LILY PERERA

v.

CHANDANI PERERA AND OTHERS

COURT OF APPEAL.
S. B. GOONEWARDENE, J. (P/CA) AND WEERASEKERA, J.
C. A. No. 223/77 (F) – D. C. COLOMBO 23984/L.
NOVEMBER 20 AND 21, 1989.

Last Will -Burden of proof on propounder- Forgery - Suspicious circumstances- Conscience of the Court - Burden of proof re-allegation of forgery - Evidence of handwriting expert.

The deceased died leaving a Last Will whereby he bequeathed all his estate in equal halves to his illegitimate child and his legitimate child. The deceased's brother was the Executor but the mistress sought probate of the will. The Will was attacked by the widow (3rd respondent) as a forgery who claimed also that the Will was not the voluntary or true act and deed of the deceased.

Held :

1. The onus probandi is upon the party propounding the will. He must prove that the Will sought to be proved is the act and deed of a free and capable testator and if there exist facts and circumstances which arouse the suspicion of the court, he must remove such doubts. The conscience of the Court must be satisfied.

2. Despite the evidence of the handwriting expert, the Judge considered all the evidence and held that the impugned Will was the act, and deed of a free and capable testator although the testator was in hospital at the time. Whether or not the evidence satisfies the conscience of the Court is always a question of fact. The Appellate Court will not interfere with such findings unless the plainest considerations justify such interference.

3. The evidence of the handwriting expert is a relevant fact but will be used only to assist the Judge himself to form his opinion. It is not in the class of the opinion of a finger print expert. The Judge as he was entitled to do held that the evidence of the handwriting expert had to yield to the other positive evidence in the case.

4. As on the evidence the District Judge held that the Will had been duly executed by the deceased the burden shifted to the 3rd respondent to show that is was a forgery. This burden she failed to discharge. The District Judge held that the propounder had successfully staved off what was alleged as suspicious circumstances and there was no justification to disturb this finding in the absence of compelling reasons.

Cases referred to:

(1) *Bany v. Buthin 2 Moore P. C. 480.*
(2) *Peiris v. Wilbert 59 NLR 245.*
(3) *De Silva v. Seneviratne [1981] 2 Sri LR 07.*
(4) *Robins v. National Trust Co. 1927 AC 515.*
(5) *Harmes and Another v. Hinkson (1946) 62 TLR 445.*
(6) *Samarakoon v. The Public Trustee 65 NLR 100.*
(7) Gratiaen *Perera v. The Queen 61 NLR 522.*
(8) *Charles Perera v. Motha (1961) 65 NLR 294, 296.*
(9) *State of Gujarat v. Vinaya Lal Pathi AIR 1967 SC 778, 1967 Crim. L. J. 668.*
(10) *Bhagawan v. Maharaj AIR 1973 SC 1246.*
(11) *Kishore Chand v, Ganesh Prasad AIR 1954 SC 316.*
(12) *Nachchia v. Mohideen Kader 49 NLR 21.*

APPEAL from judgment of the District Judge of Colombo.

Manix Kanakaratnam with *K. S. Ratnavale* for 3rd respondent- appellant.

P. Naguleswaran for substituted- petitioner.

Cur. adv. vult.

December 15, 1989.

S. B. GOONEWARDENE, J. (P/CA)

This appeal arises out of proceedings taken in the District Court to administer the estate of one Omattage Ebert Perera who died on the 5th day of February, 1968.

These proceedings were initiated upon an application to prove what was propounded as the Last Will and Testament of the deceased as contained in a document notarially attested by H. W. Gunasekera a Notary Public bearing No. 15168 dated 5th January, 1968 (P1) in the presence of two witnesses Hapuarachchige Carolis Jayatilleke and Bamunuaratchige Don William.

The petitioner by the name of Milleniyage Lilian Costa who produced this alleged Will P1 before the District Court and obtained an order nisi declaring it proved was neither the executor named therein nor a beneficiary under it. She however had been the mistress of the deceased and her illegitimate child the 1st respondent born to her by her association with him was left upon the face of P1 one half of his estate. The other half once again upon the face of P1 was left to his other child the 2nd respondent born in wedlock with the 3rd respondent. The relationship between the parties therefore was that the petitioner had been the deceased's mistress, the 1st respondent the child born to her out of this union, the 3rd respondent his widow and the 2nd respondent the child by his marriage with the 3rd respondent. The 4th respondent was the executor named in P1 a brother of the deceased who according to the petitioner was not taking the steps required of him with dilligence to administer the estate of the deceased and hence her application for Letters of Administration cum testamento annexo in respect of such estate in which she also complained that the 3rd respondent was disposing of assets belonging to the estate and disputing the right of the 1st respondent.

The petitioner had died while proceedings were pending in the District Court and the 1st respondent substituted in her place, but to avoid confusion I will continue to refer to the petitioner and the 1st respondent by those appellations.

The 4th respondent filed papers asking that P1 be admitted to probate and also asking that he be appointed executer in terms of it.

The application for Letters of Administration on the basis that P1 was the Last Will of the deceased was resisted by the 3rd respondent, who like the petitioner upon the face of it received no benefit, upon grounds set out in her statement of objections dated 29th July, 1970, based upon which

inter alia the following issues had been raised when the inquiry commenced on 27th October, 1970 :-

1. Is the Last Will No. 15168 a forgery?
2. Is the said Last Will the voluntary or true act and deed of the deceased?
3. Was the said Last Will obtained fraudulently and/or dishonestly and/or by undue influence?

As the District Judge himself had occasion to observe in the course of his judgment, there was an element of inconsistency in an assertion that P1 was a forgery and at the same time that it had been executed by the deceased in circumstances which rendered it worthless as a document of testamentary disposition, and apparently in realisation of this Counsel for the 3rd respondent had withdrawn at the inquiry the third of the issues shown above. The District Judge had thereafter proceeded upon an examination of the evidence before him against the background of the two issues remaining and has held with the petitioner that P1 was the act and deed of the deceased who at the time of executing it was of sound mind and understanding and that no element of suspicion attached to such Will. This appeal is taken against such finding.

At the hearing before us Counsel for the 3rd respondent- appellant submitted that he was limiting his case in appeal to the ground of forgery alone and what we are therefore called upon to determine in this appeal is whether the finding of the District Judge that P1 was not a forgery but in fact the act and deed of the deceased should be sustained or not.

There was before the District Judge evidence to the following effect: At the material time when P 1 was alleged to have been executed the deceased was a patient warded in the General Hospital, Colombo, having been admitted some time previously on 27th December, 1967, with a history of Uremia, a condition of kidney malfunction. He had left the hospital on 22nd January, 1968 against medical advice and had died on 5th February, 1968.

It would appear that the 4th respondent a brother of the deceased by the name of Wilbert had put up some buildings on land that belonged to the deceased and that there had been a discussion about this in the hospital at which a decision had been reached that the deceased should

convey to his brother this land improved by him and receive in exchange from him a bare land. To give affect to this Notary H. W. Gunasekera had been summoned and he had visited the General Hospital on 3rd January, 1968. This Notary had had about 35 years experience in the practice of his profession, attested over 23,000 deeds and bore an unblemished record pertaining to his work (as the District Judge accepted). He (the Notary) had spoken to Dr. Gonsalkorale the House Officer attached to Ward No. 24 in which the deceased was hospitalised and informed him that he wanted to see the deceased about a legal matter. Thereafter the Notary Mr. Gunasekera had attested the deeds of exchange executed between the deceased and the 4th respondent (P3 and P5). Prior to this event the deceased had expressed a desire to convey two boutique rooms at Borelasgamuwa junction to his two children the 1st and 2nd respondents. For that purpose he had instructed that the title deeds relating to these properties be brought to him from the custody of his wife the 3rd respondent. He had been informed subsequently that she had however been unwilling to part with them and that had aroused his anger so that on the occasion when P3 and P5 were executed he had directed the Notary to prepare his Last Will and had given necessary instructions which the Notary had recorded on P2 the protocol copy of one of the deeds of exchange referred to. These instructions had been that he desired to leave all his property equally to his two children the 1st and 2nd respondents. On 5th January, 1968 Notary Gunasekera had visited the General Hospital again and having spoken once again to Dr. Gonsalkorale, proceeded to attest the Will P1 after the deceased had approved of its contents and executed it in his presence and in the presence of the two witnesses Carolis Jayatilleka and William.

Before the District Judge the Notary H. W. Gunasekera had given his evidence as had the two attesting witnesses Carolis Jayatilleke and William. He (the District Judge) has expressed his satisfaction as to the corroboration he found in the testimony of the Witnesses, of the evidence of the Notary which he accepted. The District Judge has accepted the testimony of Dr. Gonsalkorale who had also corroborated the Notary's evidence that the latter spoke to him on both occasions, that is on 3rd January, 1968 and 5th January, 1968.

This was briefly the effect of the evidence as to the execution of P1 itself, the evidence of importance particularly in view of the claim of forgery. This and the other evidence in the case the District Judge

examined against a background of principles stated by him in his judgment thus :—

> "The 'Onus probandi' in a case of this nature lies upon the party propounding a will and he must satisfy the conscience of the Court that the instrument sought to be propounded is the Last Will of a free and capable testator. If , however, there is an element of suspicion in a Will 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 judicially satisfied that the paper propounded does express the true will of the deceased."

That this formulation embodies a correct statement of legal principle the authorities support.

The law in this country in probate matters being the same as the law in England this principle referred to in the leading case of *Barry v. Butlin* (1) had been adopted in this country and consistently followed (Vide for example the case of *Peiris v. Wilbert* (2).

Ranasinghe, J. (as His Lordship the present Chief Justice then was) in the Court of Appeal in *De Silva v. Seneviratne* (3) cited with approval the words of Viscount Dunedin in *Robins v. National Trust Co.* (4) that those who propound a will must show that that will of which probate is sought is the will of the testator and that the testator was a person of testamentary capacity, and summarising the effect of the authorities held that the propounder of a will must prove inter alia that the document in question is the act and deed of a free and capable testator and that if there exist facts and circumstances which arouse the suspicion of the Court in this regard it becomes the duty of the propounder to remove such doubts (in order that the conscience of the Court thereby becomes satisfied).

The District Judge has proceeded to examine the evidence of the 3rd respondent and the witnesses who supported her contention that P1 was a forgery and has concluded that to this mind no element of suspicion attached to the Will P1. He has considered the evidence of the 3rd respondent to the effect that P1 could not have been executed on the day and at the time it was said to have been executed since on that day and at that time it was said to have been executed she was with the testator and no such execution took place. The District Judge has taken the view

that having regard to her stated movements of that day she could not reasonably be expected to have been present there at that time and therefore could not possibly have personally known whether the deceased executed P1 or not. He has rejected her claim that the circumstances narrated by her had the effect of showing that P1 was a forgery. The District Judge has considered the evidence of Roland Tillekeratne who had claimed that he was such a close friend of the deceased that had the latter executed P1 he would have informed him of that fact but has concluded, for good reason, that such relationship could scarcely have been as close as claimed and has also rejected his evidence that he visited the deceased every day in the morning hours in hospital considering that he was an employed man who had to be at his place of work daily. The District Judge has been unimpressed by the testimony of Carolis the father of the 3rd respondent who he has held was untruthful and had been giving evidence to fall in line with that of the 3rd respondent when he claimed to have been present with the deceased all the time during his stay in hospital.

These findings of the District Judge with respect to the evidence produced for the various parties are ultimately findings on questions of fact. As was laid down by the Privy Council in *Harmes and Another v. Hinkson* (5) whether or not the evidence is such as to satisfy the conscience of the Court must always in the end be a question of fact.

Ranasinghe, J. (as His Lordship the Chief Justice then was) in his exhaustively researched judgment in *De Silva v. Seneviratne* (supra) a judgment with which I am in complete agreement summarised the correct position in law (at page 17) thus :—

> "On an examination of the principles laid down by the authorities referred to above it seems to me : that, where the trial Judge's findings on questions of fact are based upon the credibility of witnesses, on the footing of the trial Judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration and will be reversed only if it appears to the Appellate Court that the Trial Judge has failed to make full use of the priceless advantages given to him of seeing and listening to the witnesses giving viva voce evidence and the Appellate Court is convinced by the plainest consideration that it would be justified in doing so....."

As I understood Counsel for the 3rd respondent-appellant it was not that he endeavoured to contend in argument before us that the District Judge drew any wrong inferences from established facts on the issue relating to forgery. Rather he endeavoured to assail the finding by the District Judge on a primary fact that P1 was not a forgery. What Counsel contended was that there were suspicious circumstances demonstrated by the evidence to have existed, which the petitioner failed to remove, and as such P12 ought not to have been held to have been proved. In his argument he placed great emphasis upon the evidence of the hand-writing expert Mr. Samaranayake who had been called as a witness for the 3rd respondent and who at the material time was the Government Examiner of Questioned Documents although he was acting on this occasion in a non official capacity. This witness had testified that he had examined inter alia the signature on P1 and on the deeds of exchange I have already referred to P3 and P5, and he had expressed his opinion that the signatures on them upon comparison with certain admitted signatures he found not to be those of the deceased. The District Judge has rejected this evidence as he was entitled to do and he has also commented upon the fact that it did not appear that Mr. Nagendra another hand-writing expert previously consulted by the 3rd respondent had been prepared to go along with such a conclusion. I do not intend, nor is it necessary to analyse the evidence of Mr. Samaranayake here ; that the District Judge had done and in my view adequately.

In the case of *Samarakoon v. The Public Trustee* (6) with reference to the testimony of hand-writing experts there is cited with approval (at page 114) the following passage from the earlier case of *Gratiaen Perera v. the Queen* (7) :

> "I think the modern view is to accept the expert's testimony if there is some other evidence, direct or circumstantial, which tends to show that the conclusion reached by the expert is correct; provided, of course, the Court, independently of the expert's opinion, but with his assistance, is able to conclude that the writing is a forgery".

In his treatise "The Law of Evidence" 2nd Edition (1989) Volume I in summing up the effect of the authorities, E.R.S.R. Coomaraswamy (at page 627) states thus:-

> "The correct position as to the value of the evidence of the hand-writing expert seems to be that his evidence must be treated as a

relevant fact and not as conclusive of the fact of genuineness or otherwise of the handwriting: His opinion is relevant but only in order to enable the Judge himself to form his opinion (*Charles Perera v. Motha*) (1961) 65 N.L.R. 294 at 296 (8) *State of Gujarat v. Vinaya Lal Pathi* A.I..R. (1967) S.C. 778; (1967) Crim L.J. 668 (9). It is not in the class of the opinion of the finger print expert (*Bhagwan v. Maharaj* A.I.R. (1973) S.C. 246) (10)".

The District Judge upon a review of the evidence of Mr. Samaranayake has concluded that this was not a case where an expert could have expressed a definite opinion and has advised himself not to accept that evidence. Indeed he has preferred to accept the other evidence suggesting that P1 contained the signature of the deceased as he was well entitled to do. As was held in the case of *Kishore Chand v. Ganesh Prasad* (11) conclusions based upon mere comparison of handwriting must at best be indecisive and yield to the positive evidence in the case.

Counsel's next argument was connected with the name of the 2nd respondent as it is incorrectly said to be stated in P1 as Sunil Aruna Shantha whereas his correct name as shown on his birth certificate reads Wipul Aruna Shantha. Counsel contended that no father would make a mistake as to his son's name and that this shows that P1 could not have been prepared on the instructions of the deceased and was thus a forgery. The District Judge for his part has not considered this a suspicious circumstance and I do not disagree with him. It could well be that the Notary took down the name wrong and that it escaped the notice of the deceased when P1 was read and explained to him his attention being concentrated upon the manner of disposition to see that his two children shared his estate equally; just as much as it can well be said that the 3rd respondent when she filed her Statement of Objection dated 29th July 1970 had in the caption of her papers adopted the incorrect name of the 2nd respondent as it appears in the papers filed by the petitioner without seeking to correct it either in the caption or by pointing out in such objections that such incorrect name had been used since her attention would have been on the substance of her objections rather than on such name.

Counsel next contended that the Will P1 was an unnatural Will as it excluded the 3rd respondent the widow from getting any benefit under it. On the contrary I am of the view that it was quite a natural one where the

deceased thought of benefiting only his two children perhaps not unmindful of the possibility of his relatively young widow the 3rd respondent entering upon another marriage after his death; not forgetting at this point of course, his displeasure at her refusal to release upon his request the title deeds of two boutique rooms at Boralesgamuwa to which I have already made reference.

One or two other matters Counsel referred to in his submissions as demonstrating the presence of suspicious circumstances. One was what he referred to as conflicting testimony relating to what was said to have taken place when instructions were given by the deceased for the Notary to prepare his Will. Another was the non disclosure to the 4th respondent by the Notary after the death of the deceased that such Will had been executed. The District Judge has not considered these as important and upon consideration neither do I. These in any event are pure questions of fact the consideration of which was primarily within the province of the District Judge and his conclusions thereon should as far as possible remain undisturbed save in the presence of compelling reason to do otherwise, none of which I see.

In the case of *Nachchia v. Mohideen Kader* (12) Soertsz S.P.J. in considering the question as to the burden of proof where a Will was challenged as a forgery said (at page 22) thus:-

> "The 6th respondent, who was the husband of the deceased, objected to the will being admitted to probate on the ground, substantially, that it was a forgery. That being the case of the objecting husband no question of undue influence or of any other kind of influence that Courts are wont to examine with careful scrutiny arose. The sole issue upon which the inquiry was held was whether the will was executed by the deceased and this issue fell to be determined in accordance with the principles applicable to the determination of a fact in issue in civil proceedings. The initial burden of proof was, undoubtedly, upon the petitioner who brought the will into Court. She led evidence to show that the will was executed by the deceased. We must assume that the learned District Judge was satisfied that she had discharged the initial burden because he called upon the respondent to enter upon his case..... That means that he found the burden of rebutting the petitioner's case had now devolved upon the respondent."

On this basis Soertsz S.P.J. allowed the appeal and directed that the Last Will in question in that case be admitted to probate.

If one approaches the instant case against the formulation adopted by Soertsz, J. in the case before him, upon the findings of the District Judge on the evidence before him that P1 had been duly executed by the deceased, the burden shifted to the 3rd respondent to show that P1 was a forgery a burden which once again upon the findings of the District Judge she failed to discharge.

I take the view that the District Judge's approach to the questions before him was a correct one and that upon the evidence in the case he arrived at a correct decision. I would therefore concur with his conclusions on the facts and his determination that P1 was the act and deed of the deceased and that no element of suspicion attached to it.

I would thus affirm the judgment of the District Judge and dismiss this appeal with costs payable to the 1st respondent in the original application, who has since been substituted in the room of the deceased petitioner. In consequence I would direct that the order nisi be entered declaring P1 to be the Last Will and testament of the deceased Omattage Ebert Perera be made absolute and that probate be issued in respect thereof to the 4th respondent as directed by the District Judge after compliance with the usual formalities required by law.

WEERASEKERA, J. — I agree.

Appeal dismissed.