

13,1965

No. 37 of 1964

IN THE PRIVY COUNCIL

UNIVERSITY OF LONDON

O N A P P E A L

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

FEB 1966

B E T W E E N

KELVIN LUCKY (Defendant) Appellant 80949

- and -

PANDIT DINANATH TEWARI and JOSEPH CHANKARAJ SINGH (Plaintiffs) Respondents

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C A S E FOR THE RESPONDENTS

RECORD

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1. This is an Appeal in a Probate Action relating to the Estate of one Peter Chandroo of Trinidad who died there on the 5th day of October 1960. He owned cinemas and land, and the value of his estate exceeds Three hundred thousand dollars. He left surviving him his widow, 5 sons and 4 married daughters. The Appeal concerns a disputed Will of the deceased dated the 7th day of September 1960 (hereinafter called "the disputed Will") which the Respondents as Executors seek to set up and which is contested by the Appellant. He as one of the Executors of a Will of the deceased dated the 11th day of February, 1957 (hereinafter called "the 1957 Will"), in turn seeks to set up that Will, and it is accepted that if the disputed Will is not entitled to probate the 1957 Will is so entitled. The Trial Judge found against the disputed Will and in favour of the 1957 Will. On Appeal the Court of Appeal unanimously reversed that Judgment and found in favour of the disputed Will. This Appeal raises and puts in issue the questions of (a) due execution of the disputed Will and (b) the deceased's knowledge and approval thereof. These have throughout been the only issues save that the Appellant pleaded that the disputed Will was a forgery but led no evidence in support of that allegation, which was thus treated as abandoned. Neither undue influence nor fraud has been at any time pleaded.

p. 7
p.57, lines
17-19.

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2. The Appeal is brought by the Appellant, Defendant in the original Action, against an Order of the Court of Appeal of Trinidad and Tobago dated the 23rd day of March 1964, whereby the said Court (Mr. Justice A.H. McShine, President, Mr. Justice I.E. Hyatali and Mr. Justice C.E.

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- pp.62, 63. Phillips) allowed the Appeal of the Respondents, the Plaintiffs in the Action, against an Order of Mr. Justice Maurice Corbin dated the 4th day of May 1963. The latter Order pronounced in favour of the 1957 Will and ordered the first-named Respondent to pay the Appellant's costs of defending the claim but made no order for costs on the Counterclaim. The said Order of the Court of Appeal allowed the Appeal of the present Respondents, ordered that the disputed Will be admitted to probate and ordered the present Appellant to pay to the Respondents the costs of the Appeal and two-thirds (2/3) of the costs of the Trial. 10
- p. 105
3. The Appellant is a son-in-law of the deceased. The Respondent Tewari is a Hindu Priest, and although described as a brother-in-law of the deceased is in fact a cousin of the deceased's wife. The Respondent Chankaraj Singh was a friend of the deceased and was, with the Appellant and one other, an Executor also of the 1957 Will. Neither of the Respondents benefits in any way directly or indirectly under either of the said Wills. The Appellant does not benefit personally under either of the said Wills but his wife's share of the deceased's, her father's, estate is affected. 20
- p. 18
4. The effect of the respective Wills can be summarised as follows -
- pp. 112, 113. UNDER THE 1957 WILL. The Deceased's widow was given use and occupation of the dwelling-house for life free of charge and fifty dollars per month for life. Subject thereto the estate, real and personal, was divided as to 15 per cent each to four sons absolutely, a further 15 per cent to the fifth son for life and after his death to the other four sons, 7 per cent each to three daughters (including the Appellant's wife) absolutely and 4 per cent to the remaining daughter for life and after her death to the other three daughters. 30
- pp. 115, 116. UNDER THE DISPUTED - 1960 - WILL. The deceased's widow was given use of the dwelling-house for life free of charge and sixty dollars per month for life. The four daughters were given five thousand dollars each absolutely, and the real and personal estate was divided equally between the deceased's five sons. 40
- pp. 1,2,5,6. 5. By Writ and formal Statement of Claim the Respondents claimed to be the Executors named in the disputed Will and to have the said Will established.
- pp. 6,7,8. By his Defence and Counterclaim the Appellant alleged firstly that the disputed Will was not made or executed

by the deceased on the alleged date or at all and was a forgery, secondly that if he did make and execute it (which was denied) it was not duly executed, putting the Appellants to proof that the provisions of the Wills and Probate Ordinance were complied with, and thirdly that if he did make and execute it (which was denied) the deceased did not know and approve the contents thereof, pleading that he gave no instructions for the Will, that it was not read over or explained to him properly, fully or at all, nor did he read it himself, and he was unaware of the nature and effect thereof. The Appellant counterclaimed that the 1957 Will was never revoked and that the Court should pronounce against the disputed Will and in favour of the 1957 Will. By their Reply and Defence to Counterclaim the Respondents denied the allegations contained in the Defence and as to the Counterclaim alleged that the 1957 Will was revoked by the disputed Will.

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pp. 8,9.

6. The Trial before Mr. Justice Maurice Corbin took place on the 8th, 9th, 10th and 11th days of January 1963. Judgment was reserved and delivered on the 4th day of May 1963. At the Trial five witnesses gave evidence on behalf of the Respondents, namely FRANK DUFF, BOTH RESPONDENTS, THE DECEASED'S DAUGHTER STELLA and THE DECEASED'S SON GEORGE. Only one witness gave evidence on behalf of the Appellant, namely DALTON CHADEE, a former Solicitors' Clerk.

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p. 36.

7. The effect of the Respondents' case as given in evidence by the said witnesses was that the Deceased expressed a fixed intention to make a new Will so as to delete the provision for dividing his estate between all his children by way of percentages and to substitute instead division of the estate between his sons equally subject to the same type of provision for his widow as previously and subject now to equal legacies for his daughters instead of their previous percentage shares: that the Deceased's reason for this alteration was that all his daughters were married and it was accordingly more satisfactory that they should have fixed legacies rather than shares of the estate: that pursuant to such intention it was arranged that the Respondent Tewari should visit the Deceased and bring with him his own Will which followed the pattern which the Deceased had in mind: that on the 7th day of September 1960 the Respondent Tewari accompanied by Frank Duff called upon the deceased: that the deceased, then, holding Tewari's Will, dictated to the said Frank Duff the terms of the disputed Will which Duff, acting as scribe, duly wrote down: that the deceased then signed the disputed Will and Duff and

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p.114

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pp.115,116.

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the Respondent Tewari signed as witnesses, all three being present as each signed.

- p. 47
- pp.105, 109.
- pp.116, 117,
118, 119.
- pp.56-62.
- p.57
- p.58
- p.58, lines
32-38
- p.59, lines
5 - 8
- p.60
- p.61
- p.63
- p. 67, p. 86,
p. 93.
- pp.67-85
p.72, line 40
to p.73 line 9
8. The effect of the Appellant's case as shown by cross-examination of the Respondents' witnesses and by the evidence of his own witness Dalton Chadee was that Chadee, a former Solicitor's Clerk of long experience, had always managed the deceased's legal affairs and had in fact dealt with the 1957 Will for the deceased and a previous Will and Codicil in November 1956: that Chadee was the most natural person for the deceased to consult about making a new Will and was never so consulted or told about the new Will by the deceased: that Chadee in fact shortly after the date of the disputed Will, namely on the 26th day of September 1960, acted for the deceased in respect of the sale of land conveyed by the deceased by Deed of that date: that the deceased had always intended to limit his son George's interest to a life interest: and that the whole circumstances of the disputed Will were suspicious. 10
9. The learned Trial Judge in his Judgment held that the Respondents had led evidence which prima facie established due execution and approval of the disputed Will, so that the onus then shifted to the Appellant to cast doubt on such evidence and on the circumstances in which the Will was executed, but that the Appellant had effectively done so. He regarded the evidence of the Appellants' witnesses as "patently unreliable" and contradictory, accepted the evidence of Chadee and said that he could see no reason to conclude that if the deceased wished to alter his Will in September 1960 he would have turned to anyone but Chadee. The learned Judge further held that there were circumstances of "suspicion" about the disputed Will and that accordingly in the result the Respondents had failed to discharge the onus (which had shifted back to them) of establishing either due execution or that the deceased knew and approved of its contents. 20
10. The Respondents appealed to the Court of Appeal giving Notice and Grounds of Appeal dated the 7th day of June 1963. The Appeal was heard by three Judges of the Court of Appeal, each of whom delivered a Judgment on the 23rd day of March 1963 holding that the Appeal be allowed and the disputed Will admitted to probate. 30
11. In his Judgment Mr. Justice McShine, the President, said that it must be borne in mind that neither fraud nor undue influence was alleged and that there was no evidence that on the 7th day of September 1960 the 40

deceased was in any way affected in mind but indeed on the evidence of the Appellant's own witness Dalton Chadee carried through and signed a Deed of Sale on the 26th day of September 1960. The President held that the Trial Judge's Judgment was wrong in that its whole basis was a false premise that the deceased must have consulted Chadee if he proposed entering into any transaction and furthermore in that Chadee's evidence did not and could not challenge the principal and important evidence of Duff and the Respondent Tewari. He said that in fact "it would seem that the conclusion arrived at by the learned Judge amounts to a finding of forgery and/or fraud", when forgery had been "abandoned" and fraud not pleaded. He finally examined the law as to knowledge and approval and in particular as to circumstances arousing suspicion, then holding that there were no such circumstances in the instant case and that the Trial Judge had misdirected himself in finding that there were.

pp.74-75

pp.70,76.

p.77, lines
44-46.

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12. Mr. Justice Hyatali in a Judgment to the like effect pointed out that the evidence of the Respondents and their witnesses was rejected for reasons which were unsatisfactory and untenable, and as to suspicious circumstances that these were inferred from material that was tenuous and inconclusive. He went on "I am satisfied that these errors disabled the learned Judge from taking proper advantage of his having seen and heard the witnesses.....".

p.86
p.90 lines
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13. Mr. Justice Phillips in a similar Judgment stressed that there was a body of evidence not contradicted in any respect to the effect that the deceased intended to alter his Will in the way expressed in the disputed Will. He, like the other Judges of the Court of Appeal, then considered the evidence as to due execution and knowledge and approval and analysed the question of suspicion, holding that the trial Judge's findings were plainly wrong.

p.93

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14. It is accepted by the Respondents that once the questions of due execution and knowledge and approval were put in issue the burden of proof thereon was upon them as Executors but it is submitted that their evidence clearly discharged such burden of proof and was, on essentials, uncontradicted. It is further submitted that the Appellant's case did not effectively challenge the evidence adduced on behalf of the Respondents but raised extraneous and largely irrelevant matters which led the learned Trial Judge erroneously to view the Respondents' case with suspicion and to find that such suspicion was not displaced so that the Respondents failed to discharge

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the burden of proof. It is the contention of the Respondents that the learned Trial Judge was unduly impressed by the suggestions of suspicion and consequently approached the whole case in the wrong way and (a) failed to give effect to the clear evidence of due execution and knowledge and approval, (b) rejected the evidence of the Respondents' witnesses (and particularly that of the all-important witnesses Duff and the Respondent Tewari) for no good reason, (c) attached undue weight to the relatively unimportant evidence of the Appellant's sole witness Chadee, (d) overlooked the fact that the plea of forgery was abandoned and that fraud and undue influence were not pleaded, (e) attached importance to alleged suspicious circumstances which did not in fact exist and (f) put an undue burden of proof upon the Respondents.

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15. It is accordingly submitted on behalf of the Respondents that the Appeal should be dismissed for the reasons aforesaid and for the following amongst other

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R E A S O N S

(1) THAT the learned Trial Judge erred in his whole approach to the case, was wrong in his conclusions, and on the facts should have found in favour of the disputed Will.

(2) THAT there was and is no good or sufficient reason to support the Trial Judge's findings and Judgment.

(3) THAT in the circumstances of the case no weight is to be attached to the Trial Judge's advantage of seeing and hearing the witnesses.

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(4) THAT the case did not and does not call for a re-trial because the evidence in support of the disputed Will is plain and in its essentials uncontradicted and unshaken.

(5) THAT the Judgments and reasoning of each of the Judges of the Court of Appeal are right.

JAMES COMYN

JOSEPH DEAN

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Appellant

- and -

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Respondents

C A S E FOR THE RESPONDENTS

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