VIOLET PERERA *NEE* CLERK
v.
RUPA HEWAWASAM AND OTHERS

COURT OF APPEAL.
G. P. S. DE SILVA, J. AND JAMEEL, J.
C.A. 37/77 (F) AND C.A. 512/77 (F).– D.C. COLOMBO 338/PO.
JANUARY 28 TO 31, 1985.

Last Will – Original lost – Claim for probate of copy – Presumption of revocation of missing original Will –Burden of rebutting presumption of revocation– Objection in appeal to document admitted in lower Court without objection – Preferential right to letters of administration.

The petitioner who was the widow of the deceased instituted testamentary proceedings seeking probate of a Will of which she produced only a copy. She alleged the original had been stolen by the contesting 1st respondent a sister of the deceased. A few years prior to the death of the deceased the petitioner had left him and refused to return to him though the deceased invited her back. The estrangement between petitioner and deceased had led the latter to even make a complaint (R 1) to the Police. Later the deceased had executed a power of attorney (R 2) in favour of the 1st respondent according to whose version the deceased had burnt the original of the Will. The admission of R 2 in evidence was objected to at the appeal.

The oral evidence before the trial Judge was sharply conflicting on the question of the relationship between the petitioner and the deceased. In this situation acting on the documents R 1 and R 2 the Judge held that the original Will had been destroyed animo revocandi by the deceased. He however held that the petitioner as widow was entitled to letters of administration.

Held :-

(1) On the facts of this case the presumption that the testator destroyed the original Will animo revocandi arises. The burden of rebutting this presumption lay on the petitioner as propounder of the Will but she had failed to discharge this burden.

(2) A document received in evidence without objection at the trial cannot be objected to for the first time in appeal.

(3) The widow has a preferential right to be granted letters of administration.

Cases referred to :

(1) *Attapattu v. Jayawardene (1921) 22 NLR 497.*

(2) *Allen v. Morrison [1900] AC 604.*

(3) *Raliya Umma v. Mohamed (1954) 55 NLR 385.*

(4) *Ex parte Slade S.A.L.R. 1922 TPD 220.*

(5) *Perera v. Perera S.C. 194/71 D.C. Negombo 4307T – S.C. Minutes of 13.9 1976.*

(6) *Gopal Das et al v. Sri Thakuraji et al AIR 1943 P.C. 83.*

(7) *Siyadoris v. Danoris (1941) 42 NLR 311.*

(8) *Seyed Mohamed v. Perera (1956) 58 NLR 246.*

(9) *Moosajee v. Carimjee (1927) 29 NLR 387.*

APPEALS from the District Court Colombo.

P. Somatilakam for petitioner-appellant in C.A. 37/77 (F) and for petitioner-respondent in C.A. 512/77 (F).

H. L. de Silva, P.C. with *N. R. M. Daluwatte, P.C.* and *Gomin Dayasiri* for respondents-respondents in C.A. 37/77 (F) and respondents-appellants in C.A. 512/77 (F).

Cur. adv. vult.

March 29, 1985.

G. P. S. DE SILVA, J.

The petitioner is the widow of G.M.P. Senalankadhikara who died on 26.8.74. She claimed probate as the executrix of her husband's last will dated 26.5.70 attested by Mr. J. E. Seneviratne, Notary Public. What was produced was only a copy marked P 2 of the Last Will. The petitioner's case was that "the original of the said Last Will and Testament has been lost since the testator's death". Vide paragraph 3 of the petition. The respondents to the petition were the brothers and sisters of the testator.

The respondents in their objections denied the execution of the Will. Paragraphs 4 and 5 of their affidavit read thus :-

Paragraph 4 : "That at the time of the death of the deceased his wife the present applicant was not living with the deceased having deserted him sometime prior to his death".

Paragraph 5 : "That the deceased had prior to his death revoked, cancelled and annulled any Last Will, if any, and at the time of his death the deceased had no intention whatsoever of endowing or leaving any movable or immovable property to the applicant".

The Public Trustee in terms of section 284 of the Administration of Justice Law No. 44 of 1973 referred the following matters in dispute for adjudication by the District Court : –

(1) Did the deceased die testate leaving behind his Last Will and Testament No. 341 dated 26th May 1970 attested by J. E. Seneviratne, Notary Public ?

(2) Has the said Last Will and Testament been lost since the testator's death ?

(3) If issues 1 and 2 are answered in the affirmative –

(*a*) should the widow be granted probate in application P. O Colombo case No. 3387 and

(*b*) should the application for letters of administration in P.O. Colombo case No. 300 by Rupa Hewawasam (1st respondent) be refused ?

(4) If issue No. 1 is answered in the negative is the widow entitled to letters of administration in preference to the petitioner in application P. O. Colombo case No. 300 ?

After hearing evidence, the District Judge answered issues 1, 2 and 3 (*a*) in the negative and issues 3 (*b*) and 4 in the affirmative. The petitioner has appealed against the findings on issues 1 and 2 (Appeal No. 37/77) and the respondents have appealed from the finding on issues 3 (*b*) and 4 (Appeal No. 512/77).

At the hearing before us, it was not disputed that the deceased executed the Last Will No. 341 on 26th May 1970 and that on 21st June 1970 the original of the Last Will was handed over to the deceased by the Notary. It is also common ground that the original of the Last Will was not forthcoming at the time of the death of the testator. "If a Will is shown to have been in the testator's possession and is not forthcoming at his death, it is presumed to have been destroyed by him animo revocandi" – *Attapattu v. Jayawardene* (1). "Whether this should be called a presumption of law or of fact does not seem material", Lord Davey in *Allen v. Morrison,* (2). "In Ceylon, the correct view, I should imagine, is that it is a presumption based on the provisions of section 114 of the Evidence Ordinance" per Gratiaen A. C. J. in *Raliya Umma v. Mohamed.* (3).

The burden of rebutting this presumption is on the petitioner, the propounder of the Will. Citing the cases of *Ex parte, Slade,* (4) and *Allen v. Morrison* (supra) Deheragoda, J. in *Perera v. Perera.* (5) stated :

> "The Court whenever the presumption applies must refuse probate unless it is 'Morally convinced that the Will was not destroyed by the testator animo cancellandi".

At the trial before the District Judge, the principal witnesses called on behalf of the petitioner were the petitioner herself and Mr. Fernando, an Attorney-at-law and a friend of the deceased. Mr. Fernando was also one of the witnesses to the Last will. The petitioner who was an Eurasian and a Catholic got married to the deceased (testator) a Sinhalese and a Buddhist in 1950. It would appear that the marriage did not meet with the approval of the sisters and brothers of the deceased. The deceased desired to write his Last Will and had spoken to Mr. Fernando about it. Mr. Fernando had contacted Mr. Seneviratne, Notary Public, and the Last Will was executed on 26.5.70. It is common ground that the deceased obtained the original of the Last Will from the Notary on 21.6.70. According to the petitioner, the deceased had informed her of the execution of the Last Will in July 1972. In December 1972 the deceased and the petitioner left on a holiday to USA and UK and returned in early 1973. Mr. Somatilakam, Counsel for the petitioner submitted that the fact that the deceased took his wife on a holiday abroad at considerable expense clearly showed the affection he had for his wife. However, the petitioner left the deceased on 28.11.73 and returned to the

matrimonial home only on 24.12.73. Shortly after the petitioner left the deceased in November 1973, the deceased was afflicted with a "stroke" and had to be removed to hospital. It is in evidence that after the petitioner's return to the matrimonial home on 24.12.73 she looked after the deceased until 26.6.74 when she left him once again. On 30.6.74 the deceased went and met the petitioner and invited her to come with him. She, however, had refused. On 2.7.74 the deceased had made a complaint to the Mirihana Police which has been produced as R 1. Shortly thereafter on 8.7.74 the deceased had executed a power of attorney in favour of the 1st respondent, his sister. The power of attorney has been produced marked R 2. The petitoner claimed that even on his birthday (16.8.74) she had wished him and spoken to him over the telephone. The petitioner's evidence was that she and the deceased got on well but she was compelled to leave the matrimonial home owing to the interference of the 1st respondent who harassed her and had even assaulted her. In short her position was that there was no change in his affection for her after he made his Will and before his death on 26.8.74. The other important item of evidence spoken to by the petitioner was that when she came to the house on 27.8.74, after the death of her husband, she discovered that the almirah and the drawers of the table were all empty and that the keys were with the 1st respondent.

Mr. Fernando in his evidence stated that the deceased had telephoned him about a week or 10 days prior to death. On that occasion the deceased had said (1) that he had telephoned the petitioner several times and had asked her to come back ; (ii) that if anything were to happen to him that Mr. Fernando should give his wife all possible assistance ; (iii) that the Last Will is in his house ; that his wife would meet with opposition from his relations and that Mr. Fernando should assist her in the testamentary case.

The 1st respondent gave evidence on her own behalf. She stated that the petitioner and the deceased were not getting on well after their return from the holiday abroad. According to her, the deceased had told her that the petitioner had misbehaved while she was abroad and he had to cut short his holiday and return home much earlier than expected. On 27.11.73 there had been a quarrel between the petitioner and the deceased, and the deceased had telephoned her and said that the petitioner had tried to kill him with a knife. The 1st respondent had immediately gone to the house by taxi. The deceased

had complained that the petitioner was constantly worrying him to take her to England and that he has no money. Thereafter on 28.11.73 the deceased had informed her that the petitioner had left the house, taking with her all her belongings. He had also complained that she had smashed the articles in the house. The 1st respondent claims that the deceased had told her that he had burnt the Last Will. In short the 1st respondent's evidence was that after their return from the holiday abroad, the deceased had lost all affection for his wife and he no longer had any confidence in her.

The principal submission of Mr. Somatilakam was that the case must be sent back to the District Court for a fresh trial as the trial Judge has failed altogether to evaluate the oral evidence of the two main witnesses, namely the petitioner and the 1st respondent. Mr. Somatilakam complained that nowhere in the judgment has the District Judge expressed his views as to the credibility of their testimony. Mr. Somatilakam emphasised the fact that (*a*) it was the 1st respondent who had every opportunity to remove the Last Will from the house, for she it was who had the keys and who lived in the house prior to the death of the testator ; (*b*) that it was definitely to her advantage to have removed the Last Will which the petitioner saw in the house about two months prior to her husband's death ; (*c*) the evidence showed that at least the wedding ring of the deceased and certain promissory notes were in the possession of the 1st respondent after the death of the testator ; (*d*) that the 1st respondent admittedly was never on good terms with the petitioner. It was Counsel's submission that no part of this evidence which was in favour of the petitioner's case was considered by the trial Judge. Mr. Somatilakam strenuously contended that there was a total failure on the part of the trial Judge to analyse and assess the oral evidence of the two principal witnesses and in the circumstances pressed for a fresh trial.

It is true that the District Judge has not expressly stated his findings in regard to the credibility of either the petitioner or of the 1st respondent. His approach to the case is clearly seen from the following passage in the judgment :

"අත්තිම කැමැතිකරු මහුගේ අත්තිම කැමැති පත්‍රය අත්සන් කළා ද කැත්තම් විනාශ කළා ද යන්න විමතිමේදී සලකා බැලිය යුත්තේ පෙත්සම්කාරියගේ හෝ විගඳත්තරකරුවන්ගේ සැසිරීම නොව අත්තිම කැමැතිකරුගේ සැසිරීමයි. පෙත්සම්කාරියගේ හෝ විගඳත්තරකරුවන්ගේ සැසිරීම අනුව අත්තිම කැමැතිකරුගේ සැසිරීම සැබැඳැයිමට ඉඩ තිබෙන බව පහතයි. ..... කරුණු දෙකක් සම්බන්ධව අත්තිම කැමැතිකරුගේ සැසිරීමෙන් මහුගේ අත්තිම කැමැති පත්‍රය අත්සන් කළ මවට හෝ විනාශ කළ මවට කිරණයක් සැසිමට පුළුවන්කමක් තිබේ. පෙත්සම්කාරිය අත්තිම කැමැතිකරුගේ කිවවිත් හිටවී යාමට හේතුවූයේ අත්තිම කැමැතිකරු සමඟ තිබුණු අපමිවිතම නොව අත්තිම කැමැතිකරුගේ සහෝදරයාගේ

මැදිහත්වීම් කියා නම්. මියේ කැමිති අනුව ආර් 2 දරන ඇවරිති බලපත්‍රය මාර්තයෙන් 1 වෙනි වගඋත්තරකාරියට බලය පැවරීම අනවශ්‍ය බව පෙනේ. පෙත්සම්කාරිය අත්තිම කැමැතිකරු නමය හෝදින් පිටියා නම් සහ පෙත්සම්කාරිය කියන අන්දමට අත්තිම කැමැතිකරු ඇය සමග දුරකථනයෙන් කථාබස් කළා නම් ඇයට අත්තිම කැමැතිකරුගේ ඩැවකටයුතුවල පාලනය ඒවස්ථානෙන කාමට පුළුවන්කම තිබුණේ..... ආර් 1 පෙත්සම්කාරිය මිනුව අතැර මිය බව සඳහන් කරමින්, අත්තිම කැමැතිකරු තනිව ජීවත්වීමට අදහස් කෙරූ බව ද, පෙත්සම්කාරිය තැන මිනුට වඩාකිව කැනැති බව ද, අත්තිම කැමැතිකරු ප්‍රකාශ කර ඇත. මෙම තරුණ අත්තිම කැමැතිකරුගේ තිබේ රැඳී තිබුණු අවස්ථාවකදී, පෙත්සම්කාරියට මිනුගේ සම්පූර්ණ දේපළ අත්තිම කැමැති පත්‍රයෙන් පැවරීමට අත්තිම කැමැති පත්‍රයක් සකස්කිරීමෙන් කර ඇති තීරණය වෙනස් කිරීමට ද ඉඩ තිබේ. එසෙයින් අත්තිම කැමැති පත්‍රය විකාශ කිරීමට හෝ අවලංගු කිරීමට අත්තිම කැමැතිකරු ක්‍රියා කිරීමට ඉඩ තිබේ.....

It is important to note that the trial Judge was faced with two sharply conflicting versions as to the relationship between the petitioner and the deceased. The petitioner sought to make out that the bond of affection between them continued right to the end, while the 1st respondent insisted that the relationship was one of estrangement. The conflict in the oral testimony was between witnesses on the same plane of credibility. In these circumstances, the District Judge deemed it prudent to found his judgment on the conduct of the testator himself as evidenced by the two significant documents R 1 and R 2. On a reading of R 1, which is a complaint made by the deceased to the Police on 2.7.74, it is quite evident that the testator suffered a deep feeling of injury and disappointment when the petitioner deserted him on 26.6.74. In R 1 he states that on 30.6.74 he went and met the petitioner and invited her to come with him but she had refused. He goes on to say that he has now decided to live alone and that he is making the statement for his future protection. Whatever may have been his relationship with the petitioner at an earlier point of time, R 1 is a clear and safe indication of his attitude towards the petitioner about two months prior to his death. The execution of the power of attorney (R 2) on 8.7.74 in favour of the 1st respondent, his sister, is a further indication of his loss of confidence in the petitioner and his diminishing affection for her. In short, R 1 and R 2 are indicative of a sense of disillusionment with the petitioner.

It seems to me that the trial Judge s approach to the conflicting oral testimony was right and proper in the circumstances of this case inasmuch as he relied on two documents which emanated from a relevant source, namely the testator himself. Now, his reliance on R 1 and R 2 meant that he impliedly rejected the evidence of the petitoner as to her relationship with the testator just prior to his death. This would be the inevitable result of the court relying on R 1 and R 2.

As for Mr. Fernando's evidence, the District Judge has expressed a view which is both cautious and balanced. It is not his view that Mr. Fernando has given false evidence. All he says is that he is not prepared to act on his evidence unless it is corroborated by other evidence. Indeed Mr. Somatilakam (if I understood him rightly) did not seriously contend before us that this was an unreasonable view.

As I have stated earlier, on the facts of this case the presumption that the testator destroyed the Will *animo revocandi* arises and the burden is on the petitioner to rebut the presumption. She sought to rebut that presumption, as submitted by Mr. H. L. de Silva, mainly by her own evidence and that of Mr. Fernando. If the trial Judge had accepted the evidence of those two witnesses it would have established, firstly that there was no change in the testator's attitude towards the petitioner after making the Will and prior to his death and, secondly, that the testator had spoken of the existence of the Will as late as 16.8.74. But the trial Judge has preferred to rely on R 1 and R 2 which constitute independent circumstantial evidence which is inconsistent with the oral testimony of the petitioner and Mr. Fernando. In my opinion R 1 and R 2 are a safe index to the attitude the testator had towards his wife at a relevant point of time.

Mr. Somatilakam, however, strongly urged that the District Judge had failed to consider the evidence which showed that it was the 1st respondent who had both the opportunity and the motive to remove the Last Will. Opportunity and motive alone, in my view, will not suffice to show that it was the 1st respondent who removed the Last Will. Moreover, there is a presumption against fraudulent abstraction either before or after the testator's death – vide *Allen v. Morrison (supra)* On a consideration of the totality of the evidence led in the case i seems to me that the District Judge is justified in concluding that the presumption has not been rebutted. It must be remembered that there must be clear and satisfactory evidence to rebut the presumption – vide paragraph 296, Vol. 50, Halsbury's Laws of England, 4th Edition.

Finally, Mr. Somatilakam submitted that R 2 is inadmissible in evidence for the reason that it is a document required by law to be attested and not one of the attesting witnesses was called. Counsel cited an unreported case, S.C. 25-26/70, D.C. Colombo 8656/P, S.C. Minutes of 27.2.76, wherein Vythialingam, J. upheld the objection that a deed of transfer of land in a partition action cannot be

received in evidence as it was not proved as required by law. Referring to the rule that a party may by his conduct at the trial be precluded from objecting to inadmissible evidence, Vythialingam, J. observed :

> "But this rule has no application where evidence has been received without objection in direct contravention of an imperative provision of law and the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel, is not available against a positive legislative enactment".

Vythialingam, J. relied on the decision of the Privy Council in *Gopal Das et al v. Sri Thakuraji et al,* (6).

It is relevant to note that Vythialingam, J. was dealing with a case where the party raising the objection in appeal had in his written submissions in the lower Court taken the objection that the deed has not been duly proved as the attesting witnesses had not been called, although no objection was taken at the time the deed was marked in evidence. In the case before us, however, no objection was taken at anytime in the District Court to the admission of R 2.

Moreover, Vythialingam, J. makes no reference to the "explanation" to section 154(3) of the Civil Procedure Code nor to the previous decisions of the Supreme Court on this point. Mr. Somatilakam very properly and very correctly drew our attention to the judgment of Keuneman, J. in *Siyadoris v. Dânoris* (7) where the learned Judge considered the relevant provisions of the Civil Procedure Code, and the earlier decisions, and held that a deed once admitted in evidence without objection at the trial, cannot be objected to in appeal on the ground that it has not been duly proved. Counsel also cited the case of *Seyed Mohamed v. Perera,* (8) where Sinnatamby, J. and L. W. de Silva, A.J. have carefully considered this question in the context of trials conducted in the original courts and have chosen to follow the judgment of Keuneman, J. in *Siyadoris v. Danoris (supra).* In the result I hold that no objection to the admission in evidence of R 2 can be entertained at the stage of appeal.

As I have said earlier, what Mr. Somatilakam strongly urged before us was that a re-trial should be ordered in view of the trial Judge's failure "to balance the evidence of the petitioner as against the evidence of the 1st respondent and to take into account matters in favour of the petitioner's case", if I may use Counsel's own words. It is relevant to note that these proceedings commenced as far back as

April 1975 when the Public Trustee referred the matters in dispute to the District Court. On a consideration of all the evidence placed before the court, it seems to me that the trial Judge was right in his decision to test the veracity of the conflicting versions given by the contending parties in the light of the proved conduct of the testator himself as seen from R 1 and R 2. In the circumstances, a retrial after the lapse of ten years is not justified.

For these reasons the appeal in C.A. 37/77 (F) fails and is dismissed.

As regards the appeal in C.A. 512/77 (F) the only question that arises for decision is whether the 1st respondent is entitled to letters of administration. The answer to this question is clearly in the negative. The preferential right to a grant of letters of administration may be claimed even by the attorney of a widow who is absent from the Island – *Moosajee v. Carimjee* (9). Accordingly this appeal too must be dismissed.

In the result both appeals are dismissed. We make no order as to costs of appeal.

JAMEEL, J. – I agree.

Both appeals dismissed.