

1951

Present : **Rose C.J. and Swan J.****SANGARAKKITA THERO, Appellant, and BUDDARAKKITA
THERO, Respondent***S. C. 483—D. C. Colombo, 5,494**Deed—Will—Presumption of due execution—Evidence in rebuttal—Prevention
of Frauds Ordinance (Cap. 57), s. 4.*

A deed which on its face appears to be in order is presumed to have been duly executed. The mere framing of an issue as to the due execution of the deed followed in due course by a perfunctory question or two on the general matter of execution, without specifying in detail the omissions or illegalities which are relied upon, is insufficient to rebut that presumption.

APPEAL from a judgment of the District Court, Colombo.

N. K. Choksy, K.C., with Sir Ukwatte Jayasundere, K.C., E. G. Wikramanayake, K.C., C. S. Barr Kumarakulasinghe, H. W. Jayewardene and E. S. Amerasinghe, for the plaintiff appellant.

H. V. Perera, K.C., with N. E. Weerasooria, K.C., E. B. Wikramanayake, K.C., and G. T. Samarawickreme, for the defendant respondent.

Cur. adv. vult.

December 17, 1951. ROSE C.J.—

This is an appeal from the District Court of Colombo and concerns a dispute as to the incumbency of a temple. It appears that one Mapitigama Dharmarakkita Thero was the controlling Viharadhipathi of the temple in question and that he died on the 17th July, 1947, leaving the plaintiff as his senior pupil. The defendant-respondent concedes that the appellant was his senior pupil but he contends that by deed D1 of 26th June, 1947, he was appointed to succeed to the office of Viharadhipathi.

It is common ground between the parties that Dharmarakkita had freedom of choice as to his successor to the office of Viharadhipathi, the whole question in dispute being the validity of deed D1.

In the court below the appellant attacked this deed on three grounds. First, that it was obtained by undue influence ; secondly that Dharmarakkita was of unsound mind at the time of its execution and thirdly, that the document itself was not duly executed. At no stage was Dharmarakkita's signature disputed.

There is ample evidence to support the learned District Judge's findings that the appellant had failed to establish the first two allegations, and in this court the argument was confined to the third ground.

While it is true that an appointment to the office of Viharadhipathi does not require any particular form, there is, in my opinion, substance in the appellant's contention that where a party elects to make such an appointment by a deed or by will, then such deed must be shown to have been duly executed according to the requirements of the law in question. Moreover in the particular case now under consideration, it appears to

have been conceded by the parties in the court below that this document D1 should be treated as requiring to be proved with all formalities attaching to the proof of a will. The learned District Judge himself treated the matter on that basis and I, therefore, propose to consider the question in that light.

Issue No. 6 reads: "Was Deed No. 5038 (D1) duly executed by the plaintiff's tutor Dharmarakkita Thero?" The learned District Judge answered this issue in the affirmative, but as the appellant rightly points out, the only passage in the judgment which can be said to refer to this issue is at page 198 and reads as follows:—"After considering the evidence as carefully as I possibly could, I am satisfied that the document D1 was duly executed by Dharmarakkita with full knowledge and approval of its provisions". Moreover this passage follows upon a consideration of Dharmarakkita's mental capacity and it is therefore contended on behalf of the appellant that the learned District Judge did not sufficiently apply his mind to issue No. 6.

The brevity of the court's reference to this issue may be partly explained by the fact that the greater part of the contest in the court below was confined to the questions of undue influence and the deceased's mental capacity. Having regard, however, to the position now taken by the appellant, it is, I think, necessary to examine the evidence on this matter of the execution of the deed to see if, in fact, the learned District Judge was justified in answering the issue in the affirmative. Mr. Choksy in opening the appeal confined himself to the allegation that there was not sufficient proof that the two witnesses had signed in the presence of Dharmarakkita and of each other. Sir Ukwatte Jayasundere, however, in his final reply urged for the first time the highly technical and even desperate argument that it was not sufficiently proved that Mr. D. F. J. Perera, the Notary Public, himself signed the deed at the relevant time.

At page 121 of the record in his evidence-in-chief, Mr. Perera on being shown D1 said "I attested that deed. Dharmarakkita signed that deed at the Durdans Hospital. Besides myself there were present the witnesses and some people. The deed was duly executed. The deceased priest gave me instructions for the preparation of that deed. I had occasion to meet Sir Frank Gunsekera (the physician attending upon Dharmarakkita) at the Durdans. I spoke to him regarding the priest's condition. As far as I could judge, the priest's mental condition was quite normal. That was so at the time he gave me instructions and also at the time he executed the deed. I read over and explained the deed to him before he signed. The deed was in accordance with his instructions. On the same day I attested other documents. I attested three other deeds".

In cross-examination at page 129 of the record appear the following questions and answers:—

"Q. Let us get to the execution of this deed.

A. I say that at the time of the execution there were the witnesses and some other people. Buddarakkita (the defendant priest) was there but not the plaintiff priest. I do not know the names of the other priests who were there".

At page 150 of the record the following passage appears:—

- “ A. . . . He signed sitting up. The witnesses were there at the same time.
- Q. I am putting it to you that the witnesses were not there and your attestation is false ?
- A. That is not correct.
- Q. The only persons who were there at the time were Mr. D. C. Wijeywardene, Buddarakkita (defendant) and the other person who signed other than these two persons ?
- A. That is not correct.
- Q. I am putting it to you that you got some signatures in your house ?
- A. I never did that.
- Q. You did not do that on this day ?
- A. No.”

It seems to me that the only reasonable inference to be drawn from these passages is that the witness's position was that the two witnesses were there at the relevant time and signed according to the requirements of section 4 of the Prevention of Frauds Ordinance (Cap. 57). As regards the notary himself, Sir Ukwatte Jayasundere contended that when the witness states "I attested the deed" he was referring to the formal attestation which accompanies a deed. Having regard to the context in which the phrase was used I am unable to accept that interpretation. It seems to me that the reasonable and natural meaning of the expression is that the witness himself signed the deed as the attesting witness. Moreover, the artificiality of the contention is, in my opinion, demonstrated by the fact that no specific challenge was made to the witness to the effect that he himself had not signed the deed at the proper time and in accordance with the requirements of section 4 of the Prevention of Frauds Ordinance. I am, therefore, prepared to hold on the actual language of the record that the due execution of this deed is sufficiently proved. But even if that were not so, and if the correct view is that there is some small omission in the chain of evidence, I would not be disposed to say in the light of the emphasis which was placed on the various issues in the court below that such small omission was fatal to the respondent's position. There is, of course, a presumption that a deed which on its face appears to be in order has been duly executed, and it seems to me that the mere framing of an issue as to the due execution of the deed followed in due course by a perfunctory question or two on the general matter of execution, without specifying in detail the omissions or illegalities which are relied upon, is insufficient to rebut that presumption.

That being so, the appeal must be dismissed and the judgment of the District Judge affirmed. The appellant will pay the costs of this appeal.

SWAN J.—I agree.

Appeal dismissed.