

~~G.L.C.~~

14, 1954

No. 34 of 1952.

In the Privy Council.

37704

ON APPEAL FROM THE SUPREME COURT OF CEYLON

UNIVERSITY OF LONDON
W.C.1.
24 FEB 1955
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN
MURIEL AMARASEKERA NEE WIJESINGHE *Appellant*
AND
HETTIARATCHIGE DONA ADLIET
RATNAYAKE AND OTHERS *Respondents.*

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Case for the Appellant

RECORD.

1. This is an appeal from a judgment of the Supreme Court of Ceylon dated 23rd January 1950 dismissing an appeal by the Appellant from a judgment of the District Court dated 25th January 1949 by which probate of a Will dated 23rd May 1943 of James Albert Ratnayake was granted to the Respondent Hettiaratchige Dona Adliet Ratnayake. p. 346. p. 330.

2. The persons named hereunder are referred to in this Case by the designations appearing opposite their respective names.

NAME	DESCRIPTION	DESIGNATION IN THIS CASE
20 James Albert Ratnayake	The Testator	The Testator
Hettiaratchige Dona Adliet Ratnayake	Wife or mistress of the Testator	Adliet
Felix Wijesinghe	Nephew of the Testator	Wijesinghe
Hettiaratchige Don Martin	Brother of Adliet	Martin
James Alwis Weerasinghe	Witness to Will	James Alwis
James de Alwis Dissanayake	Witness to Will (cousin to James Alwis)	Loku Dissanayake
J. R. de Alwis Dissanayake	Witness to Will (cousin to Loku)	Podi Dissanayake
30 W. P. Perera	Witness to Will	Perera
Girigoris Perera	Servant of Testator	Girigoris

3. The action was commenced by a Petition dated 5th July 1943 brought jointly by Adliet and Wijesinghe, the Respondents to which were Percy Arnold Ratnayake and Pearl Bandara Menike Ratnayake, the infant children of the Testator by Adliet, Hettiaratchige Don Herath (as guardian p. 26.

ad litem of the infants), and three children of a deceased sister of the Testator of whom the Appellant is one. Shortly after the action was started Wijesinghe joined with the fourth, fifth and sixth Respondents in opposing the Petition.

Exhibit P.1A,
p. 356.

4. The alleged Will of 23rd May 1943 was found in an account book of the Testator at page 223—towards but not at the end—of the book. It purported to have been witnessed (as required by the law of Ceylon) by five witnesses. It was the case of those who opposed the Will and is the case of the Appellant that this alleged Will is a forgery.

5. The main facts relating to the Testator were as follows: The Testator was a man of some wealth owning estates in Ceylon, some foreign investments and a substantial bank balance. He was of good education and a methodical man of business. He had a business and residence at Dehiowita and also an estate at Talangama called Bank Hill Estate. Towards the latter part of his life he spent two weeks in every month at Talangama where he lived with Adliet and the other two weeks at Dehiowita. He had been twice married, and his second wife had died in 1927. After her death the Testator appears to have taken Adliet into his house at Talangama and kept her there as his mistress, although Adliet claimed that he had taken steps to make her his wife, and had two children by her. The exact status of Adliet before 1927 was not fully established: according to her own evidence she had assisted the Testator's second wife in household work, according to the objectors to the Will she was a tapper on the estate. The trial judge found, in any case, that she was no different to any other labourer who worked on the estate. Adliet swore in her evidence in chief that she was the wife of the Testator, but subsequently in her cross-examination agreed that this was not the case. If she was merely the mistress of the Testator, she would have no claim in law on the estate, unless the alleged Will was upheld.

p. 331, l. 31.

p. 210.

p. 217.

6. In 1943 the Testator was 65 years of age and had begun to suffer from bleeding piles which eventually resulted in pernicious anæmia, of which he died on 3rd June 1943. There was no evidence that his condition was in any way serious on or before the date when the Will was said to have been signed, and he had certainly been doing business up to a few days previously. He went to Talangama on 10th May 1943 and it was while he was there that the Will was said to have been executed. The account given by Adliet and her witnesses was that on the afternoon of 23rd May 1943 the Testator decided to execute a will: he first sent for Martin and asked him to fetch James Alwis, a man who had previously been watcher on the estate. When James Alwis came the Testator told him to fetch Loku Dissanayake and two others. James Alwis then left and returned later with Loku Dissanayake and two others namely Podi Dissanayake and Perera. The Testator then, as it is alleged, produced the note-book in which the Will was already written out and signed it in the presence of (1) James Alwis (2) Loku Dissanayake (3) Podi Dissanayake (4) Martin and (5) Perera, who thereupon attested it. Adliet was not actually present at the signing but was able from an adjoining room to observe the proceedings through a glass partition.

7. It may be convenient at this point to set out the principal facts elicited regarding the attesting witnesses :—

- (A) James Alwis. He had some years before been a part-time watcher on the estate. He had been fined for the illicit sale of arrack, prosecuted for damaging a bus and ordered to pay Rs.200, fined for gambling, and according to one account of his own (afterwards contradicted) charged in a criminal case with one Cornelis or Cotta Perera. The Appellant said that he had intimidated Wijesinghe who regarded him as a thug. The Appellant's husband said that he had been intimate with Adliet and was the father of her children. p. 185, l. 44.
p. 188, l. 5.
p. 188, l. 36.
p. 193, l. 12.
p. 66, l. 36.
p. 188, l. 15.
p. 315.
p. 296.
- (B) Loku Dissanayake. He was a cousin of James Alwis. He claimed at first to be a man worth Rs.20,000 but it appeared that in fact he had once been a despatch clerk with a Company in Colombo and had retired with a gratuity of about Rs.500. pp. 57, 58, 59.
p. 54, l. 12.
p. 57.
- (C) Podi Dissanayake. He was a first cousin of Loku Dissanayake. He had recently been prosecuted for theft in the Magistrates' Court under another name. At one time he claimed to have been in the habit of going to the Testator's house because he was cultivating his field but later admitted that it was his father who had taken the field and said that he went to visit the Testator on behalf of his father. Girigoris however, a trusted servant of the Testator, said that neither Podi nor Loku Dissanayake had anything to do with the deceased. p. 71.
p. 195.
p. 70.
p. 73.
p. 88, l. 42.
- (D) Martin. He is a brother of Adliet. In a case in the Magistrates' Court of Colombo he was called to give evidence and denied on oath that Adliet who was present in Court was related to him. p. 79.
- (E) Perera was the Manager of the local Co-operative Store and a man of substance. He was not related to the Petitioner or any of the other witnesses. Perera was not called. p. 79.

8. The Testator died on 3rd June 1943 and the subsequent history of the notebook, which is of some significance, and other material events were as follows. The funeral took place at Dehiowita on 4th June 1943. It was attended by Adliet and Wijesinghe and according to the latter's evidence which was independently corroborated Adliet asked him to look after her and her children. On 6th June 1943 Wijesinghe sent to Adliet to ask for the Deeds but Adliet refused to hand them over. On 7th June 1943 Adliet handed over the deeds in her possession to one Proctor Seneviratne and also handed over to him the notebook. She did not however at this time make any reference to the existence of the Will although presumably she must have known of it. On 17th June 1943 Wijesinghe saw the notebook in the office of Proctor Seneviratne who said he had discovered the Will. Wijesinghe informed the Appellant. The Appellant and her husband went immediately to Proctor Seneviratne's office and asked to look at the Will. The Proctor produced the notebook and showed them a Will at page 61 and also an entry on page 47 which read " see page 61." The Appellant and her husband at once formed the p. 255.
p. 94.
p. 255 l. 43.
p. 256.
p. 50.
p. 213.
p. 49.
p. 225.
p. 257.
p. 258, l. 37.
p. 280, l. 12.
p. 312, l. 17.
p. 280, l. 21.
p. 281, l. 15.

p. 312, l. 7.
p. 281.
p. 312, l. 30.

p. 281, l. 30.
p. 260, l. 20.

p. 96.

opinion that the Will was not in the Testator's handwriting, and they thereupon consulted a Proctor. After the Will had been filed in Court, it was found that page 61 was missing, that the alleged Will was at page 223 and that the entry on page 47 read "see page ahead 223 for my Will." At some date which was probably in August 1943, Wijesinghe and the Appellant's husband, as the result of a message, went to see Martin, who at that time had left Talangama and was living at Matara. According to their evidence Martin appealed to them to save him from trouble by coming to some settlement with Adliet as he had executed a document purporting to be a Will of the Testator at the instigation of James Alwis three or four days after the death of the Testator. In these circumstances the Appellant and her relations, including Wijesinghe, decided to contest the Will. 10

p. 60.
p. 155.

p. 88.

9. The action was tried twice, the judgment in the first action having been set aside by the Supreme Court. The first trial took place before Schokman, Additional District Judge. Evidence was given on behalf of the Petitioner by the Petitioner (Adliet) herself and by four out of the five witnesses to the alleged Will: the witness who did not give evidence was Perera. The only explanation for the absence of Perera was one given by Loku Dissanayake which the judge described as unconvincing. It was that Perera had difficulty in leaving his work to give evidence. Proctor Seneviratne did not give evidence. On behalf of the objectors Wijesinghe gave evidence but the Appellant, although she was anxious to give evidence was not called as her Proctor advised that her evidence was not necessary. Evidence was also given by Girigoris a trusted servant of the Testator who lived on the drive leading to the Testator's bungalow, that the witnesses could not have come to the house on 23rd May 1943 without his seeing them, and that he did not see them. The principal witness for the objectors was one Muthukrishna, a handwriting expert, and since he was not able to give evidence again at the second trial (at which however his previous evidence was read) the effect of his evidence is summarised at this stage and is set out in the next paragraph. 20 30

p. 113.

10. Mr. Muthukrishna first stated that he had been practising as an examiner of questioned documents for nearly 35 years and that he had given expert evidence in the District Courts and in the Supreme Court of Ceylon a great many times and also in Madras. He said that he had been supplied with signatures of the Testator on four cheques, a number of rent receipt books and pass books and a manuscript book in order to compare the Testator's signatures. On this he had formed the opinion that the writing of the Will was not in the hand of the deceased, that he had not signed the Will—(it may be noted that the alleged Will bore two signatures, one a monogram signature and one full signature) and that the entry on page 47 was not in his hand. He dealt in detail with the formation of various letters and strokes and pointed out a number of discrepancies and instances where corrections and retouchings had been made in the outlines of the letters in the Will. There were over 40 such corrections in the Will. He had also compared the spelling in the Will with the other examples of the Testator's writing. It was apparent from the latter that the Testator wrote flawless English in 40 50

p. 118, l. 30.

p. 119, l. 25.

spelling, the use of stops, and capitals and syntax. With regard to the presence or absence of stops, dashes, etc., the Will was markedly different from other admitted writings. A man who wrote as he did could never have written (as in two places in the Will) "until" with two "l's", nor could he have written the word "sisters" with random apostrophies in different places—out of eight examples only one was correct. The writer of the Will had shown him (or her) self in difficulties with the words "manage" (first spelt "mange"), "liabilities" (first spelt "liabailities") "executors" "forfeit" (which had been begun "forfi") "equal" and "foreign" (spelt "foregin"). The writer of the Will had even had difficulty with the word "Dehiowita" which the Testator must have written thousands of times. He stated that he had examined very carefully the entry on page 47 of the notebook "see page ahead 223 for my Will." That was not in the handwriting of the deceased. It was visible to the naked eye that there was an erasure in the area of "ah" in the word "ahead" and in his view the letters "ah" had been substituted for "61," and there was originally "see page 61." He had found page 61 missing when he saw the book and had drawn the attention of the Secretary of the Court who had made a note. The judge himself examined the entry through a microscope and was able to see a clear erasure under the "a" and the remains of a stroke above it.

11. Schokman, A.D.J., gave judgment on 2nd August 1945. He said of Martin that his evidence showed that he was a man quite willing to commit perjury when it suited his purpose. He disbelieved his evidence about the Will and about the interview in August 1943 with Wijesinghe. He was satisfied that Wijesinghe was a truthful witness and accepted his evidence as to the interview with Martin. He accepted the evidence of Girigoris. In his view grave suspicion arose on the evidence whether the Will propounded was the act of the deceased: the evidence of Adliet and her witnesses had not removed those suspicions; on the contrary their evidence was not such evidence as he felt he could act on with any confidence. He then referred to Mr. Muthukrishna's evidence; he had been supplied with a photograph of the original Will and had been able to follow Mr. Muthukrishna's evidence in detail. While the opinion of an expert alone would not be sufficient to induce the Court to find forgery, yet his evidence gave rise to serious doubts that the deceased wrote and signed the Will. He commented on the unusual character of the entry on page 47 and came to the conclusion that the Petitioner had failed to satisfy him that the Will propounded was executed by the deceased and dismissed the action.

12. Adliet appealed to the Supreme Court against the decision of Schokman, A.D.J., and on 6th March 1947 the Supreme Court (Keuneman, J. and Canekeratne, J.) allowed the appeal and directed a new trial, on the ground that the District Judge had been misled with the belief that there were elements of suspicion which it was the duty of the propounder to remove.

13. The second trial took place before Sinnethamby, A.D.J., in 1948, that is to say, some five years after the events in question. For the petitioner there gave evidence (as before) Adliet herself, and four of the witnesses

(James Alwis, Loku Dissanayake, Podi Dissanayake and Martin). Perera was again not called nor was any explanation given of his absence, nor was Proctor Seneviratne. There were a number of discrepancies between the evidence given by the witnesses to the Will and that given by them at the previous trial. For the Appellant Wijesinghe gave evidence, which was confirmed, as to the conversation with Adliet on 4th June 1943 in which she asked Wijesinghe to look after her and her children, by a Proctor J. D. Jacolyn Seneviratne. In addition the Appellant and her husband, John Henry Amarasekera, gave evidence. Mr. Amarasekera stated that when, together with the Appellant, he first saw the alleged Will in the office of Proctor Seneviratne, it was at page 61 of the notebook, and the entry at page 47 read : " see page 61." When he next saw the alleged Will in Court it was at page 223, and his Proctor immediately informed the Secretary of the Court. He confirmed Wijesinghe's evidence regarding the interview with Martin in August 1943. The Appellant confirmed her husband's evidence regarding the Will and said that she was convinced when she saw it in the office of Proctor Seneviratne that it was not in her uncle's handwriting. She said that her uncle was a good English scholar and could never have made the mistakes which appeared in the alleged Will. Girigoris, the trusted servant of the Testator, also gave evidence. He said that he knew the five alleged witnesses to the Will and that none of these persons came to the Testator's bungalow on 23rd May 1943 and that if they had done so he would be bound to know of it. He stated that the Testator would certainly have informed him if he had made a Will, especially since a legacy had been left to him (Girigoris). It was suggested to this witness that on 23rd May 1943 he was away plucking nuts on the Hendala estate, but he stated that 23rd May 1943 was a Sunday and that pluckers did not work on Sunday as they were all Catholics. Some check rolls were produced which showed that rubber tappers worked on Sunday but the witness did not agree that these were in the Testator's writing, and it was never proved in whose writing they were. It appears that alterations have been made in the book during or since the trial.

14. Mr. Muthukrishna was not able to give evidence at the second trial. On 4th May 1948, on evidence that he was suffering from cardiac failure, the case was adjourned until 6th July 1948. On 6th July 1948 it was further adjourned until 11th October 1948. On 11th October 1948 the Appellant's Proctor applied that Mr. Muthukrishna's evidence be taken on commission, but the Respondents objected. The application was renewed on 12th October 1948. Finally on 18th October the Appellant's Proctor applied to read the evidence given by Mr. Muthukrishna at the previous trial. This was done and the Court had before it photographs of the alleged Will.

15. The learned trial judge gave judgment on 25th January 1949. Dealing with the witnesses to the alleged Will, he said that Loku Dissanayake impressed him as being a truthful witness and he accepted his evidence. He referred to various criminal proceedings in which James Alwis had been involved but said that even a person who had been involved in criminal cases can speak the truth on matters in which he had no immediate or personal interest. With regard to Martin the judge said that if his evidence stood alone he would certainly not have been disposed

to act upon it. He made no specific finding about Podi Dissanayake. The learned judge then examined the Will and said that its contents were not such as to support a theory that it had been forged. He disbelieved the evidence of Girigoris and accepted the evidence of Adliet that Girigoris was away from Talangama on 23rd May 1943. He commented on the failure of Adliet to refer to the existence of a Will when she handed over the Testator's documents to Proctor Seneviratne. With regard to the evidence of the Appellant and her husband, the learned judge pointed to certain inconsistencies between their evidence and said that it had been influenced and even inspired by the evidence given by Mr. Muthukrishna at the previous trial. Although he had already expressed his opinion of Martin as a witness, when he came to examine the various accounts which had been given of the interview between Martin on the one hand and Wijesinghe and Mr. Amarasekera on the other hand in August 1943, the learned judge on an analysis of certain dates came to the conclusion that Martin's version was correct and that Wijesinghe and Mr. Amarasekera went to Matara in order to suborn him as a witness. With regard to Mr. Muthukrishna's evidence, the learned judge discounted this because, as he held, Mr. Muthukrishna was not aware that the Testator was suffering from pernicious anæmia. There were undoubted peculiarities, but the mistakes in spelling, etc., might have been due to the fact that the deceased was not in the best of health. However, expert evidence could only be regarded as evidence in corroboration of other evidence. In the result he accepted the evidence of the Petitioner and her witnesses and admitted the Will to Probate.

16. The Appellant appealed to the Supreme Court against the judgment of Sinnethamby, A.D.J., on the ground (inter alia) that the judgment was against the weight of evidence. On 23rd June 1950 the appeal was argued and decided. The Court (Windham, J. and Basnayake, J.) dismissed the appeal. In his reasons for judgment Windham, J., said :—

“ Upon a perusal of the evidence and the judgment and after considering the arguments of learned Counsel for the Appellant, we see no reason to interfere with the decision of the learned District Judge, which was concerned solely with questions of fact and credibility. Indeed we would feel wholly unjustified in interfering.”

17. The Appellant submits that the approach of the learned trial judge to the evidence was fundamentally wrong. The onus of proving that the alleged Will was a Will of the Testator rested upon the Petitioner.

No reason was given why the Testator a man of punctilious business habits, who had regular legal advisers should write his will in a notebook or why he should not call as witnesses persons of substance and standing who lived close to him.

The independent evidence of Mr. Muthukrishna was, if not shaken, conclusive against the genuineness of the Will and the learned trial judge misdirected himself in holding that expert evidence can only be regarded as evidence in corroboration of other evidence.

In any event the evidence of Mr. Muthukrishna was strongly corroborated by the appearance of the original "Will." The signatures are manifestly unlike the genuine signature of the Testator. The spelling and punctuation are quite out of keeping with any genuine writing of the Testator's. The witnesses' signatures appear to have been written by different pens although the witnesses' story was, in the main and apart from the highly suspicious assertion of James Alwis, that there were two pens on the Testator's table, that they and the Testator had all signed with one pen. In addition there was the appearance of the entry at page 47 of the notebook, the absence of page 61, and also the evidence of the 10 Appellant and her husband.

In view of the absence of Mr. Muthukrishna from the second trial and the failure of the learned trial judge to give full effect to his evidence, the Appellant respectfully submits that the Judicial Committee might think fit to refer the original Will to an independent expert in the United Kingdom, such expert to report thereon to the Registrar.

There were no grounds on which the other independent witness (who indeed had an interest, as legatee, in upholding the Will) namely Girigoris, ought to have been disbelieved and his evidence alone was conclusive against the genuineness of the Will. The learned trial judge was wrong in 20 rejecting the evidence of Wijesinghe and Mr. Amarasekera regarding the interview with Martin in August 1943 : this rejection was not based upon a different estimate from that formed by the judge at the trial of Martin's credibility, since he had already stated that he considered Martin untrustworthy, but was based upon a mistaken analysis of the dates. The correct analysis was that made by the judge at the previous trial.

In the face of the evidence above referred to, the evidence of the Petitioner and her four witnesses, regard being had to their varying degrees of interest, mutual relationship, records and status, the mechanical character and inconsistencies of the evidence itself, and particularly to the 30 significant abstention of the only substantial man alleged to have witnessed the Will (namely Perera) and of the Proctor alleged to have discovered the Will, should not have been regarded as approaching the weight of evidence required to discharge the onus of proof.

To sum up, the elements of suspicion against the Will were so substantial that the most convincing evidence from the attesting witnesses should have been required, and the evidence offered by the Petitioner did not approximate to that standard.

18. The Appellant submits that this appeal ought to be allowed and the judgments of the Supreme Court and the District Court reversed for 40 the following, amongst other

REASONS.

- (1) BECAUSE the judgment of the learned trial judge was completely against the weight of evidence and because his approach to the evidence and to the onus of proof was fundamentally wrong.

- (2) BECAUSE the Supreme Court did not independently consider the evidence but was content to rest upon the judgment of the learned trial judge.
- (3) BECAUSE the Courts below should not have been satisfied that the alleged Will was a genuine Will of the Testator.
- (4) BECAUSE the Courts below should have been satisfied that the alleged Will was not a genuine Will of the Testator.
- (5) BECAUSE the judgments appealed from are wrong and ought to be reversed.

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FRANK SOSKICE.

R. O. WILBERFORCE.

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