

1971 Present : Samerawickrame, J., and Wijayatilake, J.

I. B. WIMALAWATHIE, Appellant, and  
D. J. OPANAYAKE *et al.*, Respondents

*S. C. 364/67 (F)—D. C. Colombo, 22420/1967.*

*Will—Execution before five witnesses—Draft made by Proctor's clerk—Property devised to the illegitimate children of the testator—Absence of suspicious circumstances—Validity of the Will.*

The petitioner-appellant as executrix applied for probate of a 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 of the deceased. 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.

*Held*, that, in the absence of evidence of suspicious circumstances surrounding the execution of the Will, the executrix, who was the mistress of the deceased and the mother of the devisees, was entitled to grant of probate.

**A**PPEAL from a judgment of the District Court, Colombo.

*J. W. Subasinghe*, for the petitioner-appellant.

*S. W. Walpita*, for the objectors-respondents.

*Cur. adv. vult.*

March 29, 1971. WIJAYATILAKE, J.—

The petitioner as executrix is seeking probate of the Last Will dated 9.2.65 of Opanayakage Brampy Appuhamy who died at the General Hospital, Colombo on 23.2.65. Brampy Appuhamy at the time of his death was about 65 years of age. The petitioner who is about 30 years younger was his mistress from his fiftieth year. Admittedly, they were living as husband and wife and three children were born to them, Sunil Karunawathie in October 1956, Indrapala in May 1957 and Seetha in May 1963. The deceased had four sisters two of whom are living, and two younger brothers one of them being the objector John Opanayake. Two sons of the sisters of the deceased are Don Mendris and Weerakkody. Of these intestate heirs John Opanayake, the two sisters who are living and the two nephews aforementioned object to the proof of the Will, by which the deceased has devised and bequeathed all his property to his three children.

They allege that the Last Will sought to be proved was not executed by nor was it the act and deed of the said deceased. They also state that even if the deceased executed this Last Will (a) it was not duly executed according to Law; (b) the deceased did not understand the nature and the contents; (c) the said Last Will was executed as a result of the fraud and undue influence exercised on the deceased by the petitioner.

When this case came up for inquiry learned Counsel for the objectors had stated that he was not denying the signature of the deceased on the document produced as the Last Will. The case accordingly proceeded to inquiry on two issues: (1) Is the Will filed of record marked "A" duly executed according to Law, (2) Was the said Will the act and deed of the deceased. After inquiry the learned District Judge held that the Will has not been duly executed according to Law as it has not been duly attested. The Will in question has been attested by five witnesses and the learned District Judge holds that only two witnesses—namely K. S. Perera and Dolis Appuhamy had signed in the presence of the deceased while the other three witnesses Gabo Singho, Baby Singho and Mathias Perera had affixed their signatures in the absence of the deceased at his residence at Pokunuwita.

With regard to the mental capacity of the testator, Dr. Rustomjee, Ear, Nose and Throat Surgeon of the General Hospital, Colombo, has stated that according to his observations Brampy was of sound mental condition on 10.2.65 when he operated on him for the first time and even after the operation his condition was fairly satisfactory for about one week. On this evidence it is quite clear that when the deceased signed this document in hospital he was in a position to understand its contents.

The objectors have conspicuously failed to prove the charge of fraud and undue influence.

The only question which arises is in regard to the formality of the attestation. The first witness K. S. Perera who had drafted the Will is a proctor's clerk. It would appear that he lives in the village of the deceased and his assistance had been sought in respect of deeds and mortgage bonds by the deceased from time to time. Apart from Perera two other witnesses to the Will, Dolis Appuhamy and Gabo Singho have given evidence in support of the petitioner that the said Will was executed by the deceased and all the five witnesses signed the same in one another's presence at the same time at the General Hospital, Colombo. It is significant that all these five witnesses have sworn to an affidavit five months later on 15.7.65 testifying to this fact.

Of these witnesses Don Mathias who has given evidence on behalf of the objectors has sought to go back on this affidavit and he has stated that his signature was not obtained in Colombo. At the instance of John Opanayake he has subscribed to a further affidavit on 14.12.65 wherein he states that on 10.2.65 he was requested to come to the residence of Brampy Appuhamy and when he went there the proctor's clerk, K. S. Perera, had told him that Brampy Appuhamy desired that he should sign a document. He was not aware of the contents of the document. He knew Brampy very well and he signed the document. Two others Baby Singho and Gabo hamy had affixed their signatures thereafter. He proceeds to say that only very recently he came to understand that this document was the Last Will of Brampy. He had sworn to this affidavit before Mr. J. Malalgoda J.P.U.M., Solicitor and Notary, Colombo, at his office. When this witness was cross-examined as to the contents of this particular affidavit his evidence was that it was not read and explained to him. It would appear that John Opanayake had given instructions and when the affidavit was presented to him he had signed it without reading the contents! On a perusal of the evidence of this witness it is apparent that no reliance whatever can be placed on him.

The learned District Judge has also observed that one cannot fail to notice that the signatures of Gabo Singho, Baby Singho and Mathias appear to have been signed with a pen different from the one used by the other two witnesses. However, on a scrutiny of these signatures one cannot be too definite about this. If K. S. Perera, being a proctor's clerk, was seeking to perfect the Last Will is it likely that he would have slipped on a matter like this? Furthermore, being a proctor's clerk knowing very well the legal requirements is it likely that he would have got this Will attested in 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 visitors at the hospital. It is also significant that although the objectors had listed the other witness to the Last Will, Baby Singho, he has not been called.

The learned District Judge observes that he cannot overlook the evidence of John Opanayake—that the deceased had intimated to him that he had provided well for his children and his mistress and wanted the rest of the property to be shared by his brothers and sisters. This witness in cross-examination admitted that he did not associate with the deceased on account of his nefarious activities! It would appear that he was running a club of a shady character. John Opanayake has further stated that they were not on good terms with the mistress of the deceased as he had cast a slur on the family by living with her. In the light of this evidence I do not see how the objections can be upheld.

Mr. Walpita, learned Counsel for the objectors, has submitted that wherever a Will is prepared and executed under circumstances which arouse the suspicion of the Court it ought not to pronounce in favour of it unless the party propounding it adduces evidence which would remove such suspicion and satisfy the Court that the testator knew and approved of the contents of the instrument. He relies on *The Alim Will Case*<sup>1</sup>. He submits there are certain suspicious features in this case: firstly that the Last Will is written on two sides of the paper and the list of witnesses appears only on the third page. In my opinion this is of little consequence. Secondly that the petitioner has deliberately got the order nisi published in the *Sinhala Baudhaya* which is not a popular newspaper but, as we know, the list of newspapers is approved by Court and there is nothing to show that this particular paper has not been so approved. Furthermore, unlike a daily newspaper a weekly paper like the *Sinhala Baudhaya* is not generally discarded after reading. Thirdly as to the pens used, but as I have already observed on a careful scrutiny of the original this suspicion appears to be rather flimsy. Fourthly that Mr. Gunawardene, Justice of the Peace, before whom the five witnesses swore to the affidavit of May 1965 has not been called. No doubt he would have been a useful witness to the petitioner but on the face of the jurat clause his evidence would have been redundant.

Mr. Subasinghe, learned Counsel for the petitioner, has submitted that the position of the objectors has been inconsistent from the very inception of these proceedings. In the present case there are no suspicious circumstances at all as the property has been bequeathed to the three children whom the deceased dearly loved as is evident from the other gifts he has made in their favour. It is in evidence that the brothers and sisters of the deceased had very little to do with him, so that it is likely that on his death bed if he was desirous of executing a will he would have bequeathed all his property to them as mentioned by John Opanayake.

The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by Law is sufficient to discharge the onus. It is incumbent

<sup>1</sup> (1919) 20 N. L. R. 481 at 493.

upon the propounder to adduce adequate and trustworthy evidence to show that there has been full compliance with the requirements of the Law. The conscience of the Court has to be satisfied as to the genuineness of the Will which is being set up, and that it is the last testament of a free and capable testator. If the propounder makes out a *prima facie* case, the opposing party has then the burden of producing evidence in support of his objections to overcome the effect of the propounder's evidence (Law of Wills—Gopalakrishnan (1965) at page 105). In my opinion the evidence in support of the petitioner is of an overwhelming character. Mr. Walpita has further submitted that the architect of this Will is a Proctor's clerk and it therefore evokes strong suspicion. Proctor's clerks are a much maligned tribe but the contents of this Will and all the other circumstances point to the fact that this allegation is without foundation. I am not unmindful of the fact that in a City like Colombo it would have been quite easy to obtain the services of a Notary particularly through a Proctor's clerk. However, this fact alone is not sufficient to prove the allegations made by the objectors. Walter Pereira in his "Laws of Ceylon" at page 421 observes that "the mere presence of a notary when a Will is executed before five witnesses does not render it invalid." See also *Abraham Perera Will Case*<sup>1</sup>.

On the other hand the conduct of John Opanayake shows that he had very little love or respect for his brother Brampy and several months after the execution of the Will he had set up the other objectors advancing numerous objections which crumbled as the case proceeded.

I would accordingly set aside the Order of the learned District Judge and enter Order absolute declaring the said Last Will dated 9.2.65 (marked A) proved. The petitioner shall be entitled to her costs in both Courts, as against the objector-respondents.

SAMERAWICKRAME, J.—I agree.

*Appeal allowed.*

<sup>1</sup> (1898) 3 N. L. R. 306.