

In the Privy Council.

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

ON APPEAL  
FROM THE SUPREME COURT OF CEYLON.

37705

BETWEEN

MURIEL AMARASEKERA nee WIJESINGHE . Appellant

AND

- 1. HETTIARATCHIGE DONA ADLIET RATNAYAKE
- 2. PERCY ARNOLD RATNAYAKE
- 10 3. PEARL BANDARA MENIKE RATNAYAKE
- 4. HETTIARATCHIGE DON HERATH, Guardian  
ad litem of the 2nd and 3rd Respondents . Respondents.

Case for the Respondents.

RECORD.

1. This is an appeal from a Judgment dated the 23rd January, 1950, p. 346, l. 1.  
of the Supreme Court of Ceylon (Windham and Basnayake, JJ.) dismissing p. 330, l. 20.  
an appeal from a Judgment dated the 25th January, 1949, of the District p. 356, l. 1.  
Court of Colombo (N. Sinnethamby, A.D.J.) by which the District Court  
held that a Last Will dated the 23rd May, 1943, alleged to have been  
executed by one James Albert Ratnayake (deceased) in the presence  
20 of five witnesses, was duly executed by the deceased and attested by the  
five witnesses, and ordered that the said Will be admitted to probate. p. 149, l. 1.  
A previous Judgment given in the case by the District Court on the p. 167, l. 25.  
2nd August, 1945, had on appeal been set aside by the Supreme Court  
which directed a retrial.

2. In this appeal no question of law arises. The only substantial  
question to be decided is one purely of fact, namely, whether the said  
Will is a genuine one or a forgery.

3. The deceased James Albert Ratnayake died on the 3rd June,  
1943, leaving a fairly considerable estate which included an estate supply  
30 business at Dehiowita and an estate in Talangama called Bank Hill Estate.  
He appears towards the latter part of his life to have resided for about  
one half of every month at Dehiowita, and the other half at Talangama.  
The 1st Respondent lived with the deceased as his mistress at Bank Hill

Estate from about a year after the death of his second wife in 1927 up to the time of his death. The 2nd and 3rd Respondents are the minor children of the 1st Respondent and the deceased, born in February, 1932, and August, 1940, respectively, and the 4th Respondent, who is a brother of the 1st Respondent, was appointed their guardian *ad litem*. The Appellant is the daughter of a deceased sister of the deceased.

4. For some considerable time before his death the deceased was ailing in health, suffering first from bleeding piles and subsequently from a resultant attack of pernicious anæmia. On the 10th May, 1943, he left Dehiowita after a visit to his business there and returned to Talangama where he remained until his death. The case for the Respondents is that on the 23rd May, 1943, the deceased, at the bungalow where he resided at Bank Hill Estate, signed a will in the presence of five persons who had been specially summoned by him to witness the signing and who also signed the will as attesting witnesses, the law of Ceylon requiring a will to be signed by five attesting witnesses, unless the testator's signature is made or acknowledged in the presence of a notary. The witnesses were Hettiaratchige Don Martin, a brother of the 1st Respondent and "watcher" on the Bank Hill Estate, Weerasinghage James de Alwis, Martin's predecessor as "watcher" on the estate, James de Alwis Dissanayake, also known as Loku Dissanayake, who was the manager of a Buddhist vernacular school and vice-president of the Co-operative Union, Podi Dissanayake, a cousin of Loku Dissanayake, and W. Paulis Perrera, the manager of the Co-operative store. Subsequently, all five in a joint affidavit in support of the application for probate, deposed to the proper execution and attestation of the Will. The book in which the Will was written, a book in which the deceased kept certain business accounts, was almost at once handed by the deceased to the 1st Respondent to keep and was amongst the papers handed over by her after the death of the deceased to Mr. Seneviratne her proctor.

p. 29, l. 40.  
p. 353, l. 1.

p. 226, l. 33.

The case put in the Courts below for the parties opposing the Will, of whom the Appellant was one, was that the Will was a forged document, a specific suggestion being made that it was signed on the 6th June, 1943, three days after the deceased's death, and therefore necessarily that there was a fraudulent conspiracy to which the 1st Respondent and the five attesting witnesses were parties to commit forgery and support it by perjury.

p. 356, l. 1.

5. The Will, which is dated the 23rd May, 1943, appointed as Executors the 1st Respondent and Felix Wijesinghe, a nephew of the deceased and brother of the Appellant, who had been employed by the deceased in his business at Dehiowita and had lived there with the deceased for many years. Provision is made in the Will for all the deceased's dependants and there are other beneficiaries. A sum of Rs.1,000 is bequeathed out of the estate to the St. Barnabas Church at Avisawella to which also a sum of Rs.10 a month is directed to be paid out of the income of property at Yatiyantota. To the deceased's car driver, Girigoris, Rs.1,500 is bequeathed for his long service. The 1st Respondent is left certain properties at Hendala, the furniture of the bungalow at Bank Hill Estate and his car. To the 2nd and 3rd Respondents the deceased leaves Bank Hill Estate and at Dehiowita his bungalow and furniture, and certain

tenements, buildings, stores and garages, subject to a life interest to the 1st Respondent. There is a provision that if the 1st Respondent marries after the deceased's death, she is to forfeit this life interest. Felix Wijesinghe is given the whole of the Estate Supplies and Trading business at Dehiowita and also the property at Yatiyantota. To Felix and his sisters jointly the testator gives lands and premises in Magamma and two rooms at Dehiowita bearing Nos. 31 and 32. With regard to his cash balances in the Banks, amounting approximately to Rs.70,000, he gives half to the 2nd and 3rd Respondents, one-fourth to the 1st Respondent, and the remaining fourth to his sister's children, that is, Felix and his sisters, in equal shares. All his other interests in Ceylon and foreign countries and all future acquisitions the testator gives to his sister's children.

6. Probate of the Will was applied for by a Petition to the District Court of Colombo dated the 5th July, 1943, in which Petition the Executors, the 1st Respondent and Felix Wijesinghe, were joint Petitioners and to which the 2nd, 3rd and 4th Respondents in the present Appeal, the Appellant in the present Appeal and her two sisters, Ellen and Gertie Wijesinghe were made Respondents. Felix Wijesinghe had some days previously been shown the Will by the proctor, Mr. Seneviratne, at the latter's office and, according to his own evidence, having read the Will and having at that time no doubt about its genuineness, he had signed a proxy authorising Mr. Seneviratne to act for him for the purpose of proving the Will. The Petition prayed for the issue of probate to the 1st Respondent and was supported by an affidavit of the 1st Respondent and an affidavit of the attesting witnesses with which documents the Petition was filed in Court together also with the last Will itself and the proxy signed by both Executors. On the 9th July, 1943, an amended Petition dated the preceding day was filed by the 1st Respondent and Felix Wijesinghe to which the same parties as before were made Respondents and which prayed for the issue of probate to both petitioning Executors. On the 20th July, 1943, the District Court made an Order *Nisi*, ordering that the Will should be declared proved and that the Petitioners were entitled to have probate issued to them unless sufficient cause to the contrary should be shown on or before the 5th August, 1943.

7. On the 5th August, 1943, the Appellant in the present Appeal filed a proxy and was given by the District Court until the 26th August to lodge objections. Following upon this, on the 12th August, 1943, Felix Wijesinghe moved to revoke the proxy given by him together with the 1st Respondent to Mr. Seneviratne. This was allowed on the 26th August, 1943, and thereafter Felix Wijesinghe, although still nominally a Petitioner, opposed the application for probate. At the same hearing on the 26th August, 1943, the Appellant in the present Appeal lodged her objection by affidavit sworn on the preceding day, alleging that the Will was a forgery and was not the act and deed of the deceased. On the 5th October, 1943, upon the unopposed application of Felix Wijesinghe, the District Court directed the Public Trustee to take charge of and administer the estate of the deceased until it should be finally determined who was entitled to the succession, and Letters of Administration *Pendente Lite* were accordingly granted to the Public Trustee two days later.

p. 39, ll. 24-48.

p. 149, l. 1—  
p. 158, l. 30.

p. 167, l. 27.

8. The first hearing of the Petition was started on the 27th March, 1944, on which day, after the opening of the case for the 1st Petitioner (the 1st Respondent in the present Appeal) and after argument, the Court framed three issues for decision raising the questions whether the document dated the 23rd May, 1943, was the act and deed of the deceased and whether it was duly executed by him. The hearing occupied a number of days which were spread over a considerable period of time, and eventually on the 2nd August, 1945, the District Court (S. J. C. Schokman, A.D.J.) delivered judgment adverse to the 1st Respondent, refusing her application for probate and discharging the order *nisi*. The 1st Respondent 10  
appealed to the Supreme Court and the Appeal was heard on the 17th, 18th and 19th February, 1947. On the 6th March, 1947, the Supreme Court (Keuneman and Canekeratne, JJ.) delivered judgment setting aside the judgment of the Court below and sending the case back for trial before another District Judge. Keuneman, J., said in the course of a reasoned judgment—

p. 167, l. 39—  
p. 168, l. 44.

“ The 1st Petitioner who propounded the Will was the mistress  
“ of Ratnayake, who had treated her as he would a married wife,  
“ and who had two children by her to whom he was devoted.

“ The District Judge has held that the Will itself was not an 20  
“ unreasonable Will, and that no suspicion can attach to the Will  
“ from the dispositions contained in it which were just and equitable.  
“ In fact it is not improbable that the Will represented the wishes  
“ of the Testator. No doubt the Will was written in an usual  
“ place, viz., an account book of the Testator. But it is also to  
“ be noted that this moderately long Will was written out entirely  
“ in handwriting strongly resembling that of the Testator in this  
“ account book which contained pages of the Testator’s writing.  
“ If the Will was a forgery, the forger was courting immediate 30  
“ detection. The Will certainly was accepted for a time as genuine  
“ by the 2nd Petitioner who is now a strong opponent of the Will,  
“ and he signed the original affidavit asking for probate as one of  
“ the executors named in the Will. The 2nd Petitioner was familiar  
“ with the handwriting of the deceased . . . We have carefully  
“ examined the judgment and we do not think that in this case  
“ an element of suspicion relating to the Will can be said to have  
“ arisen . . .

“ In our opinion the District Judge has been misled into the  
“ belief that there were elements of suspicion which it was the  
“ duty of the propounder to remove. This belief has influenced 40  
“ the District Judge into thinking that a heavier burden of proof  
“ rested on the propounder than the law had in fact imposed upon  
“ her . . . The real question to be decided was whether the Will  
“ had been executed and attested in due course.”

p. 171, l. 1.

9. The rehearing of the case commenced before N. Sinnethamby, A.D.J., on the 1st September, 1947, on which day one issue was framed for determination, namely, whether the Last Will was duly executed and attested by the witnesses mentioned therein. At the hearings which followed a considerable volume of evidence was called on both sides.

- For the 1st Respondent four of the five attesting witnesses were called, namely, J. de Alwis Dissanayake, W. J. de Alwis, J. R. de Alwis Dissanayake and H. D. Martin, all of whom deposed to the due execution and attestation of the Will. The 1st Respondent herself also gave evidence as to the summoning of the attesting witnesses by the deceased on the 23rd May, 1943, and the actual signing of the Will by the deceased, which she saw from an adjoining room. The witness Martin further in his evidence described a visit made to him at Matara by the Appellant's husband, J. H. Amarasekera, and Felix Wijesinghe on the 23rd August, 1943, when they asked him to give evidence that the Will was signed three days after the deceased's death and tried to bribe him with an offer of Rs.2,000. Both Amarasekera and Felix Wijesinghe admitted in the evidence that they gave that they paid a visit to Martin and admitted also the version given by Martin with regard to what occurred in the course of the visit regarding their movements. They however, denied that they offered him Rs.2,000 to give evidence as suggested. According to them, it was in consequence of a message from Martin that they went to Matara where they allege that Martin appealed to them to save him from trouble by coming to some terms of settlement with the 1st Respondent as he had executed a document purporting to be a Last Will three or four days after the death of the deceased. This alleged message from Martin was put by them at some four or five days after the death of the deceased. The visit to Matara took place some considerable time afterwards—on the 23rd August, 1943, according to Martin, which date Wijesinghe and Amarasekera admitted might be correct. Martin's evidence was that on his return to Talangama he consulted Mr. Seneviratne and that an affidavit which he in fact swore on the 4th October, 1943, putting the whole matter on record was the result of Mr. Seneviratne's advice.
- 30 The learned District Judge found that Martin's statement in his affidavit and evidence was true and that Amarasekera and Felix Wijesinghe unsuccessfully attempted to suborn Martin to give evidence adverse to the 1st Respondent's case.

10. The Respondents to the Petition sought to show that the Will could not have been executed on the 23rd May, 1943, firstly because this was a Sunday and the deceased never did any work and would not have executed a will on a Sunday, and secondly because Girigoris Perera, a faithful servant of the deceased, would have known about the execution of the will as he also lived in Bank Hill Estate and the deceased would not have done anything without informing him, and indeed that if the five witnesses came to Bank Hill Estate to execute the Will Girigoris, who lived in the garage close by, must necessarily have been aware of it. Girigoris was called and gave evidence on both these matters. The learned judge rejected his evidence on these matters saying—

- “ With regard to the absence of knowledge on the part of Girigoris, the 1st Petitioner's evidence is that Girigoris was away in Hendala picking nuts from the Hendala properties. Girigoris himself admitted that he used to go to Hendala to pluck nuts and generally stayed away at nights until there occurred a theft of some car parts, after which he generally

“ returned on the same day. He admits that there was plucking  
 “ of nuts at Hendala in March, 1943, and the next plucking was  
 “ due to take place on the 22nd or 23rd of May, 1943. Though  
 “ in his examination in chief he said that no work was done on  
 “ Sundays, under cross-examination he was compelled to admit  
 “ that the Check Roll X3 showed that work was being done on  
 “ Sundays . . . In my view Girigoris Perera was not speaking  
 “ the truth when he denied that there was work on Sundays.  
 “ According to his own admission he should have been at Hendala  
 “ plucking nuts and I accept the evidence of Adliet that on the 10  
 “ day the Will was executed Girigoris Perera was in fact at Hendala  
 “ picking nuts. As he himself admits, if this were so he would  
 “ not have been in a position to know that the Will was executed  
 “ on that day. It is possible that the deceased chose that day  
 “ because he did not wish his relatives to know about the execution  
 “ of the Will.”

p. 113, l. 10.  
 p. 320, ll. 1-3.

11. The Respondents to the Petition did not call a handwriting expert before Sinnethamby, A.D.J., but the evidence of Mr. Muttukrishna, an Examiner of Questioned Documents, given at the previous hearing before Schokman, A.D.J., was read in evidence without objection. 20

p. 121, ll. 40-45.  
 p. 128, ll. 38-43.

Mr. Muttukrishna dealt in his evidence with the handwriting of the body of the Will as well as of the signatures thereon purporting to be the deceased's. His view was that the document as a whole was not in the deceased's handwriting, although there was “ a certain close resemblance to the customary writing ” and in particular “ close conformity in design and variation of letters.” Mr. Muttukrishna also stated in his evidence that there were tremors in the disputed handwriting which could well be accounted for by the state of health of the writer and that it was to be inferred from the tremulous writing that the writer was in a state of physical disability, which evidence, it is suggested, is consistent with the 30 deceased's having penned the document and would account for any slight variation that there may have been from his customary style.

p. 343, l. 14.

The learned judge refused to find that the Will was a forgery on the evidence of the handwriting expert alone, taking the view, it is submitted rightly, that evidence of this sort could only be regarded as evidence in corroboration of other evidence and that in this case the evidence satisfied him that the Will was duly executed by the deceased.

p. 310, l. 33.  
 p. 279, l. 11.

12. The Appellant and her husband, J. H. Amarasekera, were also called on behalf of the Respondents to the Petition. Their evidence was directed to show not merely that the Will of which probate was sought 40 was a forgery but that it was a second forged Will substituted for a former one which had been in identical terms. The evidence of these witnesses was to the effect that while the book in which the Will appeared was in the custody of Mr. Seneviratne certain material alterations were made in it, that pages upon which a first Will appeared were torn out and that the Will was forged again at a later page.

p. 340, ll. 13-14.

The learned judge, having heard this testimony, stated that he was quite satisfied that the Appellant and her husband were giving evidence that was utterly false on this point.

13. On the 25th January, 1949, Sinnethamby, A.D.J., delivered a Judgment accepting the evidence of the attesting witnesses whom he had heard and of the 1st Respondent, answering the issue framed in favour of the 1st Respondent and accordingly admitting the Will to probate. p. 330, l. 18.

14. On the 5th February, 1949, Felix Wijesinghe, Ellen Wijesinghe, Gertie Wijesinghe and the Appellant in the present Appeal appealed to the Supreme Court. The Appeal was heard on the 23rd January, 1950, and decided on the same day, Windham, J., in a judgment with which Basnayake, J., agreed, stating :— p. 343, l. 46.  
p. 346, ll. 1-28.

19 “ Of the five witnesses to the Will, four gave evidence that the Will was duly executed and attested, the fifth witness not being called. The learned District Judge accepted their evidence, and in a long and reasoned judgment, after carefully reviewing all the evidence, he admitted the Will to probate.

20 “ 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. The appeal is accordingly dismissed with costs.”

15. The Respondents humbly submit that this appeal ought to be dismissed for the following amongst other

### REASONS

- (1) BECAUSE the District Court rightly found upon the evidence that the Last Will dated the 23rd May, 1943, had been duly executed and attested and the Supreme Court rightly affirmed the District Court judgment.
- (2) BECAUSE there are concurrent findings of fact in the Respondents' favour.

In the Privy Council.

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ON APPEAL

*from the Supreme Court of Ceylon.*

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BETWEEN

**MURIEL AMARASEKERA**

*nee WIJESINGHE . . . Appellant*

AND

**1. HETTIARATCHIGE DONA**

**ADLIET RATNAYAKE and**

**3 Others . . . Respondents**

IN THE MATTER of the Last Will and  
Testament of JAMES ALBERT RATNAYAKE,  
of Bank Hill Estate, Talangama. Deceased.

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**Case for the Respondents**

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