Privy Council Appeal No. 2 of 1968

Dr. Natarajan Sithamparanathan – – – – – *Appellant*

v.

Ramanathan Mathuranayagam – – – – – *Respondent*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH JANUARY 1970

Present at the Hearing:

LORD HODSON
VISCOUNT DILHORNE
LORD WILBERFORCE
LORD PEARSON
LORD DIPLOCK

[*Delivered by* LORD HODSON]

On 5th March 1961 Velautham Natarajan, a Colombo pawnbroker, died of cancer of the liver at his home, 292 Deans Road, Maradana. He had been ailing for about a year before his death having been an inmate of hospitals for more than one period between October 1960 and the date of his death. He had amassed a considerable fortune, the net value of his estate being given as Rs.323,183.51. He left behind him three children namely Dr. N. Sithamparanathan the appellant and two daughters, namely Mrs. Manonmani Ponnusamy and Mrs. Rajeswari Shanmugarajah.

His last will, in order of date, was made on 3rd March 1961 that is to say only two days before he died. By this will he appointed the appellant his executor and gave his property to his three children in equal shares.

After his death the appellant applied for probate of the will and an order was made declaring that he was entitled to probate as executor but the respondent subsequently applied to have this Order set aside on the ground that the will of 3rd March 1961 was not the act and deed of the deceased. He moved for an order declaring that the last will dated 2nd February 1961 by which the appellant and respondent were appointed executors be admitted to probate.

Objections were lodged to this application in the District Court of Colombo and on 26th October 1962 the Additional District Judge in the presence of the advocates representing the parties settled the issues to be tried as follows:

1. " Was the Last Will No. 1285 dated 3.3.61 the act and deed of the deceased V. Natarajan? "

2. " Was the deceased competent to execute the Last Will? "

At the conclusion of the hearing the Additional District Judge held the evidence in the case was such as would not satisfy " the conscience of

the Court" that the will of 3rd March 1961 was the act and deed of the testator in the sense that he was competent to make a will and directed that the will dated 2nd February 1961 be admitted to probate.

From this judgment the appellant appealed to the Supreme Court which on 8th May 1966 upheld the judge's finding and dismissed the appeal.

As was pointed out in the judgment delivered by Viscount Dunedin in *Robins v. National Trust Company* [1927] A.C.515 at 519:

> ". . . Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases if there is no suggestion to the contrary any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity. Moreover, if a will is only proved in common and not in solemn form, the same rule applies, . . .".

Earlier in the same judgment at p.517 the following passage is found:

> ". . . Whether a man at the time of making his will had testamentary capacity, whether a will was the result of his own wish and act or was procured from him by means of fraud or circumvention or undue influence, are pure questions of fact. The rule as to concurrent findings is not a rule based on any statutory provision. It is rather a rule of conduct which the Board has laid down for itself. As such it has gradually developed. The judicature which has given greatest occasion for its development has undoubtedly been the judicature of India, but the principle is not in any way limited in its application to Indian legislation or Indian law, be it Hindu or Moslem, as such. Indeed it is obvious that if such a rule is a good rule to be applied to the findings of the Courts in India, there could be no reason for suggesting that the findings of the Courts of our great self-governing Dominions should be entitled to less consideration. Their Lordships wish it to be clearly understood that the rule of conduct is a rule of conduct for the Empire, and will be applied to all the various judicatures whose final tribunal is this Board.
>
> Being, as has been said, a rule of conduct, and not a statutory provision, the rule is not cast iron; but it would avail little to try to give a definition which should at once be exhaustive and accurate, of the exceptions which may arise. . . ."

In their Lordships' opinion no question of law arises on this appeal to the Queen in Council, the law in Ceylon in probate matters being the same as the law in England and the relevant considerations are to be found in the leading cases of *Barry v. Butlin* (1838) 2 Moo P.C. 480 and *Tyrell v. Painton* [1894] Probate p.151 to both of which cases the trial judge referred in his judgment. In the former case Mr. Baron Parke stated the relevant rules of law:

> ". . . These 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 true Will of the deceased."

In the latter case Davey L. J. supplemented what Mr. Baron Parke had said at p.159:

> ". . . It must not be supposed that the principle in *Barry v. Butlin* 2 Moo P.C.480 is confined to cases where the person who prepares the will is the person who takes the benefit under it—that is one state of things which raises a suspicion; but the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed. Here the circumstances were most suspicious, and the question a judge has to ask himself is whether the defendants have discharged themselves of the onus of shewing the righteousness of the transaction, . . .".

Lindley L. J. in the same case at p.157 had said in relation to cases where circumstances existed which excite the suspicion of the Court:

> "wherever 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. . . ."

If the judge's findings of fact are supported by admissible evidence and confirmed on appeal, there being no error in law, there must be a very exceptional case made in order to justify a departure from the rule of conduct.

Before examining the facts of this case which are said to be such as to justify a departure from the rule it is convenient to state that the two issues settled by the trial judge interlocked and were dealt with together at the time of his judgment thus:

> "In conclusion I would say that there are serious suspicions—to which I have adverted in this judgment—attaching to the execution of the Will A, which the petitioner has not dispelled. And the evidence in the case is such as would not satisfy the 'conscience of the Court' that the Will in question is the act and deed of the testator in the sense that he was competent to execute the Will.
>
> I answer the Issues: (1) No.
>
> (2) No."

The conclusions of the trial judge to which the Supreme Court adhered were summarised in the judgment of the Chief Justice:

> "(*a*) The physical weakness of the testator was apparent from his shaky and illegible signature (the Proctor asked him to sign a second time because the first signature 'did not seem good').
>
> (*b*) The Judge accepted the evidence of one Wilbert that the testator had been given a blood transfusion before the Will was signed.
>
> (*c*) Two doctors, one the testator's son, who is the appellant in this case, and the other an attesting witness to the Will, were present when the Will was signed. The trial Judge viewed with suspicion the failure to lead the evidence of either of these doctors as to the actual condition of the testator.
>
> The evidence shows that the Will was prepared and signed in haste on 3rd March 1961, and that it was the appellant who summoned the Proctor early that morning to receive instructions. The trial Judge viewed with reasonable suspicion the claim that the testator

on his death-bed abandoned completely his earlier fixed intention to institute a trust for religious purposes and decided instead to leave all his property to his children.

In fact the two earlier Wills expressly stated that the two daughters had been provided for by dowry; the testator had presumably borne the cost of educating his son, and the earlier Wills left a sum of money for his further medical studies. The evidence led for the appellant did not suffice to satisfy the conscience of the Judge that the testator did indeed decide upon so complete a change in his disposition. Sitting in appeal, we did not feel justified in holding that the trial Judge should have reached a different conclusion."

The first attack made upon the findings of the trial judge was based on the argument that there were no suspicious circumstances to bring into operation the Rule of law applicable when such exist so that the ordinary inference adverted to in the judgment delivered by Lord Wilberforce in *Lucky v. Tewari and Another* (1965) 8 W.I.R. p.363 can be drawn:

". . . where the will has been read over to a capable testator on the occasion of its execution, that is sufficient proof that he approved of, as well as knew, the contents of the will (see *Guardhouse v. Blackburn* (1866) L.R. 1 P. & D. 109)."

The two earlier wills were made on 28th December 1960 and on 2nd February 1961 respectively. Both of these wills were substantially to the same effect. They were both attested by Mr. Caderamanpulle, Proctor and Notary, who was instructed to prepare the last will which is now in dispute. He had been the deceased's lawyer for 30 years. His evidence was vital and if accepted in its entirety would have been virtually conclusive of the appellant's case. His evidence was however not accepted. The judge regarded him as an honest witness whose evidence was entitled to respect, due weight being given to it. At the same time he held that he was an over confident witness who was perhaps quick to come to conclusions and wrongly inferred that the charitable bequests should be abandoned and the property left to the children. In view of the fact that no attack was made on the honesty of this witness the judge's conclusion must have been that through carelessness or inattention he misunderstood the nature of the instructions given to him completely so that instead of simply substituting the children's names for that of the respondent as trustees in his stead he drew the will dividing the estate amongst the children beneficially, abandoning altogether the charitable purpose connected with the Hindoo religion which had been carried out in the two wills executed but a short while beforehand.

The matter originated in this way. On the invitation of the appellant and his two sisters the eldest brother of the deceased Velauthan Shanmugam Pillai who lived in India came to Colombo on 24th February 1961 .and went to see his brother. Two days later he learned of the existence of the will of 2nd February 1961 from the respondent and on the next day spoke to the deceased about it. He told the deceased he was sorry to hear he had left everything to a trustee and made the respondent a trustee. He explained to him that charity should be done by the children on behalf of the parents. The deceased listened patiently and said nothing. This statement of the brother may have been ambiguous as it stood but in cross-examination he said clearly "what I said was to give the property to the children and they may do charity" and ". . . according to the income they get they can spend on charity." The judge appears to have understood this as advice given by the brother to substitute the children as trustees in place of the respondent.

On 1st March, according to the brother the deceased called the appellant and told him something about the will and asked him to bring

the Proctor who made the previous wills. The judge doubted this evidence of the brother about summoning the Proctor and inferred that the Proctor was summoned by the appellant himself after two days delay when the deceased was in a weak state both physically and mentally. The appellant who was present not only when the instructions were given for the will but also at the time of its execution did not give evidence. His absence from the witness box was a remarkable circumstance, the importance of which is heightened by the fact that he was a doctor of medicine and had been attending the testator. Moreover, according to the evidence of a witness who was present on the day of the execution of the will, the deceased was given a blood transfusion by the appellant himself. The witness' evidence as to the giving of the blood transfusion although not necessarily as to the identity of the giver of this transfusion was accepted by the judge.

Mr. Caderamanpulle's evidence is clear in its terms. He said that he asked the deceased what his instructions were and that the deceased told him he wanted to give all his properties to his three children. When asked " in what proportion " he said " equally ". When asked who was to be the executor he said " Dr. Sithamparanathan " (the appellant) " I do not want that Mathuranayagam again " using an emphatic expression in Tamil to the same effect. The will was drawn up on these instructions by the Notary at his office and was executed at the house of the deceased in the presence of two witnesses, one, another medical man Dr. Ketharanathan who was not called as a witness and the other an accountant named Koruthu whose evidence the judge did not accept. At the time of execution the brother of the deceased, the appellant and the two daughters were present. The deceased before or after execution read the will himself. At his request the will was then read aloud.

It is unquestionable that the deceased was weak and it will be necessary to refer to the medical evidence which was given at the trial as to his general mental condition.

The absence of the two medical men present at the time of the execution of the will has been referred to already. The judge also mentioned that the deceased had stayed at two hospitals about two months before he died but that there was no evidence of any medical man who had attended him during his stay at either of them.

In these circumstances the judge did not find the medical evidence satisfactory. There was a conflict between Dr. Austin who saw the deceased on the day before the execution of the will and Dr. Thanabalasunderan who last saw him about 15 days before the crucial date. The latter gave the opinion that cholaemia, of which drowsiness is the first sign, was setting in, following cirrhosis of the liver. Dr. Austin was of opinion on the other hand that the deceased was suffering from cancer of the liver of which cholaemia was not a sequel. He did not accept the theory that cholaemia had set in and the judge did not doubt that on 2nd March 1961 the deceased was in control of his mental faculties. He thought however that the object of Dr. Austin's visit was for the purpose of examining a swelling on the cheek of the deceased and that although he did undertake a general examination it was of a cursory nature. He came to the conclusion that the next day the condition of the deceased had considerably deteriorated. He may not have been, as the judge thought, confined to his bed but he was seated on the bed and less steady than he had been when he signed the previous wills.

The judge no doubt found himself in difficulty in considering the mental condition of the deceased in this somewhat remarkable state of the evidence. He did however direct himself with care in accordance with the judgment of Cockburn, C.J. in *Banks v. Goodfellow* (1870) L.R. 5

Q.B. 549 and put the question posed by Sir Edward Williams in his work on Executors " whether the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done ".

In the end, notwithstanding the evidence of the Proctor who prepared the will, the judge felt compelled to the conclusion that the Proctor, although honest, had been grossly deceived when he assumed that the deceased had a disposing mind on the morning of 3rd March 1961.

It is said that the judge was wrong in regarding the circumstances surrounding the last will as suspicious and that in truth there was no evidence to support the conclusion that the will was not the act and deed of the deceased and that the finding of mental incapacity is vitiated by the previous error.

It is argued accordingly that this is not a case where there are valid concurrent findings of fact, there being no evidence to support the conclusions.

It must be recognised that the judge's conclusion that a suspicion of a family plot to get the deceased to make the disputed will was not displaced is difficult to reconcile with his acceptance of the Proctor as an honest witness.

The plot could not, one supposes, have succeeded without the complicity of the Proctor who regarded his client as of sound mind but the judge having heard his evidence held that he, the Proctor, was himself deceived as to the mental condition of the deceased and jumped to a wrong conclusion as to the nature of the instructions which had been given to him. It is also to be observed that it was never suggested to the Proctor that he was a party to a conspiracy or that he had misunderstood his instructions. There is however a fundamental difficulty in accepting the evidence of this important witness in the face of the judge's rejection of it. It cannot be said that there was nothing to arouse the suspicion of the Court in the change of a will when the deceased was nearing his end from one substantially in favour of charity to one in favour of his children.

This is not readily described as an unnatural will but it is a will which makes a radical departure from recent considered testamentary intentions. The timing of the sending for the Proctor to make the will, delayed as it was for two days after the request was made, gives some ground for suspicion.

The presence of the family at the making of the will, they not having been present at any previous will making so far as is known, is at least noticeable.

The reading of the will aloud was regarded by the judge as unusual. He commented that he could not understand the testator wanting to have the will read aloud especially after he had read it himself. He would not, the judge thought, have been in his proper senses if he made that request.

The unexplained absence of the doctor called in for the purpose of witnessing the will and above all the absence of the appellant himself, an interested party, who was actually concerned in the making of the will under which he was to receive substantial benefit are of the highest significance. The judge's much criticised conclusion that advantage was taken of the testator's condition to make him sign a will creating in the weak mind of the testator the impression that by the will he was only cutting out the objector as trustee cannot be dimissed as fanciful. Even in the absence of a plea of undue influence or fraud the burden of satisfying the Court remains on those who propound a will. The law as laid down in the older cases to which a reference has been made was reiterated in the judgment delivered by Lord Du Parcq in the Privy Council in *Harmes and Another v. Hinkson* 62 T.L.R.445 at 446 in these

words " Whether or not the evidence is such as to satisfy the conscience of the tribunal must always be, in the end, a question of fact."

Even if the reasoning of the trial judge and of the Supreme Court is not precisely the same their Lordships are of opinion that on both the issues raised in this action there are concurrent findings of fact and that there is no ground upon which it formed an exception to the rule of conduct which makes such findings final and conclusive.

Accordingly their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the cost of the appeal.

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In the Privy Council

Dr. NATARAJAN SITHAMPARANATHAN

v.

RAMANATHAN MATHURANAYAGAM

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