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38, 1956

No. 6 of 1955.

In the Privy Council.

20 FEB 1957
INSTITUTE OF ADVANCED LEGAL STUDIES

16082

ON APPEAL
FROM THE SUPREME COURT OF GIBRALTAR.

BETWEEN—

JUDAH I. LAREDO and DAVID M. BENAIM *Appellants*

— AND —

SAMUEL ABRAHAM MARRACHE *Respondent.*

CASE FOR THE RESPONDENT.

RECORD.

10 1. This is an appeal from the judgment of Chief Justice Roger Bason and a jury in the Supreme Court of Gibraltar on the 17th day of November, 1954, pronouncing in favour of the Will made by the late Simy Marrache dated the 29th day of May, 1953, and ordering that the costs of the Respondent, who was then the Plaintiff, should be paid out of the estate of the late Simy Marrache and that the costs of the Appellants, then the Defendants, should be taxed and three-quarters of the taxed costs be paid out of the estate of the late Simy Marrache and the remaining one-quarter be paid by the Appellants personally. p. 75.

2. The action was in form an action by the Respondent as executor p. 3.
20 and sole beneficiary of the Will of the late Simy Marrache who died on the 2nd day of June, 1953, and he sought probate of the Will dated the 29th day of May, 1953. The defence asked the Court to pronounce pp. 4–5. against the said Will propounded by the Respondent on the grounds that

(i) The Will was not duly executed;

(ii) The deceased was not of sound mind, memory or understanding at the date of execution;

(iii) The execution of the Will was obtained by the Respondent's undue influence;

(iv) The execution of the Will was obtained by the Respondent's fraud;

(v) The deceased neither knew nor approved of the contents of the Will at the date of execution.

3. The Respondent was a relative of the deceased, who at the time of her death was 86 years of age. The Will the Respondent sought to propound had been drawn by one Joseph Emmanuel Triay, who was a barrister-at-law and partner in the firm of Triay and Triay. He saw the deceased while she was a patient at the Colonial Hospital. He obtained instructions from the deceased and typed out the Will whilst he was with 10 her on the morning of the 29th day of May, 1953. The Respondent was also present throughout this meeting. The deceased told Triay that she wished completely to revoke her old Will and to make a new one in the Respondent's favour with the Respondent as sole executor as the Respondent was the only relative upon whom she could rely. Triay typed out the Will putting each point to her as he came to it. When he had completed the typing he found Alfred William Dotto, the Secretary of the Colonial Hospital, who agreed to attest the Will. Then, in the presence of Dotto, Triay explained the Will to the deceased and the Respondent also explained the terms of the Will to her. Thereafter the 20 deceased signed her Will and Dotto and Triay each attested the Will in the presence of each other and of the deceased.

4. The action between the Respondent and the Appellants was heard before Chief Justice Roger Bacon and a special jury between the 9th and 17th days inclusive of November, 1954. Triay and Dotto gave evidence of the circumstances in which the Will was drawn and executed. Catherine Susan Dines, a Sister at the Colonial Hospital who had the care of the deceased, gave evidence that the deceased was of sound mind at the date of the Will's execution and was a very determined person. Dr. James John Giraldi, a registered medical practitioner, who was the 30 deceased's doctor from 1946 until her death and who attended her in the Colonial Hospital, gave evidence that he was treating her as his patient at the date that the Will was executed and that he had no doubt that she was of sound mind when she gave instructions for and executed the disputed Will.

pp. 16–18, 20, 25.

p. 18, ll. 38–39.

pp. 20–24.

p. 21, l. 23.

p. 23, ll. 41–42.

5. After the four witnesses named in the last paragraph had been called in support of the Respondent's case, Counsel for the Respondent submitted that the Respondent had discharged the onus of proof which initially rested upon him by reason of the pleadings to establish a *prima facie* case of due execution and that at the date of execution the deceased 40 was of sound mind, memory and understanding and knew and approved of the contents of the Will. Counsel for the Respondent further submitted that if that were so the stage had been reached in the proceedings at which the Appellants should be called upon to establish their case and that only after the Appellants had established their case should the

p. 26, ll. 3–4.

Respondent be required to meet it. Counsel for the Appellants opposed this submission but the learned trial Judge ruled in favour of the Respondent's submission and called upon the Appellants to prove their case. p. 26, ll. 21–23.

6. The Appellants called eight witnesses, Judah Issac Laredo, his wife Mazaltob Laredo, Coti Beyunes, Rebecca Benzimra, Baruj Azagury, Esther Benzecry, Elias Belilo and Elias Isaac Gabriel Benzaquen.

7. Judah Isaac Laredo was one of two Vice-Presidents of the Board of Hebrew Community in Gibraltar and one of three Trustees of Hebrew Charities. He had known the testatrix and her brothers Benjamin and Samuel for many years. He was present in Tangier when her brother Benjamin died in February of 1945 and at that time her other brother Samuel produced a small notebook saying that he wanted to proceed to legalise Benjamin's wishes as indicated in the book. This book was found in the deceased's house after her death. Benjamin's wishes were that the whole of the family property should be sold as soon as possible and that after the payment of certain legacies, half the residue should be used to supply a canteen for meals for poor children and the other half for the Hebrew School. Samuel showed him Laredo a draft Will giving a life interest to the deceased and then giving half of the residue to one Hebrew charity and half to another. Samuel died in 1946 without executing the Will. When Samuel died the deceased told him, Laredo, that she wished to make a Will to carry out the wishes of Benjamin and Samuel and to his knowledge she later made a Will. During the years after Samuel's death and before the death of the deceased, he and his family lived in the deceased's property. He was on friendly terms with her and saw the Respondent and his family visiting the deceased frequently. He, Laredo, signed a number of forms on behalf of the deceased and advised her on business matters. Before going to hospital in May, 1953, the deceased had spent three months in bed and was very thin and weak and deaf. In May, 1953, he said that the deceased was in a very abnormal state, that she was singing opera, saying unusual things and that she did not seem to understand the ceremony of blessing the wine. She went to hospital on the 22nd May, 1953. After her death the Respondent and a Mr. Benyunes placed the deceased's body in the grave and this was in accordance with the custom that the nearest relative should do so. On the day of the funeral he, Laredo, had arranged for a caveat to be entered although he had not seen the earlier will of 1946. pp. 30–38. p. 31, ll. 21–22. p. 33, ll. 18–19. p. 33, ll. 21–30. p. 36, ll. 31–33.

8. Rebecca Benzimra gave evidence that after 1946 the deceased had constantly told her that her money belonged to Talmud Tora. She saw the deceased at the hospital on the 22nd May and talked with her for about an hour. On the 23rd May she heard the deceased speaking against Laredo and saying "I don't want to see him. He doesn't take "an interest in me. And I've got him as my trustee." She saw her p. 38, ll. 36–37. p. 39, l. 6.

again on the 24th May and talked with her for about an hour and again talked with her on the 25th May, though then she found that she was very deaf. On the 26th May the deceased told her that she thought she was dying. She saw the deceased on the afternoon of the 28th May and again on the 29th May she went in the afternoon when the deceased looked very ill and on this occasion she did not talk with the deceased who only gave her a sign of recognition. On the 30th May she saw the deceased at about 10 a.m. and heard her say to Luna Marrache "The radiogram and the records for your fiance" and to Benzimra "For you a "small picture in the wardrobe. Maria knows where it is" and then to Mrs. Benyunes "I have also remembered you in my will" and again to witness Benzimra "I have remembered you also" and "I don't want "luxuries. My tombstone shall be humble and simple. Because I want "all the money for the poor. They need it more than I do." That afternoon she was there when the Respondent's son came into the deceased's room when the deceased said to him "Do the salute". She saw the deceased on the 31st May but there was no conversation. She stated in cross-examination that Monday the 25th May, 1953 was the first time that she had noticed that the deceased was getting deaf but that she did not have to shout at her: she spoke in a loud voice. She also said that the deceased was very fond of music and had a gramophone and a number of records.

p. 39, ll. 30–33.
p. 39, l. 38.
p. 39, l. 44.
p. 43, l. 17.
p. 43, l. 33.

9. Coty Beyunes said in evidence that she saw the deceased in hospital on the 22nd May when she spoke to her and on the 25th May when again she spoke to her. On the 26th May the deceased was asleep; on the 27th May she was there when the deceased had a conversation and again on the 29th May from 5 p.m. until 10.30 p.m. when the deceased seemed very ill. She said that she was present on the morning of the 30th May when the deceased said "Cotita I remembered you in my will" and told her that all her money was for the poor. She saw the deceased later on the 30th May when she overheard a conversation between the deceased and the Respondent. In cross-examination she said that she thought that the deceased was in a fit state to dispose of her property on the 30th May, but only for a brief time.

p. 41, l. 30.
p. 42, l. 33.

10. Mazaltob Laredo said in evidence that the deceased at every moment said "a sort of chorus" that all her money was going to the poor because it was the wish of her brothers. She agreed that she sometimes drew cheques which the deceased had made out and that the deceased drew only £250 in 1950 but £700 in 1951. She said that she had seen the deceased several times in hospital but had not disturbed her.

p. 44, l. 20.

11. Baruj Azagury stated that he saw the deceased taken to hospital in May, 1953, and the deceased fell to the ground at the moment she was being put into the Respondent's car to be taken to the hospital.

p. 45, l. 19.

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12. Esther Benzecry, a school teacher at the Hebrew school, Talmud Tora, said in evidence that she had known the deceased for the last seven years and that when she saw her to collect money, the deceased always said "Now I am only giving you £1 but everything I have is for the poor and the Talmund Tora". The last time she saw the deceased was in March, 1953. p. 45, l. 35.

13. Elias Belilo said in evidence that he went to the Colonial Hospital at about 4 p.m. in the Respondent's car to be a watcher. He overheard Dr. Giraldi's conversation with the Respondent in which he complained about taking a lawyer to his patient and said "I am he who is in charge here. She is my patient. I'm going to revoke this", and later "Even if police wanted a statement they could not have it because this lady wasn't in a fit state for anything today". Dr. Giraldi then went into the deceased's room where he stayed a few minutes. On coming out he spoke to the Respondent and then said to the witness "I was very excited, because I don't want to be ignored in relation to my patients". The doctor said that he must stay as a watcher because the lady was very weak and at her age her heart could stop suddenly. Later he had given a written statement in which he stated that Dr. Giraldi had said "She's not in a fit state to be disturbed" and not "She's not fit for anything". p. 47, l. 6. p. 47, l. 9. p. 47, l. 42.

14. Elias Isaac Gabriel Benzaquen said in evidence that he was a watcher on the night of the 1st/2nd June, 1953, when the deceased died and that the Respondent told him "I want everything to be done "in the best manner. I'm going to pay all the expenses because Triay "phoned me this afternoon and said I'm the sole executor and "beneficiary".

15. At the close of the Appellants' case, Counsel for the Respondent submitted that there was no case to answer in respect of the allegations of undue influence and fraud, pleaded in Paragraphs 3 and 4 respectively of the amended Defence. Counsel for the Appellants submitted that there was a case to answer on both allegations, submitting as evidence under both Paragraphs the following facts:— p. 49. p. 51.

(1) After making the disputed Will the deceased had told Benzimra and Benyunes that she had remembered them in her Will.

(2) The constant visits of the Respondent and his offer to take her into his home which was refused.

(3) The Respondent's presence throughout the making of the second Will and his conversation with the deceased whilst Triay was typing the Will.

(4) The absence of a blood relationship between the Respondent and the deceased.

He alleged that the fraudulent misrepresentations pleaded in the Defence could be supported by circumstantial evidence, and here he relied on the conversation between the deceased and Benzimra and

Benyunes after the second Will. Counsel for the Respondent was heard in reply and indicated to the Court that he would not in any event call rebutting evidence. The Court did not put Counsel for the Respondent to his election.

p. 52, l. 14.

16. The learned trial Judge ruled on the submission made by Counsel for the Respondent and held that the defences of undue influence and fraud must be withdrawn from the jury. In respect of undue influence he said:—

p. 52, l. 36.

"I am unable to find any evidence whatever on which a "reasonable jury could find undue influence by the Plaintiff here. "Any such finding would necessarily be a pure guess, unfounded on "anything proved at this trial."

As for the allegation of fraud, he said:—

p. 53, l. 3.

"There is no question of 'fraud at large'; only question is "whether there is any evidence that the representation as pleaded "was made by the Plaintiff to the deceased, was false and fraudu-"lent and caused the deceased to execute the Will. I have "considered not only each item of evidence submitted by "Defendants to be evidence of that fraud but also all the evidence "adduced. There is, of course, no direct evidence of the alleged "representation ever having been made nor, in my view, is there "any other evidence of its having been made upon which a "reasonable jury could find that it had. There is doubtless plenty "of evidence going to other issues, on one side and on the other, but "that is beside the present point.

"Without any proof of the basic element that the alleged repre-"sentation was made the whole plea must fail. It is true that there "are circumstances giving rise to some general suspicion from which "one might hazard a mere guess that some kind of fraud may "possibly have been practised by someone, or indeed one might also "guess that something quite different happened. But that is very "far from having evidence of a particular fraudulent misrepresenta-"tion by the Plaintiff upon which a reasonable jury could act."

17. The learned trial Judge then summed up to the jury and left three questions to them in writing. The first related to due execution, the second to the deceased's capacity and the third to her knowledge and approval of the contents of the disputed Will. The Judge directed the jury that their reply to the first question should undoubtedly be "Yes", in favour of due execution. After retiring to consider their verdict, the jury returned answers of "Yes" to each of the three questions all such answers being by a majority of seven jurors to two.

p. 74, l. 31.

18. The Respondent respectfully submits that the verdict of the jury and the judgment and rulings of the learned trial Judge are correct and ought to be affirmed and that the appeal herein should be dismissed with costs for the following, among other,

REASONS.

(1) BECAUSE the Appellants failed to establish a *prima facie* case of fraud or undue influence.

(2) BECAUSE the ruling made by the learned trial Judge on the submissions of Counsel that there was no case to answer in respect of the allegations of fraud and undue influence were correct.

(3) BECAUSE the learned trial Judge's summing up was correct.

(4) BECAUSE the jury by their verdicts refused to accept the Appellants' evidence and that of their witnesses.

(5) BECAUSE the Respondent was entitled to judgment in the action for the relief claimed.

J. LLOYD-ELEY.

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