

5/1962

IN THE PRIVY COUNCIL

Appeal No. 19 of 1960

O N A P P E A L FROM THE SUPREME COURT OF CEYLON	UNIVERSITY OF LONDON INSTITUTE OF ADVANCED STUDIES 29 MAR 1963 25 ROSS SQUARE LONDON, W.C.1. <u>Appellant</u>
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B E T W E E N:
EVELYN LETITIA PEIRIS

- and -

68194

MILLIE AGNES de SILVA

Respondent

C A S E FOR THE RESPONDENT

10 1. The Appellant appeals from the Judgment and Decree of the Supreme Court of Ceylon dated the 16th December 1958 whereby the Supreme Court dismissed with costs the appeal of the Appellant from the Judgment and Decree of the District Court of Colombo dated the 28th September 1956. The District Court had held that the Last Will propounded by the Appellant was a forgery. pp.485-495

20 2. The principal question arising for consideration on this appeal is whether it is open to the Appellant to canvass before their Lordships' Board the concurrent judgments of the Courts below on a pure question of fact. It is respectfully submitted that there are no grounds upon which the Appellant can properly ask their Lordships to review the evidence on the issue of forgery for a third time. pp.419-474

3. The Appellant commenced the Testamentary proceedings from which this appeal arises by filing in the District Court of Colombo a petition in which she prayed, inter alia for - pp.32-37

30 (a) the recall of the Probate (granted on the Respondent's application) of the Last Will No.454 dated the 13th May 1950 of Sellapperumage William Fernando, deceased; p.34 Ll.15-16

(b) the grant of probate of the Last Will No.474 dated the 4th June 1951 of the said deceased; and p.34 Ll.17-18

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p.34 Ll.18-20 (c) in the alternative, an order for the administration of the estate of the deceased as on an intestacy.

The original of the said Will No. 474 was not produced, and the Appellant, in her affidavit supporting the petition explained its absence as follows:

p.35 Ll.22-31 "I was aware that the said Sellapperumage William Fernando had executed a Last Will subsequent to the alleged Last Will No.454 relied on by the Respondent and such subsequent Last Will was with the Testator till the time of his death. I fear that the Respondent who was in charge of the house and things of the Testator some time before his death and immediately thereafter has either destroyed it or is fraudulently keeping it away from the Court." 10

pp.40-42 4. The Respondent filed a Statement of Objections in which she clearly alleged that the Document purporting to be the Last Will of the deceased was not his act and deed and that his signature as well as the signature of the witness C. Vethecan appearing on the document were forged. 20

5. At the inquiry the following issues were raised and accepted by the learned trial judge:

- p.42 Ll.25-32
1. Was the Last Will No. 454 of the 13th May 1950 revoked by the deceased?
 2. Did the deceased execute the Last Will No.474 of the 4th June 1951? 30
 3. If the issues 1 and 2 are answered in the affirmative, should the Probate of the Last Will No. 454 be revoked and Probate of the Last Will No. 474 be granted?

At the stage these issues were raised, the Record of proceedings contains the following statements made by Counsel:

p.43 Ll.1-7 "Sir Lalitha Rajapaksa states that he will lead evidence to propound the Will reserving the right to lead evidence in rebuttal if necessary.

Mr. Navaratnarajah states that his position in regard to Will No.474 is that the signature of the deceased is a forgery and the signature of the witness Vethecan is also a forgery."

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- 10 6. At the inquiry the Appellant gave evidence and also called several witnesses to prove her contention that the deceased was, at the time of the execution of the Last Will No.474, well disposed towards her and gravely displeased with the Respondent. To prove the execution of the Will the Appellant called the attesting notary and one of the persons who witnessed the signature of the deceased on the alleged Will. The Appellant also called witnesses to prove that the deceased had mentioned in his lifetime that he had disposed of his property in such a way that the Appellant and Respondent would take equally after his death. The Respondent gave evidence and called several witnesses including a handwriting expert.
- 20 7. On the 28th September 1956, the learned trial judge delivered judgment holding that the Will No.474 was not the act and deed of the deceased and that the signature of the deceased on the said Will was a forgery.
8. The undisputed facts of the case are as follows:
- (a) the deceased was a native of Kaldemulla, a village within the town of Moratuwa, and starting life in humble circumstances amassed a considerable fortune from building contracts in India.
- 30 (b) the Respondent was the only child by his first marriage and the Appellant was his only child by his second wife Nancy.
- (c) in January 1934 the deceased gave the Respondent in marriage to a British qualified Architect. He gave the Respondent a handsome dowry, and in October the same year he gifted, subject to a life-interest in favour of his wife, almost the entirety of his remaining property to the Appellant.
- 40 (d) in January 1940, the Appellant who then a girl of 18 eloped with a typist working in a proctor's office and later married him with the permission of Court. The runaway

pp.43-78
pp.92-105
pp.105-123
pp.203-210
pp.227-243
pp.123-185
pp.185-196
pp. 78-80
pp. 81-84
pp. 84-91
pp. 92-105
pp.283-325
pp.326-350
pp.350-414
pp.419-474
p.43 Ll.15-28
p.283 Ll.10-15
p.283 Ll.16-40
p.244 Ll.5-13

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p.106 Ll.38-40
p.286 Ll.3-15

marriage of the Appellant caused acute bitterness in the mind of the deceased towards the Appellant and her mother whom the deceased suspected of connivance. Soon after the Appellant's marriage, the deceased left his home at Kaldemulla and lived on an estate in Matale for over 10 years with a woman named Marina Fonseka. When the deceased left Kaldemulla, his wife went to live with the Appellant at Laxapathiya, a village in Moratuwa. Neither the wife nor the Appellant visited the deceased in Matale, but the Respondent visited him during the school holidays throughout the period of his stay there.

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p.554 L.38 -
p.555 L.35

(e) on the 1st February 1940, the deceased executed a Last Will by which he devised all his property to the Respondent. (R9).

p.499-p.503
p.500 Ll.20-30

(f) on the 16th August 1941, the deceased entered into a deed of separation with his wife (P1). In terms of this deed he gave his wife Rs.500/- and promised to pay a further sum of Rs.1500/- which the wife undertook to repay in the event of her "obstructing and molesting" the deceased.

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pp.547-549

pp.549-552

pp.552-553
p.553 Ll.11-12

(g) on the 23rd November 1943, the wife brought an action against the deceased for a dissolution of their marriage on the ground of adultery. The deceased filed answer denying the allegation and asked for the dismissal of the action. On the 14th October 1944, the action was settled and the consent motion dismissing the action contained an undertaking by the wife not to "molest" the deceased in any manner. The Appellant and her husband assisted the wife in this divorce action.

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p.556 Ll.1-26

(h) on the 13th March 1946, the deceased entered into an agreement with a firm of undertakers for his funeral. (R10). He required the Firm to act on a notification by the Respondent or by his nephew. He added, as his express wish, that his wife should not have a hand in the funeral arrangements.

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pp. 6-7

(i) on the 13th May 1950, the deceased executed the Last Will No.454 naming the Respondent as

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the sole heir and executrix of his Will. He directed the Respondent to carry out the provisions of his Agreement with the Undertakers and declared that he had already made provision for the Appellant.

p.6 Ll.12-15
p.6 Ll.21-22

- 10 (j) on the 22nd May 1950, the deceased wrote a letter (P2) to the village headman of Kaldemulla asking him to convey a message to his wife Nancy and to the Appellant. The message was to the effect that he was prepared to deposit a certain sum of money for the benefit of the Appellant's children with a life interest reserved to the Appellant. The condition of the gift was that the gift would be "confiscated" in the event of their causing any trouble to the deceased. The occasion for this letter was a plea for help by the Appellant.
- 20 (k) on the 8th September 1952, after the deceased had returned from Matale to live at Kaldemulla, he made a complaint to the police that his wife who was living with her daughter (the Appellant) was harassing and humiliating him. (R 12 and R 13).
- (l) after the deceased had come back to reside at Kaldemulla, the Parish Priest of Moratuwa advised him to be reconciled to his wife and to his daughter, the Appellant.
- 30 (m) on the 29th October 1952, the deceased gave a sum of Rs.15000/ to the Appellant to be invested on a mortgage, and on the 18th November 1952, the deceased gave his wife Rs. 5000/ subject to certain conditions set out in a notarial agreement. (P8). The Appellant produced a letter dated the 7th November 1952 written by the deceased to her (P3) and an undated letter, presumably written during the same period, advising her in regard to the kind of property she should accept as security for lending the money he was intending to give her. The Appellant also produced a letter dated the 18th November 1952 and two undated letters from the deceased which show that the Appellant was entreating the deceased to allow her to visit him, and that the deceased was, for some unspecified reason,
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p.503 L.20-
p.504 L.3

p.559 L.1-
p.560 L.12

p.81 L.36 -
p.82 L.5

p.510 L.25-
p.514 L.20

p.506 L.1-
p.510 L.12

p.504 Ll.9-
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p.505 Ll.15-
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p.504 Ll.28-
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p.505 Ll.1-9
p.505 Ll.25-

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unwilling to let her visit him openly.

p.593 L.26-
p.594 L.42

(n) on the 16th January 1953, the deceased conveyed to the Respondent by way of gift, a house in Colombo worth about Rs.118,000/.

p.289 Ll.12-19
p.290 Ll.22-25

(o) the deceased fell seriously ill in January 1954 and died on the 22nd February 1954 in a nursing home in Colombo after an operation. In the last three weeks of his illness the Respondent lived at Kaldemulla with the deceased and was given the keys of the safe and the almirah in which the deceased kept his valuables.

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p.292 Ll.9-10

p.438 Ll.21-
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p.436 Ll.40-
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p.429 Ll.24-
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8. The learned trial judge held that, having regard to the relations between the parties and the character of the deceased, the Last Will No.474 was an unnatural one. He took the view that there was no change of attitude on the part of the deceased towards the Appellant until after he had returned from Matale to Kaldemulla and held that the deceased returned to live at Kaldemulla more than a year after the impugned Will was executed. He also held that the evidence given by the Appellant and her witnesses about the unseemly behaviour of the Respondent towards her chauffeur was false and that the whole story was a malicious fabrication by the Appellant to supply evidence of motive for the alteration of the dispositions in the previous Will. With regard to the witnesses who were called by the Appellant to support her story that the deceased had in his lifetime declared that he had made provision for the daughters to share his property equally after his death, the learned judge held that the evidence of two of them did not establish the contention of the Appellant and that the evidence of the other two witnesses could not be relied on.

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p.431 Ll.28-
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p.442 Ll.17-
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p.443 Ll.33-
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p.445 Ll.35-
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p.449 Ll.14-
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9. The two witnesses who were called by the Appellant to prove the execution of the Will were disbelieved by the learned trial judge. Tudugalla, the attesting Notary, gave evidence which the learned judge found to be contradictory and lacking in candour. Of this witness the learned judge said:

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p.468 Ll.44-
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"The impression left on me by Mr. Tudugalla by the time he left the witness box was that he is unworthy of credit."

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Devapuraratne who signed the Will as a witness was a proctor by profession. The learned judge found that he supplemented his earnings as a Proctor by stenography, petition drawing and by charging fees for signing documents as a witness. Of this witness the learned judge said:

p.469 Ll.2-17

10 "I have considered Mr. Devapuraratne's evidence with anxious care, but find myself unable to accept his evidence that he knew the deceased and that the deceased signed the Will in question in his presence."

p.471 Ll.1-5

20 With regard to the evidence of the handwriting expert called by the Respondent, the learned judge took the view that, having regard to the fact that the deceased signed in Sinhalese, a language unknown to the expert, it was unsafe to act upon his opinion that the signature of the deceased was a forgery. With regard to the evidence of the expert on the signature of the witness Vethecan, the learned judge concluded as follows:-

p.472 Ll.41-44
p.473 Ll.4-8

30 "The formation of "th" appears to be the most noticeable characteristic in every one of the admitted signatures, but this was not found in the disputed one. The feature is so very noticeable that one wonders whether any forger would have omitted to reproduce it. But, if the forger did not have before him at the time of the forgery a specimen of the signature he was attempting to forge, it may well be that he overlooked the feature. In any event, it is difficult to explain why, if the signature of Vethecan on P11 is a genuine one, a feature which is present in every one of the standards extending over a period of years was omitted by Mr. Vethecan, in this particular signature. However, quite apart from the absence of this feature, in the signature "C. Vethecan" on P11, and quite apart from the opinion expressed by Mr. Muthukrishna, I find

40 on the evidence in this case that the Last Will P11 was not the act and deed of the deceased and that the signature of the deceased on P11 is a forgery."

p.474 Ll.11-31

10. The Appellant appealed to the Supreme Court, and the Supreme Court (Gunsekara J. and Sansoni J.) dismissed the appeal with costs. Gunsekara J. with whom Sansoni J. agreed, dealt, first, with the contention that it was not open to the District Judge

p.474-485

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p.486 Ll. 18-22 to hold that the Will was a forgery because no issue of forgery was framed at the inquiry and that such a question was not involved in the issues tried. He rejected the contention because it was clear from the proceedings that both parties understood the second issue as raising the question whether the impugned Will was a forgery.

11. On the question whether the Will in question was an unnatural one, Gunesekara J. said:

p.488 Ll. 47-51 "There appears to be no sufficient ground for disturbing the findings of fact upon which the learned judge has based his conclusion that the impugned Will is an unnatural one, and it seems to me that this conclusion is warranted by those findings." 10

p.493 Ll.9-11 12. With regard to the rejection of the evidence of Tudugalla and Devapuraratne, Gunesekara concluded that no case had been made out for a reversal of the District Judge's findings on the credibility of these witnesses. It is clear from the judgment of Gunesekara J. that he took the same view as the learned trial judge did about the evidence of Tudugalla and Devapuraratne. The Supreme Court also expressed the view that in all the circumstances it was unlikely that the deceased would have left the Will in a safe rather than leave it in the custody of the attesting Notary. 20

p.490 Ll. 16-20 13. Gunesekara J. dealt lastly with the evidence of the witnesses called by the Appellant to prove that the deceased had in his lifetime mentioned that he had arranged for his two daughters to take his property equally after his death. About Reverend Dhammaloka Thero he said: 30

p.493 Ll.22-28 "The learned trial judge disbelieved the Reverend Dhammaloka Thero, and his finding rejecting the evidence of this witness was not canvassed in appeal. The learned Counsel for the Appellant stated that he could not ask that the finding should be set aside."

p.493 Ll.44-47 With regard to the evidence of Reverend Wikremanayaka, Gunesekara J. took the same view as that taken by the trial judge, namely, that his evidence of what the deceased told him did not mean that the Appellant would be a beneficiary under his Will. 40

About the evidence of A.V.Fernando Guneseckara J. said:

p.494 Ll.15-
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10 "It does not appear that there was any occasion for him (the deceased) to confide to Mr. Fernando information that he did not impart even to the Appellant as to the provisions such a Will. Anything that he may have said about the provisions made by him for his daughters could only have been a statement made casually and the possibility that Mr. Fernando carried away a wrong impression of a casual remark about a matter that did not interest him cannot, I think, be ruled out. The learned judge holds that he is unable to accept Mr. Fernando's evidence that the deceased told him what Mr. Fernando says he did. I can see no sufficient ground for a reversal of this finding of fact by the judge of first instance."

20 14. It is submitted with respect that the judgments of the Courts below are right. Apart from the contention that the Will in question was genuine, the only matter argued on behalf of the Appellant before the Supreme Court was that the District Judge could not properly hold the Will to be a forgery on the issues framed at the trial. It is submitted with respect that the judgment of the Supreme Court on this point is right.

15. It is submitted with respect that this appeal should be dismissed with costs throughout for the following among other:-

30 R E A S O N S

BECAUSE it is not open to the Appellant to canvass the concurrent finding by the Courts below that the Will in question was not executed by the deceased.

BECAUSE in any event, the judgments of the District Court and the Supreme Court are right.

BECAUSE the Appellant has failed to satisfy the Courts below that the deceased signed the Will in question.

40 BECAUSE the Supreme Court was right in holding that the District Judge could, on the issues framed at the trial, hold that the Will in question is a forgery.

E. F. N. GRATIAEN
WALTER JAYAWARDENA