1974
Dec. 16

ELEFTHERIOS THEODOROU MOUMDJIS

v.

MARIA ARISTIDOU MICHAELIDOU AND OTHERS

[STAVRINIDES, L. LOIZOU, A. LOIZOU, JJ.]

ELEFTHERIOS THEODOROU MOUMDJIS,

Appellant-Plaintiff,

v.

MARIA ARISTIDOU MICHAELIDOU AND OTHERS,

Respondents - Defendants.

(Civil Appeal No. 5186).

Evidence in civil cases—Alleged unsoundness of mind—Opinion of medical specialists—Weight to be given to—Direct and positive evidence of laymen by reference to the actual conversation and conduct of the testatrix (alleged to have been of unsound mind)—Trial Courts should not give undue weight to the opinion of medical specialists as to the probable capacity of a person in preference to the direct and positive testimony as to the actual capacity at the crucial period (see Karaolis *v.* The estate of the deceased Christodoulos Karaolis *(1965) 1 C.L.R. 24).*

Will—Validity—Alleged unsoundness of mind of the testatrix—Probate action—Evidence—See supra; *cf. also immediately herebelow.*

Findings of fact made by trial Courts—Findings resting on credibility of witnesses—Principles upon which the Appellate Court will interfere with such findings—Probate action—Validity of will contested on the ground of unsoundness of mind of the testatrix—Medical evidence—And evidence of attesting witnesses—Trial Court preferred evidence establishing soundness of mind—On the totality of the evidence adduced at the trial the Supreme Court on appeal not prepared to interfere with the findings and conclusions reached by the trial judges.

Fresh evidence on appeal—Application for leave to adduced fresh evidence—Principles applicable—Leave refused—Evidence sought to be adduced now was all along available to the applicant—The Courts of Justice Law, 1960 (Law No. 14 of 1960), section 25(3) and Civil Procedure Rules, Order 35, rule 8.

Appeal—Fresh evidence—See supra.

Appeal—Findings of fact made by trial Courts, resting on credibility of witnesses—Approach of the Court of appeal thereto—See supra.

Will—Probate action—Validity—Soundness of mind—Evidence—Weight—See supra.

Dismissing an application to adduce fresh evidence and, eventually, dismissing this appeal, the Supreme Court :-

Held, I *(Regarding the application for leave to adduce fresh evidence) :*

(1) The principles to be applied by this Court when fresh evidence is sought to be introduced on appeal were considered in a number of cases such as *Yiannakis Pourikkos (No. 2)* v. *Mehmet Fevzi*, 1962 C.L.R. 283, *Ashiotis* v. *Weiner* (1966) 1 C.L.R 274 and *Paraskevas* v. *Mouzoura* (1973) 1 C.L.R. 88. We need not go extensively into these principles, suffice it to say that for all intents and purposes all the proposed witnesses were available throughout the trial and it has not been shown that their evidence could not have been obtained with reasonable diligence for use therein.

(2) Leave, therefore, has to be refused.

Held, II *(As regards the merits, viz. whether or not the testatrix was at the material time of sound mind) :*

(1) *(After reviewing meticulously the evidence on record) :*
The trial Court had before it the overwhelming direct evidence of persons who had come into contact with the testatrix and spoke as to her mental capacity at the material time by reference to her actual conversation and conduct, and, further the evidence of Dr R. whose unshaken opinion was that at the time of her discharge from the Mental Hospital she had recovered from her illness and knew what she was doing.

(2) And the trial Courts should not give undue

weight to the opinion of medical specialists as to the probable capacity of a person in preference to direct and positive testimony as to the actual capacity at the crucial period, when, in particular, such specialists did not have the opportunity of examining the person concerned at such time (*see: Karaolis* v. *The estate of the deceased Christodoulos Karaolis* (1965) 1 C.L.R. 24).

(3) *(After summarizing the evidence):*
This Court has repeatedly stated that it will not readily interfere with the trial Court's findings of fact based on its evaluation of the credibility of witnesses; and on the totality of the evidence before the trial Court we are not prepared to interfere with the findings and conclusions reached by it.

Appeal dismissed.

Cases referred to:

Karaolis v. *The estate of the deceased Christodoulos Karaolis* (1965) 1 C.L.R. 24;

Yiannakis Pourikkos (No. 2) v. *Mehmet Fevzi,* 1962 C.L.R. 283;

Ashiotis v. *Weiner* (1966) 1 C.L.R. 274;

Paraskevas v. *Mouzoura* (1973) 1 C.L.R. 88;

Skone v. *Skone and Another* [1971] 2 All E.R. 582; at p. 586 per Lord Hodson;

Brown v. *Dean* [1908 - 1910] All E.R. Rep. 661 at p. 662, per Lord Loreburn, L.C.;

Ladd v. *Marshall* [1954] 3 All E.R. 745, at p. 748, per Lord Denning, L.J.;

Re Copiapo Mining Co. [1894] 10 T.L.R. 180;

Guest v. *Ibbotson* [1922] 38 T.L.R. 325.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Stavrinakis, P.D.C. and Kourris, S.D.J.) dated the 22nd May, 1973, (Action No. 6547/70) whereby his action for probate of a will executed by a certain Anna Sofocleous was dismissed and a subsequent will by which she revoked the earlier will and disposed of her property in a different way was pro-

bated and judgment was given for the respondents on the counterclaim.

C. Colocassides, for the appellant-plaintiff.

K. Michaelides, for the respondents-defendants.

STAVRINIDES, J.: The reasons for our judgment refusing the appellant's application for leave to adduce fresh evidence and dismissing this appeal, will be given by Mr. Justice A. Loizou.

A. LOIZOU, J.:- On July 8 last we dismissed this appeal with costs stating that we would give our reasons therefor later. Also in the course of its hearing we refused an application for leave to adduce further evidence by calling as witnesses the three defendants, respondents before us, who were not heard in the Court below. We now proceed to give our reasons for both decisions, beginning with those relating to the application.

The application was based on section 25(3) of the Courts of Justice Law, 1960 (Law No. 14 of 1960), and on the Civil Procedure Rules, Order 35, rule 8.

The facts relied upon appear in the affidavit of the appellant accompanying the application. In paragraphs 2 and 3 thereof it is stated that against all reasonable expectations none of the defendants gave evidence on oath on the issue whether the deceased was of sound mind at the time of executing the document sought to be probated as her last will, and counsel for the appellant "was waiting in vain up to the last moment of the trial to see the defendants, or any one of them, testifying on this issue".

We heard extensive argument in support of this application, at the end of which we found it unnecessary to call on the other side and we dismissed same. The reason for doing so is that the fresh evidence sought to be adduced was all along available to the appellant, and if the three defendants or any one of them had, in the opinion of counsel for him, something significant to say and it was considered as an essential part of his case, they should have been summoned to give evidence in the first place. Counsel should not have taken it for

granted that his adversary would call such evidence. Failing to do so does not justify this Court to allow its reception as fresh evidence on appeal. Furthermore, there has been nothing to show that the interests of justice justify the exercise of our discretion in favour of allowing such fresh evidence, a course to be sparingly followed, and this only when, there are circumstances that justify such a departure from the notion of finality of trials.

The principles to be applied by this Court when fresh evidence is sought to be introduced under section 25(3) of the Courts of Justice Law, 1960, as well as Order 35 rule 8 of the Civil Procedure Rules, were considered in a number of cases, such as *Yiannakis Kyriacou Pourikkos (No. 2)* v. *Mehmet Fevzi,* 1962 C.L.R. 283, *Ashiotis* v. *Weiner* (1966) 1 C.L.R., p. 274 and *Paraskevas* v. *Mouzoura* (1973) 1 C.L.R. 88. We need not go extensively into these principles, suffice it to say that for all intents and purposes these witnesses were available throughout the trial and it has not been shown that their evidence could not have been obtained with reasonable diligence for use therein.

In the case of *Skone* v. *Skone & Another* [1971] 2 All E.R., 582, the dicta of Lord Loreburn, L.C., in *Brown* v. *Dean* [1908 - 1910] All E.R. Rep. 661 at p. 662, and of Lord Denning, L.J. in *Ladd* v. *Marshall* [1954] 3 All E.R., 745 at p. 748, were applied in the first-mentioned case. Lord Hodson at p. 586, quoted with approval the passage from the judgment of Lord Denning, L.J., in the last-mentioned case laying down a good test applicable where evidence is sought to be admitted concerning matters which occurred before the date of the trial. He said —

> ".... to justify the reception of fresh evidence or a new trial three conditions must be fulfilled: First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words,

it must be apparently credible, although it need not be incontroversible."

This test is applicable in this country both under Order 35, rule 5 of the Civil Procedure Rules and under section 25(3) of the Courts of Justice Law, 1960.

Learned counsel for the appellant has referred us to the case of *Re Copiapo Mining Co.* [1894] 10 T.L.R., 180 and the case of *Guest* v. *Ibbotson* [1922] 38 T.L.R., p. 325. We do not think that either of them carries the matter any further. In the latter case Lord Justice Scrutton observed that there could be no question that it was in the interest of the public generally that there should be an end to litigation and that in order to obtain a new trial for the purpose of calling fresh evidence a litigant should (1) show that such evidence was available and of undoubted character, (2) that the evidence was so material that its absence might cause a miscarriage of justice and (3) that it could not with reasonable diligence have been brought forward at the trial. Reliance was placed by counsel on the second proposition. But there was nothing in the affidavit relied upon by the appellant to show that the proposed evidence was such that if given it would probably have an important influence on the result of the case; no particulars whatsoever were given in it as to what their testimony would have been and in fact it contained nothing to show that their evidence would have been of assistance to him. And all this quite apart from the fact that the evidence was available to the appellant at the time of the trial, so that the third proposition also was a bar to the application being allowed.

We now turn to the appeal as presented on behalf of the appellant. By the judgment appealed from the appellant's action which was for probate of a will executed by a certain Anna Sofocleous (to be referred hereinafter as "the testatrix") dated the 15th May, 1958, was dismissed and a subsequent will, dated 1.12.1961, by which she revoked the earlier will and disposed of her property in a different way, was probated and judgment given for the respondents on the counterclaim.

The appellant is the brother of the testatrix and the three defendants are her sisters. Under the earlier will

she left all her estate to the appellant, whereas by the new one she bequeathed her estate to him and the three defendants in equal shares, which was tantamount to ab intestato inheritance, the testatrix having no other surviving heirs.

The testatrix, who had been widowed since 1953, was living in her house, which in effect constitutes the bulk of her estate, situated at 22 Demosthenis Severis Avenue, Ayii Omologitae Quarter, Nicosia.

The son of the appellant when about 12 years of age, went and lived with the testatrix during the years 1958 - 1961. She was, until then, a good housewife, clean, tidy, very sociable and a regular church-goer. On the 21.8. 1961, however, due to some marked change in her behaviour she was admitted to the Mental Hospital. The reasons for admission, as recorded in the records of the hospital, were that she was sleepless, restless, excited, aurally and visually hallucinated, and nourishing delusions of a persecutory nature. She had the false impression that people were against her and had ideas of reference, that means that people were discussing her passivity feelings and grandiose ideas.

The diagnosis was that she was suffering from "senile psychosis". She was admitted to the Mental Hospital by an order of the Court in Application No. 106/61 and declared a mental patient by the Court on the 29th August, 1961. On the 2nd September, 1961 her brother, Eleftherios Moumdjis, was appointed an administrator of her property.

She was treated and discharged on parole on the 27th October, 1961. Dr. Ramadan certified by a certificate dated the 28th November, 1961 (*exhibit* 1), that "On the day of her discharge and from what I have elicited on the 18.11.1961 (date of re-assessment of her mental condition), I have formed the opinion that she is in a fit mental state to look after herself and to manage her own affairs". Upon her release from the Mental Hospital she stayed with respondent 3, but on the 10th January she moved to her own house at 22, Demosthenis Severis Avenue, as she was feeling quite well and did not like to be a burden on others.

Mr. Liveras (P.W.2) a practising advocate, stated that some time in 1961 he was approached by the late Costas Christoforou, the husband of respondent 3. He was instructed to apply for the discharge of the order of confinement of the testatrix in the Mental Hospital. Counsel asked for the necessary material, and before he filed the application he was handed *exhibit* 1, the medical certificate issued by Dr. Ramadan on the 28.11.1961 as a result of a letter addressed to the Specialists at the Mental Hospital by the said Christoforou on the 16th of that month. A discharge form, dated the 27th October, 1961 concerning the testatrix, was received by the Welfare Office in December, 1961, and she was visited on the 10th January, 1962 by Assistant Welfare Officer Chloe Grimaldi, (D.W.1), who prepared a report with her findings. This officer found, in effect, that the condition of the testatrix was satisfactory, she was of good disposition and sociable, quite clean and tidy in appearance, her talk was normal and rational, presented no peculiarities in her general attitude, and she ate and slept well.

The trial Court remarked that this witness, a civil servant, had no interest in the case at the time she made her report. It found that her testimony supported the evidence of Dr. Ramadan, who testified before it as to the mental condition of the testatrix from the date of her admission to the Mental Hospital till the day the order of confinement was discharged.

In the meantime, on the 9th January, 1962, the testatrix was present in Court and represented by Mr. Liveras. Dr. Ramadan gave evidence as to the circumstances in which she was declared a mental patient and admitted to the Mental Hospital and later released on parole, as well as his assessment of her condition both at the time of her release, her re-examination on the 18th November, 1961 and re-assessment of her mental condition that he made as a result of a long interview that the doctor had with her on the morning of the hearing of that application. The judge who heard the application put several questions to the testatrix and was satisfied from her answers and demeanour that she was not a mentally afflicted person any longer, accepting also the assessment of the doctor that she had regained

her sanity and it was not necessary for the adjudication order to remain in force.

Here I must revert to the evidence of Mr. Liveras for a moment. Whilst he was in the process of preparing the said application, to the outcome of which we have already referred, the said Christoforou instructed him on behalf of the testatrix that she desired to make a new will and revoke thereby the previous one. On the basis of these instructions he prepared the second will and called on the testatrix accompanied by Mr. Y. Mavroudhis (D.W.3) so that the latter would see the testatrix and witness the execution of the will and attest it. Whilst Mr. Liveras and Mr. Mavroudhis were there, Papa-Vassilios Georghiou (D.W.4) was brought by the husband of respondent 2. There as Mr. Mavroudhis a qualified valuer and a certifying officer, whose testimony has been praised by learned counsel for the appellant and considered to be reliable, said that he found the testatrix dressed in an ordinary, every-day house dress and had a conversation with her for about half an hour and he found her coherent. After PapaVassilios came, Mr. Mavroudhis read to her and explained the contents of the will and asked her to say if she was in agreement with the contents, or if she had any objection to them. In particular, when he read over to her the names of the legatees, he asked her what was their relationship with her and she said that they were her brother and sisters. After it was read over and explained to her it was made clear to her that if she wanted to sign it she was free to do so, in which case she should request those present to sign as attesting witnesses; and when he explained to her that by her will was leaving all her movable and immovable property to the said persons, she made the following remark:- "Do I have anything else, except the house"? This witness went on to say that her answers were brief, he avoided talking to her about the Mental Hospital or the doctor, but he did inquire and make certain that the will was made of her own free will, no pressure having been brought to bear on her.

The trial Court accepted the evidence of this witness and counsel for the appellant has placed great reliance on these findings, but argued that this evidence, coupled

with the fact that Dr. Ramadan had prescribed for her tranquillizers after her release from the Hospital, shows that she must have been doped at the time, so that she was not capable of exercising a free will, although her condition was not apparent. We were also asked to attach importance to the fact that Mr. Mavroudhis knowing that the testatrix was on parole, should have sought a medical certificate regarding the mental state of the testatrix on that day.

The trial Court had next before it the medical evidence that emanated from Dr. Neophytou (P.W.3) and Dr. Evdokas (P.W.4). According to that evidence, senile phychosis is a disorder of organic nature due to the damage of the neurons and as such uncurable, or, as the doctors put it, irreversible. Dr. Ramadan agreed with them, as to the nature and cause of that disorder, but he stated that the testatrix was not actually suffering from senile psychosis. The diagnosis appearing in the records of the Mental Hospital was a provisional one which was neither qualified nor rectified, owing to the testatrix's good response to treatment and subsequent cure. Dr. Ramadan concluded that in view of the very good recovery of the testatrix, she could not have been and was not, suffering from senile psychosis and her disorder was not organic but functional, which is reversible or curable. He testified as to her mental condition from the date she was admitted to the Mental Hospital till she was discharged.

Dr. Neophytou never examined the testatrix but spoke only theoretically, as he put it, on the assumption that the illness with which the testatrix was suffering was senile phychosis. On the other hand Dr. Evdokas, who examined the testatrix in 1968 or 1969, never testified that he had diagnosed that she had been suffering from senile phychosis. He was never asked a direct question as to whether what he had diagnosed was senile phychosis or not, which was, in fact, a matter of crucial importance, since, according to the medical evidence, senile psychosis is an irreversible and indeed progressive disease.

The trial Court came to the conclusion that Dr. Ramadan was in a far better position to speak as to

the condition of the testatrix on admission and the subsequent development of her case, and concluded by saying, "Although he was fiercely cross-examined, we have no doubt that what is stated in the medical history of the testatrix about the diagnosis is, as Dr. Ramadan explained, a provisional diagnosis which for some reason it was not found necessary later to amend and further that the term senile psychosis was used in a broad sense". The trial Court further found support of his evidence from the evidence of other witnesses and in particular that of Chloi Grimaldi (D.W.1) and that of the attesting witnesses and Mr. Liveras.

The evidence of Mr. Liveras came also under violent attack before this Court. It was overlooked that Mr. Liveras had been summoned as a witness for the appellant's side. He was not an attesting witness; there was no application at the trial to treat him as hostile; and he never said anything more than what Mr. Mavroudhis had stated in a more detailed manner and with more elaboration. There is, indeed, a great inconsistency in the whole argument advanced on behalf of the appellant, as counsel on the one hand has placed great reliance on the evidence of Mr. Mavroudhis, whom he described as a man of integrity, and on the other hand strenuously argued that the evidence of Mr. Liveras should have been discarded by the trial Court.

The trial Court had before it the overwhelming direct evidence of persons who had come into contact with the testatrix and spoke as to her mental capacity at the crucial time by reference to her actual conversation and conduct, and, further, the evidence of Dr. Ramadan whose unshaken opinion was that at the time of her discharge from the Mental Hospital she had recovered from her illness and knew what she was doing. This is consonant with the approach of this Court on the subject to be found in *Karaolis* v. *The estate of the deceased Christodoulos Savvas Karaolis* (1965) 1 C.L.R. p. 24, to the effect that a trial Court should not give undue weight to the opinion of medical specialists as to the probable capacity of a person in preference to direct and positive testimony as to the actual capacity at the crucial period, when, in particular, such specialists did not have the

opportunity of examining the person concerned at such time.

By the present appeal, as argued before us, the appellant's counsel has asked this Court to set aside the trial Court's findings of fact, based as they were, on its view of the credibility of the witnesses. This Court has repeatedly stated that it will not readily interfere with the trial Court's findings of fact based on its evaluation of the credibility of witnesses, since it has had the advantage of watching their demeanour in the witness box, whereas this Court would have to rely on the transcribed record of their evidence.

On the totality of the evidence before the trial Court, which we have tried to summarize, we are not prepared to interfere with the findings and conclusions reached by it. In dealing with the evidence we have pointed out the weaknesses and inconsistencies of the arguments advanced against those findings and conclusions and we do not consider it necessary to revert to the matter. The appellant has failed to make out a case for interference with the trial Court's judgment, hence the dismissal of this appeal.

Appeal dismissed.