Privy Council Appeal No. 20 *of* 1964

Sheila Prescod and Benjamin Jacob James – – – – *Appellants*

v.

Elaine Reece – – – – – – – – – *Respondent*

FROM

BRITISH CARIBBEAN COURT OF APPEAL (BRITISH GUIANA)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST JUNE 1965

Present at the Hearing:
LORD MORRIS OF BORTH-Y-GEST
LORD PEARCE
LORD WILBERFORCE
(*Delivered by* LORD PEARCE)

This appeal is concerned with the validity of the will of Jacob James who died on the 17th December 1958 at the age of 66 years. The respondent, a daughter of the testator, propounded the will as executrix and asked the Supreme Court of British Guiana to pronounce in its favour. The claim was resisted by the three defendants to the action who were a son and two other daughters of the testator. The two defendants who now appeal had set up the defences of undue influence and lack of sound mind, memory, and understanding; but the allegation of undue influence was abandoned at an early stage of the trial. The other defendant, who did not appeal, put the plaintiff to proof and alleged that the testator did not know or approve of the contents of the will. That defence was also adopted by the widow of the testator who had been cited by a defendant.

The trial judge, having heard a number of witnesses, decided that the testator knew and approved the contents of the will at the time of its execution and that he was of sound mind, memory and understanding. From that decision the appellants appealed to the then Federal Supreme Court of the West Indies which affirmed the judgment of the trial judge and dismissed the appeal.

The testator was a man of substance with a wife, eight children still living, and numerous grand-children. He had made one previous will under which it appears that his estate was left equally between his children subject to a life-interest to his widow. But admittedly that will was destroyed *animo revocandi* several years before his death. The testator was a strong forceful man of affairs, but from 1955 he suffered from diabetes. In addition he suffered at a later stage from cancer. These two diseases caused his death at the end of 1958.

In June or July 1958 the testator informed Clinton Wong, a barrister who had been his legal adviser for four or five years, that he wished to make a will. Mr. Wong referred him to Mr. Fraser, an experienced law clerk (who had over many years transacted legal and quasi-legal business for the testator), in order that Mr. Fraser might take instructions for the draft will. Mr. Fraser did so, and made a draft which was shown to Mr. Wong. The will was then prepared. On the 30th August 1958 the testator was driven in his car by his son Benjamin to Georgetown where he called at Mr. Fraser's house. There he was given the will and read it while Mr. Fraser ate his lunch. Then Mr. Fraser read the will over to him at his request and he approved it. They both

went off in the car to see Mr. Wong. Mr. Wong came to the car, and, sitting in it, read the will aloud to the testator explaining each clause as he went along, and asking whether it conveyed his wish. After the testator had expressed his approval he signed the will which was then duly witnessed by Mr. Wong and Mr. Fraser.

These two witnesses to the will testified that the testator was in a normal mental state both when the instructions for the will were given and on the day when it was executed. They differed in that Mr. Wong considered that he was physically a sick man, whereas Mr. Fraser considered that he was not, although he appeared " unduly anxious to have the will executed ". " Despite the conflict as to their respective opinions of the testator's health on those two occasions," said the learned trial judge, " the Court accepts their evidence that the testator was mentally normal when he discussed the making of the will with Mr. Wong, when he gave instructions for the preparation of the will to Fraser, and when it was executed." The learned trial judge also gave weight to certain corroborative evidence given by five reliable witnesses as to the normality of the testator's mental condition on occasions both before and after the date on which the will was executed.

After dealing with the case presented by the defendants and certain authorities to which he was referred the learned judge said " What the Court concludes from the circumstances as a whole is that the testator at the time he made his will, was not through any infirmity or disease oblivious to the claims of his relations; what he did, he did by design, fully understanding and appreciating the significance of his act, and that any circumstances which were likely to excite the suspicion of the Court have been dispelled." And finally, " the Court is satisfied from the plaintiff's case that the testator knew and approved of the contents of the will, that he was of sound mind, memory and understanding when he executed it, and that such suspicions as may have arisen have been dispelled."

On appeal Marnan F. J. (with whom Lewis and Jackson F. JJ. agreed) having clearly set out the appellants' contentions came to the same conclusion as the learned trial judge. He said *inter alia* " Having regard to the direct evidence of Mr. Fraser and Mr. Wong to the effect that the testator was in a clear and normal state of mind when the will was read and explained to him and he signed it, it is in my opinion impossible to say that the trial judge was wrong in coming to a corresponding conclusion." And again, " But when one comes to examine the will with all its detailed provisions and distinctions, and to take into account the evidence as to the testator's attitude towards the various members of his family, it seems plain that he intended to dispose of his property as he did."

It is argued for the appellants that the Court could not properly have reached that conclusion and that it did so by giving insufficient weight to the following considerations. There was evidence by the widow and a grand-child living in the house that at and about the material date the testator was feeling his diabetes severely and was giving himself injections of insulin, which would reduce the sugar in his blood, and was at the same time taking quantities of sweetened condensed milk, which would increase the sugar. This empiric and unscientific treatment was not checked by any urine tests nor was the doctor who visited him treating him for diabetes. There was medical evidence that overdoses of insulin can produce hypoglycaemia which may cause loss of memory, moroseness, and personality changes. There was great variation between the earlier will and the last will. Both treated the widow reasonably; but the former did not discriminate between the children while the latter gave the predominant share to the plaintiff who had managed the testator's affairs for less than a year, and left to others either derisory sums or amounts which were very ungenerous in comparison with the plaintiff's share. The derisory sums are explained in the will by references (which seem justified by the evidence) to unfilial behaviour. There is, however, no satisfactory evidence as to the reasons for the ungenerous amounts. Further the testamentary instructions which the testator initialled were destroyed by Mr. Fraser when the will was signed and no copy of them was available.

It is clear on reading the careful judgments of the trial judge and Marnan F. J. that both Courts had these points well in mind and exacted a high degree of proof. In their view, however, that high degree of proof was supplied by the plaintiff's witnesses.

There are thus concurrent findings of fact by the Court of first instance and the appellate Court. Their Lordships therefore cannot review the evidence for a third time unless there is some special circumstance that will justify such a departure from their normal practice. Mr. Khambatta contends that this case comes within the fourth proposition in the list of special circumstances set out in the judgment in *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* [1946] A.C. 508 at 521.

> "(4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their findings is such a question of law."

Mr. Khambatta argues that both Courts misunderstood the effect of *Harwood v. Baker* (1840) 3 Moo. P.C. 282, and *Battan Singh v. Amirchand* [1948] A.C. 161 in two respects. First they did not give sufficient weight to the suspicion which should attach to a will made by a person with a debilitating illness. Secondly they failed to appreciate that a mere capacity by a sick man to understand the terms of a will was not enough if it was not supported by an understanding of the testator's affairs and a comprehension of the various claimants on the testators' bounty. In their Lordships' opinion neither of these criticisms is valid. The facts of the two cases cited were wholly different from those in the present case. Both the trial judge and the Court of Appeal gave careful consideration to the testator's illness and its possible implications and to all the other matters which might be grounds for suspicion but they concluded that the evidence of the plaintiff's witnesses clearly established that the testator was of sound mind, memory and understanding both in respect of the will itself and also in respect of the testator's own affairs and effects and the claims of his relatives. There was ample evidence to support such a finding and their Lordships' see no reason to doubt that such a finding was correct. Their Lordships are accordingly of opinion that no ground has been shown for disturbing the concurrent findings of fact or for reviewing the evidence for a third time.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed.

The appellants must pay the costs of this appeal.

(92160) Wt. 8052/124 70 6/65 Hw.

In the Privy Council

SHEILA PRESCOD AND
BENJAMIN JACOB JAMES

v.

ELAINE REECE

DELIVERED BY

LORD PEARCE

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