

ANDRADI v. WIJEYERATNE

COURT OF APPEAL

SOZA J. & ABDUL CADER, J.

S.C. (C.A.) 12/73 (INTY) D.C. COLOMBO 25999/T

JANUARY 23 AND 24 1980

Evidence Ordinance, Sections 126 and 162 – Document claimed to be a privileged professional communication by a notary who was asked to produce it – Refusal of court to examine the document.

In a testamentary action where a last will was sought to be proved by producing a copy, some respondents took objection to the grant of probate to the petitioner on the ground that the testatrix had destroyed the will with the intention of revoking the same. In the course of examination-in-chief, the notary who attested the will was asked to produce a letter written by the testatrix which was in his custody. He claimed privilege and counsel for the respondents invited court to inspect the document in order to ascertain whether the document fell within the ambit of section 126 of the Evidence Ordinance. Counsel for the petitioner objected to the court so inspecting the document and the court made order refusing to inspect. The notary had attested seven wills executed by the testatrix and revocation of six of them. There was a controversy as to whether (1) the notary had a continuous relationship of a professional nature with the testatrix when he received the letter and (2) the letter was personal.

Held:

In the circumstances the learned district Judge was not justified in refusing to examine the letter and it is only after inspection that the court should decide the question of privilege. It must not be understood that in every case a judge is compelled to inspect a document in order to decide the claim of privilege. The section makes it clear that the court may inspect a document if it sees fit so that the matter is one within the discretion of the District Judge.

Cases referred to:

- (1) *Keerthiratne v. Gunawardena* 58 NLR 62.
- (2) *Robinson v. State of Australia* (1931) AC 704.

APPEAL from the Order of the District Court of Colombo.

C. Ranganathan, Q.C. with *N. S. A. Gunetilleke, N. Mahendran* and *M. M. Deen* for the 2nd respondent-appellant.

Mark Fernando for petitioner-respondent.

H. L. de Silva for 4th, 5th and 6th original respondents.

E. A. G. de Silva for the 7th respondent.

Cur adv vult.

6th March, 1980

ABDUL CADER, J.

It is common ground that the deceased Mrs. Rose Charlotte Helen de Silva Wijeyeratne *nee* Fernando died after making Will No. 861 dated 31st March, 1967. The petitioner filed papers seeking to prove the Will a copy of which was marked P, stating that the executrix of the Will died on 6th December, 1970 without revoking the said Will which named the petitioner as the executor. Nine heirs, of the deceased died intestate, were disclosed in paragraph 2 and particulars of the assets and liabilities of the deceased were given in paragraph 3. In paragraph 4, it was stated that the original Will was not traceable and to the best of the petitioner's belief it had been lost since the testator's death and the copy of the last Will was annexed to the petition. The 2nd and 3rd respondents took objection to the grant of probate and denied the correctness of the list of properties and their values given by the petitioner. They both pleaded that the deceased destroyed the last Will on or about 15th June, 1970 with the intention of revoking the same.

At the inquiry, five issues were framed all based on the question whether the last Will in question had been destroyed by the deceased. After the evidence of one Margaret Fernando had been recorded, there was an argument as regards the burden of proof and the Court held that there was "no burden cast on the petitioner to satisfy Court any further on the fact that the original of the Will was not now available to the parties and that the onus of the issues framed was on the 2nd and 3rd respondents and that they should begin.

Accordingly, counsel for the 2nd respondent called Rienzie John Rodrigo, Proctor and Notary who attested the Will in question. In the course of the examination-in-chief, counsel drew the attention of the witness to 2R7 and the witness stated that in 2R7 there is a reference to a letter written by "aunt Rose." Witness admitted that he had that letter with him and when he was asked to produce that letter, he claimed privilege. When the witness was asked to look at the letter 2R7 and state whether he had in that letter set out a correct summary of the letter that the aunt wrote, Counsel for the petitioner objected to the question unless aunt Rose's letter was itself tendered in evidence. Counsel further stated if the privilege claimed by the witness was upheld, any oral evidence on that document would be inadmissible.

Counsel for the respondent then referred to section 126 of the Evidence Ordinance and submitted that the document should be inspected by the Court in order to ascertain whether it falls within the ambit of section 126. Counsel for the petitioner objected stating that the Court was not entitled to look into the document, cited authorities and contended that if the witness claimed that it was made within the course of his professional work, it was conclusive. After some further questions from the witness, a long and protracted argument ensued. It went on for several dates and ultimately the learned District Judge made order as follows:-

"The framers of the Evidence Ordinance have provided for only two exceptions where protection was not attached. The Court is not entitled to go beyond this and look for other situations in which it could hold that no protection is available"-

and, therefore, refused to inspect the document.

At the hearing before us, all the matters that were discussed before the learned District Judge were argued but we have come to the conclusion that in the circumstances of this case, the learned District Judge was not justified in refusing to examine the letter in question and it is only after an inspection that the Court should decide the question of privilege.

In *Keerthiratne v. Gunawardena*⁽¹⁾ H. N. G. Fernando, J. quoted with approval a rule of Court set down in *Robinson v. State of South Australia*,⁽²⁾-

"Where on an application for an order of inspection privilege is claimed for any document, it shall be lawful for the Court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege."

Fernando J. was dealing with a case where it was alleged that some communication was made to a public officer in official confidence and he went on to say-

"...there seems to be no reason why effect cannot be given to the plain terms of section 162 which confer on the Court a right of inspection in order to determine the question of admissibility. The right of inspection so conferred would in my opinion be quite without meaning unless the Legislature also intended that the Court will have jurisdiction to decide the first question to

which I have referred, namely whether the communication was made in official confidence.” (at pages 66 & 67)

Applying the same principle, it would appear that in this case, too, it would be necessary to inspect the letter in the possession of the witness for the Court to decide whether the claim of privilege is justified. It must not be understood that we are making an order that in every case, a Judge is compelled to inspect a document in respect of a claim of privilege. The section makes it clear that the Court may inspect a document if it sees fit, so that the matter is one within the discretion of the District Judge; but in this case the circumstances are such that, in our opinion, the learned District Judge should have exercised his discretion in favour of looking at the document to decide the question of privilege.

It is common ground that the witness attested 7 Wills executed by the testatrix and the revocation of 6 of them. But there was controversy whether the witness had a continuing relationship of a professional nature with the deceased when he received the letter in question. There was also a controversy as regards the interpretation of the description of the letter in question as “a personal letter” by the witness himself in 3R4/2R8. To decide these controversies, a perusal of the letter in question would be essential and would render great assistance.

We, therefore, direct the District Judge to inspect the document in question and after such further inquiry as may be necessary to make order whether the claim of privilege is entitled to succeed and thereafter to continue with the inquiry into the main dispute.

The petitioner will pay the costs of the 2nd respondent and legal representative for 3rd respondent in both courts.

SOZA, J. – I agree.

Case sent back for further inquiry.