judge on questions of fact the principles that should guide are as follows:—

- (a) when 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 had failed to make full use of his advantage of seeing and listening to the witnesses and the Appellate Court is convinced by the plainest consideration 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 of fact by a trial judge should be reversed then the Appellate Court "ought not to shrink from that task".

This judgment was affirmed by the Supreme Court in S. C. 21/81 of 9.6.82.

In the instant case the learned District Judge has not rejected the evidence of the three witnesses Anthony Fernando, John Fernando and Godfrey Fernando on the ground of demeanour or credibility but on a wrong evaluation of the evidence of these witnesses. The Judge's complaint is that the evidence is void of detail and therefore he rejects their evidence which is an error of law. The Judge had failed to evaluate the evidence of Harold Herat the executor. His evidence relates to the finding of the Will, the reaction of the persons present on 15.3.74 at the Mahagedera when the Will was read, the conduct of Hilary Fernando who was watching the interests of Gamini Corea when the Will was read. Hilary Fernando being a lawyer and a witness to the Will did not utter a word of disapproval when the Will was read. Harold Herat's evidence on these matters is uncontradicted. Furthermore Hilary Fernando did not give evidence. There is no doubt that document P1 was prepared by Shirley Corea and that it was the document which he wished to be his Will. There is the evidence of Anthony Fernando, John Fernando and Godfrey Fernando that the Will was duly executed. The Will P1 is regular in form. Shirley Corea was a person who knew the law and it is improbable that he would have prepared the Will in the casual way Bandara had spoken of. Bandara's evidence is uncorroborated. There are no suspicious circumstances surrounding the execution of the Will.

Shirley Corea had in the Last Will P1 in the last paragraph stated that he set his hand to the Will in the presence of five witnesses.

I hold that there is overwhelming evidence in this case that the Will P1 dated 20.9.73 was duly executed in the manner required by section 4 of the Prevention of Frauds Ordinance.

I set aside the order of the learned District Judge dated 3.5.1978.

I hold that the Will P1 dated 20.9.73 proved and I hold that petitioner executor is entitled to Probate of the said Will. **I order that Probate be issued accordingly.** I allow the appeal with costs.

BANDARANAYAKE, J. — I agree.

Appeal allowed.
