

[IN THE PRIVY COUNCIL]

1952 *Present* : The Lord Chancellor, Lord Morton of Henryton
and Sir Lionel Leach

T. SELVAGURU, Appellant, and G. THIALPAGAR, Respondent

PRIVY COUNCIL APPEAL No. 14 OF 1951

S. C. 78 Inty.—D. C. Jaffna, 227

Appeal—Finding of fact—Circumstances when appellate Court will interfere—Handwriting—Value of expert's testimony.

An appellate Court will set aside the finding of a trial judge when the reasons given by him for accepting a party's story are contrary to what is plainly proved by documents produced in evidence by the opposite party.

In deciding issues of fact, the advantage which a trial judge has of seeing and hearing the witnesses is perhaps not so great when the evidence is heard on dates widely separated each from the other and when the judgment is written long after the last hearing.

Observation on the weight of a handwriting expert's evidence.

APPPEAL by special leave from a judgment of the Supreme Court.

George Hesketh, for the petitioner appellant.

R. T. Paget, Q.C., with *R. N. Hales*, for the respondents.

Cur. adv. vult.

November 5, 1952. [*Delivered by* LORD MORTON OF HENRYTON]—

This is an appeal by special leave from a judgment of the Supreme Court of Ceylon (Soertsz S.P.J. and Nagalingam J.) reversing a judgment of the District Court of Jaffna (Wijewardene A.D.J.).

The appellant is the brother of Arudchelvam (widow of Kumarakuru) who died on the 3rd July, 1943. The first respondent has been twice married. The appellant and Arudchelvam are children of his by his first wife, and he has had five children by his second wife. The second respondent is the only child of a sister of Arudchelvam who predeceased her. The appellant and the respondents are the only persons entitled to any property as to which Arudchelvam died intestate.

On the 17th February, 1944, the appellant filed a petition in the District Court of Jaffna (held at Point Pedro) for a declaration that he was entitled to take out probate as executor of the will of Arudchelvam dated the 28th June, 1943, whereby she devised and bequeathed all her property

to the appellant and appointed him executor thereof. To this petition the present respondents were respondents, the second respondent being a minor appearing by the first respondent as his guardian-ad-litem.

The first respondent filed a statement of objections and opposed the grant of probate to the appellant on the grounds that the document (marked P. 1) purporting to be the will of Arudchelvam was not executed by her, and that the signature thereto had been forged and that neither the attesting notary nor any of the witnesses to the document had been present when the document was said to have been executed.

The petition came on for trial on the 15th February, 1945, before the Additional District Judge of the said District Court. The hearing was resumed on the 5th April, 1946, and again on the 9th May, 1946, evidence being adduced on both sides. The learned judge reserved judgment. On the 10th December, 1946, he gave judgment in favour of the appellant, holding that the document P. 1 was the duly executed will of Arudchelvam. On the 10th December, 1947, the Supreme Court set aside this judgment and dismissed the petition for probate. From this decree the appellant appeals.

Counsel for the appellant urged that the issues in the case were issues of fact and that the trial judge had the great advantage of seeing and hearing the witnesses, but this advantage is perhaps not so great when the evidence is heard on three dates widely separated each from the other and when the judgment is written seven months after the last hearing.

The story told by the appellant and his witnesses Sabaratnam and Chelliah may be summarised as follows :—

The appellant said that his sister Arudchelvam, having been ill for some time past, had asked him on or about the 26th June, 1943, to find a purchaser for some land belonging to her which she desired to sell in order to raise money for her medical expenses. The appellant succeeded in finding a prospective purchaser in one Chelliah, a fisherman living nearby, and on the 27th June, 1943, an agreement was concluded whereby Chelliah was to purchase two lachams of land from Arudchelvam for the sum of Rs. 780 and the relevant deed was to be executed by the parties on the following day. On the night of the 27th June, 1943, Arudchelvam felt that she might not have long to live and at 1 a.m. on the 28th June, 1943, she asked the appellant to fetch a notary as she wished to make her will and at the same time to execute the transfer deed of the land to Chelliah. It should here be stated that at this time the first respondent was the manager of a school at Valvettiturai, and he and his second wife and his daughters by his second wife, the appellant and his wife, and Arudchelvam were all living in a building inside the school compound, and were occupying a row of three adjoining rooms opening on to a verandah. The room marked C. 2 on the agreed plan was occupied by the appellant and his wife, the next room C. 3 was usually occupied by Arudchelvam and her half-sisters, but according to the appellant Arudchelvam's bed was in room C. 2 on the night in question. The third room C. 4 was occupied by the first respondent and his wife.

In response to the request of his sister Arudchelvam the appellant went to the house of his father-in-law, one Selvadurai, and they proceeded together to the house of the witness Sabaratnam, a notary, to whom they gave instructions for the drafting of a transfer deed in favour of Chelliah. According to the evidence of Sabaratnam this transfer deed (the document marked D. 9.) was drafted in Sabaratnam's house at 4 a.m. on the 28th June, 1943, and the transferee Chelliah was not then present: although the appellant was not in possession of the title deeds of the land he was able to supply particulars of the boundaries of the land and the number of the relevant title deeds required for the drafting of the document D. 9. from information placed at his disposal by Chelliah, who in turn had obtained this information, according to the appellant, from certain of Chelliah's relatives who had previously bought parcels of adjacent land.

After the drafting of the document D. 9 the appellant, together with his father-in-law Selvadurai, the notary Sabaratnam and the latter's clerk set off for the school compound and on their way there they passed the house of the appellant's father-in-law where one Ramalingam was found seated outside the house. According to the appellant it so happened that Ramalingam had come there at 3.30 a.m. on the chance of seeing the appellant's father-in-law Selvadurai on some matter of business connected with timber. The appellant alleges further that he fetched the witness Chelliah who lived nearby and that the whole party, which was joined by Ramalingam and consisted in addition to Ramalingam of five other persons namely the appellant, his father-in-law, the notary Sabaratnam with his clerk and Chelliah, arrived at the school compound. They gained admission to the compound by unlocking the main gate of the compound by means of a key which the appellant had in his possession. They went to the room C. 2. Sabaratnam read out and explained the deed (D. 9). Arudchelvam thereupon demanded the purchase money, which was handed by Chelliah to Sabaratnam and by him to Arudchelvam. The deed (D. 9) was then signed by Arudchelvam, and Selvadurai and Ramalingam appended their signatures as witnesses. At the time the deed was being read out there were present in the room the appellant, his father-in-law Selvadurai, the notary Sabaratnam, the notary's clerk, Chelliah, Ramalingam and a certain woman. After the deed (D. 9) was executed Arudchelvam desired Sabaratnam to draft her will and on her instructions Sabaratnam drafted the alleged will P. 1 and the protocol thereof D. 10, which were then signed by Arudchelvam and attested by Chelliah and Ramalingam. In his evidence at the trial in the District Court Sabaratnam said that two pen holders had been brought by him and were used when the documents were signed. He attributed a difference in the appearance of the ink used for the signature of Arudchelvam on the deed (D. 9) from that of the signatures of the two attesting witnesses to the poor quality of the ink and explained that it had been necessary to shake the ink bottle from time to time. Sabaratnam added that the difference might be due to the pen used by Arudchelvam. There was a similar difference in the appearance of the ink used in writing the signature of Arudchelvam on all three documents D. 9, D. 10 and P. 1, to that used both for writing the contents of these documents and the signatures of the witnesses.

The first respondent in his evidence said :—

“ I generally get up from bed between 3 and 4 a.m. The deceased was occupying the room adjoining my room. Besides the deceased my other daughters also used that room. At that time my other daughters were not grown up girls. The wall between my room and the deceased's room was a half wall and it did not reach up to the roof. If anybody had gone to the deceased's room at about 3 a.m. or 4 a.m. I would have known. When I get up at about 3 a.m. my wife and children also used to get up and they prepare warm water for my bath because I am subject to catarrh troubles. Generally I go to the temple at about 5 a.m. and return from the temple at about 7 or 7.30 a.m. If anybody had come to my house between 3 a.m. and 5 a.m. I would have known. ”

Even if the first respondent was mistaken as to Arudchelvam occupying the room next to his on the night in question, it is strange that neither the first respondent nor his wife nor any of their daughters heard these six men enter and leave room C. 2 and carry on conversations therein. Further, the witness Iyengar, who is a Brahmin and Principal of the school and lives within the school compound, gave evidence as to his habits of early rising which, if it is accepted, makes it very unlikely that these six men could have passed and repassed his house on the morning in question without his knowledge. He also gave evidence that the appellant never had a key to the gate of the school compound.

Their Lordships feel that it is unnecessary to set out fully the evidence for the respondents or to comment upon the learned judge's reasons for accepting the appellant's story, because they think that certain documents produced by the first respondent show quite plainly that the story told by the appellant was false. These documents D. 1, D. 2, D. 3, D. 4 and D. 7 are letters and postcards written by Selvadurai to the appellant and other persons and their dates, contents and postmarks show, beyond reasonable doubt, that at the time when, according to the appellant's evidence, Selvadurai was taking part in this curious nocturnal expedition at Valvettiturai he was in fact at a place called Vavuniya, some eighty miles away. This documentary evidence was supplemented by the oral evidence of one Velupillai, an Irrigation Department clerk called by the respondents at the trial, who stated that Selvadurai stayed with him at Vavuniya “for about a week till 30th June, 1943”. The District Judge disbelieved Velupillai for reasons which seem to their Lordships unconvincing and dealt with the letters and postcards by saying “ The stamp of the postmark could easily have been obtained fraudulently with the connivance of an employee of the Vavuniya Post Office ”. Counsel for the appellant very properly stated that he was unable to support this observation.

It is also worthy of note that Selvadurai was present on the first day of the hearing at the District Court when the letters and postcards were produced in evidence. As from this date Selvadurai disappeared from his village and all attempts thereafter to effect service on him of a summons to attend the District Court failed. Moreover, Ramalingam, one of the

two witnesses to the alleged will, did not give evidence. His absence at the trial and his presence outside the house of Selvadurai at 3.30 a.m. about some timber business were not explained.

In their Lordships' view the Supreme Court rightly disbelieved the story told by the witnesses for the appellant. One other matter should be mentioned. On the 31st October, 1945, the District Judge issued a Commission to a handwriting expert at Colombo, Mr. E. T. MacIntyre, to examine the signature on the three disputed documents P. 1, D. 9 and D. 10, together with the signatures on four other documents admittedly signed by Arudchelvam, and to report whether in his opinion the signatures on the three disputed documents were written by the person who signed the four admitted documents. Mr. MacIntyre reported in writing that in his opinion the three disputed signatures were forgeries. At the trial he gave oral evidence to the same effect, and gave his reasons in full. No other expert witness was called, but the learned judge preferred his own view of the documents to that of Mr. MacIntyre and held that the signatures were genuine. The Supreme Court, on the other hand, thought that the appellant had entirely failed to prove that the document P. 1 was the duly executed will of Arudchelvam. Their Lordships see no reason to differ from this view and they will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.
