Present : **Jayetileke S.P.J. and Gratiaen J.**

ANANTHATHURAI, Appellant, *and* KANAGARATNAM, Respondent

S. C. 58—D. C. (Inty.) Jaffna 84

Last Will—Variation by Codicil—Person writing Codicil taking benefit under it—Suspicious circumstance—Duty of Court.

Where a person who writes or prepares a last will takes some benefit under it this fact gives rise to a suspicion that the last will does not express the mind of the testator. A Court ought, in such circumstances, to be vigilant in examining the evidence in support of the instrument and should not pronounce in its favour unless the suspicion is removed.

APPEAL from a judgment of the District Judge, Jaffna.

F. A. Hayley, K.C., with *N. Kumarasingham*, for the respondent appellant.

H. V. Perera, K.C., with *S. J. V. Chelvanayakam, K.C.*, *H. W. Tambiah*, and *C. Vanniasingham*, for the executor respondent.

Cur. adv. vult.

June 14, 1948. JAYETILEKE S.P.J.—

Selvanayagampillai, wife of Sangarapillai of Tellipallai West, died on November 29, 1942, having made her will P 1 dated May 9, 1942, by which she devised 21 lands absolutely to her eldest son Kanagaratnam, the respondent, and seven lands absolutely to her younger son Ananthathurai, the appellant, and the residue also to Ananthathurai subject to the condition, that if he married and had children by the marriage, the said residue should devolve on the children, and, if he died without leaving any lawful children, it should devolve on the children of the respondent.

On January 27, 1943, the respondent applied for probate of P 1. On March 15, 1943, the appellant produced X 1 and the duplicate X 2 dated September 23, 1942, which he alleged was a codicil duly executed by the deceased, and sought to obtain probate of P 1 and X 1. X 1 and X 2 have been attested by five witnesses Subhramaniam, Rasiah, Sinnatambiar, Arumugam and Velupillai. At the inquiry, Counsel for the respondent insisted on X 1 and X 2 being proved in solemn form. After inquiry, the learned District Judge held that X 1 was duly executed by the deceased, and entered order absolute declaring P 1 and X 1 proved. The respondent appealed against this order. The appeal was argued before Keuneman J. and myself. Counsel for the appellant contended that under our law the propounder of a will has to prove (1) the fact of execution, (2) the mental competency of the testator, (3) his knowledge and approval of the contents of the will, and further that, if the circumstances are such that a suspicion arises affecting any of these matters, the propounder should remove it. He pointed out that the learned District Judge had failed to consider the third element referred to above. In these circumstances we decided to uphold the findings of the learned

1——J. N. A. 89446-1,044 (5/49)

District Judge on the fact of execution and the mental competency of the testatrix, and to send the case back for a decision by the Court whether the testatrix knew and approved of X 1. Our judgment is reported in the 36th volume of the New Law Reports at p. 302.

When the record went back the District Judge who had heard the case had ceased to function. The inquiry was taken up by his successor and the following issues were framed :—

(1) When the testatrix signed X 1 and X 2 did she know the contents of X 1 and X 2 ?

(2) Did the testatrix approve of the contents of X 1 and X 2 ?

After hearing evidence, the learned District Judge answered both issues in the negative and directed that probate should issue only in respect of P 1. The present appeal is against that order.

Before I deal with the arguments that were addressed to us I think I should examine the nature of the burden that lies on the appellant on these two issues. The leading case on the subject is *Barry v. Butlin* [1] in which Parke B, delivering the judgment of the Judicial Committee said :—

> " The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. Those rules are two. The first, that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the will of the deceased."

The only other case to which I need refer is *Tyrell v. Painton* [2] in which Lindley L.J., said :—

> " The rule in *Barry v. Butlin* (*supra*), *Fulton v. Andrew* [3], and *Brown v. Fisher* [4] is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court ; and whenever such circumstances exist and 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 appellant admitted that X 1 and X 2 were prepared by him. These documents purport to remove the restrictions under which the residue was devised to the appellant by the testatrix by P 1. These

[1] *2 Moo. P. C. 480.*
[2] *L.R. (1894) Probate Division 151.*
[3] *L. R. 7 H. L. 448.*
[4] *63 L. T. 465.*

facts would raise a suspicion that X 1 and X 2 do not express the mind of the testatrix and, according to the authorities I have referred to, the Court ought not to pronounce in favour of X 1 and X 2 unless the suspicion is removed by the appellant by evidence that the testatrix knew what she was doing when she executed them. The appellant must establish affirmatively that the testatrix knew and approved of the contents of X 1 and X 2. On this question the District Judge, after reviewing all the evidence that was placed before him by both sides, said :—

> " It is my considered view that the documents were not read over to the testatrix or interpreted. That being so, how could she have known and approved of the contents ? ".

Mr. Hayley urged (1) that the District Judge has not rejected the appellant's evidence that X 1 and X 2 were prepared by him in accordance with the instructions given to him by the testatrix ; (2) that the general circumstances show that the testatrix intended to execute X 1 and X 2 and (3) that the above finding is unreasonable having regard to the evidence.

There are certain facts in this case which are not in dispute. They are as follows :—The testatrix was living, apart from her husband, in a village called Illavalai, for some years prior to her death, which occurred on November 29, 1942. She did not understand English at all, but she was educated in her own language. She was a very capable person, and right up to her death she managed her own affairs. In 1930 she got displeased with the respondent over his marriage, and she executed a will R 3 by which she left all her property to the appellant. She, however, made up with the respondent, and in the year 1941 she gifted to him by R 4 75 parcels of land. On that occasion she wanted to gift to the appellant also some of her lands but subject to certain conditions as he was unmarried at the time. The appellant refused to accept a gift subject to conditions, and left the house. He went to a village called Maravanpulo about 20 miles distant, and remained there for some months. In April, 1942, the testatrix was taken ill and was removed from her house to the Inuvil hospital where she executed the will P 1 on May 9, 1942. In June, 1942, when she was in the Inuvil hospital, she expressed to Mr. Ratnasingham, a cousin of hers, her desire to see the appellant, and Mr. Ratnasingham induced the appellant, who was living with him at Illavalai at the time, to see her. That visit brought about a reconciliation between the appellant and the testatrix. Towards the end of August, 1942, the testatrix left the Inuvil hospital and went back to her house. She stayed there a few days, and, as there was no improvement in her condition, she went to Dr. Subramaniam's Nursing Home at Jaffna where she stayed for three or four weeks. On September 23, 1942, she left Dr. Subramaniam's Nursing Home and went back to her house at Illavalai, stayed there for a few days, and went to the house of the appellant. On October 3, 1942, she executed X 1 and X 2 and six weeks later she died.

The appellant gave evidence at the inquiry. He said that, on his visit to the testatrix at the Inuvil hospital, he placed his grievances

before the testatrix, and, after some discussion she agreed to execute a deed of gift in his favour without any restrictions. This evidence was not accepted by the learned District Judge. He says in his judgment :—

> " It may be that, when the respondent pressed her, she gave him the impression for the time being that she would consider the matter favourably. If she had changed her mind about imposing conditions and had decided to grant him properties without restrictions she would not have hesitated to sign X 1 and X 2 in Dr. Subramaniam's Nursing Home on September 23, 1942."

The finding of the learned District Judge on this point is supported by the fact that the testatrix did not take any steps to execute such a deed, though she had ample opportunities to do so, when she was in the Inuvil hospital.

The appellant said further that the testatrix sent for Proctor Thamby, after she entered Dr. Subramaniam's Nursing Home, and gave him instructions to draw up a deed of gift without any conditions in favour of the appellant, and requested him to bring the deed to the nursing home for her signature. The evidence of the appellant as to the date on which Proctor Thamby agreed to bring the deed to obtain the testatrix's signature is somewhat contradictory. In examination-in-chief he said that Proctor Thamby agreed to come with the deeds on September 23, 1942, but in cross-examination he said that he agreed to come with the deeds nine or ten days before September 23, 1942. I think that the effect of the evidence when read as a whole is that Proctor Thamby was expected to bring the deed nine or ten days before September 23, 1942. To continue, the appellant said that as Proctor Thamby failed to bring the deed as promised the testatrix expressed a desire to execute a document like X 1 and requested him to get it prepared. Thereupon, he went to a petition drawer in Jaffna two or three days prior to September 23, 1942, and got a draft. He took the draft to the nursing home and got the dispenser to type X 1 and X 2 without the date. He did not give X 1 and X 2 to the testatrix as she was in good health at the time. But on September 23, 1942, he requested the testatrix to sign them as her illness took a turn for the worse. His father read the documents and prevented her from signing. It is important to note that the date on X 1 and X 2 is September 23, 1942. X 2 is a carbon copy of X 1. On examining X 1 I was left with the impression that the whole of it—including the date—had been typed at one and the same time. Further the impression left in my mind on a consideration of the appellant's evidence is that the appellant got X 1 prepared on September 23, 1942, when he found that the condition of the testatrix was rather grave and that the testatrix had made up her mind to leave the nursing home. He then sent the telegram P 2 himself to Proctor Thamby in order to get him to attest X 1. The telegram reads " Come immediately for signature ". If what the appellant says is true, namely, that the telegram was sent with the object of getting Proctor Thamby to come with the deeds, it should read " Come immediately with deeds obtain signature ". I find it difficult to believe that P 2 was sent by Dr. Subramaniam because he did not say so in his evidence. He was called by the appellant but he was not questioned on the point.

The evidence of the appellant was proved by P 4, P 5, P 6, P 7, P 8, and P 10 to be untruthful on many points, and I do not think it safe to place any reliance on his statements that the testatrix gave him instructions to prepare X 1 or that the testatrix gave Proctor Thamby instructions to draw up a deed in his favour without any restrictions. If, in fact, the testatrix gave the appellant instructions to prepare X 1 I am unable to comprehend why the appellant did not inform the testatrix that he had prepared the document and why he did not obtain her signature to it. Again if, in fact, the testatrix gave instructions to Proctor Thamby to draw up a deed of gift I am unable to comprehend why Proctor Thamby who, according to the evidence of Mr. Ratnasingham, was a man of integrity and had a large practice should not have carried out his instructions. It is unfortunate that Proctor Thamby had died before the inquiry commenced.

The evidence of Dr. Subramaniam, which has been accepted by the learned District Judge, shows that on September 23, 1942, the appellant requested the testatrix to sign X 1 and X 2. Dr. Subramaniam said that he went into the bedroom hearing a noise in it. He saw the appellant there with X 1 and X 2 in his hands and he believed that Sangarapillai and Mr. Ratnasingham were also there. When he went in the testatrix asked him for his advice whether she should sign X 1 and X 2. He read through the documents and told her that he did not wish to interfere in the matter. His evidence is not clear as to whether the testatrix knew the contents of X 1 and X 2. He said that from the fact that she sought his advice as to whether she should sign or not he inferred that she was aware of the contents of the documents. The learned District Judge does not seem to have been satisfied that the testatrix was aware of the contents of X 1 and X 2 when she sought the advice of Dr. Subramaniam. He says in his judgment :—

> " The evidence is that when the respondent presented X 1 and X 2 for her signature at the nursing home the father Sangarapillai objected to her signing the same and that she consulted Dr. Subramaniam, and when the doctor was not inclined to interfere in her domestic affairs and refused to express an opinion she did not sign them. If she had decided to grant the properties without restrictions I think she would have signed them in spite of the objections of Sangarapillai in the same manner as she had signed and executed deed No. 909 (R 4). The evidence is that she was a woman of strong character and thoroughly capable of looking after her own affairs and that she had been living in separation from her husband for many years."

It must be noted that X 1 and X 2 are in the English language and that there is no evidence that the documents were explained to the testatrix by anyone before she sought the advice of Dr. Subramaniam. All that the appellant said in his evidence was that when he attempted to get the testatrix to sign X 1 and X 2 his father, who was present, read them and prevented her from signing. It may well be that when the testatrix sought the advice of Dr. Subramaniam she wanted him to read the documents, tell her what they contained and advise her as to what she should do. In this state of the evidence it seems to me that it is not

possible to say with any degree of certainty that the testatrix was aware of the contents of X 1 when she sought the advice of Dr. Subramaniam.

The appellant said further that after the testatrix left Dr. Subramaniam's Nursing Home he took X 1 and X 2 with him and left them in an almirah in his house. The appellant's evidence as to what took place before the testatrix signed X 1 and X 2 on October 3, 1942, is not as full as it should have been. He said that on that day one Subramaniam came to his house and a little later Rasiah and Sinnatamby came there. The testatrix told them that she intended to execute a document in appellant's favour and requested Subramaniam to bring X 1 and X 2 from the almirah. When Subramaniam brought the documents the testatrix requested him to explain the contents of the documents to the witnesses and Subramaniam did so in her presence and hearing. Thereupon she signed the documents. The appellant called three of the attesting witnesses Rasiah, Arumugam and Sinnatambiar. At the time of the inquiry Subramaniam was dead. Rasiah said that X 1 and X 2 were read over in English and he was told in Tamil that a codicil in a particular manner was being executed. No one told him what the contents of X 1 and X 2 were. The testatrix told him that she was altering a previous will of hers. Arumugam and Sinnatambiar said that Subramaniam read and explained X 1 and X 2 to them and the testatrix told them that she was going to execute a document removing the conditions in her last will. The learned District Judge was not impressed by any of these witnesses and he rejected their evidence. Mr. Hayley pointed out that some of the reasons given by the District Judge for not accepting their evidence are not supported by the evidence. I have considered Mr. Hayley's submission very carefully, but I find it very difficult to dissent with any confidence from a conclusion on a question of fact at which the trial Judge who has seen and heard the witnesses has arrived. On a consideration of the whole of the evidence I agree with the learned District Judge that the appellant has failed to discharge the burden that lay on him. The learned District Judge seems to have thought that when the testatrix signed X 1 she may have intended to release from the *fidei commissum* created by her by P 1 a few of the lands for the benefit of the appellant. Some support for that view is afforded by R 5 which is a certified copy of P 1 issued by the attesting notary two days before X 1 was executed. A certified copy of a will can only be issued to the person who executed the will during his lifetime. I think that I am entitled to presume that R 5 was issued to the testatrix. In these circumstances the question would arise whether she needed R 5 if she intended to remove all the restrictions in P 1.

For the reasons given by me the appeal fails and must be dismissed. The respondent will be entitled to the costs of appeal. In view of the fact that the appellant succeeded in the first inquiry I think the parties should bear their own costs of the previous appeal and in the Court below.

GRATIAEN J.—I agree.

Appeal dismissed.