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

In the matter of an Application for Appeal under Article 128 of the Constitution of the Democratic Republic of Sri Lanka read with Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1996 as amended, from the Judgment of the High Court of the Southern Province (Exercising its Civil Appellate Jurisdiction) dated 13th May 2015 in the case No. SP/HCCA/GA/36/2009(F).

S.C. Appeal No:
09/2016

S.C. Case No:
SC/HCCA/LA/209/2015

Civil Appellate High Court Galle
Case No: SP/HCCA/GA/36/2009(F)

D.C. Galle Case No:
116/Probate

Nanayakkarawasam Ihalage
Francis,
Leenawatta, Naarigama,
Hikkaduwa.
PETITIONER

Vs.

1. Nanayakkarawasam Ihalage
Senerath,
Naarigama, Hikkaduwa.
2. Nanayakkarawasam Ihalage
Sirisena Senerath,
Naarigama, Hikkaduwa.

3. Nanayakkarawasam Ihalage
Jayawathie,
Naarigama, Hikkaduwa.
4. Nanayakkarawasam Ihalage
David,
Naarigama, Hikkaduwa.
5. Nanayakkarawasam Ihalage
Diyarin,
Naarigama, Hikkaduwa.

INTERVENIENT RESPONDENTS

AND BETWEEN

Nanayakkarawasam Ihalage
Francis,
Leenawatta, Naarigama,
Hikkaduwa. (Deceased)

PETITIONER-APPELLANT

1A. Karalyne Nandawthie
Hettiarachchi
1B. Nanayakkarawasam Ihalage
Pathmalatha
1C. Nanayakkarawasam Ihalage
Sirisena
1D. Nanayakkarawasam Ihalage
Nalaka Prabath
1E. Nanayakkarawasam Ihalage
Priyanka Pushpakumari

1F. Nanayakkarawasam Ihalage Niranjan

SUBSTITUTED PETITIONER-APPELLANTS

Vs.

1. Nanayakkarawasam Ihalage Senerath,
Naarigama, Hikkaduwa.
2. Nanayakkarawasam Ihalage Sirisena Senerath,
Naarigama, Hikkaduwa.
3. Nanayakkarawasam Ihalage Jayawathie, (Deceased)
Naarigama, Hikkaduwa.
3A. H.L.G. Charlis Dias
3B. H.L.G. Kumudunie
3C. H.L.G. Indika
3D. H.L.G. Gunasiri Priyantha
All of Iddamalgodawatta,
Majuwana, Keradewela.
4. Nanayakkarawasam Ihalage David, (Deceased)
Naarigama, Hikkaduwa.
4A. Nanayakkarawasam Ihalage Fredie
4B. Nanayakkarawasam Ihalage Nandasiri

4C. Nanayakkarawasam Ihalage Chitra Nandani

5. Nanayakkarawasam Ihalage Diyarin,
Naarigama, Hikkaduwa.

INTERVENIENT RESPONDENT-RESPONDENTS

AND NOW BETWEEN

1. Nanayakkarawasam Ihalage Senerath,
Naarigama, Hikkaduwa.

2. Nanayakkarawasam Ihalage Sirisena Senerath,
Naarigama, Hikkaduwa.

3A. H.L.G. Charlis Dias

3B. H.L.G. Kumudunie

3C. H.L.G. Indika

3D. H.L.G. Gunasiri Priyantha
All of Iddamalgodawatta,
Majuwana, Keradewela.

4A. Nanayakkarawasam Ihalage Fredie

4B. Nanayakkarawasam Ihalage Nandasiri

4C. Nanayakkarawasam Ihalage Chitra Nandani

5. Nanayakkarawasam Ihalage
Diyarin,
Naarigama, Hikkaduwa.

INTERVENIENT RESPONDENT-RESPONDENT-APPELLANTS

Vs.

1A. Karalyne Nandawthie
Hettiarachchi (Deceased)

1AA. Nanayakkarawasam Ihalage
Pathmalatha

1AB. Nanayakkarawasam Ihalage
Sirisena

1AC. Nanayakkarawasam Ihalage
Nalaka Prabath

1AD. Nanayakkarawasam Ihalage
Priyanka Pushpakumari

1AE. Nanayakkarawasam Ihalage
Niranjan

1B. Nanayakkarawasam Ihalage
Pathmalatha

1C. Nanayakkarawasam Ihalage
Sirisena

1D. Nanayakkarawasam Ihalage
Nalaka Prabath

1E. Nanayakkarawasam Ihalage
Priyanka Pushpakumari

1F. Nanayakkarawasam Ihalage
Niranjan
SUBSTITUTED PETITIONER-APPELLANT-RESPONDENTS

Before : Yasantha Kodagoda, P.C., J.
: Kumudini Wickremasinghe, J.
: Sampath B. Abayakoon, J.

Counsel : Vijey Gamage with Ershan Ariaratnam, Jesala Husain instructed by Upul Wickramanayake for the Appellants.
: Sumedha Mahavanniarachchi with Amila Vithana instructed by N. Balasuriya for the Respondents.

Argued on : 18-12-2025

Written Submissions : 17-06-2016 (By the Intervenient Respondent-Respondent-Appellants)
: 08-01-2026 (By the Substituted Petitioner-Appellant-Respondents)

Decided on : 13-02-2026

Sampath B. Abayakoon, J.

This is an appeal preferred by the intervenient respondent-respondent-appellants (hereinafter referred to as the intervenient-respondents) on being aggrieved of the judgment pronounced on 13-05-2015 by the Provincial High Court of the Southern Province holden in Galle while exercising its civil appellate jurisdiction.

From the impugned judgment, the High Court allowed the appeal before it with costs, and set aside the judgment pronounced on 30-04-2009 by the learned Additional District Judge of Galle where the action initiated to prove the last will deposited in Court by the petitioner of the said District Court action was dismissed.

The High Court declared that the petitioner-appellant is entitled to take necessary further steps while determining that the questioned last will was a last will lawfully executed and proved before the Court.

When this appeal was considered before this Court on 19-06-2015 for the purpose of granting of leave to appeal, leave was granted on the questions of law as set out in sub-paragraphs (a), (b), (d) of paragraph 10 of the petition dated 22-06-2015.

The said questions of law read as follows,

a. Did the High Court of Civil Appeal – Southern Province err in law and facts by holding that the circumstances of the case the attesting Notary Public can be considered as an 'attesting witness' within the meaning of sections 68 and 69 of the Evidence Ordinance?
b. Did the High Court of Civil Appeal – Southern Province err in law and in facts by holding that the disputed last will and testament bearing No. 720 attested by K. M. P. D. W. Dias, Notary Public dated 05-06-1998 is a lawfully executed last will by the deceased Nanayakkarawasam Ihalage Wilson?
d. Did the High Court of Civil Appeal – Southern Province misdirected itself by unduly relying on the evidence of the Notary Public who attested the last will?

I find that although three questions of law have been formulated, all three questions revolve around the question whether a Notary Public who attested a last will or any deed for that matter can be considered as an attesting witness when the said document is required to be proved in terms of the relevant sections of the Evidence Ordinance.

At the hearing of this appeal, this Court heard the submissions of the learned Counsel for the intervenient-respondents, as well as the submissions of the learned Counsel who represented the substituted petitioner-appellant-respondents before the District Court (hereinafter referred to as the substituted petitioners). The parties were also allowed to file additional written submissions if they so wish.

This is a matter where the original petitioner before the District Court instituted proceedings in order to prove the last will and testament bearing No. 720 dated 05-06-1998 attested by K.M.P.D. Weerasiri Dias, Notary Public. The executant of the last will has been one Nanayakkarawasam Ihalage Wilson.

The intervenient-respondents have objected to the said application on the basis that the said last will should stand null and void.

In the judgment, the learned District Court Judge has held that at the time of executing the last will, the executant was in a proper state of mind and had the mental capacity to execute the last will. It has been determined that on the face of the said last will, it can be considered a properly executed document. It has also been observed that the respondents who challenged the validity of the last will have never taken up the position that the executant had no mental capacity to execute the last will at the time of executing the same.

However, the learned District Judge has determined that the last will has not been proved due to the failure of the petitioner to call the two attesting witnesses to the last will as witnesses in the case in order to prove the same. It has also been held that although the Notary Public who attested the last will has given evidence, his evidence cannot be concluded as sufficient proof of the last will in terms of section 68 of the Evidence Ordinance.

When this decision was appealed to the Provincial High Court of the Southern Province holden in Galle, the learned Judges of the High Court, having considered the facts and the circumstances and the relevant law, held that the Notary Public who executed the last will can be considered as an attesting

witness to prove the same, and accordingly, allowed the appeal. It was the view of the learned Judges of the High Court that the Notary who attested the last will can be considered as an attesting witness under certain circumstances. Having considered the facts and the circumstances of the matter, it has been determined that the Notary is qualified to give evidence as an attesting witness. It has been held that not calling the two attesting witnesses to the last will would not be fatal in proving the same as the Notary's evidence has proved that the last will was duly executed.

As correctly determined by the learned Judge of the High Court, once a last will is challenged, it is up to the petitioner who sought to prove the last will to prove it before the Court.

In the case of **Gunawardena Vs. Cabral and Others (1981) 1 SLR 220**, the necessary elements that should be established before a trial Court in order to prove a last will were considered.

Held:

> *"1. The onus of proving the will lies on the party propounding the will.*
>
> *2. He must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator in that he must show the testator knew or approved of the instrument and intended to be such.*
>
> *3. The onus imposed on the party propounding the wills is in general discharged by proof of capacity and the fact of execution, from which a knowledge of and an assent to the contents of the instrument are assumed.*
>
> *4. The circumstances attending the executed of the document may be such as to show that there is suspicion attaching to the will, in which case it is the duty of the person propounding the will to remove that suspicion and this is done by showing that the testator knew the effect of the document he was signing.*

5. The burden of proving that the will was executed under undue influence rests on the party who alleges it (not considering any suspicions of undue influence, if any, that may arise on evidence).”

It is quite apparent from the objections filed by the intervenient-respondents that they have taken up all objections generally possible to claim that the last will was not an act of its executant, namely, the deceased Nanayakkarawasam Ihalage Wilson. However, their objections also reveal that their main contention had been that as children of another brother of the said deceased person, they are also entitled to the estate of the said deceased.

The evidence adduced before the District Court reveals that the original petitioner of the action has been the son of yet another brother of the deceased, with whom the deceased had lived until his demise, and it was he who cared for him.

As correctly determined by the learned District Judge, the evidence clearly reveals that the executant of the last will had clear mental capacity and knew what he was doing at the time of its execution. The learned District Judge has correctly accepted the evidence of the Notary Public who attested the last will and also the evidence of the other two witnesses called on behalf of the petitioner in that regard. Having accepted such evidence, the learned District Judge relying on section 68 of the Evidence Ordinance has determined that the last will was not proved since the petitioner failed to call the two attesting witnesses to the same.

The relevant section 68 of the Evidence Ordinance reads as follows,

> **68. 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 Court and capable of giving evidence.**

The learned District Judge in his judgment has observed that the said attesting witnesses should have been called as witnesses, and in fact, one of the attesting witnesses was physically present in Court during the inquiry,

and yet the petitioner failed to call even his evidence in order to prove the last will in a situation where he had the ability to call at least one attesting witness.

It clearly appears from the judgment that the said failure has been the sole reason for the dismissal of the petition.

When this matter was argued in appeal before the Provincial High Court, the position taken up on behalf of the intervenient-respondents had been the same, that is to say, that the petitioner failed to prove the last will because he did not call the attesting witnesses despite his capacity in doing so, and therefore, the petitioner has failed to prove the last will in terms of section 68 of the Evidence Ordinance.

Having considered the legal provisions in this regard, the learned Judges of the High Court have drawn their attention to the case of **N.U. Wijegoonetilleke Vs. B. Wijegoonetilleke 60 NLR 560**, where it was held by Basnayake, CJ that;

> *"A notary who attests a deed is an attesting witness within the meaning of that expression in section 68 and section 69 of the Evidence Ordinance."*

The above was a case where the attesting Notary Public gave evidence. In his attestation, he has stated that he did not know the person who executed the deed, but in the course of his evidence, he indicated that he knew that the person who executed the deed was a deaf and dumb person who knew English, about whom he had heard and whose whole family he knew. It was in evidence that the Notary had taken all the precautions necessary to make sure that the donor was no imposter and that he was quite aware of the fact that he was making a gift of number of his lands.

Having considered a very much similar position under consideration in the instant appeal that the attesting Notary Public cannot be considered as an attesting witness in terms of section 68 of the Evidence Ordinance, **Basnayake, C.J.** expressed the above quoted view.

He also cited the observation of **Burnside, C.J.** in the case of **Kiribanda Vs. Ukkuwa (1892) 1 S.C.R. 216** where it was stated;

> *"It is quite true that the rule of evidence is that if you desire to prove a written instrument to which the attestation of witnesses is necessary to give validity, you must first call the witness or witnesses to it or account satisfactorily for not doing so; but the learned District Judge has erred in holding that a notary who attests an instrument under our Ordinance against frauds is not attesting witness so as to bring his evidence within the above rule of evidence. I do not doubt that he must be considered an attesting witness."*

E.R.S.R Coomaraswamy in his book, **The Law of Evidence**, at **page 109,** having considered the relevant legal provisions in relation to the capacity of a Notary Public as an attesting witness to a document attested by him states,

> *"In this connection, two rules maybe laid down from the case law;*
>
> a. *A notary who attests a document in terms of Prevention of Frauds Ordinance is generally competent to testify under section 68 of the Evidence Ordinance.*
> b. *But he is not so competent if the executant of the document was not known to him."*

In the case of **L. Marian and S. Jesuthasan et al. 59 NLR 348**, it was held:

> Where a deed executed before a Notary is sought to be proved, the Notary can be regarded as an attesting witness within the meaning of section 68 of the Evidence Ordinance provided only that he knew the executant personally and can testify to the fact that the signature on the deed is the signature of the executant.

The above judicial pronouncements and the legal analysis show that the learned Judges of the High Court were correct in considering whether the Notary who attested the last will in fact knew the executant well, and whether his oral evidence in that regard can be considered reliable, before deciding that Notary can be treated as an attesting witness.

It is clear that although the Notary has been silent in his attestation that he knew the executant of the last will, in fact, he was a distant relative. The petitioner and the second witness to the last will who was the son of the petitioner were also his relatives similar to the executant. The learned Judges of the High Court have well considered the evidence placed before the trial Court to come to a firm finding that the Notary who attested the last will and the executant knew each other at the time of the execution of the last will, and therefore, in line with the considered judicial authority, the said Notary can be considered as an attesting witness for which I find no basis to disagree.

For the reasons as considered above, I find that the setting aside of the judgment dated 03-04-2009 of the learned Additional District Judge of Galle was a correct decision that should not be interfered.

Hence, I answer the questions of law under which leave to appeal was granted in the negative.

The appeal is dismissed.

The parties shall bear their own costs.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.

I agree.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.

I agree.

Judge of the Supreme Court