Present : **Akbar S.P.J. and Koch J.**

SINNAPODIAN *v.* MUTTAN *et al.*

144—D. C. Jaffna, 8,484.

Last will—Testamentary capacity—Minority of testator—Burden of proof—Wills Ordinance, No. 21 of 1844, ss. 1 and 2.

Where the validity of a last will is contested on the ground of the minority of the testator the burden of proving that the testator was of full age is on the person propounding the will.

THIS was an application for probate of the last will and testament of one Ratnam in which he had bequeathed all his property to his father the petitioner, respondent. The respondents, who are uncles of the deceased, opposed the grant on the ground that the deceased was a minor at the time he made the will. The learned District Judge after hearing evidence held that in case of doubt the Court should presume in favour of majority.

R. L. Pereira, K.C. (with him *N. Kumarasingham*), for respondents, appellants.—The burden of proving testamentary capacity is always on the propounder of the will. See *Smee v. Smee*[1]. Capacity includes age also. Under our law a will made by a person who is under 21 years of age is not valid. (Section 2 of Ordinance No. 21 of 1844). A person must be competent to make the will—see section 1 of Ordinance No. 21 of 1844. If the testator is not competent, the document cannot have in law the force of a will. In English law minority is dealt with as an incapacity—see *Halsbury, vol. 28, Art. 1048; British & Empire Digest, vol. 44.* The burden of proof is on the propounder. (Woodroffe & Ameer Ali on Evidence (*8th ed.*), *p. 733.*) *Krishnamachariar v. Krishnamachariar*[2] is a case in point. See also *Bhagirathi v. Viswanath*[3].

[1] *5 P. D. 84.* [2] *(1915) I. L. R. 38 Madras 166.* [3] *7 Bomb. 92*

In this case neither the birth of Ratnam nor the death of Mudaly was registered. The certificates of registration would have been the best evidence to prove these facts. Where a Statute casts a duty on a person and penalizes the nonperformance of that duty the presumption is that the provisions of the law have been complied with. The Registration of Births and Deaths Ordinance casts such a duty and contains such penal provisions. Proof of age otherwise than by the production of the certificate of registration of birth requires very strong and cogent evidence. A horoscope cannot supply such proof nor a motor car driving licence.

H. V. Perera, for petitioner, respondent.—The law applicable to the proof of a will is contained in section 524 of the Civil Procedure Code. All heirs will be cited as respondents. All that the propounder has to do is to place before the Court evidence "proving that the will was duly executed according to law", *i.e.,* according to the formalities that have been prescribed by law. If minority is pleaded the party pleading it must prove it, in the same way as, where undue influence is alleged the party alleging it must prove it. See *Hutley v. Grimstone* [1], *North v. North* [2], *Riding v. Hawkins* [3]. The petitioner has discharged the burden on him by proving due execution under section 524 of the Civil Procedure Code.

R. L. Pereira, K.C., in reply.—What is to be proved is not merely due execution, but execution according to law. Under our law a will made by a minor is invalid and a document will not be considered a will in law unless the person who made it was competent to make it. The propounder must affirmatively establish the "testamentary competency" of the testator.

Cur. adv. vult.

May 29, 1936. AKBAR S.P.J.—

The appellants who are the uncles on the mother's side of the deceased, S. Ratnam *alias* Swakin, objected to the issue to the respondent (father of the deceased) of probate of the will of the deceased, in which Ratnam had bequeathed all his lands to his father. If not for the will the properties would have devolved on the brothers of the deceased's dead mother Seethavy as the lands were her dowry property. The ground of objection was that the deceased was under 21 at the time he made the will.

Under section 1 of Ordinance No. 21 of 1844 it is lawful for every person competent to make a will to devise, bequeath, and dispose of by will all his properties to any person he likes. By section 2 no will made by a male person under 21 shall be valid. The result of sections 1 and 2 is that a person under 21 is to be deemed to be incompetent to make a will. According to the petitioner-respondent the deceased was born on November 25, 1910, but no birth certificate was produced. As the will was made on September 14, 1932, the deceased would be 22 years of age on November 25, 1932, and the will would be valid. The appellants on the other hand produced a birth certificate of a person called Mudaly, a son of the petitioner-respondent by Seethavy, in which the date of birth is given as August 16, 1912. The first appellant gave evidence,

[1] *5 P. D. 24.* [2] *25 T. L. R. 322.* [3] *14 P. D. 56*

which was supported by the Police Vidane of Mallakam, that this certificate referred to the deceased and that the peitioner had only two children by Seethavy, namely, Ratnam *alias* Mudaly and a daughter whose name is given in the birth certificate as Parky (R 5) who was born on October 26, 1921, and died on December 4, 1922 (R 3). The name of this girl given in the death certificate is S. Pakiam. According to the first appellant's evidence Mudaly was usually called by the name Retnam, just as Parky became to be called Pakiam. This evidence was countered by the petitioner in this way. He stated that he had two sons Ratnam and Mudaly and that Mudaly died within a month of his birth, but he produced no death certificate of Mudaly to corroborate his evidence. The net result of petitioner's evidence is that he has not produced the birth certificate of his alleged eldest son Ratnam nor the death certificate of his alleged second son Mudaly. He has, however, called an astrologer to prove that he prepared a horoscope of the petitioner's son Ratnam in which the date of birth is given as November 24, 1910, and ola leaves of the horoscope have been produced.

The petitioner also produced a motor car driver's certificate issued to the deceased in the Federated Malay States on October 4, 1930, in which deceased stated he was 20 years. The will was made on September 14, 1932, and was attested by K. V. Sinnathurai, Notary Public. On October 3, 1932, the deceased signed a mortgage bond together with his father before another Notary in favour of the fourth respondent, another uncle of the deceased. On the same day the deceased sold a land to one M. Murugesan for Rs. 100. These deeds P 5 and P 6 have been put in evidence on behalf of the peitioner. The District Judge makes a point of the fact that only two of the four uncles have opposed the issue of probate. But it will be seen that it was to the interest of the fourth respondent not to oppose probate as he had already committed himself to the document P 5. As regards the other uncle Nagan according to petitioner's petition dated July, 1935, Nagan died 1½ years ago about the end of 1933 and his heirs were substituted in this case. So that Nagan was not alive to enable him to participate in this inquiry which began by the filing of petitioner's petition on January 2, 1934. The petitioner further stated that he was intimate with Seethavy before marriage and that when a marriage was proposed P 1 dated January 23, 1910, was executed by the parents of Seethavy in her favour. He also said that he insisted on a dowry deed after the marriage, when Seethavy was pregnant of Ratnam, that he left his wife owing to the refusal of Seethavy's parents to execute a dowry deed and that two or three months after Ratnam was born the dowry deed P 2 (January 1, 1911) was executed. It will thus be seen that the evidence was well-balanced and the decision of the question of fact was beset with many difficulties.

Unfortunately the District Judge has not discussed the evidence given by the witnesses but has contented himself by saying that he thinks the balance of evidence would tend to show that the deceased was a major. This sentence is immediately preceded by the following :—

"I think in a case like this where the will is contested only on the ground that the deceased was not a major at that time and if there is any doubt whether the deceased was a major or not, I think the benefit of the doubt should be on the side of the majority."

The judgment of the District Judge was seriously affected by his view that in case of doubt whether deceased was a major or not the benefit of doubt should be in favour of majority. The question that I have to decide is whether this view of the law was right, for if the District Judge was wrong it is clear to my mind that he would have given judgment in favour of the appellants. A case exactly in point is the case of *Krishnamachariar v. Krishnamachariar*[1] in which both the Chief Justice and Mr. Justice Tyabji were of opinion that where the defence alleged minority as invalidating a will, the onus is on the party setting up the will to show that the person who made the will was of full age when he made it. Both the Judges could see no reason why the rule governing testamentary incapacity by reason of mental deficiency should not apply when the defence alleged is testamentary incapacity by reason of minority. Although this Indian case is not binding on me, I can see no reason why I should not follow it. Our Wills Ordinance states that a person competent to make a will may leave his property to anyone and the same Ordinance says that a will made by a person under 21 is invalid. This can only mean, in my opinion, that a person under 21 is not competent to make a will and that therefore minors have no testamentary capacity or "testamentary competency" in the words of Bertram C.J. in *Andrado v. Silva*[2]. Apart from the fact that the District Judge has wrongly misdirected himself on the law on this question of burden of proof, the evidence when read carefully convinces me that the petitioner-respondent has failed to discharge the burden which was on him. The driving licence proves nothing, as most young men are anxious to overstate their age for the purpose of getting the licence. I may mention one fact. R 2, the death certificate of the deceased, gave his age as 21 on his date of death, *i.e.*, May 5, 1933, and the informant was the petitioner. If the petitioner knew that his son was born on November 24, 1910, as he had his son's horoscope with him why did he give his age as 21, which would fix his date of birth as May, 1912? The learned District Judge has not considered this point and he has gone wrong in his view that only two of the uncles have opposed the will. And he has ignored the evidence of the Police Vidane. I would set aside the order of the District Judge and allow the appeal with costs here and the Court below.

KOCH J.—

I am in entire agreement with my brother's observations and his decision on the evidence in this case but I should wish to be permitted to briefly express my own reflections on the very important question of law that has arisen on this appeal. So far as I am aware, there is no local authority on the point. The learned District Judge would appear to have been of opinion that there is a presumption in favour of the majority of an executant of a will in proceedings in which such a will is sought to be proved. I do not agree. The Wills Ordinance, No. 21 of 1844, in section 1 says that "it shall be lawful for every person competent to make a will to devise, bequeath, and dispose of by will

[1] *(1915) I. L. R. 38 Madras 166.*

[2] *22 N. L. R. 4.*

all property and, &c.", and in the next section it says that "No will made by any male under the age of 21 years . . . . shall be valid." It would follow, generally speaking, that the propounder who produces a will in Court and seeks probate of it should satisfy the Court that the will has been made by a "person competent to make it", unless there is anything in the context of the Ordinance to the contrary. There is nothing that I can so find that would lead me to infer that this is not a necessary element which has to be established before probate is granted. For example, take the hypothetical case of no respondent to the proceedings appearing, will the Court be justified in granting probate without satisfying itself in regard to the competency of the testator to make a testamentary disposition ? Is it not the duty of the Court, before holding the will proved, to ascertain whether it is a legal will, *i.e.*, valid in law ? For otherwise, its order may deprive the intestate heir of his legal rights. I do not sympathize with the argument that the intestate heir will under section 524 of the Civil Procedure Code be necessarily made a party and he will thereby be afforded the opportunity of disproving the competency of the testator. No doubt he would *ex facie* have this opportunity but I am not so sure that in reality every intestate heir will necessarily be before the Court. Section 524 only requires the propounder to set out in his petition "the heirs of the deceased to the best of his knowledge". Further, one can conceive of a case where the sole intestate heir is an infant of tender years and his *guardian ad litem* may be acting collusively with the propounder, for the guardian personally will have nothing to lose thereby.

Chapter XXXVIII, of the Civil Procedure Code sets out the procedure for proof of a will. I have already referred to section 524 but I would wish in this connection to refer to the last paragraph of that section, which is to the effect that the propounder should place before the Court evidence "proving that the will was duly executed according to law". Mr. H. V. Perera submitted that these words confined the proof to the act of actual execution, *i.e.*, that the formalities that have been prescribed by law as to the actual act of execution only should be established, viz., the attestation by and in the presence of a notary and two witnesses or by and in the presence of five witnesses and, &c., I am not so sure that the position is so clear as all that, although I quite appreciate the reasonableness of the argument. The words are, firstly, "proving the will". The document produced therefore must be a "a will", that is to say, it must be the act of a competent person, for otherwise, under the Wills Ordinance, No. 21 of 1844, it is not a will although it may purport in form to be one. Secondly, the words continue "was duly executed according to law". The words are not merely "was duly executed" but "was duly executed according to law". The Ordinance I have just referred to says that according to law what purports to be a will is not a valid will if executed by a minor, *i.e.*, is not a will in the eye of the law, so that the counter argument may well be that a Court before it holds the will proved has, under section 524, to satisfy itself not only in regard to the actual act of execution but also in regard to its being in law what it purports to be, *i.e.*, a will. So much for the help the Civil Procedure Code renders us.

In English law I find that *Halsbury* as well as *Jarman* and *The Empire Digest* in treating with this matter under the head of "Testamentary Capacity"—which is the same as "competency to make a will" as described by our Ordinance—groups minority with unsoundness of mind and other incapacities, and *Halsbury, in vol. 28, Art 1048,* thus expresses the position :—

> "Generally speaking, the law presumes sanity, and no evidence is required to prove the testator's sanity if not impeached. When, however, it is impeached and the whole case is before the Court on evidence, the Court must pronounce against the validity of the will unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind at the time of execution."

He depends on ample authority for this proposition. While Halsbury can in reason say that the law presumes sanity, it cannot with equal force be said that the law presumes majority, but however this may be, the law would appear to be that in case the question of sanity arises and the matter is before the Court the propounder must affirmatively establish that the testator was of sound mind at the time of execution.

Applying the principle to what I consider is a stronger case, viz., a case in which the "majority" of the executant is impeached, I have little hesitation in saying that the "majority" has to be affirmatively established by the propounder and that is the case before us.

In probate suits in England the party on whom the onus lies begins and it has been held that the party propounding a will begins if either its validity or the competency of the testator be impeached (*Smee v. Smee*[1]), but if these points are admitted and fraud, undue influence, subsequent revocation and, &c., be pleaded, the party so pleding begins (*Hutley v. Grimstone*[2], *North v. North*[3], *Riding v. Hawkins*[4]).

Mr. R. L. Pereira referred us to the Indian law and instanced the case of *Krishnamachariar v. Krishnamachariar*[5]. Tyabji J. expresses himself thus: "In my view of this case, however, this circumstance ought not to affect our decision because I think that it is for the applicant in probate proceedings to prove that the testator was competent to make the will which is propounded". While White C.J. says, "So in view of what I have said, if it is necessary to decide this matter, I should be strongly inclined to hold that once the defence of minority is set up, it is for the party propounding the will to prove that the alleged testator was a man of full age." This decision again bears out the general principle—putting the case at its lowest—that in proceedings in which the capacity of the testator is impeached, it is for the propounder to affirmatively establish the competency of the maker of the will sought to be proved.

I agree with my brother that had the learned District Judge a clear conception of this rule of law his decision might in every probability have been in favour of the appeal.

The appeal will be allowed with costs in both Courts.

[1] *5 P. D. 84.*
[2] *5 P. D. 24.*
[3] *25 T. L. R. 322.*
[4] *14 P. D. 56.*
[5] *38 Madras 166.*