RANASINGHE

v.

SOMALIN AND OTHERS

COURT OF APPEAL.
WEERASURIYA, J.
UDALAGAMA, J.
CA NO. 284/90.
DC BALAPITIYA 614/T.
19TH JULY, 1999.
27TH SEPTEMBER, 1999.

Testamentary proceedings - Last will - Due execution - Presumption - Onus probandi - *Affirmative evidence* - Omnia praesumtur rite esse acta.

The Petitioner Appellant filed an Application praying that Last Will No. 357 dated 02. 05. 82 be declared duly proved and that he be accepted as its Executor and entitled to Probate thereof. The 2nd and 3rd Respondents Respondents objected to the Application. The matters in issue were whether the aforesaid Last will was signed by L and whether the same was duly executed, if so, should the claims of the 2nd and 3rd Respondent be rejected. The District Court refused probate holding that the aforesaid Last will was not duly executed by the deceased Testator.

On appeal, it was contended that :

(i) the Last will was on the face of the document regular and reasonable drawing a presumption of due execution.

(ii) the format of the Last will complied with the provisions of the Notaries Ordinance.

(iii) Court having satisfied itself on the *prima facie* proof of the due making of the will entered Order Nisi.

Held :

(i) When evaluating the evidence of the Notary and witness P in relation to due execution it must be emphasised that Court is obliged to view the testimony - on a balance of probability.

(ii) Court would always be anxious to give effect to the wishes of the Testator. Court could not allow a matter of form to stand in its way.

subject however to the condition that essential elements of execution had been fulfilled. However if there is affirmative evidence to show that there was no due execution Court would no doubt hold against the will even though the will was the act and deed of a free and capable Testator.

(iii) Contradictions in P's evidence as to how the witnesses were gathered would not be material, in view of the lapse of time from the date of execution to the date of testimony, even the Notary's admission that the attestation was in error and the fact that she was unable to produce the Instruction Book would not cast a doubt on the capacity of the Testator or that there was undue influence or that the execution was fraudulent. The most the affirmations would point to is a lapse in the formalities to be observed in the execution of a Last Will.

APPEAL from the Judgment of the District Court of Balapitiya.

Cases referred to :

1. *Corea vs Corea* [1988] 2 Sri.L.R. 200
2. *Barry vs Butlin*
3. *Tyrell vs Painton*
4. *Vere Wardale vs Johnson* (1949) 2 All ER 250
5. *Kanagaretnam vs Ananthethurai* 30 CLW 10
6. *Emali Fernando vs Caroline Fernando* 59 NLR 341
7. *De Silva vs Seneviratne* [1981] 2 Sri.L.R. 7
8. *Wijewardena vs Ellawala* [1991] 2 Sri.L.R. 14
9. *Peiris vs Perera* 48 NLR 560

P.A.D. Samarasekera, P.C., with *C.J. Laduwahetty* for Petitioner-Appellant.

L.C. Seneviratne P.C., with *Anil Silva* .

U.H.L. Wickremaratna and *Hemantha Situge* for 2nd & 3rd Respondents.

Cur. adv. vult.

October 8, 1999.

UDALAGAMA, J.

On 28. 01. 1988 Iddamalgoda Dissanayakelage Vincent Ranasinghe (hereinafter called the Petitioner) filed an application in the District Court of Balapitiya praying *inter alia* that last will No. 357 dated 02. 05. 1982 be declared duly

proved and that the petitioner be accepted as its executor and that he be entitled to probate thereof.

The 2nd and 3rd Respondents filed objections to the application of the Petitioner and at the subsequent inquiry the Petitioner raised the following issues:

(1) Whether the aforesaid last will No. 357 was signed by Leesin and whether same was the duty executed last will of the deceased.

(2) If so whether the claim of the 2nd and 3rd Respondents ought to be rejected and

(3) Whether the Petitioner was entitled to probate. No issues were raised by the respondents.

At the conclusion of the inquiry, the learned District Judge answered the three issues in the negative and made order refusing probate on the basis that the above mentioned last will was not duly executed by the deceased testator. This appeal is from that order dated 10. 08. 1990 and delivered on 20. 08. 90.

The learned President's Counsel on behalf of the Petitioner - Appellant submitted that the District Judge had misdirected himself in holding that the will was not duly executed. He based his contention of the following grounds:

(a) that the last will was on the face of the document a regular one and a reasonable one and thereby drawing a presumption of due execution.

(b) that the document contained the signatures of the notary, the two attesting witnesses and the signature of the testator.

(c) that the format of the Last will marked 'P1' complied with the provisions of the Notaries Ordinance and

(d) that the learned District Judge having satisfied himself on the *prima facie* proof of the due making of the will entered order Nisi.

Learned President's Counsel for the petitioner referred to the case of *Corea vs Corea*[1] and drew the attention of Court to the presumption of due execution and the maxim- "*Omnia praesumtur rite esse acta*".

This case was also cited by learned President's counsel for the Respondent-Respondent to support his contention that the will was not duly executed. Hence it would be appropriate to dwell to some extent on the facts of same.

In that case Shirley Corea Attorney-at-Law, Member of Parliament and Speaker of the House of Representatives executed a last will which was attested by five witnesses. Harold Herath Attorney-at-law was named the executor. The sole devisee was according to the last will one Gamini Corea said to be an adopted son of the testator. On the death of Shirley Corea, Harold Herath applied for probate, subsequent to which the will stood challenged on the basis that same was not duly executed. At the inquiry in Corea's case four witnesses to the last will and Harold Herath testified. One Bandara who was one of the five witnesses gave evidence stating *inter alia* that he did not sign the Last will in the presence of the other witnesses. The learned District Judge was inclined to accept the evidence of Bandara and held that there was no due execution and refused probate.

In appeal the Court of Appeal which took a contrary view, held,

firstly that the party propounding the last will must satisfy Court that the will was that of a true and capable testator.

secondly that in case of suspicion Court should not pronounce in favour of it until the suspicion was removed. As

an instance of suspicion the court of appeal stated that where the party writing the will accrued some benefit that in such an instance the Court should be vigilant. But that was not to mean that a special measure of proof was necessary except that the suspicions should only be well grounded.

Thirdly that the Last will must be executed according to Section 4 of the Prevention of Frauds Ordinance.

Two questions for decision in Corea's case was -

1. whether all five witnesses signed the document at the same time in the presence of each other and in the presence of the testator.

2. whether it was correct to refuse probate on the uncorroborated evidence of Bandara who testified to the fact that all witnesses did not sign the Last will in the presence of each other and before the testator.

In that case the Court of Appeal held that the will which was in a regular format and signed by the testator was the act and deed of a free and capable testator with no evidence of suspicious circumstances and that the will was duly executed and that the maxim "*Omnia Praesumtur rite esse acta*" would hold.

In the instant case however the learned President's Counsel for the Respondents did not allege suspicious circumstances, undue influence or the lack of capacity of the testator or that the last will marked 'P1' was not the act and deed of a free and capable testator but only that same was not duly and properly executed. Therefore the only matter raised by the Respondents was the absence of due execution.

Lord Baron Parker in *Barry vs Butlin*[2] laid down two rules while discussing the proof of the wills namely, that,

(1) the '*Onus propandi*' in every case is upon the party propounding a will and dwelt on the necessity of satisfying Court that the will was that of a capable testator and

(2) that if the will was prepared by a person benefiting therefrom that that should excite the suspicions of Court and in such instance the Court should be vigilant and probate should not be granted unless the suspicions were removed.

The above position was modified in *Tyrell vs Painton*[3] where Lindsay, J. held that the suspicious circumstances would not be confined to only a beneficiary receiving a benefit but to all instance which would arouse the suspicious of Court.

Learned President's Counsel for the Petitioner - Appellant referred to the case of *Vere Wardale vs Jhonsan*[4] where it was held-that 'the object of the Legislature imposing strict formalities as required by the English Wills Act of 1839 was the prevention of frauds and the duty of Court was to see that no fraud was perpetuated. It must be noted that provisions in Section 9 of the English Wills Act is identical to section 4 of the Prevention of Frauds Ordinance.

Thus what is in issue is whether the petitioner has placed affirmative evidence to establish due execution.

In examining this question the following matters are relevant.

(1) The fact that the last will No. 35 marked 'P1' is in a regular format and in accordance with Section 31 of the Notaries Ordinance.

(2) That both witnesses who testified at the inquiry also tendered to the District Court two affidavits affirming that Leesin signed the last will marked 'P1' and that same was signed by the two witnesses in each others presence and that Leesin was mentally sound and also capable of understanding the contents therein.

(3) That the contents of the third affidavit also asserted to the above although the deponent failed to testify at the inquiry.

(4) That the Notary aforesaid testified to the fact that on 03. 05. 1982. Leesin come to her office and instructed her to prepare his Last will and that she did so in accordance with the said instructions and that Leesin signed the Last will marked 'P1' before the two witnesses.

(5) That Pemawathi's brother also signed as a witness.

Learned President's Counsel for the Respondents drew the attention of Court to contradictions in the evidence of the Notary and Pemawathi. It was also the contention of learned counsel that the propounder of a will must prove the following:

(1) Due execution

(2) Testator's Capacity

(3) The absence of suspicious circumstances.

He also cited the following cases in support of his contention.

Kanagaratnam v. Ananthathurai[5]

Emali Franando v. Caroline Fernando[6]

De Silva v. Seneviratne[7]

He further submitted that there was no acceptable material to show that all witness signed 'P1' in the presence of each other. Learned Counsel's submission was that the notary when asked if all signed in each others presence that the answer was 'Cannot remember'. He also drew the attention of court to the unsatisfactory nature of the notary's evidence and highlighted the failure on the part of the notary to produce the instruction book which was referred to, in her evidence.

In reference to the decisions of the three cases brought to the notice of court, Kanagaratnam's case dealt with suspicious

circumstances attending the execution of a will and the need for the propounder to remove them while in Emali Fernando's case the subject matter was a deed of gift with reference to section 2 of the Prevention of Frauds Ordinance. In *De Silva vs Seneviratne(supra)* the review by the Appellate Courts of the findings of fact by the trial Judge and the burden on the propounder of a will and the duty of Court when suspicious circumstances exist was dealt with.

In the instant case when evaluating the evidence of the notary and witness Pemawathi in relation to due execution it must be emphasized that Court is obliged to view the testimony mindful of the fact that any finding must be on a balance of probability. It is also relevant to note that the notary gave evidence approximately eight years after the attestation. Thus when a witness says she can not remember, the answer should be considered keeping in mind the lapse of time. The same consideration is applicable to witness Pemawathie, sometimes more so, considering the level of intelligence as compared to the notary. Then again Court should not lose sight of the fact that a professional notary would have in that eight years attested numerous notarial documents necessitating attestation before two witnesses as in the present context. The affidavits filed of record in the original court and referred to above and affirmed to by the notary and Pemawathi was much earlier in time; It must also be emphasized that the notary had not testified affirmatively that Leesin or the witnesses did not sign 'P1', in each others presence although admittedly Pemawathi in cross examination however contradicted that position. Thus considering *inter alia*

(1) the lapse of time from the date of execution of 'P1' and the date the witnesses gave evidence,

(2) the affirmative evidence of the notary in her evidence in chief which corroborated her attestation in 'P1' and the contents of the affidavit filed as far back as 18. 01. 1988 and

(3) the necessity to view the evidence on a balance of probability, I am inclined to take the view that notwithstanding Pemawathi's contradictory stance that on a balance of probability, the Learned District Judge's finding that there was no due execution could not stand. Even the contradictions in Pemawathi's evidence as to how the witnesses were gathered would not be material, in view of the lapse of time from the date of execution to the date of testimony. Even the notary's admission that the attestation was in error and the fact that she was unable to produce the relevant Instruction book would not cast a doubt on the capacity of the testator or that there was undue influence or that the execution of 'P1' was fraudulent. The most the said infirmities would point to is a lapse in the formalities to be observed in the execution of a last will. As stated in the course of the judgment in Corea's case(supra) court would always be anxious to give effect to the wishes of the testator, Court could not allow a matter of form to stand in its way, subject however to the condition that essential elements of execution had been fulfilled. However if there is affirmative evidence to show that there was no due execution Court would no doubt hold against the will even though the will was the act and deed of a free and capable testator.

Apart from the allegation of the lack of due execution no specific allegation of undue influence was taken up at the lower Court. However even in such instance where undue influence is alleged same must be proved by the party alleging it. (Vide *Wijewardena vs Ellawala*[8]) I am also inclined to agree with the observations of Canakeratne, *J. in Peiris vs Perera*[9] that it was not the duty of Court to ensure that a testator made a just distribution of his property, so long as the testator executed the last will intending same to be his Last Will.

It is also of relevance when considering the evidence of Somalin the mistress of the testator and the beneficiary under 'P1' that after the execution of the last will the testator lived till

14. 11. 1987, which was approximately five and a half years after the execution of 'P1' without revoking or amending same which goes to show that the testator who had all the power and opportunity to reconsider his last will in fact did not do so, thereby confirming his intention that the property so devised on 'P1' should in fact devolve on his mistress thereby disinheriting the objectors to the said last will. In the aforesaid circumstances I set aside the order of the Learned District Judge dated 10. 08. 1990 and delivered on 20. 08. 1990 and hold that the Last will No. 357 dated 03. 05. 82 is proved and that the petitioner executor is entitled to probate.

I further order that probate be issued accordingly.

The appeal is allowed with costs.

WEERASURIYA, J. - I agree.

Appeal allowed.