RANJITH WANIGARATNE
v
KAGGODA ARACHCHI

COURT OF APPEAL
WIJAYARATNE, J. (P/CA)
CA 682/96 (F)
DC MT LAVINIA 1272/T
JUNE 25, 2004
SEPTEMBER 2, 2004
JANUARY 12, 2005

Last Will – Not the act and deed of deceased – Forgery – Suspicious circumstances – Should the suspicious circumstances be pleaded or put in issue? – E.Q.D. Evidence – Is it conclusive proof of the fact of forgery? – Evidence Ordinance, section 101 – Suggestion of fraud – Burden on whom?

The petitioner-appellant-petitioner applied to Court in May 1985 to have the last will of one K.P. bearing No. 683 proved and further sought the grant of probate. The Common Law wife and a legitimate child of KP objected to the said application on the grounds that the said will is not the act and deed of KP and the same is a forgery. The 1st respondent stated that the deceased by a last will bequeathed all his property to her and the same is the subject matter of another testamentary case. The 2nd respondent sought letters to the estate of the deceased as the sole heir at law. The trial Judge found that the last will (No. 683) gave rise to suspicious circumstances and held that the last will is a forgery.

In **APPEAL** it was contended that –

(a) Suspicious circumstances were not pleaded nor put in issue.

(b) That as the suspicious circumstances were neither pleaded nor were put in issue the petitioner had to adduce evidence without precisely knowing that such circumstances as providing suspicious circumstances were the case he had to meet.

(c) That the District judge abdicated his jurisdiction as he considered the version of the EQD as conclusive proof of the fact of forgery.

(d) That the EQD has not been believed previously therefore should not have been believed.

Held:

(1) Every circumstance that is to be considered by Court need not be raised by way of an issue. The real issue that the petitioner was required to meet was whether the impugned last will was a forgery. The allegation of fraud with regard to a last will is an instance which finds an exception to the rule of evidence that the party asserting (fraud) has to prove the fact.

The Rule set up by Courts through the line of authorities is that when there is a suggestion of fraud even if the evidence is not of such a nature as to justify a finding of fraud the burden is cast on the propounder of the Will to dispel all suspicion if he were to have the will proved and probate granted.

(2) In considering the judgment as a whole and not part by part it is clear that the trial judge did not reject and dismiss the application to have the will proved, on the sole ground of forgery based singularly on EQD's evidence. He has analytically seen circumstances exciting suspicion through the totally of evidence on record which in his opinion was not sufficient to dispel suspicious circumstances.

(3) EQD who was said not to have been believed previously has explained how he compared the signature on the impugned Last Will with admitted signatures appearing in documents read in evidence and the basis of his opinion founded according to scientific examination. Findings of the District Judge are rational and lawful. If the EQD has not been believed in earlier judicial proceedings, it does not mean that he should always be disbelieved if his evidence is based on scientific examination and justified his opinion.

(4) On the issue of forgery Court may accept a handwriting expert's testimony provided that there is some other evidence direct or circumstantial which tends to show that the conclusion reached by the expert is correct.

(5) Where there are features which excite suspicion in regard to a Will whatever their nature may be it is for those who propound it to remove such suspicion.

(6) Suspicious features may be a ground for refusing probate even where the evidence which cast suspicion on the Will though it suggests fraud is not of such a nature as to justify the Court in arriving at a definite finding of fraud. The conscience of the Court must be satisfied in respect of such matter.

(7) The propounder should dispel all suspicion by explaining the circumstances established by evidence that is pleaded on record.

APPEAL from the District Court of Mt. Lavinia.

Case referred to:

(1) *Samarakoon* v *Public Trustee* – 65 NLR 100

Upali de Z. Gunawardena with *Ms. C. Prematilaka, Deshani Jayatilleke* for petitioner-appellant.

Rohan Sahabandu with *Athula Perera, Gamini Hettiarachchi* and *Sandamal Rajapakse* for 2nd respondent-respondent.

Cur.adv.vult

January 19, 2007

WIJAYARATNE, J. (P.C/A)

Let it be noted in the first place that this is a matter that has been argued before a bench comprising Justice Andrew Somawansa since elevated to the Supreme Court and the matter is mentioned before me to fix a date for re-argument when the learned Counsel representing contesting parties agreed that the matter of the appeal be disposed of by way of written submission they have already tendered, though arguments have not taken place before me, the submissions the Counsel has tendered do comprehensively deal with the matters to be determined in appeal.

The petitioner-appellant (petitioner) made application to Court in May 1985 to have the Last Will No. 683 attested on 14.12.1984 by Samarapala Liyanage, Notary Public proved and to seek the grant of probate of the said last will to the petitioner. The application named the 1st respondent as the common law wife of the deceased and the 2nd respondent as the heir at law of the deceased as his legitimate child. The two respondents objected to the application on the grounds that the purported last will No.683 is not the act and Deed of the deceased Wahalatantrige Karunasena Perera, and the same is a forgery. The first respondent further stated that the deceased by last will No. 31097 dated 21.2.1982 attested by W.M.P. Wijesundera N.P. bequeathed all his property to her and the same is the subject of testamentary proceedings No. 1223/T of the same Court. The 2nd respondent sought letters of administration to

the estate of the deceased as the sole heir at law. Both respondents prayed that the application to have the will proved and the grant of probate be dismissed. At the inquiry into the matters in issue, the petitioner, the propounder of the last will adduced evidence of the two attesting witnesses named in the attestation, the wife of the attesting notary, Donald Ranasinghe, Attorney-at-law and Notary Public and the wife of the petitioner reading in evidence P1 to P5, but avoided giving evidence though present in Court, without any explanation. On behalf of the 1st respondent she herself gave evidence and called Examiner of the Questioned Documents, one Samaranayake and the 2nd respondent did not give evidence nor adduce the evidence of any other witness, read document marked 2D1 in evidence. At the conclusion of proceedings all the parties tendered submissions in writing. The learned District Judge having considered the same, made findings that the last will produced gave rise to suspicion which he based on three grounds and the evidence of the EQD was so cogent, that the will propounded by the petitioner is not the act and deed of the deceased and answered the first issue to the effect whether the deceased W. Karunasena Perera left the last will dated 14.12.1984 in the negative and answered the rest of the issues too to the effect that the last will produced was not the act and deed of the deceased, and the same is a forgery and the application was dismissed with costs, by his order dated 23.08.1996. Being aggrieved by the said order, the petitioner preferred this appeal on the several grounds specified therein.

The main thrust of the argument for the appellant was that the learned District Judge considered these circumstances to be suspicious circumstances, when such circumstances of suspicion were neither pleaded by the respondents in their statements of objections nor were they put in issue at the inquiry into the matter of application and objections thereto. The findings and the conclusion thereon were not supported by evidence and therefore are not warranted, they are irrational and not justified by law. It was also urged that the learned District Judge abdicated his jurisdiction to determine the validity of the last will and the genuineness of the same to the EQD whose evidence he considered as cogent and misdirected himself in accepting the version of the EQD as

conclusive proof of the fact of forgery when there is no other independent direct evidence on the matter of identification of the testator's signature on the impugned Last Will. It was also noted that the 1st respondent in the course of the passage of this appeal accepted the validity of the will.

For the 2nd respondent who persisted on the fact of the purported last will being a forgery, it is submitted that the findings made by the learned District Judge is supported by the evidence on record and the circumstances disclosed by such evidence and referred me to the relevant parts or portions of the proceedings. It is her position that the evidence on record or judgment could not be taken part by part but should be considered as a whole to make findings and draw conclusions and the findings made and the conclusion drawn by the learned District Judge who has considered the evidence as a whole, compared the evidence of several witnesses to check the contradictions, improbabilities and lapses and evaluate the total effect of all the evidence led and the failure of the propounder of the purported last will to give evidence without any explanation coupled with improprieties and irregularities of the so called execution of the last will on the face of the document itself, warranted the findings made and justified the conclusion that the purported last will is forgery, supported by the evidence and the report of the EQD, which is based on scientific study he made on the document comparing admitted signatures of the deceased.

Upon examination of the proceedings and the judgment I find the conclusion of the learned trial judge that upon these grounds the purported last will is open to suspicion. So far as ground one referred to in the judgment, it is a matter of record, taking the face value of evidence adduced on behalf of the petitioner that the application to have the impugned will proved was made five months after the date of death of the testator. According to such evidence the last will was said to have been handed over to the wife of the propounder, petitioner who being continuously in custody of the last will did not deposit it with the Court for over five months without any explanation as to any circumstance that prevented him from depositing the same in Court and making application to have it proved nor does the propounder of the will adduce any reason for delay either. It is a matter of record that the presentation of the

application and the will was after the notices in testamentary proceedings in 1223/T of the same Court instituted by the first respondent appeared in daily news papers. The propounder who had the full knowledge that he is the sole beneficiary under the impugned last will having the custody of the same all that while did not explain any circumstance or reason for delay. The effect of the totality of such facts will drive any prudent judge to consider the same as circumstance of suspicion. Such conclusion is both rational and justified, specially in the circumstances of the whole case.

The second and third circumstances of suspicion mentioned in the judgment, *per se* are open to criticism and challenge. However, they too taken along with other evidence are justified.

The learned Counsel for the petitioner urged that the learned District Judge has failed to consider the evidence given by Donald Ranasinghe, Attorney-at-law, which evidence was classified by the Counsel as uncontradictory and unchallenged. Be that as it may,the evidence in my view is revealing, though the learned District Judge did not specifically refer to such evidence in his judgment.

The claim of this witness Donald Ranasinghe that the deceased was his client over the past ten years is limited to such claim only. He could not refer to at least one instance of his services being availed by the deceased. On the contrary the three deeds marked P3, P4 and P5 all attested during the three years past to the so-called execution of the purported last will was by some other notary public, one Wijesundara. If the deceased was his standing client for ten years as claimed by Donald Ranasinghe, it is strange that he did not avail of his services on any of those occasions but sought and obtained the services of Wijesundara. It is interesting to note that Donald Ranasinghe does not at least say that he was worshipping Lord Buddha on all those occasions compelling the deceased to seek the services of Wijesundara.

However, according to Donald Ranasinghe, he is not sure as to who, of the people who visited his office stated that an execution of the last will is urgently needed. However,he unwittingly stated the person who told so told him that "uncle is entering hospital and last will is to be written. "And it is his admission that such a statement

could and should have been made only by the nephew who is the petitioner. The witness then tried to say that deceased also said so, upon realizing that he spilled the beans.

The so-called uncontradicted evidence thus manifest that the need as well as the urgency of writing a last will was on the part of the petitioner and not on the part of the so-called testator, which justify the view that the last will propounded is open to suspicion. It is in these circumstances that the deceased who availed the services of Wijesundara in execution of P5 the same year, running to Donald Ranasinghe and then to Liyanage in Hulftsdorp give rise to suspicion, because there is nothing to suggest that the deceased was having a serious illness to anticipate death and rush to execute a last will by a notary other than whose services he regularly obtained. Of course there is no rule that the deceased should have obtained the services of one notary only or that he could not have gone to any other, but the fact that he obtained the services of Wijesundara when is no urgency of executing P3-P5 and who is apparently his trusted notary, was not sought after in this hour of urgency is most improbable and not in accord with the conduct of an ordinary human being.

It is these circumstances that really justified and warranted the conclusion that these two circumstances are also circumstances of suspicion.

It is also a strange circumstance that Samarapala Liyanage the notary said to have attested the impugned last will was not available to testify. He having attested over six hundred deeds is said to have read over the last will in the presence of the beneficiary as well as the witnesses. The irregularity revealed in the testimony of the attesting witnesses though does not affect the validity of a last will, certainly will tend to create severe doubt as to the genuineness of the execution, specially said to have been witnessed by two witnesses whose evidence on the surrounding circumstances is teaming with contradictions.

According to the attestation neither witnesses nor the testator is said to be known to the notary, who is quite experienced in notarial work. This along with the fact of the attesting notary not being available to testify would ordinarily excite suspicion.

All these are matters the learned District Judge has considered as giving rise to suspicion which a prudent judge will legitimately entertain.

Learned Counsel for the petitioner who urged that the learned District Judge referring to the evidence of the EQD as 'cogent' evidence was solely guided by the same. He failed to appreciate that evidence of an expert can only corroborate other evidence and the opinion of the expert itself is not substantial evidence upon which a finding could be based. He referred me to various decisions of the Supreme Court in support of his contention. Examination of the line of authorities reveal that the Courts have gradually deviated from the earlier view and contributed to the modern views that in the event of these being other evidence direct or circumstantial tending to show that the conclusions reached by the expert is correct, the experts testimony is acceptable.

In the present case there is direct evidence of the first respondent, the common law wife of the deceased who lived with the testator for over nine years up to the time of his death, that the signature appearing on the impugned last will No. 683 is not that of the deceased W. Karunasena Perera. In addition the circumstances discussed above would tend to impress that the deceased Karunasena Perera could not have been the author or the executant of the impugned last will.

The EQD who was said to have not been believed previously, has explained how he compared the signature on the impugned last will with admitted signatures appearing in documents read in evidence and the basis of his opinion founded according to scientific examination. Upon a reading of the testimony there is no reason disclosed in cross examination either, not to accept the same. His testimony even as corroborative evidence is acceptable to corroborate the direct evidence of the 1st respondent and the circumstantial evidence discussed above tending to show that the deceased testator could not have executed the impugned will. The learned Counsel state that the EQD has not been believed in earlier judicial proceedings; but that does not mean that he should always be disbelieved, if his evidence is based on scientific examination and justified his opinion. Apart from such fact the learned Counsel attacking his evidence does not refer to any piece of evidence or

reason why his evidence should be rejected. His main contention is that the learned District Judge without forming a view himself upon the due execution or of the fact of forgery has misdirected himself in letting the expert witness decide that the impugned document is a forgery. I am unable to agree with this contention for the reason that even going by the argument of the learned Counsel for the petitioner the testimony which has an corroborative value, does in fact corroborate the direct evidence of the widow the 1st respondent. This entitles the learned District Judge make the finding based partly or mainly on the testimony of the EQD, that the impugned will is a forgery. There is no reason in my view to interfere with such finding which is both rational and lawful.

In considering the judgment as a whole and not part by part, it is clear that the learned District Judge did not reject and dismiss the application to have the will proved, on the sole ground of forgery based singularly on EQD's evidence. He has analytically seen circumstances exciting suspicion through the totality of evidence on record, which in his opinion was not sufficient to dispel suspicious circumstances. I am in total agreement with the view expressed by the learned District Judge. The findings made, the conclusions drawn and the judgment are in total accord with the more recent decisions and the modern view with regard to the acceptance of expert testimony.

The learned District Judge does not state to have compared the signatures on the impugned will and the other documents containing the signatures admitted to be that of the deceased Karunasena Perera, though he could have done so legally. However, he has formed the view and made the finding that the signature on impugned will is not that of the deceased W. Karunasena Perera based on direct and circumstantial evidence corroborated by the testimony of the EQD. It is in perfect harmony with the requirement of law and there is no reason to fault his finding based on such evidence and not on his personal comparison. The learned District Judge has however, contrary to the submission of the learned Counsel for the petitioner determined the question of genuineness of the signature and whether the will is a forgery.

In the case of *Samarakone* v *The Public Trustee* [1] it was held that -

(i) on an issue of forgery, the Court may accept a handwriting experts testimony, provided that there is some other evidence, direct or circumstantial, which tends to show that the conclusion reached by the expert is correct...

(ii) that where there are features which excite suspicion in regard to a Will, whatever their nature may be, it is for those who propound it to remove such suspicion. Suspicious features amy be a ground for refusing probate even where the evidence which cast suspicion on the will, though it suggest fraud, is not of such a nature as to justify the Court in arriving at a definite finding of fraud. The conscience of the Court must be satisfied in respect of such matter."

It is also urged in support of the appeal that the learned District Judge had failed to explain away the three suspicious circumstances referred to in the order of which were neither pleaded by the respondents nor were put in issue at the inquiry, thereby compelled the petitioner to adduce evidence without precisely knowing that such circumstances as providing suspicious circumstances were the case he had to meet.

I am unable to accede to this argument for the reason that every circumstance that is to be considered by a trial Judge should be raised by way of an issue. The real issue that the petitioner was required to meet was whether the impugned last will was a forgery. The allegation of fraud with regard to last will is an instance which finds an exception to the rule of evidence that "the party asserting (fraud) has to prove the fact" Vide section 101 of the Evidence Ordinance.

The rule set up by our Courts through the line of authorities up to the case referred to above and the later cases, is that, when there is a suggestion of fraud, even if the evidence is not of such a nature as to justify a finding of fraud, the burden is cast on the propounder of the will to dispel all suspicion if he were to have the

will proved and probate granted.

In view of such rule, the petitioner-appellant as the propounder of the impugned last will alleged as forgery by the respondent, should have been prepared to dispel all suspicions by explaining the circumstances established by the evidence, that is placed on record. The position of the present case is unique because all these circumstances of suspicion were revealed in the course of the evidence for the petitioner himself and it is not in his mouth to say that he was taken unaware of these circumstances, that were considered and highlighted in the order refusing grant of probate, consequent to adjudication of the dispute of contesting parties that the will propounded is a forgery.

The Order of the learned District Judge refusing the grant of probate for reasons stated therein, is in total accord with the rule set up by the above decision of the Supreme Court.

As such I do not find any reason to interfere with the findings made or the conclusions reached by the learned District Judge in refusing the petitioner's application for grant of probate.

In the result the appeal is dismissed with costs fixed at Rs. 10,000/-.

Appeal dismissed.