GUNEWARDENE v. CABRAL AND OTHERS

COURT OF APPEAL
RANASINGHE, J. & RODRIGO, J.
C.A. (S.C.) 127/73 F. D.C. COLOMBO 25636/7
AUGUST 7, SEPTEMBER 24, 25, 26, OCTOBER 21, 22, 24 1980

Last Will – Civil Procedure Code, sections 529, 536 and 537 – Prevention of Frauds Ordinance, section 4 – Notaries Ordinance, sections 31(8) (9), (11) and (12).

Decree absolute was entered by the District Court in the first instance, declaring the will proved and the husband of the executrix entitled to have the probate of the will. Petitioners wanted the probate recalled on the grounds that the will was a forgery: the executrix did not understand or approve the contents thereof: the signature of the executrix was obtained by exercise of fraud or undue influence: and that the will was cancelled and revoked by the executrix. The contesting petitioners merely put the propounder to the strict proof of due execution of the will, that is to say, apart from compliance with the legal formalities required for the execution of the will, they wanted proof that the testatrix had in fact signed the last will and if so, it was with a proper appreciation and approval of its contents and with the required quality of understanding necessary for its due execution.

Held:

(1) The onus of proving the will lies on the party propounding the will.

(2) He must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator in that he must show the testator knew or approved of the instrument and intended to be such.

(3) The onus imposed on the party propounding the wills is in general discharged by proof of capacity and the fact of execution, from which a knowledge of and an assent to the contents of the instrument are assumed.

(4) The circumstances attending the executed of the document may be such as to show that there is suspicion attaching to the will, in which case it is the duty of the person propounding the will to remove that suspicion and this is done by showing that the testator knew the effect of the document he was signing.

(5) The burden of proving that the will was executed under undue influence rests on the party who alleges it (not considering any suspicions of undue influence, if any, that may arise on evidence).

(6) The appellate court will set aside inferences drawn by the trial judge only if they amount to findings of fact based on:–

(a) inadmissible evidence; or
(b) after rejecting admissible and relevant evidence; or
(c) if the inferences are unsupported by evidence; or
(d) if the inferences or conclusions are not rationally possible or perverse.

Cases referred to:

(1) *Barry* v. *Butlin* (1838) 2 Moo PC 480.
(2) *Tyrell* v. *Painton* (1984) Probate 151.
(3) *Sithamparanathan* v. *Mathuranayagam* 73 NLR 53 at 55.
(4) *Atter* v. *Atkinson* (1986) Law Reports 1 P&D 670.
(5) *Parfitt* v. *Lawless* 1 Reports (2) P&D 462.
(6) *Boyse* v. *Rossborough* (1856) 6 RLC 2; 49.
(7) *Craig* v. *Lamoureux* 1920 AC 349.
(8) *Naidu & Co.* v. *Commissioner of Income Tax* (1959) AIR 359 SC.
(9) *Mahavithana* v. *Commissioner of Inland Revenue* 64 NLR 217.
(10) *Andrado* v. *Silva* 22 NLR 4.
(11) *Alim Will Case* 20 NLR 481; 494.

APPEAL from the judgment of the District Court of Colombo.

C. Ranganathan, Q.C. with *M. S. M. Nazeem, M. S. Sivanandan* and *C. Selvaratnam* for intervenient – petitioner-appellant.

H. W. Jayewardene, Q.C. with *D. R. P. Gunetileke, Miss P. Seneviratne* and *Lakshman Perera* for petitioner-respondent.

Cur adv vult.

20th November, 1980.
RODRIGO, J.

This appeal originates from a disputed last will dated 16th February, 1955. Its propounder alleges it to have been executed jointly by its two executants who are husband and wife. The wife died on 28th May 1970, 15 years after its alleged execution with the

husband surviving her, there being no issue of the marriage. On 20th September , the husband who is designated in the will as the executor in the event of the wife predeceasing him and the sole beneficiary sought probate of the will by presenting a petition in the District Court of Colombo. Decree absolute was entered on the same day in the first instance declaring the will proved and, the husband the executor thereof and entitled to have probate of the will. See Section 529 of the Civil Procedure Code. The Court at the same time ordered its publication and fixed 23rd January 1971 for the case to be called.

When the case was called on 23rd January 1971, the only full sister of the deceased Diana Evelyn Wickremasinghe Gunawardena presented a petition for the revocation of the grant of probate. There is provision for such a petition in Section 536 of the Civil Procedure Code. She also sought to have the order absolute entered in the first instance set aside. The Court fixed inquiry into this application for 23rd March 1971.

On that day the inquiry was adjourned for the 20th June 1971. But before the inquiry was resumed six other parties intervened with petitions themselves asking for the revocation of the grant of probate. Then inquiry was fixed for 1st August 1971 into both sets of petitions.

Issues were suggested and adopted by Court at the combined inquiry into the two sets of petitions, it being remembered that decree absolute has already been entered on the original petition by the propounder granting probate. The issues centred on four categories of objections, namely, in the words of the learned trial Judge,

> "(a) that the will P2 was not executed by the deceased: that is, that it was a forgery,
>
> (b) that even if it was executed by her she did not know or understand or approve of the contents thereof,
>
> (c) that the signature of the deceased to P2 was obtained by
> (i) exercise of fraud and/or
> (ii) undue influence and:
>
> (d) the said will was cancelled and revoked by the deceased.

I shall set out the issues themselves as raised as follows.

(1) Is the last will No. 1195 dated 16.3.1955 filed of record marked 'A' the duly executed joint last will of the petitioner and his wife Dona Agnes Venesia Cabraal nee Gunawardena? – This is the last will marked 'P2'.

(2) If issue (1) is answered in the affirmative, is the petitioner entitled to probate?

For the contesting first petitioner –

(3a) Is the last will filed of record the result of undue influence and/or fraud, and/or importunity?

(3b) Was the last will prepared on the instructions of the petitioner?

(4a) Was the last will revoked and/or cancelled by the deceased during her lifetime ?

(4b) Has the deceased by her conduct and her action revoked and/or cancelled the last will?

(5) Did the deceased assert in her lifetime that the deceased had not disposed of her property and had not made the last will?

(6) Did the deceased not have knowledge of the contents of the last will for the approval of the contents thereof?

(7) If issues 3 - 6 are answered in favour of the respondent (sic) did the deceased die intestate – the 'respondent' here meaning the objecting first petitioner. That is the full sister who filed the petition first.

For the contesting intervenient petitioners –

(8) Are the intervenient petitioners heirs of the deceased?

(9) Is the document marked 'A' sought to be produced as the last will

(a) not executed by the deceased?
(b) not the act and deed of the deceased and that she did not know what she was doing?

(10) Not relevant as the suggested issue had been ruled out.

(11) Did the deceased express a wish to give her properties to her own relations?

(12a) Did the deceased sign the document sought to be proved as her last will?

(12b) If so, was the signature obtained,
(i) by exercise of fraud

(ii) by undue influence
(iii) by substitution of the document in the form of a last will in the belief that it was a deed of gift to one of her relations.

Particulars of undue influence were called for and were given as follows:

(a) The testatrix is the wife of the petitioner propounding the will.
(b) He is himself a Notary Public.
(c) The testatrix had no opportunity of getting legal advice, and.
(d) That the testatrix had been forced into signing it.

It had been, however, specifically stated that the husband is not alleged to have used physical force.

On the particulars of fraud the facts relied on were stated to be the substitution of a document in the form of a will for another document which was represented to be a deed of gift by which the testatrix was gifting her properties to her relations and that further, when the testatrix was signing this document she was made to believe that she was getting some benefit herself. The particulars given of undue influence on behalf of the first objecting petitioner was adopted as being valid on behalf of the intervenient – petitioners as well.

A sketch about the background of the case: the deceased had only one full sister – Evelyn Wickremasinghe Gunawardena (Evelyn). After their mother's death their father married again and from that marriage the deceased had three step sisters and two step brothers. One step sister had predeceased her leaving behind a nephew and a niece. The persons who intervened after the full sister had sought revocation of the probate were these step brothers and step sisters and the nephew and the niece.

The deceased had no children but had adopted a boy called Justin which was, however, not a legal adoption. In the result, the intestate heirs of the deceased would be her husband who would inherit a half share and the full sister and the half sisters and half brothers with the nephew and the niece who would inherit the balance half share.

The deceased was possessed of property worth about six lakhs of rupees at the time of her death according to the inventory filed. She had been brought up by her father's brother after her mother's death and had received all her immovable property from him. Her father had given her only some cash.

The husband of the deceased was about 15 years older than she. He is a Notary Public and obviously a man of standing in his family circle. At the time of the alleged execution of the will the husband's properties had not been worth more than Rs. 20,000/-. Going on immovable properties the deceased was much wealthier than her husband. But the husband appears to have enjoyed a good practice as a Notary and by October 1969 he had attested as many as 40,000 deeds. By 1934 he was married and his age at the time of marriage, sometime prior to 1934 was stated to be 34 years. If that were so at the time of the alleged last will in 1955 he must have been 55 years of age while the deceased was about 40 years of age. The deceased was stated by the husband in his evidence to be an uneducated lady. The deceased's father and uncle were traders and it is probable that her relations considered that a marriage with the husband would enhance her social standing as well as their's. The deceased herself appears to have been "a simple, kindhearted and conservative lady". The learned trial Judge states that the evidence indicates that the deceased was very respectful towards her husband and that she was a very devoted and dutiful wife. She was able to read and write Sinhala but was not sufficiently educated to attend to her affairs. She could also sign her name in English. It is the learned trial Judge's finding that it was the husband that attended to all the matters connected with the deceased's properties including the completion of her income tax returns. She had a bank account. The cheques had been filled up by the petitioner and the deceased had signed them whenever requested to do so.

The deceased had maintained a close association with her full sister and two of her children. They had visited the deceased frequently and the children often lived at the deceased's house for varying periods of time. One of her nieces from her full sister was a girl called Wimala. She was about 17 or 18 years at the date of the last will. She had lived in the deceased's house from 1954-1957 – the will is alleged to have been executed in 1955. This girl had attended school from the house of the deceased. The deceased had provided her with clothes and books. She appears to have been fond of her full sister and her children. She had gifted properties by way of providing dowries to her sister's children. One gift was of a property worth Rs. 50,000/-. That was to a sister of Wimala. To Wimala and another sister of hers, the deceased had given gifts of cash of Rs. 5,000/- each. She had, of course, gifted properties to her adopted son and even to a servant called Gunawathie.

The deceased had been very accommodating towards her husband on occasions of financial difficulty for her husband. She has

sold a property to liquidate the debts of her husband in 1957and mortgaged another property of hers in 1934 shortly after her marriage to secure the repayment of monies borrowed by her husband.

I come now to the events which had led up to the alleged execution by the testatrix of her will on 16th February, 1955. The will had been attested by M. U. M. Saleem, a Proctor and Notary Public. In 1955 Mr. Saleem had been in practice for 23 years. At the time he gave evidence he had been 40 years in practice. The learned trial Judge had found that the deceased (hereinafter referred to as 'testatrix') had known Mr. Saleem from about 1937 – a period of 18 years. Mr. Saleem had known her husband also for the same length of time. It was Mr. Saleem who had appeared in the administration cases respecting the estates of the two sisters of the husband of the testatrix. It was about that time that he had first come to know the testatrix and her husband. Thereafter he had acted professionally for both of them. He had watched their interests in certain land acquisition proceedings and also had attested deeds for them after that, that is, after 1937. He had been to the house of the testatrix on two or three occasions in connection with professional work and had been treated to tea and refreshments. So that Mr. Saleem was no stranger to the testatrix and her husband.

On the 15th of February, 1955, a day before the alleged attestation of the will, the husband and the wife had come to see him in his office and indicated to him that they wished to execute a joint last will whereby the survivor was to be appointed the executor and the sole beneficiary. He was satisfied that that was their intention and accordingly he had taken down the instructions on a piece of paper and obtained the signatures of both of them to it. That document had been produced in evidence marked P1. He had told them that the will will be ready for signature on the following day and had requested them to come along with two witnesses. The document P1, is very brief and runs as follows:

"Instructions for a Joint Last Will

Testators: Lokuliyanage John Edmund Cabral,
Notary and Dona Agnes Venisia
Cabral (nee Wickremasinghe Gunawardena)
husband and wife – both of Talawatuhenpita,
Adikari Patty Siyane Korale in the District of Colombo

Revocation: of all former wills.

Executor: Survivor.
Devise and bequeath: all properties to the survivor.

Colombo, 15th Feb. 1955

Sgd/.

This document was shown to the husband who gave evidence in this case and he identified the first signature as his and the second signature as his wife's, the testatrix. This document had been filed by the Proctor with the protocol of the will and it was produced in Court from the file of protocols in his custody. Then on the morning of the 16th February 1955 the testatrix and her husband came with the attesting witnesses to Mr. Saleem's office. The will was read over by Mr. Saleem and it was read over by the husband of the testatrix as well and he had explained it to the testatrix. The Proctor too had read over and explained the will to the testatrix and her husband. He had done so in Sinhalese. Thereafter the husband of the testatrix had signed it, then the wife, and then the two witnesses who had all signed in the presence of one another. The husband of the testatrix had given evidence as the propounder of the will and he had said that in 1955, some days prior to the execution of the will he had discussed the matter of making a last will with his wife as he felt that it was advisable to do so as they had no children. She had agreed and the two of them together had gone to see Mr. Saleem, their Proctor, on the 15th of February, 1955 and given instructions. The discussion and the decision to make a last will was as simple as that. The instructions given also, as I have said, had been brief and simple. Brief as they are, these then are the events that led up to the execution of the last will according to its propounder, the husband of the testatrix.

But Evelyn, the full sister of the testatrix, and Hector Gunawardena, a step brother, saw or they alleged that they saw, in the simplicity of events leading to the execution of this will as alleged by the husband of the testatrix, a great deal of complicated matter and endeavoured to attack its due execution from every angle conceivable in a disputed last will case. According to their own evidence they had not even heard of the execution of this will, leave alone any knowledge of circumstances attending the execution of the will. When Evelyn attacked the last will on the grounds that I have set out earlier, it was her position when giving evidence that she did so, on the advice of her lawyers. She had further testified that it was her lawyers that gave her the grounds for seeking to set aside the will. She added that the testatrix would sign anything that her husband, the Notary, wanted her to sign and that therefore she concluded that

the testatrix did not know what she had signed. When asked whether she had been asked by anybody else other than the lawyers to contest this will she said that her step-brothers had asked her to contest it referring particularly to Hector Gunawardena. She was specifically asked whether she grudged the fact that the testatrix had left her properties to her husband and her answer was that she would not have objected if the testatrix had given her also something. She, of course, spoke to the dowries in cash and properties that the testatrix had given to her children.

Wimala Ranasinghe was a daughter of Evelyn. She had no quarrel with the disposition in the will. This girl had been called in to give evidence by the contesting petitioners to support a theory that the testatrix never went out of her house with her husband and in any event, unaccompanied by this girl. She was living with them at the relevant time but the contesting petitioners had not been able to establish that through this witness Wimala. This witness answered affirmatively a question that there must have been occasions when the testatrix went with her husband without her. Hector Gunawardena, the half brother who gave evidence, being a contesting petitioner, was a Police Constable who later had been promoted an Inspector of Police. One might have expected him to have unearthed a lot of material that has a bearing on the allegations that he had made together with the rest of the contesting petitioners as grounds for attacking the will. But he, as it turned out, was a damp squib, for he could speak to nothing in relation to the signatures on the note of instructions and the last will and in fact neither of these two documents was even shown to him by Counsel and gave as his reason for saying that the testatrix did not execute either the last will or the note of instructions that nothing had been left by the testatrix to her blood relations and also that he did not know at the time that the deceased signed her name in English, meaning that she was not in the habit of signing in English at this stage. The learned trial Judge had found that the testatrix had signed her name in English at one time and it was sometime after the attestation of the will that she had switched on to signing her name in Sinhala, probably after the Official Language Act was passed.

It is clear that when the contesting petitioners sought revocation of the grant of probate on the ground of undue influence, fraud, forgery and similar grounds set out earlier, they were merely putting the propounder to a strict proof of the due execution of the will. That is to say, apart from the compliance with the legal formalities required for execution of a will they wanted proof, that the testatrix had in fact signed her last will and if she had done so, it was with a proper appreciation and approval of its contents with required quality of

understanding necessary for its due execution. The contesting petitioners were no doubt entitled to probe the alleged execution of the will as severely as they could to expose if possible any lack of understanding or approval of the contents thereof by the testatrix. If they had succeeded in establishing their allegations affirmatively the grant of probate would undoubtedly stand revoked. Even if they had fallen short of establishing their allegations affirmatively but had succeeded only in raising a well grounded suspicion of lack of due execution of the will, it would have imposed the burden of dispelling such suspicion on the propounder, for, it is settled law that the burden lay on the propounder to establish not only the formalities required for execution of a will but also to repel a well-grounded suspicion that the testatrix did not have the required quality of understanding to appreciate and approve the contents of her will.

The formalities required are contained in Section 4 of the Prevention of Frauds Ordinance and in Sections 31(8), (9), (11), and (12) of the Notaries Ordinance. The learned trial Judge had accepted the evidence of Saleem, the Proctor Notary, who attested the last will and, the evidence of the attesting witness Jayawardena and that of the propounder himself with regard to the formalities of execution.

The law in Sri Lanka in probate matters is the same as the law in England and the relevant considerations outlined above are to be found in the leading cases of *Barry v. Butlin*[1] and *Tyrell v. Painton*[2] – see *Sithamparanathan v. Mathuranayagam*[3] – the learned trial Judge has referred to the former case and he has set down the oft-quoted passage from the said judgment in these words;

> "It is clear first, that the onus of proving the will lies on the party propounding it and secondly, he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. To develop this last rule a little further, he must show that the testator knew or approved of the instrument and intended it to be such. In all cases the onus is imposed on the party propounding a will; it is in general discharged by proof of capacity and the fact of execution from which a knowledge of and an assent to the contents of the instrument are assumed. The question is whether the testator knew the effect of the document he was signing. The circumstances attending the execution of the document may be such as to show that there is a suspicion attaching to the will, in which case it is the duty of the person propounding the will to remove that suspicion: this is done by showing that the testator knew the effect of the document he was signing".

In the Court below even the formal execution of the will was challenged in as much as it was alleged that the signature of the testatrix had been forged. Forgery was put in issue. The learned trial Judge had observed that Evelyn and Gunawardena, two of the contesting petitioners who were alleging forgery had not even been shown the two documents P1 and P2 namely the note of instructions and the last will and had not examined the signatures appearing therein. Gunawardena gave as his reason for this allegation that he thought that the testatrix did not sign her name in English. The trial Judge was amply satisfied that the testatrix had herself signed her name in English in the two documents in question and that she had been in the habit of signing her name in English during this period. He had held against the petitioners on this issue and in any event Counsel appearing before us for the petitioners did not seek to support this allegation of forgery or to argue against the finding of the trial Judge on this issue. He specifically said that he was making no submission against the finding of the trial Judge.

Also touching on the formalities of execution of the will is the allegation of fraud that was put in issue. The particulars of fraud supplied at the commencement of the trial alleged that the will had been substituted in place of a deed of gift which the testatrix was made to believe she was signing. Capitalising on some answers given by the propounder in the course of his evidence, the contesting petitioners developed a line of cross-examination of the propounder suggesting that the will was in any event not signed before the Proctor Notary in his office but it had been signed in the home of the testatrix at the instance of the propounder, her husband, and that she had been made to do so in the belief that she had signed a deed of gift. The propounder gave evidence after the Proctor Notary did with the result that no questions relating to this suggestion were even put to the Proctor Notary when he was in the witness box. This issue, however, was pressed in appeal before us and it had been contended that the trial Judge was far too indulgent to the propounder on account of his old age in particular and the condition of his health (the propounder was partially paralyzed at the time he was giving evidence) and it is this indulgence that had diverted the trial Judge from a proper approach to the investigation of the material elicited or rather unwittingly given as a bonanza by the propounder of his own accord in irrelevant answers and thus prevented himself from a critical or hostile approach to what the propounder said in his evidence bearing on this issue which the law demanded. Counsel for the appellant (a contesting petitioner) did not, however, challenge the honesty, integrity or even truthfulness of the evidence of Saleem, the Proctor Notary, who attested the will. Without attacking the integrity of the Proctor Notary the way was too

short and narrow for Counsel to tread along successfully to contend that the two documents and the will in particular had been prepared outside and brought to Mr. Saleem's office for him to attest it without the testatrix signing it in his presence. As I said earlier it was the propounder himself who opened the floodgates for this suggestion with an irrelevant answer that he gave to a question put to him. Since this evidence of the propounder and the build-up thereon by Counsel for the petitioners in the court below had loomed large in the proceedings of the Court below, I shall set out the questions to and the answers given by the propounder on this part of the case even as the trial Judge himself had done in his judgment.

Having identified his signatures and his wife's on both P1 and P2, he was asked:

"Q. What is this document P2 ? A. That is that will.

Q. Did you sign it ? A. I failed to sign the earlier document and therefore another document has been signed by me.

Q. What is this earlier document that you have referred to ?

A. It is a copy of this.

Q. You say that your wife has signed after you ?

A. Yes.

Q. Did she read this document before signing it ?

A. Prior to this another document was written out and we failed to sign that and therefore this was signed.

(To Court)

Q. You said you read this document before you signed it ? A. Yes.

Q. Did your wife also read it before she signed ?

A. We have failed to sign an earlier document and we signed this.

Q. You said you did not sign an earlier document ?

A. We wrote out a small receipt to the effect that we had given our instructions.

Q. Did you sign that ? A. Yes, we signed that.

Q. Then what is the document which you say that you did not sign ?

A. We failed to sign one portion.

Q. You read the contents of this document ? A. Yes.

Q. You understood what is in that ? A. That is the will.

Q. Before you signed it did you approve the contents of that will?

A. Yes.

Q. Did your wife approve of the contents of that will ? A. I accept that she has signed. (Witness gives this answer after a little delay).

Q. How did she know what was in the will ? A. The Proctor explained it to her.

Q. Did you listen to the Proctor's explanation yourself ? A. Yes.

Q. Did you yourself approve of what the Proctor said ?

A. We failed to sign an earlier document and therefore we signed this.

(To Court)

Q. Did you approve of what the Proctor told your wife ?

A. What is to be done when we have failed.

Q. You read the deed and understood it ? A. Yes.

Q. Then you were asked how your wife understood it ? A. Yes. She said that she failed to sign a note where instructions were given and therefore she was asked to sign this.

Q. How does your wife know what was in the document ?

A. She signed. What was required was the instructions which were given."

It is thus seen that the answers at this stage had indicated that the propounder and his wife had signed only one document and not two.

Though he identified the two signatures on both P1 and P2 he still persisted in saying that they failed to sign an earlier document. But on a subsequent day when the propounder was being cross-examined on the same point he denied having given the evidence referred to above. He said at this stage in no uncertain terms that it was both of them that had gone and given instructions to Proctor Saleem. I shall set out some of the questions and answers as recorded on the subsequent day that had a bearing on his previous day's evidence.

"Q. In the first instance you instructed Mr. Saleem, the Proctor with regard to this matter? A. It is both of us who came and gave instructions to Mr. Saleem.

Q. On the last date you said one document had not been written. Which document was not written ? A. I misunderstood that question.

Q. Did you read your last date's evidence ? A. No."

"(To Court)

Q. Was it because of the question asked today that there were two writings you thought you had made a mistake on the last date ?

A. I was asked whether there were two writings. I said if there were it must be a mistake.

Q. You were asked by Mr. Samarakoon whether you remember signing a will and you answered "I failed to sign an earlier document and therefore another document was signed by me" ?

A. I had failed to sign the instructions written out.

Q. When you said "I failed to sign the earlier document" you referred to the instructions ? A. May be that.

Q. I must know what you meant ? A. There is no earlier document or later document. This is only one document and that is the last will.

Q. Who told you that ? A. I say so."

Still later on, however, the matter being pursued he answers the questions as follows:

"Q. A little later the Court asked you "Did your wife also read it before she signed it (Will) ? A. It was written and explained by the Proctor.

Q. To you ? A. To my wife.

Q. Did the Court ask you the question "Did your wife also read it before she signed it" ? A. Yes.

Q. And your answer was "We have failed to sign the earlier document and so we signed this". Did you say that ? A. No.

Q. You do not know what that means, namely, "having failed to sign the earlier document" ?

A. (No answer).

Q. Did you say that what is recorded is wrong ? A. According to what is written down there it looks that there were two writings, but there were no two writings."

Then after further questioning he was again asked.

"Q. Then your reply was "We failed to sign the earlier document and therefore we signed this ?

A. By the earlier document I meant the instructions.

Q. You did not sign the instructions ? A. Now I cannot remember whether we signed the instructions or not but the last will written out on the instructions given was signed by me.

Q. That was signed in your house ? A. No. The last will was signed in Colombo.

Q. The witnesses were in your house ? A. The witnesses came to Colombo to sign the will.

Q. Not in your house ? A. In the house of the Proctor.

Q. Is it not the fact that you got the document and went and got the signatures from your wife and the witnesses in your house ?

A. No. It is not."

Since the Counsel for the contesting petitioners had strenuously contended in the Court below that the above evidence of the

propounder was very damaging to the propounder's case and that it constituted a well-grounded suspicion that this will had not been executed before the Notary and thus touching on the formalities of execution the trial Judge made a hostile approach to his evidence in examining it though Counsel argued before us that he has not. He posed to himself a number of relevant questions and asked himself specifically the question whether the propounder in giving this evidence was speaking to what actually happened or was this evidence given by him because of his confused state of mind due to his ill-health.

The trial Judge had observed that the "propounder was 80 years old at the time he gave this evidence. He had a stroke and was partially paralysed. He had to be helped to talk and was unable to keep standing. He found difficulty in forming his words and of expressing himself. His speech was slurred and at times a question had to be repeated several times before he appeared to understand it. It is difficult to assess whether this was due to any difficulty in hearing or any loss of the power of comprehension but the impression he created in my mind was that he was slow in understanding the questions that were put to him. His memory in regard to time and dates was vague and unreliable. At times his answers indicated that he failed to understand the questions which were put to him. He appeared to tire easily and in fact proceedings had to be adjourned on more than one occasion owing to this. The evidence given by him immediately prior to and soon after the evidence referred to above showed no lack of understanding or incoherence or confusion. This would certainly indicate that the propounder was able to understand the questions asked of him in the course of his examination referred to above. Could he then have been speaking the truth, or was he making a mistake? On a subsequent date when the petitioner was being cross-examined on the same incidents he denied having given the evidence referred to above. He was then definite that both P1 and P2 were signed by the deceased in Mr. Saleem's office. He was also definite that P2 was explained to the deceased by Mr. Saleem before she signed it. The question which I have to consider is what effect this evidence would have on the facts in issue. Do they tend to negative the other evidence which has been led. Does it tend to create suspicions regarding the execution of the will and the testamentary capacity and understanding of the deceased?"

The trial Judge thereafter examines in detail the evidence of the two contesting petitioners and Mr. Saleem himself and has no hesitation in coming to the conclusion that the evidence of the propounder that seem to indicate the preparation of a document

other than P1 and P2 was the result of a confusion in his mind and that, he being the propounder would naturally not willingly and wittingly come out with something that was so damaging to his case and what he had come to establish and more so that there was no need for him to have said those things if, in fact, he was dishonest or was a designing witness. It must be remembered that Mr. Saleem's own integrity was in jeopardy as a result of this evidence and as the trial Judge has accepted Mr. Saleem's evidence and not doubted his integrity, the conclusion of the trial Judge would be justified that the propounder was obviously confused.

But as I said it was pressed before us in appeal that the learned trial Judge was wrong in having looked at the evidence that way and should not have accommodated the propounder in the manner that he had done and found excuses for the contradictory nature of his evidence. It is our view that the trial Judge was in a much better position than we are to sort out this problem and the eventual conclusion as a finding of fact was within his competence and jurisdiction to reach and unless we are satisfied that he had made a wrong approach to examining the evidence and not followed in practice the precept that he had laid down for himself, we would not be justified in upsetting the finding of fact on this issue reached by the trial Judge. We accordingly hold that as far as the formalities of execution are concerned the learned trial Judge had rightly come to the conclusion that the fact of execution and the mental competency of the testatrix and the other formalities required by law for execution of a will have been satisfactorily established.

The question still remains as to whether the testatrix had knowledge of the contents of the will and given her approval to the contents thereof apart from any suspicious circumstances arising on the evidence.

Barry's case referred to clearly shows that under the English Law the propounder discharges his onus if he shows,

(a) capacity; and,

(b) the fact of execution. From this the knowledge of the contents by the testator is presumed.

Sir J. P. Wilde in *Atter v. Atkinson*[4] – states the proposition in these words:

> "Once get the facts admitted or proved that a testator is capable, that there is no fraud, that the will was read over to him, and that he put his hand to it, and the question whether he knew and approved of the contents is answered".

In relation to a complicated testamentary document, however, this decision may seem to require some qualification. But be that as it may. In the instant case, however, the question whether the testatrix knew and approved of the contents was put in issue and at the trial cross-examination of the propounder and the Notary was directed towards establishing that the contents of the will had not been communicated to the testatrix with the competence of knowledge of the Sinhalese language required for the purpose by the Notary. Accordingly the presumption raised was sought to be rebutted. In my view, the evidence of instructions given by the testatrix to the Notary and the reading over to her of the will afford the best proof of knowledge of its contents, if the evidence of competence in that language on the part of the Notary is established. The Notary is a Muslim by nationality and his mother tongue is not Sinhalese. At the time of the execution of the will the Notary had been 23 years in practice and at the time he gave evidence, some 16 years after the execution of the will the Notary had been nearly 40 years in practice attesting deeds all in English and a good proportion of his clientele must have been Sinhalese and the occasion therefore must necessarily have arisen for him to have explained the contents of the deeds that he had been attesting to the Sinhalese clients. Mr. Saleem in his evidence said that he read and explained the will to the deceased in Sinhalese. He was questioned as to his knowledge of Sinhalese and his ability to explain the contents of the will in that language. He stated in Sinhalese in his evidence what he had told the testatrix and from what he stated in Court, the trial Judge finds (the trial Judge himself is a Sinhalese) that he had adequately explained the will in Sinhalese which was a joint will whereby the survivor was instituted the sole beneficiary. The testatrix also had the benefit of the will being explained to her in Sinhalese by her own husband in the presence of the Notary. It is true that the Notary has said that he was able to speak only broken Sinhalese and even the propounder said that the Notary had only a broken knowledge of Sinhalese. But that is different from saying that the broken knowledge of Sinhalese that the Notary had was not adequate to explaining this last will, regard being had to its nature and its simplicity. The note of instructions purported to have been given by the testatrix and her husband I have set out above, and it shows how simple the document is. The will itself contains only three paragraphs and the third paragraph by which the two of them devised and bequeathed all their properties, estates and effects whether real or immovable to the survivor is simple enough. So that the testatrix need not have mental faculties of a high nature or education or literacy beyond an average standard to render herself capable of appreciating and understanding the nature and effect of this kind of will if it is borne in mind that it is a very simple document containing no provisions

which would require in order that they should be appreciated and understood anything more than an ordinary mental effort. It was strenuously contended before us in appeal that the trial Judge is again wrong in finding the Notary to be competent enough to have been able to communicate its contents with the kind of broken knowledge of Sinhalese that he had. All that we need say here, sitting in appeal, is that it was a matter for the trial Judge to ascertain as a matter of fact whether the Notary was competent to understand the instructions given by the testatrix and to translate and explain the contents of the will written in English to the testatrix. I am mindful of the fact that translating and explaining are two different things, but, as I said, having regard to the simple nature of the document, I find no material on record on which I can disagree with the learned trial Judge's finding of competence of knowledge in the Notary for this simple purpose. It was the submission of Counsel for the appellant that the knowledge of the Notary in respect of the language, not too satisfactory as it was even at the time of evidence, was very probably deplorably poor at the time of the execution of the will. I cannot fail to note that her husband also had testified that he too added his weight of an unquestioned superiority of knowledge of the language on this occasion to what the Notary said. I have no doubt that more than sufficient must have been said to make the testatrix understand the contents of the will. We are, therefore, of the view that the trial Judge is right in his conclusion that the testatrix understood the contents of the will and signified her approval thereto.

It is next urged that the testatrix was not a free agent and that her will had been overborne and virtually coerced into signing this last will even, assuming that she understood and approved its contents. That is, the contesting petitioners alleged undue influence. The burden, of course, of proving that the will was executed under undue influence rests on the party who alleges this. I am for the time being not considering any suspicions of undue influence, if any, that may arise on the evidence.

The allegation was put in issue and particulars of undue influence were stated at the commencement of the trial. It was urged at the trial that three factors, namely, that the testatrix was the wife of the propounder, that the propounder was a Notary Public and that the testatrix had no opportunity of getting independent legal advice, all cumulatively if not separately constituted an influence which must have morally pressurised the testatrix signing the will much against her wishes. In the argument before us further factors were added namely, that there was a disparity in age between the two of them amounting to as much as 15 years, that the testatrix was not educated enough to be able to manage her affairs, that she was so

conservative in her outlook and in her relationship with her husband that she would unhesitatingly do his bidding and that her husband was so elevated in social status compared to her and her relations that she was all the same in respectful awe of him and in short that she was so pliant to his suggestions as to render her helpless in matters of this nature.

It is the propounder's evidence that in or about 1955 when he was about 55 years old and his wife was about 40 years he thought to himself that there being no issue of theirs from the marriage, it would be a good thing to write the last will to avoid trouble whatever it may mean at the time of death of either of them. So he discussed the matter with his wife, the testatrix and she also agreed. All that they wished to say in their last will was the survivor should be the sole beneficiary of the other. That done the two of them went on the 15th of February, 1955 to the Notary and told him that in Sinhalese and the Notary took it down in English. That is the note of instructions. Being a short disposition the Notary had asked them to come the following day and when they went the following day, the will was ready and they signed it. The contesting petitioners did not know anything about the circumstances under which the will came to be written. The testatrix died 15 years after the execution of the will. So that beyond what the husband himself had said from the witness box it is impossible to ascertain how matters must have stood in regard to the events leading up to the execution of the will at the time of its execution. True it is, that the husband had played a leading role in suggesting and indicating to the Proctor Notary how the will should be prepared. The testatrix may have been merely a consenting party. True it is, also that the husband regard being had to his status and the disparity in age and the other matters that I have mentioned earlier, had the power undoubtedly to overbear the will of the testatrix if he was so minded. It is the law that the Courts will scan the evidence of independent volition closely in order to be sure that there has been a thorough understanding of consequences by a testator whose will has been prepared at the instance of another. But unlike in the case of a gift *inter vivos*, the Courts have not in the case of wills given to this principle the sweeping application which they have applied. There is no reason why a husband or a parent on whose part it is natural that he should do so may not put put his claims before the wife or the child and ask for their recognition provided the person making the will knows what is being done. The pursuasion must of course stop short of coercion and the testamentary disposition must be made in comprehension of what is being done. See Lord Penzance in *Parfitt v. Lawless*[5]. Again as was said in the House of Lords in *Boyse v. Rossborough*[6] it is not sufficient that the circumstances attending the execution of a will are consistent with

the hypothesis of its having been obtained by undue influence, it must also be shown that they are inconsistent with a contrary hypothesis. The relationship of a marriage is such that when a will is executed between husband and wife how matters must have stood between them is not easy to ascertain. It must be borne in mind there is no presumption of undue influence between husband and wife, in any event, in respect of wills that one or the other may make or make jointly – See *Craig v. Lamoureux*[7].

It is significant that the testatrix had been told by her husband to keep the execution of the will a secret from everybody, according to his evidence and she appears to have faithfully followed that request for the full 15 years since its execution up to the time of her death, as none of her relations was aware of a will having being executed by her. After the execution of this will she had gifted properties to her relations on more than one occasion and on each of these occasions it was her husband who attested the deeds. She had also given gifts of cash to the children of her full sister on the occasions of their marriage. She could not have parted with her properties or cash if her husband had contrived to get her to execute a will with the design of keeping all her properties to himself after 1955. If she had wanted to gift away the properties without the knowledge of her husband she would not have got the deeds attested by him. Since the deeds had been attested by her husband it is not difficult to see that he had not stood in the way of his wife gifting her properties as she wanted and that she herself was under no restraint by her husband in respect of these matters. If the will had been executed against her wishes and because she was pressurised to do so by her husband she could well have taken the opportunities that came her way during the 15 years after its execution and before her death, to have disposed of all the properties to her full sister's children that she was undoubtedly fond of. Even on the evidence of Hector Gunawardena, one of the contesting petitioners, the testatrix had shown no attachment to any of her step-brothers or step-sisters and the nephew and the niece. There is no evidence that the alleged undue influence exercised on her in 1955 continued throughout the rest of the 15 years. As I said she had ample time to free herself of any alleged undue influence and dispose of her properties according to her inclinations as she had done as and when the occasions arose. I cannot overlook the fact that at the time the will was executed, If anybody was expecting to benefit from it, it must have been the wife, that is the testatrix, who was younger than the propounder by 15 years. There does not appear to be any evidence from which any well-grounded suspicion arises of the will of the testatrix having been overborne or pressurised into executing this will. The trial Judge has found the allegations of undue influence to be based on flimsy and unreal material and it is also his view with

which I agree that the decision of the deceased to leave all her properties to her husband in the event of her predeceasing him which, as I said, it was very unlikely she contemplated, to be not unnatural in the circumstances. She had no abiding affection or attachment to any of her step-brothers and step-sisters and her association with them was confined to occasional visits paid to her by them. The evidence indicates a long period of marriage notwithstanding their disparity in age which appears to have been happy and harmonious. So that the will cannot be said to be an unnatural will, it is hard to find any reason why she should not have bequeathed her properties in the manner she has done to her husband as a free agent. In fact a property had been sold in 1969 and also a mortgage bond had been entered into in that year by the testatrix to accommodate her husband to liquidate some of his debts. The husband, therefore, could easily have got the testatrix to transfer the properties to him or to sell the properties to anybody else in the manner he wanted and to the extent he wanted without resorting unnecessarily to getting his wife to execute a will.

All the issues that had been raised and all the arguments that were submitted to us relating to the issues centred on questions of fact that the trial Judge had to decide. What was really pressed before us by Counsel for the contesting petitioners was that the trial Judge had not drawn correct inferences from the evidence led. But we can set aside those inferences only if they amount to findings of fact based on :

(a) inadmissible evidence or,
(b) after rejecting admissible and relevant evidence or,
(c) if the inferences are unsupported by evidence or,
(e) if the inference or conclusion is not rationally possible or was perverse.

See *Naidu Company v. Commissioner of Income Tax*[8] and *D.S. Mahavithane v. Commissioner of Inland Revenue*[9]. In the case before us we do not see that the findings of the trial Judge and the inferences drawn by him are vitiated by any of these considerations. The evidence relating to every issue had been critically analysed and tested and his approach to the examination of the evidence led had been critical and jealous as the law required and from this crucible the last will had emerged undamaged and as a document executed by a free agent with full appreciation of its consequences.

Taking a bird's eye view of the factual landscape of this case, we find it to be conspicuous that the opponents of the will had made an attempt to make a mountain of such features as that it was the

husband of the testatrix who took the initiative to make the will and took a very active interest in procuring the will against the background of the disparity in age between the husband and wife and the elevated social status of the husband compared to that of the wife. But in the case of *Andrado v. Silva*[10], instructions for the will had been written out by one Andrado himself and he had accompanied the testator on his visits to the Notary who attested the will and avoided using the services of the Notary who was acquainted with the family circumstances and who might therefore remonstrate with the testator and in addition Andrado had declined to go into the box and give evidence on substantial matters which only he could give. The will principally benefited Andrado and his family and he was living with the testator. Andrado was the petitioner seeking to propound the will. Notwithstanding the matters that I have mentioned, Bertram C.J., took the view that though these circumstances required the Court to examine the evidence with jealousy and care, still these facts do not cause one to suspect that the will of the testator was either coerced or dominated. If this was the view taken in respect of a beneficiary of a will who was a mere relation of the testator, there is hardly any ground for reaching a conclusion in respect of the disposition in this case by the testatrix to her own husband that the will of the testatrix was either coerced or dominated. The view, of the matters mentioned in the case cited, taken by Bertram C.J., confirms us in our view that the alleged suspicions do not in any event amount to suspicions sufficient enough to recall probate already granted of the will.

It is also urged that this will does not satisfy "the conscience of the Court" or that it does not show that the "transaction had been righteous". These phrases do not mean that it is the duty of the Court to see that a testator makes a just distribution of his property. These are two forcible expressions used in cases to emphasize the principle that a Court must 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". See *The Alim Will case*[11], per Bertram C.J., at page 494. The trial Judge was mindful of this principle and it is manifest that he has applied it in his judgment.

For these reasons, we are of the view that this appeal should be dismissed and it is accordingly dismissed with costs.

RANASINGHE, J. – I agree.

Appeal dismissed.