IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Mahapatabendige Edmund Piyasena,
No. 11, Old Waidya Road,
Dehiwala. (Deceased)

Chula Subadra Dissanayake Mahawela,
also known as Chula Piyasena,
No. 11, Old Waidya Road,
Dehiwala.
Plaintiff

SC APPEAL NO: SC/APPEAL/170/2011
SC LA NO: SC/SPL/LA/100/2011
CA APPEAL NO: CA/543/95 (F)
DC MT. LAVINIA NO: 2379/T

Vs.

R.M. Seelawathie Menike Piyasena,
No. 44, Waidya Road, Dehiwala.
Intervenient Petitioner

AND BETWEEN

Chula Subadra Dissanayake Mahawela,
also known as Chula Piyasena,
No. 11, Old Waidya Road,
Dehiwala.
Petitioner-Appellant

Vs.

R.M. Seelawathie Menike Piyasena,
No. 44, Waidya Road, Dehiwala.
Intervenient Petitioner-Respondent

AND NOW BETWEEN

R.M. Seelawathie Menike Piyasena,
No. 44, Waidya Road,
Dehiwala.
Intervenient Petitioner-Respondent-Petitioner-Appellant

Vs.

Chula Subadra Dissanayake Mahawela,
also known as Chula Piyasena,
No. 11, Old Waidya Road,
Dehiwala.
Petitioner-Appellant-Respondent-Respondent

Before: Murdu N.B. Fernando, P.C., J.
Kumudini Wickremasinghe, J.
Mahinda Samayawardhena, J

Counsel: J.A.J. Udawatta with Kawshalya Molligida and Anuradha N. Ponnamperuma for the Intervenient Petitioner-Respondent-Appellant.

Faisz Musthapha, P.C., with Faisza Markar for the Petitioner-Appellant-Respondent.

Argued on: 03.11.2021

Written submissions:

by the Intervenient Petitioner-Respondent-Appellant on 05.12.2011 and 22.11.2021.

by the Petitioner-Appellant-Respondent on 29.02.2012 and 07.12.2021.

Decided on: 26.07.2023

Samayawardhena, J.

Introduction

The Respondent instituted proceedings in the District Court of Mount Lavinia seeking to prove and to have the probate issued in her name as the executrix of the last will of her late husband. The Appellant who is the wife of the younger brother of the deceased testator intervened in the proceedings after the order *nisi* was published in the newspapers. After inquiry, the District Court held that the last will was not an act and deed of the deceased as there are suspicious circumstances attached to the will and dismissed the Respondent's application. On appeal, the Court of Appeal reversed the judgment of the District Court and held that the District Court had erroneously rejected the evidence led on behalf of the Respondent and ruled that the last will is proved. Learned counsel for the Appellant submits that the principal issue for adjudication before this Court is whether the Court of Appeal erred in law and fact in overturning the judgment of the District Court and holding that the last will is the act and deed of the deceased testator.

Burden of proof of a last will

It is well-settled law that the party propounding the last will must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator of sound disposition of mind. If there

are circumstances which excite the suspicion of the Court, the burden is on the party propounding the will to remove all such suspicion and doubt. If the propounder of the will fails to do so, the Court shall hold against the will and dismiss the application without further ado.

Speaking on the rules of law according to which last will cases are to be decided, in the seminal case of *Barry v. Butlin* [1838] II Moore 480 at 482-483, Baron Parke, delivering the opinion of the Judicial Committee of the Privy Council, articulates:

> *The rules of law according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present Appeal: and they have been acquiesced in on both sides. These rules are two; the first that the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator.*
>
> *The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.*

These dicta of Baron Parke are consistently adopted and applied as good law for nearly two centuries. *Vide The Alim Will Case* (1919) 20 NLR 481, *Pieris v. Wilbert* (1956) 59 NLR 245, *Sithamparanathan v. Mathuranayagam* (1970) 73 NLR 53, *Ratnayake v. Chandratillake* [1987] 2 Sri LR 299.

What can be regarded as suspicious circumstances in a last will case? Suspicious circumstances will necessarily vary from case to case. As stated in *Barry v. Butlin (supra)*, for instance, if the beneficiary of a will has actively participated in the execution of the will, it is a circumstance that ought generally to excite the suspicion of the Court. In such an instance the will can be attacked on undue influence. *Vide Arulampikai v. Thambu* (1944) 45 NLR 457.

In *Sellammah v. Sellamuttu* (1957) 59 NLR 376 certain obvious alterations were noticeable in a will in regard to the name of one of the devisees. The alterations were not attested or authenticated by the signatures of the notary or the testator and the witnesses in terms of either section 30(21) of the Notaries Ordinance or section 7 of the Prevention of Frauds Ordinance. When application for probate of the will was made, obtaining an affidavit from the attesting notary and witnesses proved to be quite difficult. In such circumstances, the Supreme Court held that the will should not have been admitted to probate. Sinnetamby J. at page 381-382 stated that "*it was incumbent on the propounders in the first instance to remove the suspicions created by alterations, the knowledge of which must necessarily be imputed to them. Having regard to the far-reaching effects of the alterations it was their duty if the alterations were made before due execution to have led some independent evidence to establish that the deceased during his lifetime confirmed the dispositions made in the will. This was necessary to meet the charge that the testator did not know and approve of the contents of the will.*"

In *Meenadchipillai v. Karthigesu* (1957) 61 NLR 320, the following circumstances were held to be suspicious, where it was shown that the testator died within seven hours after the execution of the will in a hospital: (a) the testator was severely ill at the time of execution that he was unable to speak or to hold a pen to sign; (b) the notary did not take

the precaution of consulting a doctor at the time he took instructions from the testator or at the time of executing the will; (c) the notary was a close relative of the petitioner who was the widow of the testator and the primary beneficiary of the will; (d) the witnesses to the will were not of independent character.

However, this initial burden cast upon the propounder of the will is not as heavy as proof beyond reasonable doubt. It would be unrealistic to expect proof of a will with mathematical precision when the actual author of the will (testator) is not among the living. The question the Court has to grapple with in last will cases is to understand what the deceased intended to do, or, in some instances such as the instant one, whether the deceased intended anything because the appellant alleges that the will was prepared after the death of the testator. The standard of proof is, like in any other civil case, on a balance of probabilities.

When suspicion is attached to the will, what the Court is actually expected to do is to adopt the criterion proposed by Baron Parke in *Barry v. Butlin* in the case of undue influence, i.e. "*to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased.*" *Vide The Alim Will Case (supra)* at 494.

If the propounder of the will successfully discharges the aforesaid initial burden, the burden then shifts to the opposing party to prove fraud, conspiracy, coercion, undue influence or any other ground they rely upon to invalidate the will.

In another landmark case on the subject, namely, *Tyrrell v. Painton* [1894] P.D. 151, Lindley L.J. stated at 157 that the rule laid down in *Barry v. Butlin* and similar other cases such as *Fulton v. Andrew* Law Rep.

7 H.L. 448 and *Brown v. Fisher* 63 L.T. 465 which places the *onus probandi* upon the party propounding the will to satisfy the conscience of the Court that the instrument so propounded is the will of a free and capable testator should not be limited to cases where the beneficiary was actively participated in the preparation of the last will, but should also be extended to "*all cases in which circumstances exist which excite the suspicion of the Court; and whatever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will*."

This was reiterated by Davey L.J. at 159-160 when he stated:

> *There rests upon that will a suspicion which must be removed before you come to the plea of fraud. It must not be supposed that the principle Barry v. Butlin is confined to cases where the person who prepares the will is the person who takes the benefit under it – that is one state of things which raises a suspicion; but the principle is, that whatever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed.*

Lindley L.J. was quoted with approval by Sansoni J. in *Meenadchipillai v. Karthigesu (supra)* at 322 and Davey L.J. was quoted with approval by Bertram C.J. in *The Alim Will Case* at 494.

When the burden shifts to the opposing party too, the required standard of proof is not stringent. For instance, if the ground of attack is fraud, the fraud need not be proved by the opposing party beyond reasonable doubt.

The Court need not disregard the evidence that casts suspicion on the will on the basis that, even if it suggests fraud, it does not warrant a definite finding of fraud. In *The Alim Will Case* at pages 493-494, Bertram C.J. explained the law as follows:

> *It has been established by a long series of decisions, the most important of which are Barry v. Butlin (1838) 2 Moore P.C. 480, Baker v. Batt (1838) 2 Moore P.C. 317, Fulton v. Andrew L.R. 7 H.L. 448, Tyrrell v. Painton (1894) P.D. 151 (see also Orion v. Smith (1873) L.R. 3 P.& D. 23, Dufaur v. Croft 3 Moore P.C. 136, Wilson Basil (1903) P. 329 and Sukhir v. Kadar Nath I.L.R All. 405), that wherever a will is prepared and executed under circumstances which arouse the suspicion of the Court, it ought not to pronounce in favour of it unless the party propounding it adduces evidence which would remove such suspicion, and satisfies the Court that the testator knew and approved of the contents of the instrument. It is now settled that this principle is not limited to cases in which the will is propounded by a person who takes a special benefit under it, and himself procured or conducted its execution. It may very well be that a refusal to grant probate in such a case may involve an imputation of fraud upon the party propounding the will. This is no objection to the operations of that principle. (See Baker v. Batt (supra).) The Court is not necessarily bound to give a decision upon the truth or falsehood of the conflicting evidence adduced before it upon the question of fraud. What it has to ask itself is whether in all the circumstances of the case it will give credit to the subscribing witnesses, or the other witnesses adduced to prove the execution.*

> *Nor is it an objection to the operation of this principle that the evidence which casts suspicion on the will, though it suggests fraud, is not of such a nature as to justify the Court in a finding of fraud. (See Tyrrell v. Painton.) The principle does not mean that in cases where a suspicion attaches to a will a special measure of proof or a particular species of proof is required. (See Barry v. Butlin (supra).) It means that in such cases the Court must be "vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."*

In *Samarakone v. The Public Trustee* (1960) 65 NLR 100 at 115, Weerasuriya J. stated:

> *As held by Lindley, L.J., in Tyrell v. Painton (1894) P. 151, where there are features which excite suspicion in regard to a will, whatever their nature may be, it is for those who propound it to remove such suspicion. Suspicious features may be a ground for refusing probate even where the evidence which casts suspicion on the will, though it suggests fraud, is not of such a nature as to justify the Court in arriving at a definite finding of fraud. It has also been stated that the conscience of the Court must be satisfied in respect of such matters. These principles have been applied in several local cases, such as The Alim Will Case (supra), John Pieris et al. v. Wilbert (1956) 59 N.L.R. 245 and Meenadchipillai v. Karthigesu (1957) 61 N.L.R. 320.*

However, in *Barry v. Butlin* at page 491 it was remarked that "*The undue influence, and the importunity which, if they are to defeat a will, must be of the nature of fraud or duress, exercised on a mind in a state of debility*". On the facts and circumstances of that case, it was held that those were

only "*insinuated but not proved*". In *Pieris v. Pieris* (1906) 9 NLR 14 at 23-24 Wood Renton J. (later C.J.) by citing *Boyse v. Rossborough* (1856) 6 H.L.C. 2 remarked that "*Undue influence is not to be presumed; the party alleging it must prove the fact.…In order to be "undue" the influence must amount to coercion or fraud".*

At this point, a word of caution may be necessary. Specific grounds of challenge, such as fraud, conspiracy, coercion, undue influence should not be considered as distinct and separate grounds that must be proved by the opposing party alone after closing the propounder's case. If the opposing party alleges, for instance, fraud or undue influence, it has a direct bearing on the initial burden of the propounder. The propounder must first prove that the will was duly executed in terms of law and it is the act and deed of a free and capable testator who not only was aware of but also approved of the contents of it.

As pointed out by Viscount Dunedin in *Robins v. National Trust Company* (1927) A.C. 515 at 519 "*In ordinary cases if there is no suggestion to the contrary any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity."* The proof of due execution, testamentary capacity of the testator etc. are upon the propounder of the will.

Before the question of fraud, undue influence etc. can arise, any suspicion arising from the circumstances under which the will was executed has to be dealt with and removed. In the course of establishing his case, the propounder needs to address the allegations of his opponent and remove all suspicion attached to the will before the burden is shifted to the opposing party. It would be naive on the part of the propounder if

he leaves such allegations untouched on the basis that it is solely up to those who oppose the will to establish them.

This was explained by Bertram C.J. *in Andrado v. Silva* (1920) 22 NLR 4 at 6-7 in the following manner:

> *I do not mean to say that the principle that it is the duty of the propounders to remove suspicions does not apply to undue influence. I think it does so apply in exactly the same manner as it applies to fraud. But it is necessary that the Court should ask itself, what are the nature of the suspicions which are said to be excited. The only material suspicions are suspicions which affect issues the proof of which is on the propounders. It lies upon the propounders to prove (1) the fact of execution, (2) the mental competency of the testator, (3) his knowledge and approval of the contents of the will. If the circumstances are such that a suspicion arises affecting one of these matters, it is for the propounders to remove it. The Court is required under these circumstances to watch the evidence tendered with special vigilance, and not to declare that the onus of proof is discharged unless the suspicion is removed. The suspicion may point to fraud. The onus of fraud is ordinarily on those who allege it. But in the case of a will there may be a suspicion of fraud affecting either the fact of execution, or the mental condition of the testator at the moment of execution, or his knowledge and approval of the document or part of the document. In such a case it is for the propounders to remove the suspicion, and if this is not done the will must be rejected, even though the suspicious circumstances do not amount to a prima facie case of fraud, and even though it cannot be said, on a review of the evidence on both sides, that fraud has been established. Undue influence, as it seems to me, is on the same footing as fraud, and I observe that in Tyrrell v. Painton (1894) P. D.*

> *151 Davey L.J. speaks of them together:- "If the circumstances are such that a suspicion arises that the apparent approval by the testator is not a real approval, that his act was not the expression of his own free will, but of a will coerced or dominated by another, then I take it that it is for the propounders to remove the suspicion, and that if they fail to do so their whole case fails, even though the suspicious circumstances do not constitute a prima facie case of undue influence, and even though, on a review of the evidence on both sides, it cannot be said that undue influence has been positively established." I take this to be the meaning of Wood-Renton J. in his observations in the case of Pieris v. Pieris (1907) 9 N.L.R., on page 23.*

However, mere *ipse dixit* from the opposing party should not be regarded as suspicious circumstances. Not every circumstance can be considered suspicious; a circumstance warrants suspicion when it deviates from the norm. The suspicion must be real, reasonable and well-founded, and not based on conjecture, surmise and innuendo. In *Tyrrell v. Painton* at 159, Davey, L.J. observed "*the principle is, that whatever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed.*" In *Andrado v. Silva*, Bertram C.J. at 6 observed "*The only material suspicions are suspicions which affect issues the proof of which is on the propounders.*" The circumstances should indeed arouse the Court's suspicion peculiar to the case the Court is called upon to decide.

In the ultimate analysis, in last will cases, no rigid rules can be laid down in respect of burden of proof or appreciation of evidence. The matter rests fairly and squarely on the facts and circumstances of each individual case.

The decision on the will is essentially a question of fact

Whether there are in fact suspicious circumstances surrounding the will and if so whether such suspicious circumstances have been removed to the satisfaction of the Court is a question of fact best left to the trial Judge. In *Sithamparanathan v. Mathuranayagam* (1970) 73 NLR 53 at 61, Lord Hodson stated:

> *The law as laid down in the older cases to which a reference has been made was reiterated in the judgment delivered by Lord Du Parcq in the Privy Council in Harmes and Another v. Hinkson 62 T.L.R. 445 at 446 in these words "Whether or not the evidence is such as to satisfy the conscience of the tribunal must always be, in the end, a question of fact."*

Learned Counsel for the Appellant strenuously submits that the Court of Appeal should not have reversed the District Judge's findings of fact which he arrived at after seeing and hearing the witnesses.

As Chief Justice G.P.S. de Silva stated in *Alwis v. Fernando* [1993] 1 Sri LR 119 at 122, "*It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal.*" This widely recognized general rule is largely predicated on the premise that the trial Judge is at a distinctly advantageous position of hearing and seeing witnesses giving evidence in the witness box. This priceless opportunity, which is denied to a judge sitting in appeal, enables the trial Judge to accurately determine which party is speaking the truth.

Fradd v. Brown & Co. Ltd (1918) 20 NLR 282 is a case where the Privy Council quashed the judgment of the Court of Appeal and restored the judgment of the trial Court because the whole case depended upon the

veracity and trustworthiness of the witnesses who gave evidence at the trial. Earl Loreburn stated at 282-283:

> *Accordingly, in those circumstances, immense importance attaches, not only to the demeanour of the witnesses, but also in the course of the trial and the general impression left on the mind of the Judge present, who saw and noted everything that took place in regard to what was said by one or other witness. It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is overruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and so specific as these, a Court of Appeal will overrule a Judge of first instance.*

In *Munasinghe v. Vidanage* (1966) 69 NLR 97 on behalf of the Privy Council, Lord Pearson quoted with approval the following part of the speech of Viscount Simon in *Watt or Thomas v. Thomas* (1947) AC 484 at 486:

> *If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining*

> *from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.*

In *Munasinghe's* case the Privy Council stated that the Supreme Court should not have reversed the findings of the trial Judge who heard and saw the witnesses giving evidence because it was a case of complicated facts and there was a good deal to be said on each side and the findings of the trial Judge were not unreasonable. The Privy Council restored the judgment of the trial Court.

Chief Justice Samarakoon in *Undugoda Jinawansa Thero v. Yatawara Piyaratna Thero* [1982] 1 Sri LR 273 at 281 acknowledged the importance of this well-established principle when he stated:

> *The District Judge had the priceless advantage of seeing and hearing these witnesses and of watching their demeanour. After careful analysis and cogent reasoning he has rejected their evidence. I can see no justification for holding that he was wrong.*

Having quoted all these judgments, I must say that the accepted principle that the findings of fact of the trial Judge should not be lightly disturbed cannot be considered an absolute rule of law. If the findings of fact of the trial Judge are not upon or not only upon the credibility or demeanour and deportment of the witnesses, but upon or also upon analysis of the evidence, and the appellate Court is fully convinced that the trial Judge has manifestly failed to analyze the evidence in the proper perspective, there is no impediment for the appellate Court to give effect to its own conviction and reverse the findings of fact of the trial Judge.

It is important to understand that failure to analyze or evaluate the evidence in the proper perspective is not necessarily a question of fact but rather a question of law. (*Collettes Ltd. v. Bank of Ceylon* [1982] 2 Sri LR 514) This includes rejecting relevant evidence, accepting irrelevant evidence, clam and dispassionate appreciation of evidence.

After reviving a number of local and foreign authorities, in *De Silva v. Seneviratne* [1981] 2 Sri LR 7 at 17, Ranasinghe J. (later C.J.) held:

> *On an examination of the principles laid down by the authorities referred to above, it seems to me: that, where the trial judge's findings on questions of fact are based upon the credibility of witnesses, on the footing of the trial judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration, and will be reversed only if it appears to the appellate Court that the trial judge has failed to make full use of the "priceless advantage" given to him of seeing and listening to the witnesses giving viva voce evidence, and the appellate Court is convinced by the plainest consideration that it would be justified in doing so: that, where the findings of fact are based upon the trial judge's evaluation of facts, the appellate Court is then in as good a position as the trial judge to evaluate such facts, and no sanctity attaches to such findings of fact of the trial judge: that, if on either of these grounds, it appears to the appellate Court that such findings of fact should be reversed, then the appellate Court "ought not to shrink from that task".*

In *Collettes Limited v. Bank of Ceylon* [1984] 2 Sri LR 253 at 264-265 Sharvananda J. (later C.J.) held:

> *Thus this court undoubtedly has the jurisdiction to revise the concurrent findings of fact reached by the lower court in appropriate*

> *cases. However, ordinarily it will not interfere with findings of fact based upon relevant evidence except in special circumstances, such as, for instance, where the judgment of the lower court shows that the relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or that the conclusion rests mainly on erroneous considerations or is not supported by sufficient evidence. When the judgment of the lower court exhibits such shortcomings, this court not only may but is under a duty to examine the supporting evidence and reverse the findings.*

Vide also *Anulawathie v. Gunapala* [1998] 1 Sri LR 63, *De Silva v. De Croos* [2002] 2 Sri LR 409.

On the facts and circumstances of this case which I have discussed below, I take the view that no special sanctity can be attached to the findings of fact arrived at by the trial Judge as he has manifestly failed to properly analyze the evidence and unnecessarily taken irrelevant matters into consideration in the assessment of evidence. This has unfortunately led him to come to an erroneous conclusion at the end.

Suspicious circumstances

Let me now consider the circumstances that the learned District Judge deemed suspicious to hold that the last will is not the act and deed of the deceased. The District Judge accepted the version of the Appellant that the will was prepared after the death of the deceased and is therefore a forgery.

The main ground upon which the will is attacked appears to be that it is an irrational will in that the exclusion of the three children of the Appellant as beneficiaries is highly suspicious. In my view, this is an unreasonable suggestion. The Respondent is the wife (widow) of the

testator. They had no children. They had been living in harmony as husband and wife throughout their married life. The Respondent was unemployed. The deceased had been employed in the tourism industry but towards the latter part he had been living a retirement life. The testator did not have too many properties. The testator possessed a modest estate. The sole immovable property owned by the testator comprised the land and the house in which they resided together throughout their married life. In addition, he had a paltry sum of Rs. 6,835 in his Bank Account and some shares in the Associated Motorways company. Is it an irrational act to bequeath this modest property solely to his wife with whom he found solace in life? Is this conduct inherently improbable? This a rational and natural will rather than an irrational and unnatural one. The argument of the Appellant that since the deceased did not have children and he had an affection towards the three children of his brother (who predeceased the testator), it is unlikely that he would have excluded them (who would have become entitled to half of the property had he died without a last will) is based on imagination, illusion and wishful thinking.

Even if the deceased had children but bequeathed all the above properties to his wife, the Court cannot look at it with suspicion. It should be understood that a person takes the decision to execute a will to deviate from the legal rules of succession. Hence, uneven distribution or denial of any legacy to some heirs should not make otherwise genuine will an ingenuine one. In adjudicating a last will case, it should not be the task of the Court to see equitable and fair distribution of property among the heirs of the deceased. The duty of the Court is to give effect to the wish of the testator. There is no requirement in law that the rationality of the will shall be established by the propounder of the will. However I must add that if there are other suspicious circumstances surrounding the will, the Court may take the irrationality of the will also into account in

deciding whether the will truly represents the act and deed of a free and capable testator.

The learned District Judge in his judgment states that the following items are suspicious.

The deceased was in good health when he is alleged to have executed the last will about two months before his untimely death at the age of 59. The Appellant states that this is highly unnatural, i.e. a healthy man executing a last will. The vanity of this argument is demonstrable by the fact that this healthy man died of a heart attack nearly two months after the alleged execution of the will.

The learned District Judge states that if the last will had indeed been executed, it would be expected for the wife to be informed immediately. However, according to the Respondent wife, the deceased husband informed her about it during their journey by train to attend a wedding in Kandy. The Respondent stated in her testimony that she did not further inquire into the matter as the deceased had already told her that the property would be written to her. She discovered the last will in the almirah approximately one week after the death. There is no cause for panic or curiosity when the husband states that he executed a last will. The wife is aware of the husband's wealth. At the risk of repetition, the husband virtually had only the matrimonial home and the appurtenant land. What is there to share with others?

The Respondent in her evidence tried to show that the two families, i.e the Respondent's family and the Appellant's family (although lived adjoining to each other on the same land which the two brothers inherited from their parents) did not have a close association maybe to convince that there was no reason to give anything to the children of the brother. That is the layman's way of thinking. The Appellant gave

evidence to the contrary, which the District Judge believed. On that basis, the District Judge treated the Respondent as an untrustworthy witness and rejected her entire evidence. Rejection of her evidence *in toto* on that basis is unreasonable. Even if there was a cordial relationship between the two families and the deceased was fond of his brother's three children, one cannot assume that he should give a portion of the matrimonial house or a portion of his paltry savings to the brother's three children.

The Appellant further argues that the Respondent did not obtain an opinion from the Examiner of Questioned Documents (EQD). On the application of the Appellant a commission was issued to the EQD but the EQD indicated that he was unable to give an opinion due to the insufficiency of specimens for the comparison of the signatures. The Appellant has not pursued the matter thereafter.

Taking into account all the facts and circumstances of this case I do not think that these are circumstances seriously arouse the suspicion of the Court as to the genuineness of the will.

Proof of a last will: statutory provisions

Wills Ordinance, No. 21 of 1844, as amended, makes provisions with respect to testamentary dispositions of property. Section 2 thereof (after the amendment by Act No. 29 of 2022) admits in no uncertain terms the legal capacity of the testator to execute wills as he pleases even to the exclusion of natural heirs without assigning any reasons whatsoever.

> *2(1). It shall be lawful for any person who has reached the age of eighteen years and residing within or outside Sri Lanka to execute a will bequeathing and disposing any movable and immovable property and all and every estate, right, share or interest in any property which belong to him at the time of death and which, if not so devised, bequeathed or disposed would devolve upon his heirs of*

such person not legally incapacitated from taking the same as he shall seem fit.

(2) Every testator shall have full power to make such testamentary disposition as he shall feel disposed, and in the exercise of such right to exclude any child, parent, relative, or descendant, or to disinherit or omit to mention any such person, without assigning any reason for such exclusion, disinheritance, or omission, any law, usage, or custom now or herefore in force in Sri Lanka to the contrary notwithstanding.

The due execution of the will is regulated by section 4 of the Prevention of Frauds Ordinance, No. 7 of 1840, as amended by Act No. 30 of 2022.

4(1) No will, testament, or codicil containing any devise of land or other immovable property, or any bequest of movable property, or for any other purpose whatsoever, shall be valid unless it shall be in writing and executed subject to the provisions specified in subsection (2);

(2) The testator shall -

(a) sign; and

(b) affix his left or right thumb impression,

at the foot or end of the will, testament or codicil referred to in subsection (1), before a notary public and two witnesses who shall be present at the same time:

Provided however, in the event the thumb impression of the testator cannot be obtained due to any reason, he shall affix any other finger impression or the toe impression, as the case may be.

Section 31 of the Notaries Ordinance, No. 1 of 1907, as amended, lays down the rules to be observed by notaries but provides in section 33 that no instrument shall be deemed to be invalid by reason only of the failure of a notary to observe any provision of any rule set out in section 31 in respect of any matter of form.

Section 68 of the Evidence Ordinance regulates the proof of a will. This section reads as follows:

> *If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.*

In this case, the notary and both attesting witnesses gave evidence. This is indeed rare.

The notary had known the deceased for about 20 years. The District Judge however rejected the evidence of the notary completely on the basis that he failed to produce the paper on which he had noted down the instructions given by the deceased prior to the execution of the last will. As previously mentioned, the estate of the deceased is not characterized by intricate complexities. The failure to produce the paper on which he wrote down instructions cannot be fatal to reject the evidence of the notary completely. It cannot be seriously considered a suspicious circumstance.

In the written submissions filed on behalf of the Appellant it is stated that the notary has not produced the monthly list. No question had been asked from the notary on the monthly list.

The Appellant claims that it is unnatural for the notary to send a message to the Respondent to "look for the will" upon hearing the death of testator. Considering the fact that the notary and the testator knew each other for a long time, I do not see any unnatural conduct on the part of the notary in it.

The notary in his evidence has stated that the testator unsuccessfully attempted to sell the house and thereafter wanted to gift the house to his wife. However, since he had financial constraints in covering the stamp fees for such a transaction, he opted to write a last will. The Appellant says this is irrational. I cannot agree.

When making a declaration by Court that a will is proved, minor lapses need not be taken very seriously. In *Ranasinghe v. Somalin* [2000] 2 Sri LR 225 at 233, Udalagama J. stated:

> *Even the notary's admission that the attestation was in error and the fact that she was unable to produce the relevant instruction book would not cast a doubt on the capacity of the testator or that there was undue influence or that the execution of P1 was fraudulent. The most the said infirmities would point to is a lapse in the formalities to be observed in the execution of a last will. As stated in the course of the judgment in Corea's case (supra) court would always be anxious to give effect to the wishes of the testator. Court could not allow a matter of form to stand in its way, subject however to the condition that essential elements of execution had been fulfilled. However if there is affirmative evidence to show that there was no due execution Court would no doubt hold against the will even though the will was the act and deed of a free and capable testator.*

Given the other circumstances of the case, contradictions regarding the place of execution and attestation of the will were considered "minor

discrepancies" in *Wijewardena v. Soysa* [2002] 1 Sri LR 50. *Vide* also *Wijewardena v. Ellawala* [1991] 2 Sri LR 14.

The District Judge rejected the evidence of the first attesting witness of the will, namely Farook, on the sole basis that he could not identify the signature of the deceased although he had stated that he knew the deceased for about 20 years. The District Judge considers this as a suspicious circumstance. According to the evidence of this witness, which I read, he has never stated that he could not identify the signature of the deceased on the will. What he has stated is that the deceased signed the will in front of him and thereafter he signed it, and that was the first occasion on which he saw the deceased signing a document. His evidence was that he had been meeting the deceased during their regular encounters, particularly at the club where they met in the evenings. There was no opportunity for the witness to see him signing documents. It cannot be regarded as a suspicious circumstance.

The second attesting witness is Rita. She was a clerk of the notary. Her evidence was that she knew Farook since he used to come to the notary's office in relation to some other Court cases. The notary is also an Attorney-at-Law. She also says that the deceased testator also came on some occasions to meet the notary to the office. The day on which the last will was signed she was asked by the testator to sign the will as an attesting witness which she agreed with the consent of the notary. This is not an unusual practice or illegal practice. This happens in notarial practice. The District Judge disbelieved the witness because she was a clerk of the notary. This is unacceptable.

I accept that when there are suspicious circumstances, the mere proof of compliance with the statutory requirements itself is not sufficient to prove a will.

Sir John Woodroffe and Amir Ali's Law of Evidence, Volume 3 (Edited by M.L. Singhal, 15th Edition, 1991) states at page 603 that:

> *under ordinary circumstances, the competency of a testator will be presumed, if nothing appears to rebut the ordinary presumption; ordinarily, therefore, proof of execution of the will is enough. But where the mental capacity of the testator is challenged by evidence which shows that it is (to say the least) very doubtful whether his state of mind was such that he could have duly executed the will, as he is alleged to have done, the Court ought to find whether upon the evidence the testator was of sound disposing mind and did know and approve of the contents of the will.*

This requirement is not confined to the testamentary capacity only. It is applicable in all instances where there is suspicion surrounding the will.

However, in this case there are no suspicious circumstances to hold against the will.

The failure to name the Appellant as a party to the main case

Let me now turn to the additional points the Appellant relies on before this Court to say that the last will is suspicious.

The main additional ground is that the Respondent filed the application seeking probate in the District Court without making any intestate heirs parties to the application. The Respondent filed the action on the basis that the Respondent is the sole heir of the deceased and that to her knowledge no one would object to her being granted probate. This is not a suspicious circumstance. This is not against the law either.

At the time the application was made to the District Court (i.e. on 28.03.1990) there was no express provision in the Civil Procedure Code to make intestate heirs as parties to the application.

However, section 524(1) of the Civil Procedure Code required *inter alia* to name "*the heirs of the deceased to the best of the petitioner's knowledge*" in the body of the application.

Section 525(1) at that time provided that "*If the petitioner has no reason to suppose that his application will be opposed by any person, he shall file with his petition an affidavit to that effect and may omit to name any person in his petition as Respondent.*"

The said requirement in section 524(1) was taken away by the Civil Procedure Code (Amendment) Act, No. 14 of 1993.

Section 525(1) was also repealed and reintroduced as section 524(5) by the Civil Procedure Code (Amendment) Act, No. 14 of 1993.

Section 524(5) was repealed, and section 524(1)(bb) which requires the petitioner to name in the body of the petition "*the heirs of the deceased to the best of the petitioner's knowledge*" was re-introduced by the Civil Procedure Code (Amendment) Act, No. 38 of 1998.

Even as the law stands today, in the case of proving a last will, the law does not require the petitioner to name the heirs of the deceased <u>as Respondents</u> to the application.

The failure to name the heirs in the body of the application also will not make the application bad in law *per se*. Compliance with all the provisions of section 524(1)(a)-(d) is not mandatory but directory. If it is mandatory, for instance, failure to mention one property of the deceased or one heir of the deceased would render the entire proceedings void *ab initio*. The section requires the heirs of the deceased to be stated in the petition "*to the best of the petitioner's knowledge*". The language itself gives the indication that it is not mandatory. If the petitioner is a stranger to the family and has no personal knowledge of the heirs of the deceased,

for instance, he will not be able to list out the names of the heirs of the deceased. Hence as was held in *Biyanwila v. Amarasekere* (1965) 67 NLR 488 and *Pieris v. Wijeratne* [2000] 2 Sri LR 145, the provisions of section 524(1)(a)-(d) are directory. However, willful suppression of material particulars will not be tolerated by Court. It is in this context that Sirimane J. in the *Biyanwila* case stated at 494 "*I am of the view that the provisions of this section [524] are only directory, and that a failure to strictly comply with those provisions, does not render the proceedings void ab initio. They are, however, voidable, and in an appropriate case a party may ask the court for relief under section 839 of the Civil Procedure Code*." Referring to the failure to name heirs as parties to the application for probate, in the Supreme Court case of *Actalina Fonseka v. Dharshani Fonseka* [1989] 2 Sri LR 95 at 99, Kulatunga J. stated "*However, such failure is a relevant fact in determining whether probate had been obtained by fraud*."

These observations have no practical relevance to the instant appeal. In the instant case, upon order *nisi* being published in the newspapers, the Appellant intervened in the action and contested the Respondent's case.

Conclusion

In the circumstances of this case, there is hardly anything significant to cast any suspicion on the will. There are no legitimate doubts. The circumstances suggested as being suspicious are all capable of natural explanation. The due execution of the will had been proved by the evidence of the notary who drew it and the two attesting witnesses who signed it. The Appellant objected to the will on the sole basis that the will is a forgery. This was never established by the Appellant when the initial burden was discharged by the Respondent.

I answer the question of law whether the Court of Appeal erred in law and fact in overturning the judgment of the District Court and holding that the last will is the act and deed of the deceased testator in the negative and dismiss the appeal with costs.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., J.
I agree.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.
I agree.

Judge of the Supreme Court