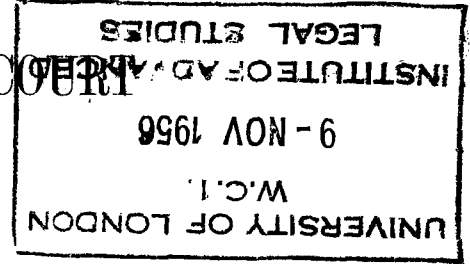


In the Privy Council.

31423

No. 14 of 1951.

ON APPEAL FROM THE SUPREME COURT
OF CEYLON.



BETWEEN

THAIALPARGAR SELVAGURU of Valvettiturai

PETITIONER-APPELLANT

AND

1. GNANASEGARAMPILLAI THAIALPAGAR of Valvettiturai

2. KANDASAMY PARAMAKURU of Valvettiturai

RESPONDENTS-RESPONDENTS.

CASE FOR THE RESPONDENTS

RECORD

RESPONDENTS CASE

1.—This Appeal arises out of testamentary proceedings in the District Court of Jaffna (held at Point Pedro) instituted by a Petition dated 17th February, 1944, filed on behalf of the Appellant Thialpargar Selvaguru of Valvettiturai in the Island of Ceylon by which he sought to prove as executor a document (marked P. 1.) purporting to be the last will of one Arudchelvam widow of a certain Kumaraguru of Valvettiturai. The said document is alleged to have been executed by the said Arudchelvam between 3 a.m. and 5 a.m. on the 28th June, 1943. By the terms of this document the said Arudchelvam purported to leave her entire estate to her brother the Appellant to the complete exclusion of her father the first Respondent and of her nephew the second Respondent. The said Arudchelvam died on the 3rd July, 1943.

p. 20
p. 20, l. 7
pp. 97-98
p. 20, ll. 19-21
p. 20, ll. 16-18
p. 33, l. 39
p. 32, l. 12
p. 23, l. 16

2.—The first Respondent and the second Respondent and the Appellant were respectively the heirs of the said Arudchelvam in the event of her dying intestate without issue. The Appellant is the son of the first Respondent and the second Respondent who is an infant appears by the first Respondent who was on the 17th February, 1944, appointed his Guardian *ad litem* by the Court.

p. 20, ll. 24-26
p. 19, ll. 28-31

10

pp. 26-27
pp. 97-98

3.—On the 17th April, 1944, the Additional District Judge sitting at Point Pedro made an order *nisi* declaring the will (the document P. 1.) of the said Arudchelvam to be proved and declaring the Appellant to be entitled to take out probate as Executor unless sufficient cause were shown to the contrary.

pp. 27-28
pp. 97-98
p. 27, ll. 28-34

4.—On the 31st August, 1944, the first Respondent filed a statement of objections in the said District Court and opposed the grant of probate to the Appellant on the grounds that the document (marked P. 1.) purporting to be the act and deed of the said Arudchelvam was not executed by her and that the signature thereto had been forged and that neither the attesting notary nor any of the witnesses to the document had been present when the document was said to have been executed. 10

pp. 30-40
pp. 41, l. 21
pp. 53-65
p. 65, l. 29.

5.—The said Petition came on for trial on the 15th February, 1945, before the Additional District Judge of the said District Court. The hearing was resumed on the 5th April, 1946 and again on the 9th May, 1946, evidence being adduced on both sides. The learned Judge on that date reserved judgment.

pp. 65-69.
p. 69, l. 19
p. 69, ll. 10-11

6.—The reserved judgment dated the 10th December, 1946, which was delivered on the 17th January, 1947, some seven months after the conclusion of the hearing, declared the document (marked P. 1.) to be the last will and 20 the Act and Deed of the deceased Arudchelvam.

pp. 69-73
p. 73, l. 24
p. 72, ll. 29-35
p. 72, ll. 25-26

7.—On the 25th January, 1947, the first Respondent filed a Petition of Appeal to the Supreme Court of Ceylon to have the said Judgment set aside on the grounds that it was against the weight of the evidence and that the learned District Judge had misdirected himself and prayed for an order declaring the said will to be a forgery or in the alternative null and void for lack of due execution.

p. 73, l. 37

8.—The Appeal was argued before the Supreme Court on 2nd December, 1947. On the 10th December, 1947, Soertsz, S.P.J., delivered the Judgment of the Court, in which Nagalingam, J., concurred, allowed the Appeal, set 30 aside the Judgment of the Additional District Judge and dismissed the Petition for probate with costs in both Courts on the ground that the learned District Judge had not properly considered the evidence and that his decision was in the judgment of the Supreme Court after reconsidering the whole of the evidence against the weight of such evidence.

pp. 73-76

pp. 73-76
pp. 80-81

9.—From this Judgment and Decree of the Supreme Court of Ceylon the Appellant on the 30th January, 1948, obtained conditional leave to appeal to His late Majesty in Council and on the 15th March, 1948, the Appellant applied to the Supreme Court for final leave to appeal. The said application was heard on the 20th April, 1948, when by an order dated the 40

pp. 81-84
p. 87, l. 9

14th May, 1948, the Supreme Court upheld a preliminary objection by the first Respondent and dismissed the said application. pp. 88-89

10.—The Appellant thereafter petitioned His late Majesty in Council for special leave to appeal and the said Petition was duly heard and on the 21st December, 1949, an Order in Council was made granting the Appellant leave to appeal from the Judgment and Decree of the Supreme Court of Ceylon dated the 10th December, 1947. pp. 90-91

11.—The issues involved in this Appeal are substantially questions of fact ; whether a document marked P. I. produced by the Appellant at the trial who sought to have it admitted to probate, was the Act and Deed of his sister the deceased Arudchelvam or a forgery and whether the Appellant did or did not discharge the burden of proving as executor the due execution of this alleged will. pp. 97-98
10 p. 20
p. 20, ll. 30-34

12.—At the trial in the District Court it was alleged on behalf of the Appellant that his sister the said Arudchelvam, having been ill for some time past, had asked him on or about the 26th June, 1943, to find a purchaser for some land her property which she desired to sell in order to raise money for her medical expenses. According to the Appellant he succeeded in finding a prospective purchaser in one Chelliah, a fisherman living nearby, and he alleges that on the 27th June, 1943, an agreement was concluded whereby the said Chelliah was to purchase two lachams of land from the said sister for the sum of Rs. 780 and that the relevant deed was to be executed by the parties on the following day. pp. 31, l. 31
p. 31, ll. 38-40
p. 31, ll. 41-45
20

13.—On the night of the 27th June, 1943, the Appellant's sister is said to have felt that she might not have long to live and at 1 a.m. on the 28th June, 1943, so the Appellant alleges, she asked him to fetch a notary as she wished to make her will and at the same time to execute the transfer deed of the land to Chelliah. p. 32, ll. 1-7

14.—Thereafter at about 3 a.m. on the 28th June, 1943, the Appellant alleges that he went to the house of his father-in-law one Selvadurai and that together they proceeded to the house of the witness Sabaratnam, a notary to whom they gave instructions for the drafting of a transfer deed in favour of Chelliah. According to the evidence of the notary Sabaratnam this transfer deed the document marked D. 9 was drafted in Sabaratnam's house at 4 a.m. on the 28th June, 1943, and that the transferee Chelliah was not then present : although the Appellant was not in possession of the title deeds of the land it appeared that he was able to supply particulars of the boundaries of the land and the number of the relevant title deeds required for the drafting of the document D. 9. from information placed at his disposal by Chelliah who in turn had obtained this information according to the Appellant from certain of Chelliah's relatives who had previously bought parcels of adjacent land. pp. 32, ll. 9-12
p. 43, l. 45
p. 32, ll. 9-11
p. 37, l. 26
p. 37, ll. 35-36
p. 39, ll. 35-36
p. 34, l. 35
p. 34, ll. 36-40
pp. 116-117
p. 44, ll. 35-43
30
40

RECORD

pp. 116-117

15.—After the drafting of the document D. 9. the Appellant says that he, together with his father-in-law, Selvadurai, the notary Sabaratnam and the latter's clerk set off for the first Respondent's house where the deceased Arudchelvam was then living and that on their way there they passed the house of the Appellant's father-in-law where one Ramalingam was found seated outside the house. According to the Appellant it so happened that Ramalingam had come there at 3.30 a.m. on the chance of seeing the Appellant's father-in-law Selvadurai on some matter of business connected with timber. The Appellant alleges further that he fetched the witness Chelliah who lived nearby and that the whole party which was now 10 joined by Ramalingam and consisted in addition to Ramalingam of five other persons namely the Appellant, his father-in-law, the notary Sabaratnam with his clerk and Chelliah arrived at the first Respondent's house.

p. 34, l. 33

p. 35, l. 9.

p. 35, ll. 2-3

p. 35, l. 9

p. 38, ll. 11, 12

p. 59, ll. 16-20

p. 35, ll. 10-12

p. 35, ll. 18-21

p. 33, ll. 32-33

p. 111

p. 33, ll. 33-34

The Appellant says that they gained admission to the compound surrounding the first Respondent's house by unlocking the main gate of the compound by means of a key which he had in his possession. The Appellant said he took precautions to see that the Respondent knew nothing of these events. According to the Appellant the deceased Arudchelvam was lying in bed in the Appellant's room marked C. 3. on the plan marked D. 5. 20 whilst the first Respondent and his wife occupied the room marked C. 4. on the plan.

p. 111

p. 35, ll. 36-39

p. 40, ll. 14-17

p. 38, ll. 21-34

p. 38, l. 23

pp. 97-98

p. 39, ll. 44-45

p. 117

p. 38, l. 39

16.—The Appellant alleges that it was in this room C. 3. that the deceased Arudchelvam executed the transfer document D. 6. (the certified copy of D. 9.) which was then signed by the said Selvadurai and by the said Ramalingam as witnesses thereto. Immediately after the transfer deed was executed it is alleged that the notary Sabaratnam drafted a will (the document marked P. 1.) on the instructions of the deceased Arudchelvam and that this document was signed by the deceased in the presence of the said Ramalingam and the said Chelliah who severally signed 30 the document (P. 1.) as witnesses in the presence of the deceased and of each other. The notary Sabaratnam produced the alleged protocol (D. 10) of the document (P. 1.) which purported to be signed by the deceased Arudchelvam and to be witnessed by Ramalingam and Chelliah. The time of these happenings according to the Appellant was between 3 a.m. and 5 a.m. on the 28th June, 1943.

pp. 116-117

pp. 97-98

pp. 116-117

p. 33, ll. 4-7

p. 40, ll. 6-8

p. 37, l. 35

17.—The manner and sequence in which these three documents that is to say the alleged transfer deed (D. 9), the alleged will (P. 1.) and the protocol of the will (D. 10.) were drafted and executed appears from the evidence called by the Appellant to have been as follows: The transfer 40 deed (D. 9.) was drafted in the house of the notary Sabaratnam at about 4 a.m. on the 28th June, 1943, by the notary Sabaratnam himself in his own handwriting and was taken by him to the first Respondent's house where in a room C. 3. the deceased Arudchelvam was lying in bed.

- Sabaratnam entered this room (marked C. 3. on the plan) and read out and explained the deed (D. 9.) and the deceased Arudchelvam thereupon demanded the money which was handed by Chelliah to the said Sabaratnam and by him to the deceased Arudchelvam. The deed (D. 9) was then signed by the deceased Arudchelvam and the Appellant's father-in-law Selvadurai and the said Ramalingam appended their signatures to D. 9. as witnesses. At the time the deed was being read out there were present in the room (C. 3) the Appellant, his father-in-law Selvadurai, the notary Sabaratnam, the notary's clerk, Chelliah, Ramalingam and a certain woman.
- 10 After the deed (D. 9). was executed the deceased Arudchelvam desired the notary Sabaratnam to draft her will and on her instructions Sabaratnam is said to have drafted the alleged will P. 1. and the protocol thereof D. 10., which were then signed by Arudchelvam and attested by the said Chelliah and the said Ramalingam. In his evidence at the trial in the District Court Sabaratnam said that two penholders had been brought by him and were used when the documents were signed. He attributed a difference in the appearance of the ink used for the signature of the deceased Arudchelvam on the deed (D. 9.) from that of the signatures of the two attesting witnesses to the poor quality of the ink and explained that it had been necessary to shake the ink bottle from time to time. Sabaratnam added that the difference might be due to the pen used by Arudchelvam. There was a similar difference in the appearance of the ink used in writing the signature of Arudchelvam on all three documents D. 9., D. 10. and P. 1. to that used both for writing the contents of these documents and the signatures of the witnesses. All three documents, although their contents were of different length, finished at the same place on the page. All three documents were written by Sabaratnam, the writing on the longer documents being smaller and the lines closer together.
- 18.—It was the Respondent's case firstly that the signatures on the document marked P. 1. and on the protocol thereof marked D. 10. and on the deed marked D. 1. were forgeries and were not the signatures of the said Arudchelvam and in support of this contention the witness Mr. McIntyre was called, stated his opinion and produced his report (marked D. 5.). Secondly it was the contention of the Respondent that if the signatures are genuine the will had still not been duly executed, that the meeting described by the Appellant and his witnesses never took place and was a pure invention and that the signatures of the said Arudchelvam had not been affixed on all the three said documents as described and indeed that the said signatures may well have been placed on the paper of the said documents when the said paper was blank.
- 19.—In support of this contention it was alleged by the Respondent that the Appellant's father-in-law Salvadurai who is stated by the Appellant and his witnesses to have witnessed the document D. 9. and to have been present at the execution of the alleged will P. 1. and the protocol thereof D. 10. at the house of the Respondent on the early morning of 28th July,
- p. 33, ll. 30-34
p. 38, ll. 9-16,
p. 111
pp. 116-117
p. 33, ll. 16-21
p. 38, ll. 11-13
p. 33, ll. 18-22
p. 38, ll. 16-19
p. 39, l. 39
p. 39, ll. 41-44
pp. 116-117
p. 39, ll. 41-45
p. 35, ll. 41-42
p. 40, ll. 3-5
p. 40, ll. 20-22
p. 40, ll. 1-8
p. 47, ll. 18-21
p. 46, ll. 23-33
p. 40, ll. 6-8
pp. 97-98
p. 117
pp. 116-117
p. 46, ll. 19-21
pp. 120-121
p. 27, ll. 33-36
p. 32, ll. 9-35
p. 37, l. 35-p. 38
l. 39
p. 42, l. 38-p. 43,
l. 4
p. 72, l. 35-p. 73,
l. 11
pp. 116-117
pp. 97-98
p. 117
p. 32, l. 16

p. 38, l. 18
p. 39, l. 30
p. 42, ll. 29-31

1943, was not in fact present at the execution of any of these documents since at the material time he was at Vavuniya and could not therefore have been in the Respondent's house at Valvettiturai and certain letters written by him from Vavuniya at the relevant time were produced. These included :—

pp. 113-114
p. 33, ll. 6-16
pp. 112-113

(A) Document D. 1. is a letter written by the said Selvadurai dated Vavuniya 28.6.(1943) to his son-in-law the Appellant. D. 1. was admitted by the Appellant in his evidence to be a letter written to him by Selvadurai at the time Selvadurai went out to propose a marriage for his son-in-law's sister the said Arudchelvam. 10

pp. 112-113
p. 32, l. 22
p. 113, l. 26

From the contents of D. 1. it appears that the writer Selvadurai arrived at Vavuniya on the night preceding the 28th June (the night of the alleged execution of the will) at "4." Furthermore the references in this letter to Arudchelvam and her affairs are inconsistent with the pretence that the writer Selvadurai had visited and talked with his son-in-law the addressee and had also visited Arudchelvam on the very day the letter was dated.

p. 113, l. 21
p. 113, l. 19

p. 114
p. 33, ll. 11-13

(B) Document D. 2. is the envelope in which D. 1. was enclosed, addressed to the Appellant from Vavuniya postmarked the 28th June, 1943, and is in the handwriting of Selvadurai. 20

pp. 112-113
p. 33, ll. 16-18
p. 112, l. 12

(C) The letter D. 3. is in the handwriting of Selvadurai and is addressed to the said Ramalingam. It is dated 14.6.43. and according to the Appellant was sent from a place called Puliyantevu in the vicinity of Vavuniya. The contents of D. 3. make it evident that on the 14th June, 1943, Selvadurai was already busying himself with the task of arranging a marriage for the Respondent's daughter, that the negotiations were not to be disclosed to her father the first Respondent and that his son-in-law the Appellant would materially benefit by the match. The Appellant stated in his evidence that Ramalingam had previously been consulted 30 on this marriage proposal.

pp. 112-113

p. 112, ll. 14-16
p. 112, ll. 38-39
p. 32, ll. 13-15

p. 118.

(D) Document D. 4. This is a postcard written by Selvadurai to one Kandasamy and is dated Vavuniya 30.6.43. The Appellant in his evidence admits the handwriting to be that of Selvadurai and that the contents include a reference to the fact that the addressee had not kept his appointment with Selvadurai on the 26th June, 1943, as arranged. The text of this letter shows that Selvadurai had received on the very day the letter is dated (30.6.43) a letter from his son-in-law the Appellant.

p. 33, ll. 21-25

p. 118, l. 23

p. 119

(E) D. 7. is a postcard from Selvadurai dated 30.6.43. written 40 to one Upayaseman resident at Valvettiturai and appealing to the addressee to lend Selvaguru (the Appellant) Rs. 50 at interest.

p. 119, ll. 7-9

- 20.—Selvadurai was present on the first day of the hearing at the District Court on which day the above mentioned documents were produced in evidence. As from this date Selvadurai disappeared from his village and all attempts thereafter to effect service on him of a summons to attend the District Court failed. p. 43, ll. 46-p. 44, l. 7
p. 58, ll. 11-24
p. 121, ll. 28-40
- 21.—The evidence of the witness Velupillai an Irrigation Department Clerk called by the Respondent at the trial, shows that Selvadurai had been staying in the witness's house at Vavuniya for about a week until the 30th June, 1943. p. 53, ll. 1-40
p. 53, ll. 4-5
p. 53, ll. 8-15
p. 53, ll. 18-19
- 10 22.—There is no evidence on the record as to the distance between Valvettiturai (or Point Pedro) and Vavuniya but the learned Senior Presiding Judge of the Supreme Court must be presumed to have known the relative situations of these two places and the nature of the transport and facilities between them when he stated in the Judgment he delivered :
“ Documents D. 1., D. 2., D. 3. and D. 4. taken with the evidence of
“ Vellupillai the Irrigation Clerk, show beyond any reasonable doubt that
“ the Petitioner's father-in-law was in Vavuniya between the 23rd and
“ 30th of June continuously and could not possibly have been at Point
“ Pedro on the morning of the 28th June which is the date on these
20 “ documents.” p. 75, ll. 26-28
p. 75, ll. 26-28
- 23.—The two persons alleged to have been present and witnessed the execution of the document P. 1. were Ramalingam and Chelliah. Ramalingam although resident in the neighbourhood of Point Pedro was not called at the trial as a witness and his presence outside the house of the Appellant's father-in-law at 3.30 a.m. about some timber business was not further explained. p. 32, ll. 19-20
p. 35, ll. 38-39
p. 35, ll. 4-9
- 30 24.—The Appellant and Chelliah gave evidence that a sum of Rs. 780 was paid by Chelliah to the deceased Arudchelvam in the early morning of the 28th June, 1943. That amount is not shown amongst the assets of the deceased on the Schedule annexed to the Petition dated 17th February, 1944. Arudchelvam died five days later and no explanation is given as to its disappearance. p. 38, ll. 14-16
p. 42, ll. 24-25
p. 42, ll. 37-40
pp. 24-25
p. 20, l. 18
- 40 25.—The plan marked D. 5. produced in evidence, and the evidence of the Appellant, shows that the deceased Arudchelvam was sleeping in room C. 3. and that the first Respondent was sleeping next to this room in a room marked C. 4. The Respondent in his evidence at the trial said that the deceased was sleeping in the same room with her half sister ; that the wall between his room and that of the deceased Arudchelvam was a half wall and did not reach up to the roof and that if anyone had gone to the deceased's room at about 3 a.m. and 4 a.m. on the 28th June, 1943, he would have known ; that it was his custom to rise between 3 a.m. and 4 a.m. and thereafter to go to his temple in the compound of his house at about 5 a.m. p. 111
p. 33, ll. 32-33
p. 111
p. 59, ll. 12-13
p. 59, ll. 31-34
p. 59, l. 29
p. 54, l. 24
p. 59, l. 37

RECORD

p. 54, ll. 5-6

p. 59, ll. 16-17

p. 54, l. 29

p. 55, l. 2

p. 54, ll. 38-40

p. 54, ll. 37-40

p. 56, ll. 18-20

p. 56, ll. 28-30

p. 55, ll. 3-5

p. 35, l. 11

p. 56, ll. 6-7

26.—The evidence of the first Respondent taken together with that of the witness Iyengar, Principal of the Sithambara Vidyalayam at Valvettiturai who lives in a house in the same compound in which the first Respondent's house is situate, shows that there was only one gate to the compound and that there were only two keys of this gate, one of which was in the possession of the watcher and the other in that of the first Respondent, and that this gate was always left locked at night. The witness Iyengar said that it was impossible for any outsider to get into the compound between 10 p.m. and 6.30 a.m. without the knowledge of either the Manager (the first Respondent) or the watcher. The witness Iyengar said that he was wont to get up at 3 a.m. and do his cooking until about 5 a.m. and that if a party of five or six persons were getting into the house of the first Respondent he would have heard it. The Appellant in his evidence alleged that he too had a key to the gate of the compound but this was not produced at the trial. The witness Iyengar said that he well knew that the Appellant did not have a key for this gate. 10

p. 34, ll. 16-19

p. 37, l. 33-p. 38,
l. 2

p. 43, ll. 30-40

27.—The Appellant admitted that the whole of the verandah of the first Respondent's house was completely packed up with furniture except for passages four feet wide leading to each door but the notary Sabaratnam said that he went along the verandah and did not see any furniture on the verandah whilst the witness Chelliah said that he got onto the verandah and walked towards the west, that there was no furniture on the verandah and nothing to prevent them walking on the verandah. 20

28.—It is the submission of the Respondent that the meeting described by the Appellant as having taken place at 3 a.m. on the 28th June, 1943, never occurred ; that Selvadurai was at Vavuniya and could not have been at Point Pedro on the 28th June, 1943 ; that neither the notary Sabaratnam nor the witness Chelliah ever went to the deceased's room ; that the signatures of the deceased, whether genuine or forged, were placed on the paper at one time using one kind of ink whilst the body of the documents and the signatures of the other witnesses were written at another time using other ink ; that the documents were probably engrossed after the deceased's signature had been written, since the body of the documents appear to have been written to fit above the deceased's signature which appears at the same place on the disputed documents. 30

29.—The first Respondent humbly submits that this Appeal from the Judgment and Decree of the Supreme Court of Ceylon should be dismissed with costs for the following amongst other

REASONS

1. BECAUSE ample evidence was adduced by the first Respondent to prove that the alleged Last Will and Testament of the 40

widow Arudchelvam could not have been validly executed on the date or at the place on which they purport to be executed.

2. BECAUSE the Appellant has failed to discharge the burden of proving the due execution of the said alleged Last Will and Testament which rested upon him.
3. BECAUSE the alleged Last Will and Testament was clearly shown to have been a forgery.
4. BECAUSE the Judgment of the Supreme Court of Ceylon was correct and ought to be affirmed.
5. BECAUSE the Judgment of the learned Additional District Court Judge was wrong and ought to be set aside.

10

R. T. PAGET.

ROBERT N. HALES.

In the Privy Council.

No. 14 of 1951.

ON APPEAL FROM THE SUPREME COURT OF
CEYLON.

BETWEEN

THAIALPARGAR SELVAGURU of
Valvettiturai PETITIONER-APPELLANT

AND

1. GNANASEGARAMPILLAI
THAIALPAGAR of
Valvettiturai

2. KANDASAMY PARAMAKURU
of Valvettiturai

RESPONDENTS-RESPONDENTS.

CASE FOR THE RESPONDENTS

WALTERS & HART,
16-18 Mansfield Street,
Portland Place, W.1,
Solicitors for the Respondents.