

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

Supreme Court Appeal No. 114/2018

Supreme Court Leave to Appeal No.
SC/HCCA/LA 374/16

WP/HCCA/COL Appeal No. 177/2011(F)

D.C. Colombo Case No.37367/T

Amarasinghe Arachchige Sumith
Amarasinghe,
No. 42, Ruhunupura,
Thalawathugoda.

PETITIONER

- VS -

Amarasinghe Arachchige Nalini,
No.225/47, Siridhamma Mawatha,
Colombo 10.

RESPONDENT

AND

Amarasinghe Arachchige Nalini
No. 225/47, Siridhamma Mawatha,
Colombo 10.

RESPONDENT - APPELLANT

- VS -

Amarasinghe Arachchige Sumith
Amarasinghe,
No. 42, Ruhunupura,
Thalawathugoda.

PETITIONER – RESPONDENT

AND NOW BETWEEN

Amarasinghe Arachchige Sumith
Amarasinghe
No. 42, Ruhunupura,
Thalawathugoda.

PETITIONER – RESPONDENT -
APPELLANT

-VS-

Amarasinghe Arachchige Nalini
No.225/47, Siridhamma Mawatha,
Colombo 10.

**RESPONDENT – APPELLANT –
RESPONDENT**

Before : E.A.G.R. Amarasekara, J.
Kumudini Wickremasinghe, J.
Achala Wengappuli, J.

Counsel : S.N. Vijithsingh with B.C. Balasuriya for the Petitioner-Respondent-Appellant.

Anuruddha Dharmaratne for the Respondent – Appellant – Respondent.

Argued on : 11.01.2022

Delivered on : 23.05.2025

E A G R Amarasekara, J.

This is an appeal by the Petitioner-Respondent-Appellant (hereinafter referred to as the “Appellant” and /or “Propounder of the Last Will”) against the Judgement of the Civil Appellate High Court holden in Colombo dated 29.06.2016, whereby the Civil Appellate High Court allowed the appeal of the Respondent – Appellant – Respondent (hereinafter referred to as the “Respondent”) and set aside the Judgement of the District Court of Colombo in case No. 37367/T dated 26.09.2011.

The said Testamentary action bearing No. 37367 was filed in the District Court of Colombo by the Appellant on 28.01.2007, to prove the Last Will alleged to have been left behind by his mother L. D. Premawathie (hereinafter referred to as the “Testatrix”) who died on 16.12.2006. Death Certificate of the said Testatrix and the said Last Will No.171 were marked along with the Petition dated 25.01.2007 as ‘Pe 1’ and ‘Pe 2’ respectively. It appears that this petition was amended by the Petition dated 13.02.2007. It was averred that the Appellant was the sole beneficiary as well as the executor named in the said Last Will. The Respondent was made a party to the said action as she was the only other surviving child of the deceased Testatrix. Thus, the Respondent was the only other heir in case if there was no Last Will, as the Husband of the Testatrix and the Other Daughter predeceased the Testatrix without any other issues. It was further revealed that there was another testamentary action filed for the estate of the mother of the deceased Testatrix where the deceased Testatrix was the applicant.

- Thus, the Appellant had *inter alia* prayed for the following;

- That the Probate be granted with a copy of the Last Will attached;
- That a limited probate be granted enabling her to take necessary steps in the Testamentary Case No. 25123/T.

In response, the Respondent in her Statement of Objections dated 23.07.2007 *inter alia* averred the following:

- The Testatrix is the mother of the Respondent and the only intestate heirs of the Testatrix are the Respondent and the Appellant.
- The said Last Will and Testament is not lawful due to the following reasons:
 - a. The signature appearing in the said Last Will is not the signature and/or act and/or deed of the Testatrix.
 - b. The said Last Will is not the intent or desire of the Testatrix.
 - c. The said Last Will is not in conformity with Section 2 of the Prevention of Frauds Ordinance and provisions of the Notaries Ordinance.

Thus, she prayed for the dismissal of the Appellant's application and to grant her the letters of administration for the intestate estate of the deceased mother.

At the inquiry, both parties admitted that L.D Premawathie, the Testatrix, died on 16.12.2006 and her heirs are the Appellant and the Respondent.

The Appellant led the evidence of N. A. Gunadasa and M. S. Abeykumara Perera, who were the attesting witnesses to the Last Will and according to the attestation knew the Testatrix. The Appellant also led the evidence of Padmini Caldera N.P., who attested the said Last Will. Even though she had not stated in her attestation to the Last Will that she knew the Testatrix, while giving evidence, she had stated that she knew the Testatrix as the Testatrix came to her for the filing of the other testamentary case No.25123/T. As per the said attestation, the said notary had indicated that she did not know the said attesting witnesses. The Appellant also had given evidence at the inquiry.

The Respondent, Assistant Examiner of Questioned Documents, Ranbanda Jayasundara (hereinafter 'EQD officer'), and Samurdhi Development officer, S.A.J Nilmini Silva (hereinafter 'Samurdhi officer'), had given evidence for the Respondent at the inquiry. The documents marked V1 to V6 that were related to the Samurdhi reliefs made to the Testatrix were sent to the Examiner of Questioned Documents (hereinafter referred to as "EQD") to compare with the alleged signature of the Testatrix found in the Last Will. The said 6 documents obtained from the Samurdhi Department contained sample signatures which were sent to the EQD for comparison.

At the conclusion of the inquiry, the learned additional District Judge of Colombo delivered the Order dated 26.09.2011 in favour of the Appellant granting relief as prayed for in the Petition, stating that:

- Since the Respondent disputes the signature appearing in the Last Will, the burden of proving that it was not the signature of the Testatrix is with the Respondent.

- Even though, on the evidence of the EQD, it can be decided that the signature appearing in the Last Will is not the signature of the Testatrix, the EQD's report has to be analytically considered together with other documents which had been tendered to the District Court.
- Respondent is the one who sent the Last Will to the EQD and the documents sent for comparison were documents issued to the Samurdhi officer and those documents are not admitted documents by the Appellant. She has not tendered any document to the EQD which has been admitted by the Appellant. The Testatrix was the Petitioner in case No.25123/T and the signatures placed in the documents of that case have been admitted by the parties, but the Respondent has not sent those documents to the EQD.
- It cannot be concluded that the Samurdhi officer is acquainted with the signatures of all who reside in Obesekarapura to identify them where there are about 1600 households within that division. Even though, the said Samurdhi officer had stated that the Testatrix placed her signatures before her, it is clear that the said officer did not know the name of the people who lived close to the house of Testatrix. Aforesaid officer had admitted that she came after perusing the necessary documents.
- For those reasons mentioned above, the additional District Court cannot be satisfied that the documents taken from the Samurdhi Officer contain the signatures of the Testatrix. Hence, the correct documents have not been sent for comparison to the EQD. Thus, based on EQD report it cannot be decided that the signature found in the Last Will is not the signature of the Testatrix.
- The Testatrix had signed the Last Will before the Notary Public and two witnesses and the Notary Public in evidence has stated that she knew the Testatrix without any contradiction. It is also stated in evidence that the Testatrix was mentally sound. Even the witnesses to the Last Will have corroborated the said facts.

While reasoning out as above, the learned additional District Judge decided that the signature in the Last Will was the signature of the Testatrix and granted relief for the Appellant as prayed for. The above reasons and observations of the learned additional District Judge indicates that the learned additional District Judge had a doubt with regard the genuineness of the specimen signatures sent to the EQD and therefore decided not to accept the expert opinion contained in the EQD report. Whether the learned additional District Judge was correct or not will be considered later.

Being aggrieved by the above Order of the District Court of Colombo dated 26.09.2011, the Respondent made an Appeal to the High Court of the Western Province in Colombo exercising Civil Appellate Jurisdiction, under Case No. WP/HCCA/COL/177/2011/F, where the learned High Court Judges set aside the said Order of the learned additional District Judge and allowed the appeal of the Respondent based on the following reasons:

- The learned additional District Judge's statement that the burden is on the Respondent to prove that the signature in the Last Will is not that of L. D. Premawathie, the Testatrix, is not correct. The Appellant, the Propounder of the Last Will, had both the initial burden of establishing that the Last Will is genuine and to remove any doubts that may arise from the conscience of the Court. Thus, the Propounder of the Last Will has to prove that the Last Will is an act or deed of the Testatrix while having the burden to remove any suspicion attached to the Last Will.
- Samurdhi Officer providing evidence via the production of the files and the existence of sufficient material, satisfies that documents sent for comparison to the EQD are not forged documents but contain genuine signatures of L. D. Premawathie, the Testatrix.
- EQD has found that the signature in the Last Will, which purports to be the signature of Testatrix, had been placed by a person who could have controlled the pen in a better or stronger manner than the person who placed the signature on the documents sent for comparison. Thus, signature in the Last Will shows an attempt made by a person having a stronger hand to fake the way an older and weaker person placing the signature. The explanation provided by the EQD during cross examination, as well as the conclusions he reached, were satisfactory. (In other words, the learned High Court Judges opined that the learned additional District Judge should have formed his opinion as to the genuineness of the signature of the Testatrix found in the Last Will in accordance with the findings and conclusions of the EQD and not contrary to it).

Other than the above, after analyzing the evidence before the learned additional District Judge, it appears that the learned High Court Judges have come to the conclusions that the conduct of the Appellant gave rise to a suspicion over the whole transaction and the Appellant had attempted to distance him from being aware of the intentions of the Testatrix to thereby pin it on the free will of the Testatrix. Further, the learned High Court Judges have come to the conclusion that despite the long and strenuous cross examination, the position of the Respondent had not been refuted and such cross examination had not made the Respondent waver from her original stance. It further appears that for the reasons given, the learned High Court Judges came to the conclusion that rather than the Testatrix inviting the witnesses to come as witnesses, it was the Appellant's association with witnesses that made them to take part as witnesses for the Last Will.

Thus, the High Court is of the view that the conscience of the Court was not made clear of any doubts as to the free and uninfluenced exercise of will of the Testatrix. Hence, the appeal made to the High Court was allowed and the learned additional District Judge was directed to grant letters of administration in respect of the estate of the Testatrix to the Respondent considering it as an intestate estate.

Being aggrieved by the Judgment of the Civil Appellate High Court, the Appellant appealed to this Court, where this Court granted leave on 03.08.2018, on the Questions of Law in Paragraph 24 i – vi of the Petition dated 28.07.2016. The questions of law are as follows;

“(i) Did the Civil Appellate High Court err in Law, in not considering the vital issue that, the Respondent had willfully and voluntarily deviated from complying with the Order dated 10. 10. 2008? (Vide page 142 of the Brief X)

(ii) Did the Civil Appellate High Court err in Law by not considering that, all five signatures sent to the EQD were from a single source, which signatures were vehemently opposed to by the Petitioner with regard to their authenticity?

(iii) Did the Civil Appellate High Court err in Law in interpreting the EQD's Report which stated that, the signature of Premawathie placed on the Will No: 171, does not tally with the six specimen signatures, creates a reasonable doubt, as to the question whether the Testament was the act and deed of the Testatrix?

(iv) Has the said interpretation caused a grave miscarriage of justice and has deviated from the Judgement entered in the Case of **Lily Perera Vs. Chandani Perera** (1990 SLR 246)?

(v) Did the Court of Appeal err in Law in coming to the finding that, "the propounder of the Will is having not only the initial burden of establishing that the Will is genuine, but, he should also remove any doubt that may arise from the conscience of the Court and prove that, the Last Will is an act or deed of the Testatrix?"

(vi) Do the said findings deviate from the Judgement of **Charles De Silva Vs. Arivawathie De Silva** (1987 SLR 261) ?”

For a Last Will to be effective or operative, it has to be proved before a competent court with jurisdiction in that regard. Thus, one has to file a Testamentary action to establish that the Last Will is genuine to obtain the probate. If the propounder proves the due execution of the Last Will, it may give presumption that the Testator knew and approved its contents but the circumstances may attach a suspicion to the document. In an application for probate of a Last Will, the Propounder of the Last Will has to satisfy court on;

- 1) That the instrument tendered to Court is the Last Will of a free and capable testator,
- 2) That no circumstances exist that excite the suspicion of Court – vide **Pieris Vs Wilbert** 59 N L R 245

Even in **Lily Perera Vs Chandani Perera** (1990) 1 Sri L R 246, it was stated that the principle contained in the statement that “*the onus probandi is upon the party propounding the Will. He must prove that Will sought to be proved is the act and deed of a free and capable testator and if there exist facts and circumstances which arouse the suspicion of court, he must remove such doubts. The conscience of Court must be satisfied*” is correct.

In **Rajasuriar V Rajasuriar** 39 N L R 494 at 495, it is stated that ‘*The Onus of proving a Will lies upon the party who propounds it. The cannons of proof vary according as the Will is reasonable and natural one or the reverse. “Where a suspicion attaches to a Will, a 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.”.....*’. (Also see **The Alim Will case** 20 N L R 481.)

As per **Ratnayake Vs Chandratillake** (1987) 2 Sri L R 299, it appears that it is only when the Propounder of the Last Will satisfy Court on the above, the burden falls on the Respondent to

prove fraud or undue influence or whatever they rely on. Thus, the said case indicates that even fraud, undue influence or coercion was not proved the failure of the Propounder to discharge the burden that lay upon him to remove the suspicion when there was material to trouble the conscience of the Court, entitles the judge to hold that the Last Will has not been proved. (In relation to the discussion above also see **Gunewardene Vs Cabral** (1980) 2 Sri L R 220)

The above indicates that the proof of the Last Will as the deed and act of a free and capable testator falls on the Propounder of the Last Will and the removing of any suspicion that affects the conscience of Court is also within that task of the Propounder of the Last Will. Some of the cases indicate that the Petitioner or his children becoming only beneficiary/beneficiaries is a suspicious situation that troubles the Court's conscience. See **Ratnayake V Chandratilleke** (supra). In **Ananthathurai Vs Kanagaratnam** 50 N L R 361 shows if a person who prepares or writes a Last Will takes some benefit under it, it raises the suspicion that the Last Will does not express the mind of the testator.

Due to the reasons mentioned below I observe that there was suspicion attached to the impugned Last Will:

- Propounder of the Last Will, the Appellant was the only beneficiary when there was another child among the living (The Respondent) to the Testatrix other than the Appellant;
- As per evidence it was the Propounder of the Last Will who accompanied the Testatrix to the Notary Public to execute the Last Will;
- The two witnesses to the Last Will were friends or acquaintance of the Propounder of the Last Will and as per the evidence of those two witnesses it was the Appellant, Propounder of the Last Will who requested them to come as witnesses, even though the Appellant says in evidence that it was the Testatrix who asked them to come. However, the learned High Court Judges correctly observed the time the Testatrix had to associate them to make such a request independent of the Propounder of the Last Will was very limited. The Appellant's attempt to state that it was her mother who invited the witnesses to come and sign in contradiction to the evidence of said witnesses and his evidence that it was at the time of the signing of the Last Will he came to know of the contents of the Last Will further creates a doubt as to whether the Propounder wanted to hide what really happened with regard to the execution of the Last Will;
- The Notary Public, who attested the Last Will, in her evidence clearly state that she knew the Testator, but she in her attestation had evaded from stating that the Testatrix was known to her even when the witnesses to the Last Will were not known to her.

The Appellant, to prove the due execution of the Last Will, called the said witnesses and the Notary Public, Padmini Caldera. As the Testatrix is not among the living, it is only these witnesses and the Propounder of the Last Will who were there to verify on the facts relating to the execution of the Last Will. As said before, the two witnesses were friends or acquaintance of the Propounder of the Last Will. However, the Notary Public also cannot be considered as

an impartial witness as she was the registered attorney for the Propounder of the Last Will for the Testamentary case. Thus, in fact, the case became her case as she is the one who represents the Propounder of the Last Will and was entrusted with the success of the case for the Propounder of the Last Will, the Appellant. As it was revealed that she was the lawyer for the Propounder of the Last Will while giving her evidence, it appears that she revoked her proxy later on after giving evidence.

In that backdrop, the Respondent, EQD officer and a Samurdhi officer had given evidence for the Respondent. After considering the documents sent for comparison with the signature in the Last Will, the EQD had clearly expressed the opinion that the signature in the Last Will cannot be a one placed by the person who placed signatures on the documents sent for comparison. The said documents sent for comparison were documents taken from the Samurdhi Department. The Samurdhi officer has been called to establish that fact. Even the Propounder of the Last Will, the Appellant in his evidence had stated that he came to know that her mother took Samurdhi reliefs even though he had attempted to indicate during the cross-examination of the Respondent that it was the Respondent who took or applied for Samurdhi reliefs in their mother's (Testatrix's) name. However, as per his own evidence, the Respondent after her marriage was not continuously living with their mother but intermittently lived in the Obesekarapura house on three occasions where their mother lived and she left for the last time in early 1990s after the death of their father. Even the Respondent had stated in evidence that she left that house in 1991. Thus, the Respondent cannot be the one who made the application and signed on various documents sent for comparison which appears to be relevant to the early period of the decade started from the year 2000. There was no evidence or suggestions made during cross-examination to say that there were more than one L.D Premawathie benefiting from Samurdhi reliefs in the relevant division. The Samurdhi Officer had stated that the signatures were taken before her and it appears that signatures correspond to the name L. D. Premawathie or Lokuralalage Dona Premawathie on the documents, which was the name of the Testatrix (only the copies are found in the appeal brief). These appears to be documents maintained for official purposes of the Samurdhi bank and Samurdhi department. It appears the Appellant attempts to indicate that these specimens were taken from one source but it must be noted that the signatures were placed on different occasions and they cannot be considered as fake documents as they were taken from official custody. As explained later on, the doubt created by them along with the EQD report is serious and it is the burden of the Appellant to wipe out that doubt from the mind of the Court. If there were other reliable document from other sources, the Appellant could have taken a commission to send such documents to the EQD. In fact, as explained later on, he too had obtained an order for that but has not carried it out.

The learned additional District Judge had considered irrelevant factors in refuting these documents sent for comparison to the EQD as explained below;

- One reason to refute the signatures in the Samurdhi department documents is that the Appellant, the Propounder of the Last Will, had not accepted these documents:-

These documents have been maintained by the Samurdhi Department for its official purposes, it is not necessary for the Court to have any admission from the Appellant to accept them. In fact, the Appellant in his evidence admitted that he came to know about his mother obtaining Samurdhi reliefs. Thus, naturally there should be documents, relating to such reliefs given, with the Samurdhi department. As observed above, these are signatures corresponding to her name in the documents of the Samurdhi department. There was no evidence to show that there was any other Lokugamage Dona Premawathie or L.D. Premawathie in Obesekarapura division who obtained Samurdhi reliefs to cause a wrong identification of the relevant signatures.

- Another reason for not accepting the signatures in the Samurdhi department documents is that, as there were more than 1600 households in the Obesekarapura division given to the said Samurdhi officer when she worked there, even though she has said that those signatures were placed before her, when she is not aware about the names of the residents living close to the Testatrix's Obesekarapura house, it cannot be said for any reason that the said officer has the ability to identify any of such signatures of the people of Obesekarapura and the said officer had come to courts after perusing those documents:-

Even though the officer had said that there are 1600 houses in the Obesekarapura division, she had categorically said that only 400 households came under her. She had further said that it was the Testatrix who came and made the application and she (said officer) was the one who inquired into the said application and made recommendation to the authorities for reliefs to be granted. She also had revealed the inclusion of the name of the other daughter who pre-deceased the Testatrix in the Samurdhi Card. She had also explained that before issuing the card, name and identity card numbers were checked. It is also revealed during her evidence that Testatrix came to the Samurdhi Bank to tender the application marked as V1 and signed it. Said Samurdhi officer had further said in her evidence regarding the placement of signature by the Testatrix when she was obtaining Samurdhi reliefs on V2 to V5 and categorically stated that no one other than the beneficiary of Samurdhi relief could sign the documents as per the rules and regulations of her department. Those signatures were taken while her official duties when issuing the Samurdhi cards to the beneficiaries for them to buy goods from the cooperative shop. What has been explained by the Samurdhi officer was the official process of granting Samurdhi reliefs and issuing relevant cards and even if she refreshed her memories by perusing the relevant documents, one cannot find fault with her or doubt that official process. It is true when cross examining she could not reveal correctly where the addresses of some of the residents in Obesekarapura exists (not the names as stated in the order). She gave her evidence few years after the time relevant to the taking of the signatures on Samurdhi documents and after that time she took signatures she appeared to have had a transfer in 2005 and thereafter again came back to work in the same division in

2009. Thus, it is natural that she may have forgotten where some of the addresses referred to during the cross examination exist. At one occasion she had stated that the Testatrix's age was around 60 years. As per evidence, it would have been around 75 to 80 when she obtained Samurdhi relief. What the witness had stated was the apparent age of the Testatrix to her perception and it should not be a ground to disbelieve her or the said documents.

The learned additional District Judge also failed to observe that the said Samurdhi Officer had revealed the nick name of the Testatrix used by the neighbors and the fact that Testatrix deposited some money in the Samurdhi bank when the Testatrix received money from her sister Karunawathie. Those facts may not be available in the Samurdhi department and thus, they indicate that the witness, Samurdhi officer had some personal knowledge about the Testatrix too.

Thus, in my view, the learned additional District Judge erred in taking irrelevant facts into consideration and not taking relevant facts into consideration to refute the signatures in Samurdhi documents which were maintained for official purposes and he should have considered the signatures found in those documents which were sent to the EQD for comparison as the signatures of the said Testatrix.

Aforesaid EQD report and the evidence supporting the opinion of the said report creates a serious doubt as to the genuineness of the Last Will and it aggravates the suspicion attached to the Last Will.

Another ground relied on by the Appellant and the learned additional District Judge in his Order is that the Respondent did not take steps to send the documents admitted by both parties to the EQD for comparison. In fact, this argument or reasoning is based on the fact that the Respondent, even though, once moved to send such documents for comparison and obtained an order for the documents in the other testamentary Case No.25123/T, did not send them for comparison by the EQD. It is true that it appears as per the proceedings dated 10.10.2008, the Counsel who appeared for the Respondent had moved to issue copies of the said case and send them for the EQD and obtain an Order in that regard (There seems to be typographical errors in the said proceedings as it refers to an appearance marked for the 2nd Defendant and moving for the 1st Defendant where there was only one Respondent.). However, in his application made in open court on 10.10.2008, the Counsel for the Respondent had referred to the previous order made on 23.01.2008 to send those documents to the EQD. Even the motion filed in this regard on 08.10.2008, also refers to a previous order made by the District Court in that regard. As per the journal entry No.26 dated 09.10.2008, due to an error in the motion (since it had referred to documents containing petitioner's signatures where it should have been testatrix's signatures), an order had been made to make a proper application. Thus, it appears, the Counsel had moved in open Court on 10.10.2008 as aforesaid to get the said documents sent for the examination by the EQD. Since that application to send them for EQD refers to the previous order made on 23.01.2008, it is necessary to look at the previous order made on 23.01.2008. As per the Journal Entry made on 23.01.2008, according to the motion dated 05.12.2007 filed

by the Appellant which was mentioned in Journal entry No.14 dated 20.12.2007, the Court had made the said previous order to send the said documents in Case No. 25123/T to the EQD along with some documents in the CID. Thus, it appears that the Counsel for the Respondent moved the District Court on 10.10.2008 to carry out the said previous order made in accordance with the application made on behalf of the Appellant. Thus, it is the prime duty of the Appellant to file commission papers to get what he asked from the Court and for which it seems that the Respondent lawyer too had contributed later on. Now it appears that the Appellant is trying put the blame on the Respondent for not sending those documents mentioned in the Appellant's said motion to the EQD. It seems even the learned additional District Judge also have found fault with the Respondent, without considering that the burden was on the Appellant to remove any suspicion attached to the Last Will and to prove that it was an act and deed of the Testator named in the Petition.

On the other hand, there is no clear admission by the Respondent that the documents in Case No.25123/T contained the true signatures of the Testatrix - see the answers given on pages 281 and 282 of the brief. It appears that she knew that there are papers filed in that case in her mother's name but if there is any specific knowledge as to the genuineness of those purported signatures on the documents in Case No.25123/T, that knowledge should have been with the Appellant and his lawyer who also attested the Last Will since said lawyer Padmini Caldera appears to be the lawyer who appeared on behalf of the Testatrix in that case. Now it is important to observe what the said lawyer Padmini Caldera had stated regarding the said documents filed in the said Case No.25123/T. At page 169 of the brief, during the cross examination when questioned above the signature on the Last Will suggesting that it was not the signature of the Testatrix, aforesaid lawyer had voluntarily come out and had said that by placing forged signatures Testatrix had been mentioned as a petitioner in that case No.25123/T and there are lot of forged signatures of the Testatrix in that case. Learned additional District Judge found fault with Respondent for not sending those documents to the EQD and the Appellant wants to place the blame on the Respondent not sending them. The lawyer for the Appellant (the Propounder of the Will) who also appeared for the Testatrix in the said Case No.25123/T, herself has stated in evidence that the Testatrix's signature in the said case had been forged to mention her as the Petitioner in that case indicating that someone else had placed the Testatrix's signature on the documents in that case. It may be a reason for the Appellant and his lawyer, even though, they moved to send those documents to the EQD first, not to send them to the EQD knowing that true signatures of the Testatrix may be used to challenge the Last Will. It is quite interesting to see that the same lawyer had attested the impugned Last Will in the case in hand and she also became the registered attorney for the Propounder of the Last Will in the case in hand till she revoked her proxy after giving evidence as aforesaid. For the reasons discussed above I cannot find fault with the Respondent for not sending the said documents to the EQD. I repeat that the burden was on the Appellant to prove that the Last Will was the act and deed of the Testatrix and also to wipe out suspicion that may attach to the Last Will. I also observe that the Appellant have not asked permission to lead evidence in rebuttal other than blaming the Respondent who had no burden to remove any suspicion attached to the Last Will. Thus, if there is any fault on the Respondent for not sending them to the EQD, the fault of the Appellant, for not sending even after moving court to send it to the

EQD first, is more serious than that of the Respondent. As said before, the Respondent's application to send them to EQD was based on the order obtained by the Appellant previously.

Further to the above, the EQD officer who gave evidence has considerable experience and had satisfactorily explained reasons for his decisions. Even the learned additional District Judge had stated that the EQD had correctly done his task- vide page 341. The learned High Court Judges correctly observed that the EQD had clearly found that the signature on the Last Will was placed by a person who could have controlled the pen in a better or stronger manner than the person who placed the signatures on the documents sent for comparison indicating an attempt made by a person having a stronger hand to fake the way an older and weaker person placing the signature.

The Appellant has brought this Court's attention to the cases of **Charles de Silva Vs Ariyawathie de Silva** (1987) 1 Sri L R 261 where the Appellate Court found the lower court wrong for acting on the evidence of the handwriting expert as the genuineness of the comparison material on which the EQD based his opinion was in dispute and such material had not been proved. In the matter in hand the comparison documents have been proved by calling the Samurdhi officer and it should also be observed that there was no objection reiterated to those documents at the close of the case of the Respondent. Further, the said decision indicates that there should be reasonable number of specimens of signatures placed about the same time on similar material and circumstances using similar pen or pencil etc. The specimens used were within the last 5 or 6 years prior to the Last Will and I cannot find that the EQD was questioned during cross examination on such grounds to indicate through evidence any insufficiency of the specimens sent for comparison due to the number of specimens sent or on any other ground. The EQD had said that he himself made the photograph for comparison and thus any need to prove those photographs does not arise and the Appellant had not challenged the correctness of those photographs. It must be noted that this is an expert witness. Criteria referred to in old cases may not suit to evaluate the present-day situations with the development of technology and knowledge unless it is shown through evidence that same criteria still apply. Thus, in my view, the decision in **Charles de Silva case**(supra) cannot be used in favour of the Appellant.

The Appellant also has relied on the decision of **Lily Perera Vs Chandani Perera** quoted above in support of a different ground. The said decision states that the hand writing expert's evidence is relevant but it is only to assist Court to form an opinion. It is true that expert evidence is only to assist the Court and the court must form its opinion. As discussed above, the initial suspicion attached to the Last Will due to the associated circumstances had been aggravated by the expert's evidence placed by the Respondent creating a serious doubt as to the genuineness of the Last Will. The burden was on the Appellant to remove such suspicion to satisfy the conscience of Court. The learned additional District Judge as discussed above clearly misdirected himself by considering irrelevant facts and not considering relevant facts in evaluating evidence relating to the specimen documents sent for comparison to the EQD. Thus, there was a question not only regarding the decision on facts but whether the evaluation of facts was done according to law. In such an occasion the Court with appellate powers has to interfere. On the other hand, since the decision of the learned additional District Judge does not

appear to be based on the demeanor of the witness who gave evidence regarding the specimen documents sent to the EQD. In such occasions 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 court judge to evaluate such facts and no sanctity is attached to such findings of fact of a trial judge – vide **De Silva Vs Seneviratne and Others** (1981) 2 Sri LR 7. It is generally true once the due execution of a Last Will is proved by the Propounder of the Last Will, the burden shift to the Respondent to prove any forgery concerning the Last Will. However, in the case in hand, as shown above all the witnesses of the Propounder of the Last Will appears to be acquaintance of the said Propounder, the Appellant, and even the Notary Public who attested the Last Will became the lawyer for the Propounder of the Will making the possibility of them be partial. Thus, their evidence was not that strong to remove the suspicion attached to the execution of Last Will. Further, as said before, the evidence led by the Respondent created a serious doubt as to the genuineness of the Last Will. In that situation, it is correct to state that the Appellant failed to remove suspicion attached to the execution of the Last Will. In fact, on balance of probability, evidence was sufficient to say that the Last Will was not an act of the Testatrix named in the Petition. The learned additional District Judge failed to evaluate evidence before him correctly and the learned High Court Judges came to the correct conclusion. Thus, I am of the opinion that the decision in **Lily Perera Vs Chandani Perera**(supra) cannot help the case of the Appellant where he failed to remove the suspicion attached to the execution of the Last Will to the satisfaction of Court.

As per the reasons discussed above, I answer the questions of law quoted above in the Negative. Hence this appeal is dismissed with costs.

Appeal Dismissed.

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Judge of the Supreme Court

Kumudini Wickremasinghe, J.

I agree.

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Judge of the Supreme Court

Achala Wengappuli, J.

I agree.

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Judge of the Supreme Court