1939

Present : **Wijeyewardene and Nihill JJ.**

GUNASEKERE *v.* GUNASEKERE *et al.*

139—D. C. Kandy (Testy.), 26.

Last will—Proof of due execution—Presumption that the testator knew and approved of contents—Shifting of burden to objector—Bed-head tickets not a public document—Evidence Ordinance, s. 74 (Cap. 11).

Where the propounder of a last will proves the due execution of the document, a presumption would arise that the testator knew and approved of its contents, unless suspicion *a priori* attaches to the document by its very nature.

If, after proof of due execution, there is nothing intrinsically unnatural in the document, the burden is shifted to the objector to show that there was undue influence or fraud or that the deceased was not of a sound disposing mind when he made the will.

Held, further, that where the testator is able, while instructions are given to the will, to address himself to the matter and indicate his mind, it would not be fatal to the will that he may not have been able to follow all its provisions when it was read out to him before signature.

Quaere, whether a bed-head ticket is a public document within the meaning of section 74 of the Evidence Ordinance ?

[1] *(1904) 7 N. L. R. 182.*

THIS was an appeal from an order of the District Judge of Kandy. The appellant applied for probate to a document purporting to be the last will of Don Adirian Appuhamy. The appellant was named executor in the document, which devised the whole of the estate to him and his brother. The objector-respondent who was the brother of the deceased opposed the grant of probate. The learned District Judge refused probate.

H. V. Perera, K.C. (with him *L. A. Rajapakse, Dudley Senanayake* and *C. C. Rasa-Ratnam*), for petitioner, appellant.—The general rule is that the *onus-probandi* in every case is upon the party propounding the will, and he must satisfy the conscience of the Court that the instrument so far propounded is the last will of a free and capable testator. (*Barry v. Butlin*[1]; *Fulton v. Andrews*[2].) The will is, on the face of it, a rational disposition of the small estate of the deceased, substantially amongst his two favourite nephews, as otherwise this small estate may have had to be divided amongst so many nephews.

Therefore if a will is natural on the face of it, it is presumed, in the absence of evidence to the contrary, to be valid. (*Foot v. Stanton*[3].)

The notary received clear instructions when he was first called in, and in pursuance of the instructions the notary prepared the will, brought it and read it over to the deceased, who understood it as the one in pursuance of his instructions. This is borne out by the evidence. A thumb-impression had to be taken owing to the trembling of the hand of the deceased. *Parker v. Felgate*[4] and *Perera v. Perera*[5] (a judgment of the Privy Council) are authorities for the proposition that it is not essential that the testator should at the time of his signing the will be mentally competent, if the instructions were given while he was mentally competent and the will is prepared in accordance with them, and if, at the time he signs the will, he understands that it is the one for which he gave instructions. Then the will is valid, although, at the time of signing it, he may not be able to understand the provisions in detail. (*Jarman on Wills, p. 54.*)

Further, *Voet* (*28.1.36*) says, that not only healthy but also those situated in the struggle of death can rightly make a will, provided that they are still sound in mind.

All the circumstances in the case point to the disposition of the property by the deceased as a rational act and that he had testamentary capacity in the way that the law has always upheld.

N. Nadarajah (with him *E. B. Wikremanayake*), for objector-respondent.—The question is essentially a question of fact and the finding of the trial Judge should not be disturbed. See *Fradd v. Brown & Coy. Ltd.*[6] and *Powell & Wife v. Streatham Manor Nursing Home*[7]. The deceased was a very old man. The medical evidence is that for some days prior to the execution of the will the testator's brain capacity was impaired and he talked nonsense. This is corroborated by the bed-head tickets which are

[1] *2 Moo. P. C. 480.*
[2] *L. R. 7 ; H. L. 448.*
[3] *1 Dick 268.*
[4] *8 L. R. P. D. 171.*
[5] *(1901) A. C. 356.*
[6] *20 N. L. R. 282.*
[7] *L. R. (1935) A. C. 243.*

admissible as public documents. It is clear from the evidence that the deceased talked nonsense even at the execution of the will. His reference to the Bodhisath clearly shows that his mind was wandering. The presence of the witnesses to the will in hospital at that time is suspicious. The evidence of the notary has not been accepted by the Judge. The burden was on the propounders to satisfy the Court that the testator, when he executed the will, was aware of what he was doing. The Court has not been satisfied and it cannot be said in the Court of Appeal that it should have been satisfied. See *Rajasuriar v. Rajasuriar*[1]; *Mitchell v. Thomas*[2].

N. E. Weerasooria, K.C. (with him *H. A. Wijemanne*), for Syrus Gunasekere, respondent to the appeal.

Cur. adv. vult.

November 16, 1939. NIHILL J.—

This is an appeal from an order of the District Judge of Kandy refusing probate to a document purporting to be the last will of Don Adrian Appuhamy, who died on December 31, 1937. The appellant who was the petitioner for probate was named executor in the document which devised the whole of the deceased's estate equally to the appellant and his brother who is the respondent in these proceedings. The objector-respondent, Don Allis Appuhamy, is a brother of the deceased.

The estate which consists of landed property is not a big one, something in the region of Rs. 2,000. It is clear from the judgment appealed against that the learned Judge took an early view that there was something *a priori* unreasonable and unnatural about the terms of the will propounded, which at once raised a cloud of suspicion that could only be dissipated by strong evidence that the will sought to be proved was the clear act and deed of a legally competent testator.

Now the learned Judge's careful and exhaustive review of the authorities bearing on the onus of proof lying on the propounder in such circumstances is unimpeachable, but I find a difficulty in accepting the original hypothesis.

The facts bearing on this point are shortly these. The testator was an old man, eighty-four years at least if not older, unmarried and without issue; the beneficiaries are his nephews. He had other brothers and a sister living and these had children. There is evidence that the two beneficiaries had been special favourites of the testator, that at times they had lived with him, worked for him and generally paid him attention.

Is there anything very remarkable or strange that this old bachelor should have wished to single out these two amongst his nephews for his beneficence and, having regard to the modest nature of his estate, was it an unnatural decision if he formed the view that it was better to leave two of his nephews a small but satisfactory legacy rather than to divide his properties *pro rata* amongst all his other nephews and nieces with whom he appears to have had little to do ?

To my mind and in the light of my experience of the ways of testators—other than Sinhalese—I should not have thought so, and my brother whom I have consulted assures me that he can see nothing in the testator's disposition of his property which would at once strike a Sinhalese as an

[1] *39 N L. R. 494.*

[2] *6 Moores' P. C. 137.*

outrage to family conventions. If this be so, then the learned Judge, I think, erred in placing so heavy a burden as he did on the shoulders of the propounder.

Certainly the propounder had to show that the document produced was the properly attested and valid act of the testator but if he proved the due execution of the will, there was a presumption that the testator knew and approved of its contents, unless suspicion *a priori* attached to the document by its very nature. If there was nothing intrinsically unnatural in the document, then after proof of due execution the burden shifted to the objector to show that there was undue influence or fraud or that the deceased was not of a sound disposing mind when he made the will.

It must be admitted that there were circumstances surrounding the making of the will from which a doubt as to the soundness of the testator's disposing mind might reasonably arise and the Court below was undoubtedly right in addressing itself to this question.

However, as Mr. Perera has stressed there is a world of difference between a doubt as to testamentary capacity which may be dispelled by trustworthy evidence and suspicions engendered by the character of the document itself, suspicions involving all concerned with the preparation of the will and those who benefit under it.

The problem in this appeal, as I see it, is for us to decide whether on the evidence the learned Judge was justified in coming to the conclusion that the evidence of the notary who took the instructions and attended to the execution of the will together with that of the witnesses has been overborne by the medical evidence called by the objector.

It will be necessary to consider in detail the real probative value of the medical evidence but before doing so I think it will be convenient to set out the facts which are common ground.

Don Adirian Appuhamy was admitted to the Kandy Civil Hospital on December 13, 1937, where he occupied a bed in a paying ward. He was suffering from a form of kidney disease which affected his bladder and made it difficult for him to pass urine. It was a painful malady and the treatment was probably as painful as it involved injections and frequent catheterising. For so old a man his position was obviously serious from the start. On December 22 his condition was so unsatisfactory that the Superintendent of the Hospital telegraphed Don Baron Gunesekere asking him to come. Now Don Baron whom I will hereafter call the petitioner is the appellant and propounder of the will.

In passing it should be noted that it was the petitioner who has made the arrangements for the old man's admission to hospital which explains no doubt why the telegram was sent to him. It had its effect for on the next day the petitioner arrived at the hospital with a notary and the alleged will was executed.

I will, however, deal separately in detail with the events which took place on December 23. Following December 23, Don Adirian's condition remained much the same with possibly a slow deterioration. On December 29 he was removed from hospital by his relatives. On December 31 he died.

Now to return to December 23. On the morning of that day according to Mr. W. J. Wijewardene, a young Proctor and Notary, the petitioner came to his office with Proctor M. J. Perera. It appears that the petitioner had been to see Mr. Perera first but Mr. Perera not being a Notary Public passed on the business to Mr. Wijewardene.

In consequence of what he was told, Mr. Wijewardene went with the petitioner to the Kandy Civil Hospital and saw Don Adirian at about 11 A.M. From this point the notary's evidence becomes of first importance. He says that he had an interview with Don Adirian which lasted about twenty minutes, and that during that time although the old man was obviously weak and feeble, he was able to give him clear instructions in regard to the making of his will.

It has been regarded as a suspicious circumstance that Mr. Wijewardene on his own admission took no notes of the instructions. I think too much can be made of this. It was a very simple will and the instructions were given to a young man whose mind was not overburdened with the weight of his professional practice. Even if he received some prompting from the petitioner as to names and addresses this would be immaterial provided he can be believed when he says that Don Adirian clearly indicated to him what his intentions were with regard to the disposition of his property.

Having got his instructions Mr. Wijewardene returned to his office and immediately set about drafting the will. This done he returned to the hospital about 1 P.M. again with the petitioner. He says he read over and explained the will to the testator in the presence of two witnesses. He then tried to get the testator to sign but his hand trembled so much that he was unable to form the characters properly, so an ink pad was obtained and a thumb impression taken. Then the two witnesses signed the document. Again at this second interview Mr. Wijewardene has sworn that he was satisfied that the testator understood what he was doing.

Now Mr. Wijewardene's evidence, if it be trustworthy, so strongly supports the contention that this will is valid, that it is not surprising that an attempt was made at the trial to attack his bona fides. I do not think I need consider in detail the material on which this attack was based. It was persisted in only in a half hearted manner during the hearing of the appeal and it was a matter upon which the learned Judge himself came to no definite conclusion.

Much has been said about this young notary's inexperience but that he was a party to a conspiracy in collusion with the beneficiaries has certainly not been established nor has that been seriously persisted in. It is only fair to this young professional man to place this on record.

The learned Judge thought that common prudence would at least have prompted Mr. Wijewardene to call in one of the hospital doctors to certify to the old man's competency. Possibly a more experienced man would have done this but if Mr. Wijewardene is speaking the truth his suspicions were not aroused. He had received rational and explicit instructions at 11 A.M. and at 1 P.M., although in a feeble condition and unable to sign his name properly, the testator seemed able to understand what was said to him. A shakiness of fist in an aged invalid does not necessarily connote irrationality.

We now come to the evidence of the two witnesses to the will, Ekanayake Appuhamy and Rajapakse. Neither of them was present at the first interview between the testator and Mr. Wijewardene, but their evidence with regard to the testator's condition at the second interview is important. Ekanayake Appuhamy stated that he was in the testator's room for about half an hour before the notary came on the second occasion and that he was talking to him. He says that the testator began to shiver when he was trying to sign the will and that he appeared nervous. He stated also that the testator asked in whose favour the will was drawn and that the petitioner replied that it had been drawn in favour of himself and his brother. The testator then said, " That is right, you are not the only beneficiary. It should be given to both of you ".

Then followed a remark by the testator which it is contended shows very clearly that the testator's mind was wandering, for according to this witness he inquired " Is our Bodhisath here ? " Should he also not be given something ? "

It is contended that the introduction of this holy name in such circumstances is clearly indicative of the testator's irrationality. The remark was not heard by Rajapakse or apparently by the notary.

Ekanayake Appuhamy confessed that he did not understand what the remark meant at the time but later he thought it might have referred to Don Cyrus, the respondent. Rajapakse, whose evidence did not impress the learned Judge, said that he spoke to the testator who was able to answer questions and that he heard the notary explain the will to the testator before he signed it.

Now the evidence of these two witnesses leaves an impression that the old man's condition may have been worse at the time of the signing of the will than at the time the instructions were given, but there is nothing to suggest that he was *in extremis*. Both these witnesses were at pains to suggest that their presence at the hospital that afternoon was more or less an accident, but even if it be assumed against the petitioner that he had asked them to be there, I do not know that the case against the will is carried much further. It seems to me quite likely that the brothers expected a will in their favour and that they were determined to give the old man every facility for its making and execution.

The crucial point is however the condition of the testator when he gave his instructions. If he was then able, as Mr. Wijewardene says he was, to address himself to the matter and indicate his mind, it would not be fatal to the will that he may not have been unable to follow all its provisions when it was read over to him before signature. See *Parker v. Felgate* [1] cited by Lord Macnaghten in the Privy Council appeal of *Perera v. Perera* [2].

We are thus left with the final issue of determining whether the medical evidence led by the objector is of such a nature as to force us to the conclusion that the notary, although honest, was grossly deceived when he assumed that the testator had a disposing mind at 11 A.M. on December 23.

[1] *8 P. D. 171 ; (1901) App. Cases 361.*

[2] *(1901) A. C. 356.*

This brings me to the medical evidence. It consisted of Dr. E. L. Christoffelsz, the Superintendent of the Kandy Civil Hospital, and Dr. Somasunderam, the senior visiting physician to the hospital, together with a document known as a "bed-head ticket". As regards the admissibility of this document and the use to which it was put I shall have a good deal to say. The point is of importance because the evidence of the two medical men and the conclusions they reached were based to a very large extent on data supplied by this document.

So far as Dr. Christoffelsz goes his evidence was really purely formal. He produced the "bed-head ticket" and gave the Court information about the general hospital rules with regard to the admission of patients and visitors. He did not have anything to do with the testator in a strictly medical sense, as he was under the charge of Dr. Somasunderam. That Dr. Somasundaram is an experienced medical man there can be no doubt and his opinions are entitled to respect but the difficulty in assessing the value of his evidence is to distinguish between mere generalization and particular conclusions based on his own observations of the patient.

Never at my time did he examine the patient with the specific end in view of judging his rationality nor was he able to speak from first hand knowledge as to what the patient's condition was like on the morning of December 23. It is clear that throughout his evidence he was relying on the entries on the "bed-head ticket". This is not surprising; the doctor stated that he might see two hundred patients a day and he was giving evidence six months after this particular patient had left the hospital.

Now if the "bed-head ticket" was a record of Dr. Somasunderam's own observations of the patient from day to day, there would be no difficulty in regard to it for the doctor would have been entitled to refresh his memory by referring to it. Unfortunately it was not. It was only partly so and we have no evidence as to which items were entered on the "bed-head ticket" by Dr. Somasunderam and which by someone else, or if by some one else, whether they were read by Dr. Somasunderam at the time or soon afterwards and known by him to be correct.

It appears that at the Kandy Civil Hospital there are house surgeons, junior men, whose duty it is to keep the patients under supervision and attend to them when necessary. Dr. Somasunderam, as the senior visiting physician would visit his patients twice a day and prescribe suitable courses of treatment in consultation with the house surgeons, but so far as observation is concerned, it is clear that the house surgeons would have better and more protracted opportunities of studying a patient than the busy visiting physician on his daily round of two hundred beds.

It is unfortunate that we have not the assistance of the house surgeons in determining the testator's mental condition because they were not called. We have the "bed-head ticket" on which some of their observations were recorded but on the view that I take on the probative value of this document, this tends to confuse rather than to clarify the case.

Now the learned District Judge admitted the "bed-head ticket" or rather a certified copy of it because he held it to be a "public document" within the meaning of section 74 of the Evidence Ordinance. If this was correct it involves, to my mind, an alarmingly wide application of the section but this is not a point that I propose to discuss here as it is not

necessary to do so, for even if the document was rightly admitted in the form it was, the use to which Dr. Somasunderam was allowed to put the "bed-head ticket" was objectionable. He regarded it as data on which he could construct a theory as to the testator's mental condition on the morning of December 23, that is to say, that he accepted the recorded observations of some other person as accurate because it was entered on the "bed-head ticket".

Now if it be accepted that a "bed-head ticket" being a public document, can be proved by the production of a certified copy, what is it that the document proved? It proved that certain observations about the patient were recorded by certain medical officers on various dates, it did not prove that those observations were in fact accurate.

There is no presumption in any section of the Evidence Ordinance relating to public documents which could take the documents as far as that. A "bed-head ticket" is not placed in the same category as a map, plan, or survey signed by the Surveyor-General the accuracy of which can be presumed by section 83, nor are the recorded observations of a house surgeon included in the scope of section 78.

It would be patently absurd if it were so. It follows then that in so far as Dr. Somasunderam went outside the facilities allowed him by section 159 of the Evidence Ordinance, his evidence was inadmissible and of no probative value. Quite clearly he did so and it is for this reason that I am unable to accept his conclusions as to the probable state of the testator's mind when he made the will.

From Dr. Somasunderam's recollections of the patient all that one can safely deduce is that he was suffering from a malady which does induce a general toxic condition and that such a condition may impair brain capacity to some extent. He also said he remembered that on some of his bed-side visits the patient talked nonsense but Dr. Somasunderam also conceded that even up to December 27 the testator was at times "giving me rational answers". In the face of this and bearing in mind that Dr. Somasunderam did not examine the patient for brain capacity on December 23, and that he has no first hand knowledge of his actual condition at 11 A.M., it cannot, I consider, be said to be proved that the testator had not a disposing mind at that hour.

There was another little piece of evidence by Dr. Somasunderam which is interesting but of no great moment. A day or two after the testator had been admitted to hospital somebody came to the hospital and asked for a certificate as to the patient's mental condition. The doctor asked for a fee in advance and the person went away and never returned. At that time, nor indeed at any time afterwards, had Dr. Somasunderam examined the testator in order to ascertain the state of his mind and he told the person who came to him that he could not say what the certificate would be like. Dr. Somasunderam cannot recollect who the person was. I suppose the suggestion is that it was the petitioner or his brother and that this shows an anxious and even guilty mind and a determination to prepare the ground against possible objectors. I doubt if this is a justifiable inference.

From the circumstances in which these two brothers had associated with their uncle, it is quite likely that they expected a will in their favour and knew also that if it came off they could expect trouble from a certain quarter. If then they were prepared to risk a possibly unfavourable medical certificate, this was hardly the act of conspirators determined to get a will out of the old man by fair means or foul.

Finally I will touch on two further points of fact urged on behalf of the objector respondent. First of all it is said that the notary's account of the interview at 11 A.M. is either unworthy of credence or that it shows that the testator's mind was wandering. It appears that he took twenty minutes to give instructions which the notary confesses could have been given in a couple of minutes. To my mind it would have been far more suspicious had he only taken a couple of minutes and it does not need much imagination to conjure up what play would have been made upon it by the objector had the interview in fact been so limited in time; the entry of the notary into the ward already provided with instructions by the petitioner, a hurried question or two, hardly waiting for an answer the notary is off hot haste to prepare the document. It seems to me consistent with the truth of the notary's account that the old man should have paused, should have indulged in circumlocution; we all know that is the way the very aged have.

Then secondly there is the remark about " Bodhisath " to which I have already referred. Certainly that may be evidence of some lack of grip on the situation by the old man towards the end of the second interview and I have already dealt with this; but it has another significance also. It does not fit into the general theory of a conspiracy because evidence of it was volunteered by the first witness to the will, a gratuitous offering to the objector which I can hardly believe would have been made if Ekanayake was in fact the mere tool of the petitioner.

To summarize my conclusions therefore I would say :—

(*a*) That this will on the face of it is not an unnatural disposition thereby invoking suspicion.

(*b*) That the " bed-head ticket " introduced and used in the way it was involved the use of inadmissible evidence, and that its use should have been limited to the refreshment of Dr. Somasunderam's memory alone.

(*c*) That the evidence of Mr. Wijewardene and the witnesses to the will establishes the presumption that it was the valid act of the testator.

(*d*) That the medical evidence tendered by the objector does not remove the presumption because it does not show that the testator could not have had a disposing mind at the time.

One last point I should mention. It has been contended that the failure of the petitioner to go into the witness box is by itself a very suspicious circumstance, but the question is what is it in this case which the circumstances cause one to suspect ? Undue influence has not been alleged. He had a burden of proving mental competency which he elected to discharge by the evidence of the notary and the witnesses to the will. Perhaps he might have added further weight to that testimony but if that testimony has not been dislodged by contrary testimony then the fact that the petitioner did not share in the testimony is immaterial.

I would, therefore, for the reasons I have given, allow the appeal with costs and admit the will to probate.

In view of my conclusions it is not necessary for me to consider the position of Cyrus Goonesekere, the respondent, on whose behalf Mr. Weerasooria raised an objection in law on certain grounds to the proceedings in the District Court so far as they concerned him.

WIJEYEWARDENE J.—

I have had the advantage of reading the judgment of my brother and I agree that the learned District Judge should have admitted the will to probate. I would allow the appeal and direct the objector-respondent to pay the petitioner-appellant the costs of this appeal and the costs of the proceedings in the District Court.

Appeal allowed.