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UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

In the Privy Council.

Appeal No. 13 of 1953

ON APPEAL FROM THE SUPREME COURT OF
CEYLON

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF
KATHRI ARACHIGE DON FREDERICK SIRIWARDANA OF
WALAGEDERA, DECEASED.

BETWEEN

KATHRI ARACHIGE DON VELIN SIRIWARDANA

Respondent-Appellant

AND

ARACHI APPUHAMILLAGE DON CARTHELIS APPUHAMY,
THE COLOMBO BUDDHIST THEOSOPHICAL SOCIETY, LTD.

Petitioners-Respondents

AND

KATHRI ARACHCHIGE PREMAWATHIE SIRIWARDANA,
AND CECELIA KANNANGARA

Intervenients-Respondents-Respondents.

CASE FOR THE APPELLANT

1.—This is an Appeal by the above-named Appellant, by leave of the Supreme Court of the Island of Ceylon given on the 29th September, 1951, against the Decree of that Court dated the 25th April, 1951, dismissing the Appellant's appeal from the Order of the District Court of Colombo made on the 17th January, 1949, whereby it was adjudged and declared that the alleged last will and testament of the above-named Kathri Arachige Don Frederick Siriwardana deceased (hereinafter called the deceased) was proved, and that a grant of probate of the said alleged will should be issued to the first Respondent above-named (who is the only active Respondent to this Appeal and is hereinafter called the Respondent).

RECORD

pp. 426-7

pp. 418-9

pp. 393-410

- RECORD
pp. 229-30
- pp. 208-15
- pp. 229-30
pp. 208-15
- pp. 26-9,
p. 39
- p. 40, ll. 9-13
- pp. 39-40
- pp. 51-2
- pp. 58-60
- p. 66
- 2.—The Appellant submits that on such appeal he is entitled to ask, in the alternative, to have an interlocutory Decree of the said Supreme Court, made in the same proceedings on the 22nd November, 1945, set aside. This Decree had set aside a judgment of the said District Court made on the 4th February, 1944, in the Appellant's favour, in effect dismissing the Respondent's claim, and had sent the case back to the District Court for trial *de novo*. The Appellant submits that he is entitled in the alternative to have this Decree set aside and the said judgment of the District Court restored.
- 3.—The deceased died on 12th October, 1942, in the General Hospital of Colombo, to which he had been admitted on 7th October, 1942. Thereafter the Appellant, who was the brother of the deceased, applied for Letters of Administration of the deceased's estate upon the ground that the deceased had died intestate.
- 4.—Shortly thereafter, however, on the 8th December, 1942, the Respondent petitioned the District Court of Colombo *inter alia*
- (a) for an Order declaring an alleged last will and testament of the deceased dated 5th October, 1942, proved; and
- (b) that he might be declared executor of the said last will and testament, and probate thereof might be issued to him accordingly. 20
- 5.—On the 6th January, 1943, on the hearing of the said Petition, by Order *nisi*, the District Court of Colombo ordered that the alleged last will and testament of the deceased be declared proved and that the Respondent be entitled to have probate thereof issued to him unless the Appellant "show sufficient cause to the satisfaction of this Court to the contrary."
- 6.—On the 25th February, 1943, the Appellant accordingly petitioned the District Court, praying *inter alia*, that
- (a) the said Order *nisi* be discharged;
- (b) the Appellant be declared entitled to Letters of Administration of the said estate of the deceased on the grounds that he had died 30
intestate.
- 7.—The contest between the parties turned on the question whether the will put forward by the Respondent was a genuine will. The burden of establishing this lay, of course, on the Respondent, and the matter was fought out in proceedings in which he figured as Petitioner and the now Appellant as Respondent.
- In those proceedings the following issues were framed :—
- (1) Was the will produced in Court the act and deed of the deceased ?
- (2) Was the said will duly executed ? 40

(3) Was the signature "D. F. Siriwardana" appearing on the document marked "A" annexed to the present Respondent's then Petition (being the alleged will of the deceased) the signature of the deceased? RECORD
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8.—The first trial of the cause was held before the Additional District Judge of the said District Court on various dates in June to October, 1943. On the 4th February, 1944, the said District Judge gave judgment (as mentioned shortly in paragraph 2 hereof) holding that the alleged last will and testament of the deceased was not proved as the deceased's act or deed, and ordered that the Order *nisi* mentioned in paragraph 5 hereof be discharged. The District Judge, in this judgment, examined all the facts of the case and gave a number of reasons for his conclusion that the now Respondent had not satisfied him that the alleged will was genuine. pp. 66-103
pp. 110-208
pp. 208-215
pp. 208-215

9.—By petition of appeal dated 16th February, 1944, the now Respondent appealed to the Supreme Court of Ceylon against the said judgment and order of the District Judge. pp. 216-220
pp. 208-215

10.—The said appeal was heard in November, 1945, and the Supreme Court on 22nd November, 1945, adjudged and ordered that the order made 4th February, 1944, by the said District Judge be set aside and the case be sent back to the District Court of Colombo for trial *de novo*. The reasons given by the judges of the Supreme Court for ordering a new trial were, it is submitted, wholly insufficient. pp. 220-229
p. 230
pp. 208-215
pp. 220-229

11.—The case was accordingly re-tried before the District Court of Colombo on various dates between July, 1947, and October, 1948, the issues originally framed as stated in paragraph 7 hereof being adopted by consent for the purposes of the said re-trial. pp. 234-293
p. 66
p. 234, ll. 1-2

12.—The case was accordingly re-tried before another Additional District Judge of the said District Court who on 17th January, 1949, adjudged that the alleged last will and testament of the deceased was proved and should be admitted to probate, and that the issues set out in paragraph 7 hereof should be answered as follows: pp. 393-410
p. 66

(1) That the last will and testament was the act and deed of the said deceased. p. 410

(2) That the last will and testament was duly executed.

(3) That the signature D. F. Siriwardana appearing in the alleged will and testament was the signature of the deceased.

13.—The present Appellant by petition of appeal dated 24th January, 1949, appealed to the Supreme Court against the aforesaid judgment of the District Court. pp. 411-415
pp. 393-410

14.—The said appeal was heard by the Supreme Court on 24th and 25th April, 1951, and the said Court on 25th April, 1951, dismissed the same with costs. The said dismissal is the subject matter of this appeal.

15.—The following matters were not in dispute between the parties :—

(a) The deceased was at the date of his death on 12th October, 1942, aged between 66 and 70 years and was a bachelor. The deceased was a landowner and also carried on business as a planter, cultivator and merchant. At all material times prior to his death the deceased lived in his own bungalow at Walagedera, where there also lived with him (among others)

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(1) The Respondent, who was, and for a considerable period prior to October, 1942, had been employed by the deceased, latterly in the management and control of a part of his business affairs ; and

(2) one Cecilia Siriwardana, an illegitimate daughter of the deceased's father, together with her husband one Lewis Appuhamy Beddevidane.

Under the alleged will of the deceased the Respondent and the said Cecilia Siriwardana became entitled, subject to certain specific bequests, each to a one-third interest in all the acquired property of the deceased, the remaining one-third interest in such property being purported to be bequeathed to one Lily Siriwardana, another illegitimate daughter of the deceased's father.

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(b) The deceased had inherited certain properties of small value from his father (which properties are purported to be excluded from the alleged will) but in the course of his business activities had acquired lands of considerable value. He had played a prominent part in the affairs of the village where he had for a considerable time resided and had been an extensive benefactor to the local school. In the course of his career the deceased had frequently been engaged in litigation and had constant recourse to lawyers. In particular the deceased was concerned in litigation pending in early October, 1942, in which a Proctor, Mr. Wilson de Silva, of Kalutara, who had acted for the deceased in a number of matters since in or about 1940, was acting for him.

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(c) Prior to the events of 5th October, 1942, hereinafter referred to the deceased did not express to any person any intention of making a will.

(d) In the matter of the pending litigation mentioned in subparagraph (b) hereof the deceased had through Mr. de Silva on the 2nd October, 1942, taken the opinion of counsel, which opinion was sent by counsel to Mr. Wilson de Silva at Kalutara under cover of a letter dated 7th October, 1942, in an envelope addressed to Mr. Wilson de Silva at Kalutara. This envelope after perusal of its contents by

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Mr. Wilson de Silva was handed with its contents to one Thomas Appuhamy (an alleged witness of the alleged will) some time after its receipt by Mr. Wilson de Silva, and before 7th October, 1942, to be taken to the deceased. pp. 243-244

(e) For a short time prior to October, 1942, the deceased had been ill with a stomach disorder and was undergoing medical treatment, and on the 5th October, 1942, the deceased was confined to his bedroom.

10 (f) The deceased had been medically advised to go to Colombo for medical examination, and on the morning of the 7th October, 1942, he travelled by private motor car to Colombo, stopping *en route* outside the offices of Mr. Wilson de Silva in Kalutara so that he could discuss matters connected with pending litigation with that gentleman, his Proctor. The deceased remained in his motor car during such discussion and nothing was said concerning the opinion of counsel which had been sent to Mr. Wilson de Silva as set forth in sub-paragraph (d) hereof. The deceased at this time appeared to Mr. Wilson de Silva to be very ill, in a feeble condition and hardly able to speak. pp. 243-244

20 (g) Later on the said morning the deceased was admitted to Colombo General Hospital, where he died on the 12th October, 1942, and whence his body was moved on the same date to his residence.

30 (h) On 13th October, 1942, the Appellant, having become aware of the deceased's death, went to his residence, and as next of kin demanded the keys of the deceased from the Respondent, in whose possession they then were. A discussion took place and a dispute arose between the Appellant and the Respondent on this date, as a result of which the village headman, one Jayanetti, who had been sent for, took temporary charge of the deceased's keys, all lockable drawers in the deceased's residence having been locked. During the course of the above discussion and dispute, it was not alleged or suggested by the Respondent that the deceased had made any will, although the Respondent stated in his evidence that at that time he had already been informed that the deceased had made a will. pp. 297-299
pp. 239; 252, 268

(i) The cremation of the deceased took place on 15th October, 1942. In addition to the Appellant and other members of the deceased's family, servants and friends, there were present the Respondent and the five persons alleged to be witnesses of the alleged will of the deceased put forward by the Respondent.

(j) On 16th October, 1942, the Respondent called on a Proctor, one Mr. de Alwis, of Bentota, seeking his advice as to how a will of the deceased could be proved. pp. 241-243

(k) Subsequently on 18th October, 1942, the deceased's keys were handed over by Jayanetti to the Appellant. Jayanetti made no mention at this time to the Appellant of any suggestion that the deceased had made a will, although Jayanetti stated in evidence that he had been informed on 13th and 15th October, 1942, that the deceased had made a will. pp. 297-302

RECORD

pp. 509-510

(1) On 20th October, 1942, the Respondent attended with the five persons alleged to be witnesses of the deceased's will before the said Mr. de Alwis, who prepared an affidavit which was sworn by the said five alleged witnesses of the will. This affidavit was to the effect that the deceased had made a will and that at the time of such making the deceased was of full testamentary capacity. In the affidavit one of the deponents thereto, Thomas Appuhamy, further deposed to the fact that, at the request of the deceased, the said will was put into a suitcase which the deceased took with him to Colombo when he went to enter the General Hospital. 10

(m) Shortly thereafter the Respondent caused to be inserted:—

p. 511

(1) On the 5th November, 1942, in the Ceylon Daily News an advertisement reading as follows:—

“ *Lost.*”

“ Lost on 7th October between Colpetty and General Hospital important documents enclosed in cover bearing name Wilson de Silva, Proctor, Kalutara. Reward R.50 to finder.”

p. 511

(2) On the 6th November, 1942, in a Sinhalese newspaper entitled “ Dina Mina ” the following advertisement:— 20

“ *Lost.*”

“ Lost on the 7th of last month several valuable documents enclosed in an envelope bearing name of Wilson de Silva Proctor of Kalutara were lost between Kolutiya (Colpetty) and the General Hospital via Fort. To any person who finds the same or gives a proper clue shall be given R.50 reward.”

p. 511

(n) On 12th November, 1942, one John Perera, a Sinhalese employed in the management of the “ Maliban Hotel,” Norris Road, Colombo, wrote to the advertiser c/o the Dina Mina newspaper with reference to the advertisement which had appeared in that newspaper on 6th November, 1942, a letter stating that he had the documents with the envelope addressed to Mr. Wilson de Silva, Proctor and Notary Public, Kalutara. 30

(o) Thereafter the Respondent obtained the alleged will from the said John Perera and paid him Rs.50.

16.—The case for the Respondent at the second trial was as follows:—

pp. 323-348

(1) By the evidence of Don Sammy Jayasinghe, who was employed at that time by the deceased as a clerk, that on the morning of 5th October, 1942, the deceased told him that he desired to make a will and that the said Sammy Jayasinghe wrote a draft will for the deceased at his dictation. After the deceased had approved the draft, the said Sammy Jayasinghe wrote a fair copy thereof which subsequently 40

became the body of the alleged will, and this was placed in the drawer of a table in the deceased's bedroom. RECORD

(2) By the evidence of Don Peter Jayasinghe, that he was sent for by the deceased at approximately mid-day on the 5th October, 1942; that he shortly thereafter saw the deceased, who told him that he had made his will in favour of the Respondent and his, the deceased's, sisters, and that he desired the said Jayasinghe to witness the will when certain other witnesses arrived. pp. 282-296

10 (3) By the evidence of the said Sammy Jayasinghe and Peter Jayasinghe, that later in the afternoon of the 5th October, 1942, there arrived at the deceased's bungalow two persons who had come from a distance, one named Handy Singho who lived five to ten miles away from the deceased's house (who had been in attendance at Court at the first trial but was not called, and who had died before the second hearing) and one Parlis Goonetilleke who lived seven to eight miles away from the deceased's house (who was not summoned or called as a witness at either trial). pp. 282-296,
323-348
p. 249

20 (4) Finally, on the same afternoon, Thomas Appuhamy arrived at the deceased's bungalow, having returned from a visit made that day at the deceased's request to Mr. Wilson de Silva at Kalutara; he brought with him a sealed envelope addressed to Mr. Wilson de Silva and containing the letter and opinion of counsel mentioned in paragraph 15 (d) hereof. pp. 307-323

30 (5) At about 5 p.m. on the same afternoon, the five witnesses necessary for the valid execution of a non-notarial nuncupative will, namely Sammy Jayasinghe, Peter Jayasinghe, Parlis Goonetilleke, Handy Singho, and Thomas Appuhamy, having been thus assembled, these persons went into a bedroom of the deceased where Sammy Jayasinghe closed the door; Sammy Jayasinghe then read over the will to the alleged witnesses; the deceased then read over the will to himself and asked Sammy Jayasinghe to write the names of the witnesses and, this having been done, the deceased then signed the will and the aforesaid five persons signed as witnesses to the signature of the deceased; the deceased then swore the witnesses to secrecy. Following this, the witnesses other than Thomas Appuhamy and Sammy Jayasinghe left the bedroom; the deceased then asked Sammy Jayasinghe to place the document in a drawer, which he did and then left the bedroom. pp. 282-296
pp. 307-323
pp. 323-348

40 (6) By the evidence of Thomas Appuhamy, that he remained in the deceased's bedroom after the other alleged witnesses had left that room; that he then handed the envelope which he had obtained earlier the same day from Mr. Wilson de Silva to the deceased, who told the witness (who could not read English) that the name on the said envelope was that of Wilson de Silva; that the deceased then opened the envelope, read its contents, and replaced them in the envelope on a teapoy in his bedroom. pp. 307-323

RECORD

pp. 252-253

(7) All the foregoing matters were unknown to the Respondent until he was informed thereof as hereinafter appears.

pp. 307-323

(8) By the evidence of Thomas Appuhamy, that in the early morning of the 7th October, 1942, prior to the deceased leaving his bungalow for Colombo, Thomas Appuhamy went into the deceased's bedroom and saw the deceased take the will out of the table drawer, place it in the envelope addressed to Mr. Wilson de Silva, being the same envelope as he had handed to the deceased on 5th October, 1942, and then placed the envelope in a suitcase containing items of clothing and bedding.

pp. 307-323

pp. 238;
307-323

(9) Thereafter the deceased took the suitcase to the hired car in which at approximately 7 a.m. he left for Colombo, being accompanied by the Respondent, the said Thomas Appuhamy, and Lewis Beddevidane, the husband of the said Cecilia Siriwardana (the last named was not called as a witness at the second trial).

pp. 238 & 256

(10) *En route* for Colombo the car stopped at the dispensary of one Dr. Ratanayate, where a letter was obtained relating to the deceased's condition to be delivered by the deceased to one Dr. Jayasuriya in Colombo.

pp. 68 ; 257
p. 261

(11) The car, having first stopped outside the offices of Mr. Wilson de Silva at Kalutara (where the meeting between Mr. Wilson de Silva and the deceased took place as stated in paragraph 15 (f) hereof) thereafter proceeded on its way to Colombo; *en route* the deceased required to answer a call of nature and accordingly the car was stopped in the vicinity of a public convenience originally stated to be situated at Colpetty (Kolupitiya) but later stated to have been at Wellawatte (it having been established by the Appellant that there was no such convenience at Colpetty); the deceased alighted from the car and went to the convenience, accompanied by the Respondent; whilst the deceased was in the convenience he required some cloth and the Respondent returned to the car to obtain this and did so by opening the suitcase and tearing a piece of cloth from a sheet which lay resting at the top of the contents of the suitcase, whereafter he closed the suitcase and returned with the piece of cloth to the convenience.

pp. 257-258

pp. 238 ; 257
258 ; 259

(12) Thereafter the car proceeded on its way, but the deceased desired to answer a further call of nature and/or to take refreshment, and was accordingly driven to the Maliban Hotel near the Fort Station at Pettah, Colombo; the deceased entered the hotel taking the suitcase with him, accompanied by the Respondent; the car, with the other passengers in it, then went to obtain petrol.

pp. 258 ; 259

p. 238

(13) The deceased having entered the Maliban Hotel accompanied by the Respondent used the convenience there, leaving the suitcase unattended in the hall of the Hotel, and then ordered and consumed a drink of soda-water; the Respondent then, at the request of the deceased, left the Hotel to look for the car.

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(14) During the absence of the Respondent, the deceased handed to one Perera the manager of the said hotel an envelope asking Perera to take care of such envelope for two or three days which Perera agreed to do. RECORD
p. 349

(15) Perera was not told by the deceased what the writing on the envelope was and was unable to read it ; but he asked a casual customer what was written on the envelope, and the latter told him that it was the name of Wilson de Silva. pp. 349 ; 356

10 (16) The car then returned to the hotel and the deceased left the hotel in it, and proceeded on his journey, first to the house of Dr. Jayasuriya and thereafter to the Colombo General Hospital, where it was decided that he should be admitted as an in-patient. p. 238

(17) Following the admission of the deceased to the General Hospital, the Respondent packed the clothes of the deceased in the said suitcase, and this was taken back to the deceased's bungalow on the same day by Thomas Appuhamy and Lewis Beddevidane, who returned there in the car ; the Respondent remained for the time being in Colombo. p. 256
pp. 238 ; 254 ;
310

20 (18) On the 11th October, 1942, the Respondent, who had meantime remained in Colombo, returned to Walagedera at the request of the deceased, in order to make arrangements for the deceased to leave the General Hospital for the purpose of obtaining Sinhalese medical treatment. pp. 238 ; 246

(19) On the morning of 12th October, 1942, the Respondent returned to Colombo, bringing with him the suitcase from Walagedera containing clothes for the use of the deceased on leaving hospital, but upon reaching Colombo he was informed (as was the fact) that the deceased had died ; he thereupon arranged for the embalming of the deceased's body and its removal to Walagedera which was carried out. pp. 239 ; 254
pp. 238 ; 249

30 (20) On the 13th October, 1942, prior to the discussion and dispute with the Appellant mentioned in paragraph 15 (h) hereof, the Respondent was informed by Sammy Jayasinghe that the deceased had left a will. pp. 239 ;
268-9 ; 329 ;
337

(21) On the day of the deceased's cremation, viz. the 15th October, 1942, Thomas Appuhamy told the Respondent that the deceased's will had been placed in an envelope bearing the address of Wilson de Silva in the suitcase which was alleged to have been taken to Colombo on the 7th October, 1942. pp. 239-40 ;
318

40 (22) On the following day, viz. the 16th October, 1942, in consequence of information given to him by the alleged witnesses, the Respondent visited Mr. de Alwis as indicated in paragraph 15 (j) hereof, and on the 20th October, 1942, took the five witnesses of the alleged will to Mr. de Alwis for the purpose of swearing the affidavit mentioned in paragraph 15 (1). pp. 241-243
p. 239

RECORD

pp. 239 ; 255;
262

(23) In consequence of advice given by the headman Jayanetti and other friends the Respondent caused to be inserted the newspaper advertisements mentioned in paragraph 15 (m) hereof.

pp. 240 ;
263-4 ; 279

(24) Following the receipt of the letter from Perera mentioned in paragraph 15 (n) hereof, the Respondent on or about 18th November, 1942, visited the Maliban Hotel and obtained from the said Perera the envelope addressed to Mr. Wilson de Silva said to have been deposited with the said Perera by the deceased, which the Respondent then opened and from which the alleged will accompanied by counsel's letter and opinion was then extracted.

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p. 240
p. 241

(25) The signature on the alleged will was the signature of the deceased and was similar to signatures alleged to be signatures of the deceased on documents purporting—but not proved—to have been signed by him.

(26) The deceased was on good terms with the beneficiaries under the alleged will and was on bad terms with his other relations not named in the said will, and the will was accordingly a natural and reasonable will for the deceased to have made.

pp. 152-157
p. 368

(27) By the evidence of one Fr. Julian, who had given evidence at the first hearing and whose evidence was by consent read at the second hearing, that the signature on the alleged will was a genuine signature.

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17.—The case for the Appellant throughout was that the alleged will was a forgery and that the evidence of the witnesses called in support of the case of the Respondent as to the alleged making and execution of the will, as to the placing of the will in the Wilson de Silva envelope and of that envelope in a suitcase which was taken to Colombo on the 7th October, 1942, and as to leaving the envelope in the custody of the said Perera by the deceased, was false. The positive evidence led for the Appellant was

pp. 158-176
p. 369

(1) The evidence of a handwriting expert Mr. Muthu Krishna (who had given evidence at the first hearing and whose evidence was by consent read upon the second hearing) based on the comparison of authentic signatures of the deceased with the signature to the alleged will, that the latter signature was a forgery.

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pp. 369-375

(2) The evidence of one Wedasinghe, an employee of the deceased who had been present when the deceased left his bungalow on the 7th October, 1942, to go to Colombo, stating that no suitcase had been taken in the car.

p. 375

(3) The evidence of one Amarasinghe (given at the first hearing and read at the second hearing, the witness having died prior to the second hearing) to the effect that none of the alleged witnesses of the will (except Sammy Jayasinghe) had been at the bungalow of the deceased on the 5th October, 1942.

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pp. 190-198

18.—Apart from the above positive evidence the Appellant relied upon the evidence elicited in cross-examination of the witnesses for the Respondent and particularly upon the differences upon material matters between their evidence given at the second hearing.

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19.—At the conclusion of the evidence on the second trial the submissions for the Appellant were as follows :—

pp. 376-382

(a) That it was improbable that the deceased would have made a non-notarial nuncupative will when he was experienced in legal affairs and had constant contact with lawyers.

10 (b) That it was improbable that the deceased would have made a will on the 5th October, 1942, in the absence of (1) any previously expressed intentions so to do (2) any expectation that he was gravely ill or unlikely to recover, or that he even expected to be detained in the General Hospital at Colombo (3) any arrangements made by the deceased for the carrying on of his business affairs or litigious matters or the management of his finances at any material time.

20 (c) That it was improbable that the deceased would have collected persons from a distance in order to witness a will, thereby occasioning delay for a number of hours, when other persons were accessible and available for this purpose.

p. 273

(d) That it was improbable that the deceased would have concealed the fact that he had made a will from the proposed beneficiaries there under, two of whom lived in his bungalow, on intimate terms with him.

(e) That it was improbable that the deceased would have taken the will to Colombo with him when he took no other documents and made no arrangements for the safe keeping of any of his property or effects.

30 (f) That the admitted fact that the Respondent said nothing to the Appellant, when the discussion and dispute arose between them about the deceased's keys and his property, or thereafter, as to the deceased having made a will or as to the Respondent being a beneficiary thereunder, was entirely inconsistent with the Respondent's evidence that at that time he had already been told of the existence of a will, and indeed inconsistent with the existence of any such will.

(g) That, as shown by their contradictions and their demeanour in the witness box, the evidence of Sammy Jayasinghe and Thomas Appuhamy was entirely unreliable (which contention was accepted by the District Judge on the second hearing).

40 (h) That it was improbable that the deceased, who had admittedly held a discussion with Mr. Wilson de Silva on the way to Colombo on the morning of the 7th October, 1942, would have handed an envelope containing a will for safe custody not to Mr. Wilson de Silva but to an

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employee of a hotel (Perera) who was at best only known to him casually and as a servant of a hotel which he had visited, or that if he had done so he would not have informed other persons of the fact.

(i) That the evidence relating to the deceased's visit to a public convenience *en route* to Colombo was demonstrably false and fabricated as shown by the fact that the Respondent and his witnesses alter their evidence as to the location of this convenience when it was established that no such convenience existed at the place first named ; this evidence was important as it had plainly been fabricated to fit in with the contents of the advertisements inserted in the press advertising for the envelope addressed to Wilson de Silva (these advertisements, it will be remembered, mentioned Colpetty (Kollupitiya) as the starting point of the route on which it was suggested the will had been lost). 10

(j) That the account of the deceased's visit to the Maliban Hotel on 7th October, 1942, was contrary to all the probabilities of the case, and that the Respondent's account of such visit was materially changed at the second hearing from that given at the first hearing, with the object of lending colour to the alleged visit and to the evidence of Perera relating thereto.

(k) That the evidence of Perera as to the handing over of the envelope by the deceased to him and as to his having been informed by a casual customer of the name on the envelope which he himself was unable to read was plainly a fabrication. 20

pp. 382-393

20.—The submissions for the Respondent at the conclusion of the second hearing before the District Court were :—

(a) That the alleged will was a natural and probable will for the deceased to have made.

(b) That it was natural that those persons who were the alleged witnesses of the will and who were friends or acquaintances of the deceased should have been assembled and requested to act in the capacity of witnesses. 30

(c) That the incorrect evidence as to the location of the public convenience first given by the Petitioner Respondent and his witnesses was a mistake, and that it was quite natural for them both to have made such a mistake and to have persisted in it until it was disproved.

(d) That the explanation of the Respondent's failure to inform the Appellant on the 13th or 15th October, 1942, that the deceased had made a will was that the Respondent desired to prevent the destruction of such will, which he then believed to be locked in a drawer at the deceased's bungalow by the Appellant. 40

(e) That the Respondent and his witnesses were simple village people and that it would have been beyond their comprehension or ability to embark upon or carry through such a complicated plot as would have been necessary were the will a forgery.

21.—In giving judgment in favour of the Respondent on the re-trial, the District Judge held *inter alia* :—

(1) That the evidence of Don Peter Jayasinghe as to the events of 5th October, 1942, was acceptable because it was corroborated by the evidence of Sammy Jayasinghe and of Thomas Appuhamy ; notwithstanding that the District Judge also held

(a) as to Sammy Jayasinghe, that he was a man on whose evidence no Court could act with confidence ; and

10 (b) as to Thomas Appuhamy, that it was unsafe to act on his evidence except where the same was corroborated by other independent evidence ;

(2) That the evidence of Thomas Appuhamy that the deceased put the alleged will in his suitcase on the morning of 7th October, 1942, was acceptable, and furnished strong corroboration of the Respondent's claim that the alleged will was genuine—notwithstanding that there was no corroboration of this evidence of Thomas Appuhamy and that the District Judge had held that it was unsafe to act on the evidence of that witness unless independently corroborated.

20 (3) That there was evidence that an attempt had been made to summon the headman of the deceased's village to witness the alleged will, thus tending to support the probability that the deceased intended to and did in fact execute a will, notwithstanding that the evidence of such an attempt was solely that of the said Sammy Jayasinghe of whom the District Judge had earlier held that no Court could act with confidence on his evidence ; but the District Judge treated as corroboration of this evidence of Sammy Jayasinghe the evidence of the headman Jayanetti himself who said that Sammy Jayasinghe had come to his house to fetch him but that he, Jayanetti, was not there at the time ; the District Judge must have, unfortunately, ignored or overlooked the fact that, if Jayanetti had not in fact been at his house at the material time, he could not have given admissible evidence of the alleged visit of Sammy Jayasinghe.

30 (4) That the Respondent's claim that the alleged will was genuine was strongly supported by two matters ; firstly, that if the will was a forgery it must have been fabricated between the date of the deceased's death on the 12th October, 1942, and the 16th October, 1942 (when the Respondent and the alleged witnesses to the will visited Mr. de Alwis and that between these two dates it would have been impossible (because the deceased's keys were with the headman Jayanetti) for anyone to obtain the envelope addressed to Mr. Wilson de Silva in which the will was ultimately found ; secondly, that the delay in the insertion of the advertisement for the alleged will, in the reply thereto by Perera, and in the alleged will being forthcoming were contra-indications of forgery. But as regards the first of these supporting matters, the District Judge unfortunately must have overlooked or ignored the following facts :—

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RECORD

(a) That the mere fact that the Respondent and the alleged witnesses of the will informed third parties that there was such a will in existence is no evidence that the same did in fact exist at the time when the statements to this effect were made.

(b) That the only evidence that the envelope addressed to Wilson de Silva was in fact handed over to the deceased or that he received such envelope or was acquainted with its contents was that of Thomas Appuhamy of whom the District Judge held as mentioned in sub-paragraph (1) (b) above.

As regards the second of these supporting matters the District Judge overlooked that, in the circumstances of the case, particularly the events of 13th October, 1942 (when the headman took possession of the deceased's keys) the delay in the "finding" and the ultimate production of the alleged will was an essential ingredient in a successful conspiracy to utter a forged will. 10

(5) That the Respondent's identification of the place Colpetty (Kollupitiya) as that at which the motor car stopped *en route* for the General Hospital on 7th October, 1942, in order to enable the deceased to visit a public lavatory (followed by the identification of that place as Wellawatte) was due to a genuine mistake and was not a fabrication; 20 the Additional District Judge overlooked or ignored not only that the Respondent had persisted in the identification of that place as Colpetty both at the first and at the second hearings before the District Court, until it was proved that there was no lavatory at that place, but also that the identification of the place as Colpetty was an essential ingredient in the wording of the advertisements relating to the loss of the will.

(6) That the evidence of the handwriting expert called by the Appellant was to be ignored as being of no value and as throwing no light upon the genuineness or falsity of the alleged signature to the 30 pretended will.

p. 411 22.—The Appellant appealed against the findings and judgment of the District Court on the second hearing to the Supreme Court of the Island of Ceylon.

p. 418 23.—The Supreme Court (Gunesakara and Palle, JJ.) on 25th April, 1951, dismissed the said Appeal. Gunesakara, J., whilst holding that there was great force in the contentions of the Appellant, stated that it had not been shown that there was a single point of substance which the trial Judge had omitted to consider, and that no reason could be shown that he had erred in his findings of fact. Palle, J., whilst criticising certain matters on 40 which questions had been left without any or any adequate answer, held that the acceptance by the trial Judge of the evidence of the Respondent and of Peter Jayasinghe made it impossible to disturb the trial Judge's conclusions on the facts.

24.—The Appellant submits that the Supreme Court were in error in accepting the trial Judge's findings of fact in the circumstances and for the reasons set out fully in paragraph 20 hereof ; that it was open to the Supreme Court to review the whole of the evidence with a view to determining whether or not, accepting the views of the trial Judge as to the unreliability of certain witnesses, his conclusions could, in fact, be supported. The Appellant further submits that the onus of proof was upon the Respondent, and that, upon the whole of the facts and evidence, the conclusion was inescapable that the Respondent had not discharged that onus.

10 25.—In the premises the Appellant submits that the decree of the Supreme Court of the 25th April, 1951, dismissing his appeal from the District Court was wrong and should be reversed, and that it should be held that the Respondent failed to discharge the onus upon him of proving that the alleged will was in fact the true will of the deceased, for the following amongst other

REASONS

- 20 (1) BECAUSE the Supreme Court failed to review, as they should have done, the whole of the District Court Judge's findings, in the light of his findings that certain important witnesses called by the Respondent were not credible or worthy of belief unless corroborated.
- (2) BECAUSE the Supreme Court failed to disregard, as they should have done, the uncorroborated evidence of the witnesses whom the District Court Judge found to be unreliable.
- (3) BECAUSE the Supreme Court failed to distinguish between the factual findings and the speculations of the District Court Judge, but in fact treated his speculations as findings of fact, which they were not.
- 30 (4) BECAUSE upon the facts and evidence accepted by the District Court Judge, but disregarding the evidence of those witnesses whom he judged unworthy of belief unless corroborated, the Respondent did not discharge the onus of proof which rested upon him.

26.—In the alternative the Appellant submits that the decree of the Supreme Court dated the 22nd November, 1945, should be set aside, and the judgment of the District Court made on the 4th February, 1944, should be restored for the following among other

pp. 228-30

pp. 208-15

REASONS

- 40 (5) BECAUSE the judgment of the District Court was right.
- (6) BECAUSE the Supreme Court had no reason for setting the said judgment aside.

D. N. PRITT.
NEIL LAWSON.

In the Privy Council.

No. 13 of 1953.

ON APPEAL FROM THE SUPREME COURT OF
CEYLON.

IN THE MATTER of the last Will and Testament
of KATHRI ARACHIGE DON FREDERICK
SIRIWARDANA of Walagedera, deceased.

BETWEEN

KATHRI ARACHIGE DON VELIN
SIRIWARDANA

Respondent-Appellant

AND

ARACHI APPUHAMILLAGA DON
CARTHELIS APPUHAMY, THE
COLOMBO BUDDHIST THEO-
SOPHICAL SOCIETY, LTD.

Petitioners-Respondents

AND

KATHRI ARACHCHIGE PREMA-
WATHIE SIRIWARDANA, AND
CECELIA KANNANGARA

Intervenients-Respondents-Respondents.

CASE FOR THE APPELLANT

BUCKERIDGE & BRAUNE,
3/4, Clement's Inn, W.C.2.
Solicitors for the Appellant.