1957 *Present :* **Weerasooriya, J., and Sansoni, J.**

MEENADCHIPILLAI, Appellant, *and* S. KARTHIGESU and others, Respondents

S. C. 499—D. C. Jaffna, 1712

Will—Probate—Resistance to application—Suspicious circumstances—Burden of proof.

Where an application for probate of a will is resisted and 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 ."

The following circumstances were held to be suspicious in the present case, where it was shown that the testator died within seven hours after the execution of the will in a hospital :—(1) The testator was so ill at the time of execution that he was unable to speak or to hold a pen to write his signature. (2) The Notary did not take the obvious precaution of consulting a doctor at the time he took instructions from the testator or at the time of executing the will. (3) The petitioner, who was the widow of the testator and to whom the bulk of the property was devised, was a near relation of the Notary. (4) The witnesses to the will were not of independent character.

APPEAL from a judgment of the District Court, Jaffna.

H. V. Perera, Q. C., with *S. Sharvananda* and *Miss Maureen Seneviratne*, for the petitioner-appellant.

C. Ranganathan, with *K. Shanmugalingam*, for 1st and 2nd respondents.

R. Manickkavasagar, for the 3rd to 6th respondents-respondents.

Cur. adv. vult.

April 11, 1957. SANSONI, J.—

This is an appeal from the judgment of the learned District Judge of Jaffna dismissing the application of the petitioner-appellant to have the will of her deceased husband Krishnapillai proved, and to have probate thereof issued to her. The application was resisted by the deceased's daughter by his first wife, and also by the guardian ad litem of three minor children of the deceased by the petitioner ; those children were 6, 4 and 3 years old respectively at the time of the application.

The estate of the deceased was valued by the petitioner at over Rs. 80,000, and except for a legacy of Rs. 10,000 to the 2nd respondent the whole of it has been devised to the petitioner. The deceased was about 55 years old at the date of his death. He seems to have fallen

ill some days before he entered the Moolai Hospital on the 27th November, 1952. Dr. Chacko who examined him on that day before admitting him as a patient was called as a witness by the respondents. He has stated that the patient's face was swollen (he had erysipelas) and that he was diabetic. Other details about the patient which were elicited from this doctor were that on 30th November and 1st December he was given a coramine injection as his heart was feeble, and he died on 1st December at about 2.30 p.m. Dr. Chacko seems to have been unable to remember any further details about the deceased because of the large number of patients he had treated in the hospital, and because he was giving evidence two years after the event. On being questioned about the deceased's mental condition he stated :—" I am not quite sure about the mental condition of the patient Krishnapillai. So I will not say anything about it ".

The will was executed, according to the petitioner and her witnesses, at about 8 a.m. on 1st December, that is about 6½ hours before he died. As to what happened prior to the time of execution we have the evidence of the Notary who attested the will, the petitioner herself, and three other attesting witnesses, Krishnar, Manikam and Murugesu. I shall deal first with the Notary's account of how he came to get instructions for the drawing up of the will.

The Notary is a Proctor of 29 years standing who is also the President of the Village Committee, Treasurer of the Hindu Board of Education, and a member of the Board of Management of the Moolai Hospital. According to this witness, he had met the deceased for the first time at a poojah ceremony on 20th November. On 29th November he was fetched from his house by one Subramaniam, a relation of the petitioner, and he reached the hospital at about 5 p.m. He and the deceased were alone together when the deceased told him that he had sent for him as he had decided to execute his will. The deceased further told him that he was very much worried at the thought of his sons, and he wanted to make provision for their education and maintenance. The instructions he received were that the testator's daughter by his first wife should receive a legacy of " not less than Rs. 10,000 ". These instructions were noted on a piece of paper which he later destroyed. The testator told him that his throat and tongue were affected and that he could not talk much. The witness has stated that he knew that the deceased was seriously ill even on that day. The Notary left the hospital at about 5.30 p.m., having informed the testator that he would be back at the hospital the next morning with the will. He could not do this as arranged because there was a cyclone on the 30th November.

We now come to the events of the morning on which the will was executed. The Notary travelled to the hospital in a car owned and driven by Manikam. They both went to the ward in which the testator was, and found the petitioner and Murugesu also there. According to the petitioner, the Notary on entering the ward asked her husband " How are you ? " and her husband just nodded his head. The Notary's statement of what happened in the ward begins with his telling the testator that he had brought the will prepared according to his wishes ; on being asked whether

he would execute it, the testator assented by nodding his head. It is perfectly clear from the evidence of this witness that the testator was unable to speak at all that day. The Notary then sent for Krishnar, who was the Senior Apothecary of the Hospital, to sign as a witness. His reason is best given in his own words :—" I sent for him because he was a respectable man. I sent for him to satisfy myself. If he was satisfied he would sign the Will and I too would have been satisfied. "

After the Notary had ascertained from the three men who had by now assembled at the testator's bedside that they were willing to sign the Will as witnesses, he asked the testator whether he approved, and the testator nodded his head again. The Will was then read out in the presence of the witnesses, and the Notary asked the deceased if it was written according to his wishes. The testator nodded again. His wife then raised him up in order that he might sign. Although a pen was offered to him, his hand trembled and he could not hold it. He showed the Notary his right thumb, and after the Notary had daubed it with ink the testator put his thumb impression on the original Will and protocol. The three witnesses then signed it.

This is substantially the account related by the Notary, Manikam, Murugesu and the petitioner. Krishnar's account of what took place is remarkable on account of its negative character. He pleaded ignorance of almost every detail, and the only matters he seemed to remember were the setting of the deceased's thumb impression to the Will and the protocol, and the fact that he and the two other witnesses signed them. He remembered, however, that the testator was unable to talk either on that day or on the previous day. He could not remember if he was able to talk on 29th November.

The learned Judge has regarded the Will as one to which suspicion attached. He held that the petitioner had not proved due execution, or the mental competency of the testator, or that the testator understood the nature and the contents of the Will. Mr. Perera has submitted that the learned Judge has wrongly conjured up suspicions arising from the conflict of evidence, and that no suspic ous circumstances surrounded the execution of this Will. Mr. Renga athan argued that not only were there suspicious circumstances, but the evidence led by the petitioner, far from removing the suspicion, tended to confirm it.

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 ".[1]

Is this then such a case ? I think it is, and the very first matter which strikes me as suspicious is that this experienced Notary did not take the obvious precaution of consulting a doctor at the time he took instructions from the testator or at the time of attesting the Will. Nothing would

[1] *(1894) P. at p. 151.*

have been easier than to summon one of the doctors in this hospital. The Notary had met the testator only once before—on 20th November. On 29th November on his own admission he knew that the testator was seriously ill. He was with him for only about half an hour. The testator could not talk much and conversation must have been reduced to a minimum. It is questionable whether the Notary was able to judge the testamentary capacity of the deceased on that occasion.

I think the Notary's failure to take this precaution is more culpable in view of his relationship to the petitioner. The Notary and the petitioner's father were first cousins. Mr. Renganathan even argued that the Will was bad for this reason : he relied on the rule of Roman Dutch Law that a will cannot be executed before a Notary whose son or father or other near relation is instituted heir therein (Voet 28.1.22, 28 quoted in Steyn on Wills p. 5). Without going so far as to hold that this Will is rendered invalid by that rule, I would say that the existence of such relationship is a circumstance of suspicion. The learned Judge has described the Notary as an interested party and Mr. Perera argued that the relationship is a matter which can only affect the Notary's credibility. I think it is something more than that. Certainly the Notary's evidence as to the instructions he received must, on account of this relationship, and the other circumstances under which they were taken, be viewed with great caution.

Another circumstance of suspicion is the testator's condition at the time of execution of the will. One feature of his condition, which has been admitted by all who saw him at that time, was his inability to speak. All he could do, apparently, was to nod his head. The witnesses have chosen to interpret the fact that he nodded his head three or four times to mean that he assented to the three or four questions that were addressed to him by the Notary. Nothing more seems to have passed between the testator and the witnesses on that occasion. The question arises whether it is satisfactory to construe the nodding of his head as a sign of approval. Whether the testator heard all that the Notary said, and also understood what he heard, is by no means clear. His hand trembled so much that he could not hold the pen which was offered to him. The Notary and the petitioner say that the testator showed his thumb and they interpreted this to mean that he wanted his thumb impression taken. When all these matters are taken with the proved fact that the testator died within seven hours, the exact condition of the testator is left in grave doubt.

There is also the significant admission of the Notary as to why he sent for Krishnar when he already had two witnesses who could have attested the will. One reason may be, as he has stated, that Krishnar is a respectable man. But that is not the only reason given by the Notary. He admittedly wanted Krishnar there in order to remove some doubts which existed in his mind. But what Krishnar did after he arrived cannot have helped in that direction, and the doubt which existed only increases the sum total of suspicion attaching to the will.

The learned Judge has commented on the position of the other attesting witnesses in relation to the petitioner. He pointed out that Murugesu is her uncle. Krishnar is an employee of the hospital, and the Notary

is on the Board of Management of the hospital. Manikam appears to be friendly with the Notary and the petitioner. Mr. Perera characterised these comments as showing that the learned Judge was too suspicious. I dare say that the evidence of each witness must not be regarded with the same degree of scepticism, but I cannot say that they were so regarded by the trial Judge. But it can be a point of suspicion that the witnesses to the will are not, as one would expect, of independent character (as Bertram, C.J., said in the *Alim Will Case* [1]).

Certain passages in the judgment under appeal are open to objection and show that the learned Judge was sometimes scrutinizing the evidence led for the respondents so closely that he found discrepancies where none existed. For instance, I see nothing in the affidavits of the Notary and the attesting witnesses to suggest that instructions could not have been given on 29th November. To declare one's intention to execute a will is not the same thing as to give instructions for the preparation of the will. The judgment contains a close analysis of the evidence, and although a more generous allowance might have been made for faulty memories and indistinct recollections, the Judge's findings on the matters of suspicion I have dealt with remain unshaken. Two matters arising from the evidence are open to comment. One is that the cross mark has been made by a strong, firm hand, and the petitioner and her witnesses have made no reference at all to the making of a cross mark by the testator. The other matter is the remarkably clear and well defined thumb impression which the testator made on the documents, even though his hand was trembling so much that he was unable to hold a pen.

Ultimately, of course, it was 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 suspicions were unfounded the burden of proof which lay on the propounder of the will remained undischarged: see *Harmes v. Hinkson* [2]. "The onus of proof may be increased by circumstances such as unbounded confidence in the drawer of the will, extreme debility in the testator, clandestinity, and other circumstances which may increase the presumption so much as to be conclusive against the instrument.": see *Parke v. Ollatt* [3]. The trial judge was not satisfied with the evidence led for the petitioner and I cannot say that he was wrong.

Mr. Perera relied on the decision in *Perera v. Perera* [4]. The principle applied there was that if a testator has given instructions to a Solicitor when he was able to appreciate what he was doing in its relevant bearings, and if the Solicitor prepares a will in accordance with these instructions, the will is good though at the time of execution the testator is capable of only understanding that he is executing the will which he has instructed but is no longer capable of understanding the instructions themselves or the clauses in the will which give effect to them. The difficulty I have in applying this principle to the present case is the want of proof that the testator had sufficient capacity to give instructions or was able to speak at all on 29th November. The evidence of Krishnar and Dr. Chacko,

[1] *(1919) 20 N. L. R. at p. 493.*
[2] *(1946) A. I. R. P. C. 156.*
[3] *(1815) 161 E. R. p. 1158.*
[4] *(1901) A. C. 354.*

both of whom might have given disinterested evidence on those points, is entirely negative. The trial judge was not prepared to act on the evidence of the Notary and the petitioner who were the only two witnesses who claimed to speak to the testator's condition on that day, and I am unable to say that he was wrong in taking that view.

Even otherwise, it is doubtful whether the testator was in a fit condition on the morning of 1st December to understand that he was executing the will for which he had given instructions. Independent and reliable evidence on this point is woefully lacking. We know that the testator could not speak, he could at the most nod and raise a trembling hand, he was a dying man. I do not think it would be safe to rely on his gestures as signs that he knew and approved the contents of the will.

I would dismiss this appeal with costs, but in the circumstances of the case I would direct that the costs be paid out of the estate.

WEERASOORIYA, J.—I agree.

Appeal dismissed.