WEERASINGHE

v.

NAGAHAWATTE AND OTHERS

COURT OF APPEAL.
TAMBIAH, J. AND MOONEMALLE, J.
C.A. 107/74 (F) – D.C. GALLE 9306/T.
MARCH 26, 1984.

Testamentary action – Last Will of testator not found at time of death – Applicability of presumption that Will had been destroyed animo revocandi – Proof of Will by secondary evidence – Issue of probate on protocol of Will, when possible – Validity of judgment written by trial judge and pronounced by his successor.

The deceased was known to have made a Last Will attested by a Notary Public. His wife the appellant applied for letters of administration on the basis that he died intestate and Order Nisi was entered granting her letters. The objecting respondents filed objections denying that the deceased died intestate and claimed that he had made a Last Will the original of which was being suppressed or had been destroyed. The protocol of the original Will and other documentary evidence was led to prove that the deceased had made a Last Will. The appellant took up the position that the Will was not among the

papers of the deceased and relied on the presumption that if a Last 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*. The District Judge held the Will proved by secondary evidence and issued probate of the protocol of the Last Will.

Held –

(1). It is a necessary condition to the coming into effect of the presumption that a testator has destroyed his Last Will animo revocandi where the Will is shown to have been in his possession but is not forthcoming at his death, that the Court should be satisfied that the Will was not in existence at the time of the death. As the appellant has failed to satisfy court that the Will did not exist at the time of death, the presumption will not arise.

(2). Where circumstances giving rise to the presumption are absent, and the Will has been irretrievably lost or destroyed its contents may be proved by secondary evidence. The protocol is a copy of the original Will and the court was competent to issue probate thereof.

(3). A judge may pronounce a judgment written by his predecessor but not pronounced.

Cases referred to:

(1) *Attapattu v. Jayewardene, (1921) 22 N.L.R 497, 499, 420.*
(2) *Raliya Umma v. Mohamed, (1954) 56 N.L.R. 385.*
(3) *Sergdan & others v. Lord S. T. Leonards & Others, (1976) 1 P.D. 154 p.220.*
(4) *Ramanathan Reports, (1877) p.31 at 34.*

APPEAL from the District Court, Galle.

E. R. S. R. Coomaraswamy, P.C., with *S. Walgampaya* for the appellant.
N. S. A. Goonetilleke for the respondents.

Cur. adv. vult.

May 31, 1984.

TAMBIAH, J.

The petitioner-appellant, the widow of the deceased Arthur Andrew Weerasinghe, applied for letters of administration in respect of the estate, on the basis of an intestacy. There were 27 respondents to this application. The deceased had no children ; nor had he brothers or sisters.

The deceased died on 24.1.70 and the application for letters of administration was made on 24.9.70. Order Nisi was entered granting letters to the appellant.

The 7th respondent (who is the son of the deceased's father's *own brother*) Stanley Weerasinghe and his son Gemunu Weerasinghe filed objections and denied that the deceased died intestate without leaving a Last Will. They stated that the deceased left a Last Will No. 2542 dated 20.12.65 attested by T. G. J. Abeysundera, Notary Public, Galle, and that "some person who seems to be interested in the estate of the said late Arthur Andrew Weerasinghe seems to have destroyed or seems to be suppressing the original of the said Last Will". They also set out two properties which they said were owned by the deceased, but have been left out by the appellant in the inventory filed. The 2nd property was called "Obahena". The Notary who attested the said Last Will had died and his protocols were with the Registrar-General. They prayed that the Registrar-General be ordered to furnish a certified copy of the said Last Will, that the said Last Will be admitted to probate and that the 23rd respondent, who was named as executor in the said Will be ordered to "execute" the said Last Will. The 23rd respondent, Piyasena Karunanayake, is the brother of the appellant.

The issues raised are as follows :–

(1) Did the deceased Arthur Andrew Weerasinghe die leaving Last Will No. 2542 of the 20th December, 1965, attested by T. G. J. Abeysundera, Notary Public ?

(2) By the said Last Will did the deceased Arthur Andrew Weerasinghe appoint a person called Piyasena Karunanayake as administrator of the estate ?

(3) Has any person with any connection with the estate of the deceased Arthur Andrew Weerasinghe destroyed or suppressed the original copy of the aforesaid Last Will ?

(4) If the above issues are answered in favour of the objecting-petitioners, can the petitioner's claim be granted ?

(5) Is Piyasena Karunanayake entitled to probate as stated by the objecting-petitioners without the production of the original of the Last Will ?

The original of the protocol of the said Last Will was with the Clerk of the Land Registry when he gave evidence. A certified copy has been marked (R 2). Under the Will, the properties were to devolve on Gemunu Weerasinghe, the 2nd objecting petitioner, subject to a life

interest in favour of the appellant. The two attesting witnesses gave evidence and they identified their signatures as well as the signature of the Notary Public. The Delivery Book (P 6) maintained by the Notary Public shows that this Last Will had been handed to the deceased on 22.12.65. The appellant herself, having come to Court on the footing that her husband died without leaving a Last Will and having first taken up the position in her evidence that if her husband wrote a Last Will, he would have put it in the iron safe, the key of which was always in her custody and that she would come to know about the Last Will, later conceded that her husband did write a Last Will and has identified her husband's signature on the Protocol (P 2). The learned trial Judge has come to the finding that the deceased executed a Last Will bearing No. 2542 dated 20.12.65 and learned President's Counsel for the appellant has not canvassed this finding.

In the lower Court, the appellant's position was that at the time of her husband's death, the Last Will was not among his papers in the iron safe and she relied on the presumption that if a Last 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.

The objecting petitioners, the father and son, gave evidence and it was their position that the Last Will written by the deceased was in existence at the time of his death. Gemunu Weerasinghe in his evidence stated that after the funeral he stayed back with the appellant while his father and mother returned to their home. About seven days after the death, Piyasena the 23rd respondent who was named as Executor in the Will came one morning to the house and discussed with the appellant, his sister, about filing a testamentary case. She told him that Stanley Weerasinghe had asked for the Will before he left and asked Piyasena to take the Will and hand same to Proctor Abeysundera, with instructions to file a testamentary case. She opened the safe and took out something like a deed and handed it to Piyasena, who then left. He returned in the afternoon and discussed something with her which he did not hear. Later, he told his father about the conversation and the handing over to Piyasena, of something which looked like a deed.

Stanley Weerasinghe, in his evidence, corroborated the son's evidence that he told him that Piyasena removed a document from the widow to be given to a lawyer. He produced in evidence the letter

dated 19.2.66 (R 1) written by the deceased to him in which he stated that he had written a Last Will. He then met the deceased and inquired as to whom he had left his properties. The deceased told him he was attached to Gemunu and that he had chosen him as his legatee. The deceased opened his safe and showed him the Last Will. He read the Last Will and noted its contents in his pocket Diary (R 3 A) which he produced in evidence. After the funeral, before he left. he asked the widow for the Last Will and she replied that it would be produced in Court.

Koranelis, the former clerk of the Notary Public who attested the Last Will, and who has signed as one of the attesting witnesses, also gave evidence. He stated that the Protocol was typed by him. Two weeks after the deceased died, Piyasena came to meet Proctor Abeysundera, bringing with him the Last Will. The proctor read the Last Will out and he gathered it was the Last Will of the deceased. The witness asked Piyasena to furnish a full list of the deceased's properties and Piyasena left taking with him the Last Will. He came back a few days later but did not bring a list of the properties. Thereafter he never came.

The appellant in her evidence denied the alleged conversation spoken to by Gemunu Weerasinghe. She first stated that Gemunu left with his parents soon after the funeral and came back for the one month's "Daane" and stayed on till the three months' "Daane". Later, she admitted that Gemunu stayed back for a week after the funeral, then went away and returned again. According to her, she told Piyasena that something must be done about the properties of the deceased. She told this after the three months' "Daana". Piyasena said he would attend to it when he was free and that he would hand over the deeds to the Proctor. The deeds were in the safe. After the three months' "Daana", they went through the deeds. There was no Last Will among the papers. Piyasena said that a testamentary action has to be filed. He removed the deeds. After some time he returned the deeds, after noting down the particulars. She denied that she destroyed or suppressed the Last Will. She did not tell Piyasena to give the deeds to Proctor Abeysundera.

Piyasena's evidence is that no one spoke about the Last Will till the three months' "Daana". He told his sister he would attend to the matter after the "Daana". Thereafter he made a list of the deeds and took all the deeds to Proctor Jayawardena and gave instructions regarding the testamentary case. He did not know Proctor

Abeysundera well, and denied he saw Proctor Abeysundera with the Last Will. He denied the suggestion that he and his sister had suppressed the Will.

It is Proctor Jayawardena who filed the testamentary case for the widow. It would appear from the evidence that the deceased's legal matters were attended to by Proctor Abeysundera and Piyasena's usual lawyer was C. R. Wickremanayake, and that their respective offices were in the same room. Piyasena stated that he had engaged the services of Proctor Jayawardena in two cases.

The learned trial Judge rejected the appellant's allegation that the Diary entries (R 3A) are a fabrication and holds that the entries are genuine ; he rejected the suggestion of the petitioners-objectors that there was estrangement between the appellant and her husband ; he has not accepted the submission of the appellant that the sale by the deceased of two lands mentioned in the Last Will, shortly prior to his death, is indicative of an intention to revoke the Last Will and stated that if the deceased had changed his mind about leaving a Last Will, he would have intimated that fact to the Notary and asked for the return of the Protocol ; he accepted the evidence of Stanley Weerasinghe that before he left after the funeral, he asked the appellant for the Last Will and she replied it would be produced in Court ; he pinpoints the admission by the appellant that Gemunu stayed back for a week and the admission by Piyasena that there was discussion about a Last Will,when he stated that no one spoke about a Last Will till the three months' "Daana" ; he accepted the evidence of the clerk Koranelis, who, admittedly, was on good terms with the appellant and Piyasena ; he characterised him as an independent witness ; he took into consideration the sudden change of Proctor and that Proctor Abeysundera was alive when the testamentary action was filed ; he accepted the version of the objecting petitioners that the Last Will No. 2542 of 20.12.65 was lying in the safe of the deceased at the time of his death and that it has been subsequently destroyed or suppressed by some interested party ; he referred to the fact that the appellant had only a life interest in the deceased's property under the Will and if the Will was destroyed, the appellant and Piyasena would stand to gain ; he also referred to the admission of the appellant that, on her death, the half-share of the property that would come to her in case of intestacy would devolve on her brother Piyasena as she was childless.

The learned Judge answered the issues 1, 2, 3, and 5 in the affirmative, and 4 in the negative. He discharged the Order Nisi entered and made order declaring the Last Will proved and issuing Probate to Piyasena Karunanayake, the Executor named in the Last Will.

The appellant came to Court on the basis of an intestacy and asked for Letters of Administration. Stanley Weerasinghe produced the letter(R1) wherein the deceased stated he had written his Last Will. His pocket Diary (R3A) contains entries relating to the Last Will. The Delivery Book (P6) of the attesting Notary proves that the Last Will was delivered to the deceased. The Land Registry Clerk produced the Protocol (R2). Confronted with this documentary evidence, the appellant had no alternative but to admit that her husband did write a Last Will and has even identified her husband's signature on the Protocol.

The question is, what has become of the Last Will ? The appellant says that the Last Will was not among his papers in the iron-safe and relies on the well settled principle of law that if a Will is made by a testator, and is shown to have been in his possession and is not forthcoming at his death, the presumption is that he has destroyed it himself, animo revocandi. The objecting-petitioners on the other hand, say, the Will was in existence at the time of the death. For this, they rely on their own evidence and the evidence of Koranelis, the Notary's Clerk. The learned Judge has preferred to accept the version of the objecting-petitioners.

Learned President's Counsel for the appellant submits that the evidence shows that the Last Will was in the possession of the deceased (R 3 A, P 6, and evidence of Stanley Weerasinghe). The Will was missing at death. Therefore the presumption applies and the burden of proving that the Will was not destroyed animo revocandi is upon the party propounding its contents. He pointed out to the infirmities in the evidence of the objecting-petitioners and Koranelis.

(1) In their joint affidavit the objecting-petitioners stated–"Some person who seems to be interested in the Estate...seems to have destroyed or seems to be suppressing the original"

Stanley Weerasinghe stated in evidence that the appellant said soon after the funeral that she would produce the Will in Court.

Gemunu said in evidence that he listened to a conversation and had seen the appellant giving a document to Piyasena to take it to the lawyers. They therefore suspected the appellant and Piyasena of having destroyed or suppressed the Will.

These matters have not been pleaded. The vague statements in their petition and affidavit lead to the inference that these two items of evidence were in fact afterthoughts.

(2) Koranelis, who was summoned to produce the Delivery Book, spoke to matters that transpired in Proctor Abeysundera's office. He admitted that he had neither told the petitioners-objectors nor the lawyers about what happened in the office. He was divulging these matters for the first time in Court

As regards (1) above, the learned Judge has considered the matter and has correctly taken the view that these are matters of evidence which need not have been embodied in the petition.

As regards (2) above, this aspect too has been considered by the learned Judge and amongst other reasons for believing his evidence, he stated that Koranelis had no reason to give false evidence and that admittedly, he was on good terms with the appellant and Piyasena.

I cannot agree with learned Persident's Counsel that in this case, the presumption that the Last Will had been destroyed by the deceased animo revocandi applies. As was pointed out by Bertram, C. J. in *Attapattu v. Jayawardena* (1) "The first question is : Is it shown that the Will could not be found at the date of the deceased's death ? It is a necessary condition to the coming into effect of the presumption that the Court should be satisfied that the Will was not in existence at the time of the death. . . . .The onus of this is on those who assert it . . . . . The next question is : Had the Will been in his possession ?. . . . . Now, if that is held, there follows the presumption above explained "

After considering the evidence in the case, the learned Judge has preferred to accept the version of the objecting petitioners to that of the appellant and her witness Piyasena. The learned Judge has found as a fact that the Will was in the possession of the deceased ; he has also found as a fact that the Will was in existence at the time of the testator's death. He has given reasons for his findings. I see no reason to disturb these findings. The first finding is fully justified on the

evidence. As to the second, it is a reasonable finding having regard to the evidence. As the appellant has failed to satisfy the condition, namely, that the Will did not exist at the time of death, the presumption will not arise.

Is there any reason for the testator to destroy his Will ? The evidence shows that he was on terms of cordiality with his wife ; so was he with his father's brothers's son Stanley Weerasinghe and the latter's son Gemunu who has been referred to as "my nephew" in the Last Will. He had no children nor any brothers and sisters. For a man in this position, he, therefore, did the most natural thing – to ensure that his wife will be provided for during her lifetime, he gave her a life interest in the properties ; to ensure that his properties remain in his family, he left his properties to Gemunu.

Who stands to benefit, if the Last Will is not forthcoming at his death, and he is considered to have died intestate ? The widow gets a half share of the properties which admittedly would go to Piyasena, her brother. She admits she had access to the iron safe, and that the key was in her custody, both after her husband's death, and while he lived. It was in their interests, therefore, to destroy or suppress the Will.

It is the appellant's Counsel's next submission that the learned Judge has erred in holding that the protocol is an original Will. Learned Counsel relied on the case of *Raliya Umma v. Mohamed* (2). Dealing with the submission that the protocol ought to be regarded as an original document capable as such of being propounded, Gratiaen, A. C. J. said (p. 386)- "As to the argument concerning the protocol, I concede that a testator may, for greater security, execute his Will in duplicate..... But a protocol is not a duplicate in that sense, for it is intended only to serve as a formal authenticated record of the transaction in which the Notary concerned had been professionally employed. Under our law, it is not an original document but only a copy of one."

But, the proper question to be asked is whether it is competent for the Court to issue probate on the protocol of the Last Will ?

In *Sergdan & Others v. Lord S. T. Leonards & Others* (3) it was held that where a Will had not been destroyed by the testator with the intention of revoking, but is missing and is lost, parol evidence of the contents of the lost Will may be received ; otherwise, as Cockburn, C.

J. said- "it would enable any person who desired, from some sinister motive, to frustrate the testamentary disposition of a dead man, by merely getting possession of the Will to prevent the possibility of the Will of the deceased being carried into execution"

In a case reported in *Ramanathan Reports* (4) it was held that where the Will has, after the death of the testator, been irretrievably lost or destroyed, its contents may be proved by secondary evidence, and probate granted of a copy embodying the terms of the Will. Probate was granted of the draft of the Will corrected by the testator, and which was with the attesting Notary.

These two cases establish the proposition that where the circumstances giving rise to the presumption – destruction by the testator animo revocandi- are absent, and the Will has been irretrievably lost or destroyed, its contents may be proved by secondary evidence. In the former case it was proved by parol evidence ; in the latter, by the production of the draft of the Will. A protocol is a copy of the original Will (per Gratiaen, J. (supra)). The appellant has identified her husband's signature on the protocol and has admitted that her husband did write a Last Will on 20.12.65. It is not her position that (R 2) is not the protocol of the Last Will executed by her husband. The Court was competent, therefore, to issue probate of a protocol which is a copy of the original Will.

Finally, learned President's Counsel submitted that though the entire trial and addresses were before Mr. L. H. de Alwis, D. J., the judgment was delivered by the Additional District Judge, as at the end of the judgment appears the designation "A.D.J." ; that there being two versions before Court – spoken to by Stanley Weerasinghe, Gemunu and Koranelis and denied by the appellant and Piyasena – the question of demeanour of witnesses and the credibility of their evidence become important.

We have called for and perused the record of the case. I find that the judgment has been signed by Mr L. H. de Alwis but has been pronounced by another Judge. It is the judgment of the Judge who heard the Case. A Judge may pronounce a judgment written by his predecessor but not pronounced (s. 185, Civil Pro. Code). This final submission also fails.

MOONEMALLLE, J. – I agree.

Appeal dismissed with costs.