Privy Council Appeal No. 37 *of* 1964

Kelvin Lucky – – – – – – – – – *Appellant*

v.

Pandit Dinanath Tewari and another – – – – – *Respondents*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH APRIL 1965

Present at the Hearing:
LORD GUEST
LORD UPJOHN
LORD WILBERFORCE
(*Delivered by* LORD WILBERFORCE)

This is an appeal from a decision of the Court of Appeal of Trinidad and Tobago in a Probate action relating to the estate of Peter Chandroo of La Romain Village in the island of Trinidad who died on 5th October 1960. His estate was valued at more than 300,000 dollars. He left a family consisting of a widow, 5 sons and 4 daughters.

The action was commenced by writ on 8th November 1961 followed on 27th January 1962 by a statement of claim by which the plaintiffs, as the executors named in an alleged will dated 7th September 1960, sought probate of it in solemn form. By the defence and counterclaim the defendant denied that the 1960 will was duly executed as required by the Wills and Probate Ordinance and denied that the testator knew and approved of its contents. He contended that the will was a forgery. By way of counterclaim the defendant set up a previous will of 11th February 1957 of which he was named as one of the executors, and asked for probate thereof in solemn form.

At the trial, the defendant " did not press " the allegation of forgery and the trial judge said that it was treated as abandoned. The trial proceeded on the two defences of non-execution and want of knowledge and approval. The learned judge found in favour of the defendant on both issues: accordingly he pronounced for the will of 11th February 1957. This decision was reversed by the Court of Appeal which decided both issues in favour of the plaintiffs and admitted the will of 7th September 1960 to probate. In the present appeal brought by the defendant, the defence of non-execution was not proceeded with so that the only issue before their Lordships was as to knowledge and approval. Before consideration is given to the evidence on this issue and the manner in which it was dealt with at the trial, it may be convenient to summarise the contents of the testator's various testamentary dispositions.

I. The first will placed before the Court was one dated 10th November 1956. This will was prepared by one Dalton Chadee, a solicitor's clerk and a person of some standing in public life in San Fernando, whom the testator had consulted in various matters over a considerable period of years. The executors named were two of the testator's sons, George and Byron Chandroo and a daughter Ethel Massahood. The testator bequeathed 20 per cent. of his estate to each of his sons George, Byron, Claude and Hector, 10 per cent. to his son Charles, 2 per cent. to each of his daughters Ethel, Stella and Pearl. Finally he left 3 per cent. to his wife Lilian Chandroo and 1 per cent. to his

daughter Maud in each case for life with remainder after their deaths to his 5 sons and his 3 other daughters in equal shares. There was a direction that if any devisee under the will desired to sell his or her share, an option was to be given to the other devisees to purchase the same.

II. On 12th November 1956 the testator made a codicil to the above mentioned will. It was prepared by Chadee. By the codicil he appointed his son Claude and his daughter Stella as executors in place of his daughter Ethel. He gave his wife an annuity for life of 600 dollars in addition to the life interest in 3 per cent. of the estate. In all other respects he confirmed his will.

III. On 11th February 1957 the testator made a fresh will (the will for which the trial judge pronounced). This also was prepared by Chadee. As executors, he named Joseph Chankarajsingh and two sons-in-law, Kelvin Lucky, the Appellant, and Joseph Motilal. He gave his wife the use of his dwelling house for life and an annuity of 50 dollars a month. His real estate he divided between his children, as to 15 per cent. to each of his sons Byron, Claude, Hector and Charles. George's interest, though extending to 15 per cent., was reduced to a life interest with remainder to the other four sons: 7 per cent. was given to each of the elder daughters, Ethel, Stella and Pearl; and Maud received a life interest in 4 per cent. with remainder to the other three daughters. The personal estate was given to the testator's children in the same shares as those relating to the real estate.

IV. The (disputed) will of 7th September 1960 was not prepared by Chadee. The circumstances in which it was prepared will be described later. The executors named were the respondents Pandit D. Tewari and Joseph Chankarajsingh. The testator gave to his wife the use of his dwelling house for life and an annuity of 60 dollars a month. He gave to each of his four daughters the sum of 5,000 dollars. The rest of his real and personal estate he gave to his five sons in equal shares absolutely. There was a direction to each of his sons not to dispose of his share in the estate without first offering the same to his brothers.

These being the relevant dispositions of the testator, their Lordships will now consider the evidence which was before the trial judge.

In support of the will of 1960, five witnesses were called on behalf of the plaintiffs, namely the two attesting witnesses, two children of the Testator, namely his son George and his daughter Stella, and Joseph Chankarajsingh. The only witness called by the defendant was Chadee.

The attesting witnesses were Frank Duff, a Transport Overseer who had never met the testator before 7th September 1960, and who was a neighbour and friend of the other attesting witness Tewari, and Tewari. Tewari is a Hindu priest whose cousin was married to the testator. Tewari said that he had talked to the testator on 4th September 1960. The testator said that he was not satisfied about his will because his daughters were given percentages of the estate and that might lead to trouble. There was a suggestion that the testator should have a deed prepared and the testator instructed his daughters Stella and Ethel to send for a Mr. Cameron, a solicitor who had acted for the testator in previous transactions. After they had gone to see Cameron, the testator said to Tewari that he did not want a deed because his children would get to know of it. Tewari then suggested a will, mentioned that he had a will of his own and offered to bring it over so that the testator could have his will prepared on the same lines. The testator agreed and it was arranged that Tewari should come on 7th September. It appears that Mr. Cameron was also to come to see the testator on the same day.

On 7th September 1960, Tewari collected Duff in his car and they reached the testator's house about 7 a.m. Tewari went in and showed his will to the testator who read it and said he would like his own will made the same way. Duff was then called in and asked to write out the testator's will: he agreed. The testator dictated his will and Duff wrote it down from dictation. Duff read the will over. The testator signed it in the presence of Tewari and Duff and the latter witnessed the testator's signature in his presence and in

the presence of each other. The testator signed it again. The testator handed the will to Tewari, asking him to keep it secret, and in due course Tewari and Duff left.

The original will was produced at the trial: Duff identified his handwriting and his signature. The testator's signature was identified by both attesting witnesses and by other witnesses. Tewari identified his signature and also produced his own will. A comparison of this with the testator's will suggests strongly that the latter was modelled on the former.

The testator died on 5th October 1960. Tewari took no immediate action with regard to the will of 7th September 1960 although he knew that there was a previous will made by Chadee. He told his co-executor Joseph Chankarajsingh about the 1960 will on 16th November 1960 and put it in the hands of a solicitor, a Mr. Roberts (who was not the regular solicitor of Tewari) on the same day, with instructions to apply for probate. The family as a whole was not told about the will till 8th January 1961. Tewari explained the delay of some 6 weeks between the testator's death and the disclosure of the 1960 will by saying that in the interval he was ill.

As to the evidence of these witnesses, the learned trial judge said that, on the face of it, this evidence established due execution of the 1960 will on 7th September 1960 and that, due execution being proved, the onus to prove lack of knowledge and approval would shift to the defendant. He held however that the defendant had destroyed the evidence of the plaintiffs' witnesses. He gave two reasons for this holding: first that there were differences as to detail in the witnesses' evidence—and he mentioned certain circumstantial matters as to the events of the day in question on which differences in the evidence appeared; second that some of the behaviour of Tewari was difficult to understand—as to which he gave, as two illustrations, Tewari's delay in informing his co-executor of the 1960 will and the manner in which probate was applied for. He referred to the witnesses (meaning clearly the attesting witnesses) as " patently unreliable " and as contradicting themselves and each other. He asked how, if he did not believe their evidence, could he be sure of the circumstances in which the will was executed especially " as I think it extremely unlikely that a layman [Duff] could write a will in the terms of this one merely on listening to a testator express his wishes ". Apart from this, the learned judge considered that there was positive evidence which cast suspicion on the execution of the will. This was the evidence of Chadee. Chadee had been concerned with the wills of 1956 and 1957 and it was difficult to believe that the testator would wish to abandon him. The learned judge expressed his disbelief of two witnesses' statements that the testator had lost confidence in Chadee. He accepted Chadee's evidence that the testator on 26th September 1960 (i.e. after the alleged execution of the will of 7th September) had denied to Chadee that he had told George Chandroo that he wished to change his will. On this the learned judge held that the Plaintiffs had failed to prove either due execution or knowledge and approval.

Their Lordships have referred in some detail to these findings of the learned trial judge, and they have considered them with some care, in view of the strength which necessarily attaches to findings of fact of the trial judge who has seen the witnesses, is able to form an appreciation of their personality and demeanour, and who is familiar with local conditions. But giving the fullest recognition to these advantages, their Lordships are unable (as were all the members of the Court of Appeal) to avoid the conclusion, that even as regards the two attesting witnesses (and there are others whose evidence must also be considered) the appreciation of their evidence by the learned trial judge was faulty, to the degree which entitles and compels an appellate court to interfere.

In the first place he took no account of the nature of the substantive dispositions contained in the 1960 will. It appears to their Lordships to be a relevant and significant circumstance that this was not only in no sense inofficious (it made provision for all members of the testator's family) but as the analysis which has already been made most clearly shows, fitted in a

natural manner into the pattern of the dispositions which the testator from time to time had made. It followed the same scheme as had been adopted in both of the previous wills while altering the manner in which the estate was to be divided between the sons on the one hand and the daughters on the other, and in making some adjustments within each class. As to the manner of preparation, it was incorrect to describe Duff's action as writing the will " merely on listening to a testator express his wishes ". The evidence of both witnesses was that the testator dictated the actual text and all that Duff had to do was to follow the dictation. When consideration is given to the nature of the dispositions (which varied little in form from those of the previous wills) and to the terms of Tewari's model will, there is no inherent difficulty in believing that the will was written in the manner described. As to the attesting witnesses themselves, their Lordships agree with the Court of Appeal that the reasons expressly given by the learned judge for disbelieving their evidence are unconvincing, and though their Lordships are prepared to assume that some reliance was placed by the learned judge on the manner and demeanour of the witnesses, although in his judgment he does not expressly say so, even allowing for this, their Lordships cannot accept that the point was reached, or indeed approached, where a total rejection of these witnesses' evidence was justified. Their Lordships also agree with the Court of Appeal that undue weight was placed by the learned trial judge on the evidence of Chadee. He was not able to speak at all as to the circumstances in which the 1960 will was prepared and executed, and though no doubt he might have been expected to be asked to make a new will—as he had made the wills of 1956 and 1957—no proper judgment could be reached as to the probability that the testator might not wish to employ him in 1960 without taking account of the fact (to which the learned judge did not refer) that, as was clearly proved by several witnesses, when he was thinking of sending for a lawyer in September 1960, he sent not for Chadee but for Cameron. If anything therefore required explanation, it was not the failure to send for Chadee, but the failure after having sent for Cameron, to wait for him to arrive before making the will. The only other matter for which Chadee's evidence was relied on, namely to prove the testator's denial on 26th September 1960 that he had told George that he wished to alter his will, could be explained by a desire on the testator's part (natural enough in the circumstances) after he had made the will on 7th September, to keep the fact that he had done so from Chadee.

Their Lordships therefore agree with the Court of Appeal in their inability to accept the learned trial judge's total rejection of the evidence of the attesting witnesses: they consider, as indeed the appellant now concedes, that the due execution of the will was satisfactorily proved. Moreover, since proof of due execution depends on the evidence of Duff and Tewari and involves, to that extent, acceptance of their evidence—or at least of the evidence of one of them—their Lordships can see no ground on which to reject that portion of their evidence which proved that the will was dictated by and read over to the testator. If this is accepted, the plaintiffs are in a position not only to rely upon the normal presumption of validity which arises from due execution of a will regular on the face of it (see *In the Estate of Musgrove* [1927] P. 264) but to go further and to invoke the principle, equally well established, that where the will has been read over to a capable testator on the occasion of its execution, that is sufficient proof that he approved of, as well as knew, the contents of the will (see *Guardhouse v. Blackburn* L.R. 1 P & D 109). Their Lordships accept that if suspicious circumstances are shown, the burden may be cast upon the plaintiffs of proving positively the fact of knowledge and approval. But although, in order to raise a case of suspicion, it is not essential that the will should have been prepared by a person taking a benefit under it (see *Tyrell v. Painton* [1894] P. 151 per Lindley L.J. at p. 157) yet where, as here, this is not so and the will has been prepared by a person who takes no benefit, the evidence of facts giving rise to suspicion must be such as to create a real doubt that the testator did not know or approve of the contents of the will; it is not enough merely to show that the circumstances in which the will was prepared were unusual or that the testator did not make use of the legal adviser whom

he might have been expected to consult. The circumstances attending the preparation and execution of the will of 7th September 1960, though unusual, do not even, taken by themselves, and even allowing some degree of unreliability in the attesting witnesses, in the view of their Lordships satisfy this test.

The matter does not however rest there for, in addition to the two attesting witnesses, there were three other persons who gave evidence at the trial on behalf of the plaintiffs. Their Lordships consider that their evidence is important in two respects: first because it places the somewhat unusual course of events of 7th September 1960 in a wider perspective which makes it more easily intelligible; secondly because two of the witnesses (namely Stella Motilal and Joseph Chankarajsingh) were quite disinterested. Chankarajsingh is a Minister of the Gospel who had known the testator for over 40 years; he took nothing under either will, while Stella Motilal, a daughter of the testator, so far from being concerned to support the will of 1960 was directly interested in upholding the will of 1957 under which she was given greater benefits. Yet apart from two brief references on minor points to the evidence of George Chandroo and of Stella Motilal (a statement of whose as to the testator's loss of confidence in Chadee he rejected) the learned judge made no reference to this evidence, an omission commented on, in their Lordships' view with justification, by the Court of Appeal. This evidence shows quite clearly that:

1. In August 1960, at a family meeting held at the testator's house, the testator expressed his intention to give his estate to his 5 sons—possibly at this stage the testator may have been thinking of making a gift *inter vivos* rather than of altering his will, but the intention was clearly expressed. This caused some natural distress to his daughters and one of them at least abused the testator with some violence.

2. On 4th September 1960 Joseph Chankarajsingh visited the testator and met Tewari there. There was discussion about a will and the testator asked his daughters to fetch Cameron to make either a will or a deed—the evidence differs somewhat on this point.

3. On 30th September 1960 Chankarajsingh visited the testator and was told that he had given all his property to his 5 boys; when asked about the girls, he said " the girls have ". Ethel, a daughter, came in and asked the testator if he had given all to the boys upon which the testator did not answer and put his finger to his lips.

The effect of this is to show that the testator had been thinking, before 7th September 1960 of making a fresh disposition of his property in favour of his sons, that, after 7th September he realised that he had done so, and that he wished to avoid discussion on what he had done. No suggestion was made that at either date, or on the date when the will was executed, the testator was not of sound mind and understanding.

On a view of the whole of the evidence which substantially corresponds with that which their Lordships have taken, the Court of Appeal reached the two conclusions: first that the decision of the trial judge could not be upheld, and second that there was sufficient evidence of a positive character on the record to justify them in substituting a finding of their own in favour of the will of 1960 for that of the trial judge rather than in ordering a new trial. Their Lordships agree with the Court of Appeal on both points and will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of this appeal.

(91771) Wt. 8069/113 80 3/65 Hw.

In the Privy Council

KELVIN LUCKY

v.

PANDIT DINANATH TEWARI
AND ANOTHER

DELIVERED BY

LORD WILBERFORCE

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
HARROW

1965