IN THE COURT OF APPEAL OF SEYCHELLES

ette Appasamy & ors . . . . . Appellant

versus

illia Appasamy &
lip Foo Heng . . . . . Respondent

Civil Appeal No. 9 of 1988

iet~~te~~/or Appellant

ler - Payet for Respondents

Judgement of Mustafa P

The appellants were plaintiffs in an action in the Supreme Court challenged the existence and genuineness of a holograph will alleg have been made by one Antoine Paul Appasamy in favour of first pondent Cetilia. The appellants were respectively the nephews nieces of the deceased Antoine and the first respondent was the e of the deceased. The deceased allegedly bequeathed all his perty, movable and immovable to the first respondent. The second pondent Philip was the executor of the deceased's estate.

There were two preliminary points raised at the Supreme Court the respondents. The first was that the appellants had no locus ndi and the second that there was no cause of action. The Supreme rt rejected both these preliminary points and there is no appeal n those dismissals.

The facts briefly are as follows. Antoine Paul Appasamy died on July 3, 1983. Prior to his death he allegedly made a holograph will. A holograph will has to be wholly written, dated and signed by the testator, in terms of Article 920 of the Civil Code of Seychelles. A holograph will is not an authentic document; it is a private document and no presumption of genuineness attaches to it. The beneficiary or person claiming under such a will has to pr its existence, genuineness and authenticity. This is common ground.

The first respondent Cetilia saw the deceased writing one nigh and later on the same night the deceased told her that he had writt out his will and that she was to lodge it in Court on his death. The second respondent Philip, who had been a friend of the deceased for 30 years, stated that the deceased, before his death, had told him that he had made a will. After the death of the deceased the first respondent Cetilia took a sealed envelop from the house safe to Court. Wood J received the sealed envelope, opened it and made a transcription of the contents of the document in the Court Registry in Vol. 70 No. 152 dated July 25, 1983. The transcribed copy has all the elements of a holograph will as written and signed by the deceased.

Wood J ordered, following the usual practice, that the original will be deposited with a Notary Public, but somehow somewhere the will since then went missing and cannot be found, despite efforts by court officials. The original will has been lost or misplaced, and cannot be now produced for scrutiny.

de Silva Acting J. in his judgement stated that he had no hesitation in accepting the evidence of first and second respondents and from their evidence and the circumstances of the deposit of the will in court he was satisfied that the first respondent Cetilia had

appellant's action with costs.

The appellant's appeal is on one sole ground. It reads:

> "The learned judge erred in finding that the impugned document was the holograph will of Antoine Paul Appasamy in the absence of the production of the said document."

Mr. Juliette for the appellants submitted that no oral evidence was permissible or admissible to prove the contents of a holograph will which cannot be produced, even in the circumstances as in this case. He submitted that he would conceded that a will existed and was read by Wood J and duly transcribed by him as adduced in evidence. But he challenged the genuineness of the said will in that there was no proof that the signature on the will was the signature of the testator, in the absence of the document. He also conceded that the will was filed with Wood J on July 25, 1983 and that the appellant's action was commenced in February 1986. And during that intervening period the appellants did not seek to examine the will as lodged.

I am not persuaded that no secondary evidence can be adduced to prove the will in the circumstances existing in this case. According to French jurisprudence this can be done. I refer to certain passages

elle seule existence formelle du testament au regard de l'article 970 du Code civil. Ou bien la disparition a été voulue par le testateur et alors la jurisprudence considère qu'il s'agit d'un cas de révocation tacite du testament de la part du testateur. Ou bien la disparition est indépendante de la volonté du testateur, et alors le légataire peut invoquer le benefice de l'article 1348-4 du Code civil, qui lui permet d'etablir par tous moyens le testament disparu.

85 (2) . . . . il doit prouver l'existence d'un testament regulier, la cause fortuite de la disparition et enfin le contenu du testament. . . . "

These commentaries are on Articles in the French Civil Code which in my view are in pari materia with relevant articles in the Civil Code of Seychelles.

And according to the English Law of Evidence which is applied to Seychelles in the absence of specific Seychelles legislation on matters of evidence, secondary evidence to prove the contents of a document lost in the circumstances as in this case is certainly admissible.

I think that de Silva Ag. J had come to the right decision. I would dismiss the appeal with costs.

Dated _____ this _____ day of _____ 1989.

A. Mustafa

A. Mustafa
President

Read out in open court this 4th day of October 1989.