WIJEWARDENA AND ANOTHER VS. ELLAWALA

COURT OF APPEAL.

WIJETUNGA, J., ANANDACOOMARASWAMY, J. AND WEERASEKARA, J.

C. A. No. 323/89 (F)

C.A. Application No. 1031/89.

D.C. Colombo No. 29901/Testy.

17, 18, 19, 20, 21, 25, 26, 28 September, 1990 and 01, 04, 05, 10, 11 and 12 October, 1990.

Last Will - Limited Probate - Probate of Will - Legal requirements for making a valid Will - Wills Ordinance section 2 - Prevention of Frauds Ordinance sections 4, 10, 11, 12, 13 -Notaries Ordinance sections 31, 33, 41 (2), (3) — Attesting witnesses — Civil Procedure Code sections 524, 526, 533, 534, 539 - Evidence Ordinance, section 68.

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 will be valid unless it is in writing and executed as follows:

It must be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of a licensed notary public and two or more witnesses who shall be present at the same time and duly attest such execution.

Where one partner of a firm of Attorneys-at-law practising in partnership take the instructions of the deceased testator and later signs as a witness, the validity of the Will will remain unaffected. There is no impropriety when partners of a partnership of Attorneys–at–law attest the Will as witnesses and a 3rd partner attests the execution of the Will itself.

Where a Will is prepared under circumtances 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 until that suspicion is removed.

Where a will is shown to be rational and duly executed there is a presumption that the testator had testamentary capacity. The failure of the notary to seek medical opinion in regard to the competence of the testator at the time of the taking of instructions for the preparation of the Will or at the stage of execution, will not affect the validity of the will, especially where the testamentary capacity of the testator was never in issue. Non-medical evidence to prove that the testator had a sound disposing mind can be relied on. 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. Where undue influence is alleged it must be proved by the party alleging it.

Where the trial Judge is in gross error in regard to findings of fact the Appeal Court will interfere especially as here, the judgement was dellvered long after the conclusion of the evidence. When a deed has been admitted in evidence without objection or protest and no issue was raised at the commencement of the trial or later raising the question of due execution of the deed, section 68 of the Evidence Ordinance does not require an attesting witness to be called. The failure to object to the deed being received in evidence would amount to a waiver of the objection.

Cases referred to:

1. *Peiris v. Peiris* (1904) 8 NLR 179
2. *Meenadchipillai v Kathigesu* (1957) 61 NLR 320
3. *Sithamparanathan v Mathuranayagam* (1970) 73 NLR 53
4. *Gunasekara v Gunasekera* (1939) 41 NLR 351
5. *Peiris v Perera* (1947) 48 NLR 560, 569
6. *Abeysekara v De Livera* (1968) 71 NLR 465, 467
7. *Wijegoonetilleke v Wijegoonetilleke* (1956) 60 NLR 560
8. *Hemapala v Abeyratne* (1978-79) 2 Sri LR 222
9. *Gunasekara v Resanona* SC No. 22 of 1987 CA Maho No. 140/80 (F) DC Maho No. 201/I - SC minutes of 23.7.1990
10. *Karthelis Appuhamy v Siriwardena* (1945) 31 CLW 86
11. *Barry v Butlin* (1838) 2 Moore's Privy Council Appeals 480
12. *Tyrell v Painton* (1894) Probate 151
13. *Davis v Mayhew* (1927) Probate 264, 286
14. *Fernando v Peiris* 47 NLR 169
15. *Andrado v Silva* (1920) 22 NLR 1, 11
16. *Perera v Perera* (1901) 70 LJR 46
17. *Peiris v Peiris* (1906) 9 NLR 14
18. *Gray v Kretser* (1916) 2 CWR 190
19. *Brampynona v Vithanage* (1942) 23 CLW 110
20. *De Silva v Seneviratne* [1981] 2 Sri LR 7
21. *Lily v Chandani Perera & Others* [1990] 1 Sri LR 246

APPEAL from the judgment of the District Judge of Colombo.

F.A.D. Samarasekara P.C. with *Romesh de Silva P.C., Gamini Jayasinghe, S. Mahenthiran* and *A. R. Surendran* for petitioner - appellants.

Miss M. Seneviratne P.C. with *Miss I.R. Rajepakse, Wasantha Wijesekara* and *Miss S. Jayatilleke* for intervenient-respondent.

Cur.adv.vult.

30 April, 1991.

WIJETUNGA, J.

Donald Joseph Wijewardena (hereinafter sometimes referred to as 'the deceased') died on 14.1.85 at the Intensive Care Unit of the General Hospital, Colombo.

The intestate heirs of the deceased are —

(a) his widow Mrs. Beryl Helene Iranganie Wijewardene (hereinafter sometimes referred to as 'the widow'), and

(b) his two daughters, the 1st petitioner-appellant and the intervenient-petitioner-respondent (hereinafter sometime referred to as 'the 1st petitioner' and 'the intervenient,' respectively).

The petitioners claim that the deceased left a last will and testament bearing No. 2137 dated 7.1.85 attested by V. Murugesu, Notary Public of Colombo and that he appointed the petitioners as the executors of the said last will. The 2nd petitioner is said to be a close family friend of the deceased.

By the said last will, the deceased devised and bequeathed his assets to his wife, his younger daughter (the 1st petitioner) and the younger daughter's children. He did not leave any bequest to his elder daughter (the intervenient).

The deceased was the Chairman and Managing Director of Sedawatta Mills Ltd., Sedawatta Drugs Ltd. and Sedawatta Exports Ltd. The petitioners claim that the 1st petitioner had been assisting her deceased father in the management of the said companies and after the father's death, she is managing the affairs of the companies. The deceased had shares in seven other companies too. The petitioners claimed before the District Court that it was necessary and expedient in the interests of the estate that limited probate under Section 539 of the Civil Procedure Code be granted empowering and authorising them to have themselves registered as the executors with limited probate and as legal representatives of the said deceased in the registers of members of all the companies in which the deceased was a member and to exercise all powers and rights as such members of the said companies (but without any right to collect or receive any dividends or income from those companies in their capacity as members) until the full grant of probate is made or until the petitioners received further orders from the District Court of Colombo.

The Court, by its order dated 8.2.85, granted the said limited probate. On or about 22.2.85 the Court entered order nisi in respect of the main application for probate returnable on 14.3.85. The intervenient entered appearance on or about 11.3.85 and filed her statement of objections and affidavit and moved that the petitioners' application for probate be dismissed and that letters of administration be granted to the Public Trustee of Sri Lanka.

On or about 17.3.85 the intervenient filed a petition repeating the prayers in her statement of objections and in addition thereto asked for an order declaring the grant of limited probate void or in the alternative to recall the grant of limited probate to the petitioners.

Inquiry commenced before the then Additional District Judge of Colombo on 29.3.85 and an admission was recorded that the only intestate heirs of the deceased Donald Wijewardene are the widow Beryl Wijewardene, the 1st petitioner Amari Wijewardene and the intervenient Nelum Kumari Ellawala.

The following issues were raised on behalf of the petitioners:

(i) Is the Last Will bearing No. 2137 dated 7.1.85 and attested by V. Murugesu, Notary Public, the lawful and valid Last Will of Donald J. Wijewardene?

(ii) If so, are the petitioners entitled to prove the said Last Will?

(iii) If the above issues (i) and (ii) are answered in the affirmative, are they entitled to obtain probate of the said Last Will?

The intervenient raised the following issues:-

(iv) Is the aforesaid Last Will bearing No. 2137 attested by V. Murugesu, Notary Public, a Last Will signed under undue influence, intimidation and illegal compulsion?

(v) Should the limited probate issued in this case be recalled for the following reasons:-

(a) since the intestate heirs have not been made respondents.

(b) since a false averment has been made that no opposition is apprehended to the issue of probate?

Thereafter, the evidence commenced with that of Dr. Wickrema Wijenayake and while Dr. Wijenayake was under cross-examination, further hearing was adjourned for 24.4.85 and 9.5.85. However, it appears that on 19.4.85 the Attorneys-at-Law for the parties had informed Court that those dates were not suitable to them and had moved that the case be taken off the inquiry roll and be called on 30.5.85, to fix a date for further inquiry. On that date, the inquiry had been fixed for 3.9.85 but had once again been postponed for 10.1.86. By then, there had been a change of District Judge under whom too there had been several postponements of the inquiry. When the inquiry ultimately commenced before the successor the following additional issues were raised by the intervenient:-

(vi) Was the Last Will No. 2137 dated 7.1.85 not executed according to law?

(vii) If so, can the petitioners have and maintain this application?

The record does not indicate that the evidence already recorded before the previous District Judge was adopted by his successor. The petitioner had then called the following witnesses:

(a) Dr. A.T.S. Paul, retired Chief Surgeon of the General Hospital, Colombo, said to be a close personal friend of the deceased.

(b) Mr. V. Murugesu, Attorney-at-Law and Notary Public who attested the Last Will as Notary, and

(c) Mr. K. Neelakandan, Attorney-at-Law and Notary Public who was one of the witnesses to the said Last Will.

The intervenient called her husband William Tissa Ellawala and Dr. T.G. Haththotuwa, Professor of Psychiatry, Colombo North Medical College, as her witnesses.

The intervenient's case was closed on 29.7.87 and the written submissions and documents of the intervenient were filed on 19.10.87 and those of the petitioners on 1.12.87. The learned District Judge delivered the order on 28.11.89 (a) declaring that the Last Will bearing No. 2137 dated 7.1.85 attested by V. Murugesu had not been duly proved and the same cannot be admitted to probate, (b) holding that the deceased died intestate, (c) dismissing the petitioners' application for probate, and (d) declaring the limited grant of probate null and void and recalling the same.

It is from this order that the present appeal and the application in revision have been filed.

The first issue viz: "Is the Last Will bearing No. 2137 dated 7.1.85 and attested by V. Murugesu, Notary Public, the lawful and valid Last Will of Donald J. Wijewardene?" has been answered by the learned District Judge in the negative.

Much has been submitted before us regarding the execution of the said Last Will. I shall begin by referring to the basic legal provisions applicable to the making of a Will. The right of every testator to make such testamentary disposition as he shall feel disposed, even to the exclusion of natural heirs, without assigning any reasons is well recognized by Section 2 of the Wills Ordinance (Cap. 75).

The legal requirements in regard to the making of a will are contained in the Prevention of Frauds Ordinance. Section 4 thereof states inter alia that "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 in manner hereinafter mentioned (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of a licenced notary public and two or more witnesses who shall be present at the same time and duly attest such execution..."

Section 10 further provides that any will etc. shall not be void on account of the incompetency of any attesting witness to be admitted a witness to prove the execution thereof. Section 11, though it makes gifts to an attesting witness void, still provides for such person so attesting the will to be admitted as a witness to prove the execution or to prove the validity or invalidity thereof. Sections 12 and 13 make similar provision regarding creditors and executors respectively, attesting the execution of a will.

Section 31 of the Notaries Ordinance (Cap. 107) 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.

Bearing these provisions in mind the first matter to be examined is the propriety or otherwise of Mr. and Mrs. Neelakandan, who were a partner and an assistant respectively of the firm of Messrs. Murugesu & Neelakandan, signing the said Last Will as attesting witnesses. They are both Attorneys-at-Law and Notaries Public. Mr. Neelakandan is the son-in-law of Mr. Murugesu, the senior partner of the firm and Mrs. Neelakandan is the daughter of Mr. Murugesu and the wife of Mr. Neelakandan. The intervenient, in her statement of objections filed in the District Court, has stated that the said Last Will has not been executed in accordance with the law inter alia on account of the fact that the attesting notary had as

witnesses to the said Last Will and Testament his daughter and son-in-law who with him are the registered Attorneys-at-Law for the petitioners.

As the statutory provisions cannot provide the answer to the matter raised by the intervenient, one must necessarily look elsewhere for guidance. In Hayes & Jarman's "Concise Forms of Wills" 15th Edition at page 120 it is stated that "Witnesses of intelligence and respectability should be selected and preference is to be given to professional men, whose subscription of the memorandum of attestation raises a presumption that the formalities of execution have been strictly attended to. Moreover, there is greater facility in finding such witnesses, if living, and in proving their handwriting, if dead".

Halsbury's 'Laws of England', Vol. 50, 4th Edition dealing with the capacity of witnesses under the head of 'testamentary disposition' states at paragraph 269 that there is no statutory provision which forbids any person from witnessing a will.

The case of *Pieris v. Pieris,* (1) is an illustration of a will attested by a Proctor as Notary Public where one of the two attesting witnesses was his partner, who was himself a Proctor and Notary Public. Though the question of due execution and attestation according to law was very much in the forefront of that case, the Court found no impropriety as regards attestation.

In the instant case, learned counsel for the intervenient made the further submission that Mr. Neelakandan should not, in any event, have been an attesting witness as it was he who had taken down the instructions given by the deceased testator to Mr. Murugesu regarding the making of the will. It was her contention that the Notaries Ordinance does not take cognisance of any partnership of notaries and that the functions are personal to the notary.

But, as was pointed out by learned counsel for the petitioners, Section 41(2) of the Notaries Ordinance makes specific reference to instances 'where two or more notaries carry on a

notarial business in partnership'. So also, sub section (3) of that Section refers to 'a notary who is an attorney-at-law of the Supreme Court (who) has engaged for the purposes of his business an assistant who is also a notary and such assistant practises as a notary under such an engagement for the purposes of the business of the said notary who is an attorney-at-law.'

Thus, the Ordinance itself recognises not only partnerships of notaries but also one notary assisting another in a notarial business.

Admittedly, it was Mr. Neelakandan who had taken down the instructions given by the deceased testator. His notes have been produced in evidence marked P.7. As mentioned earlier, he was a partner of the firm of Messrs. Murugesu & Neelakandan, Attorneys-at-Law and Notaries Public. He has stated in evidence that the deceased was talking to both Mr. Murugesu and himself when he gave instructions and that though the Last Will was attested by one partner (Mr. Murugesu), it was the Firm that was dealing with the client. He, as the junior partner, took down the notes, as is the practice.

As E.R.S.R. Coomaraswamy in his 'Conveyancer and Property Lawyer' states at page 25, "Where the will is before a notary and two witnesses, the witnesses must not only subscribe the will, but must also attest it. To 'attest' a will means to put one's name to it as bearing witness to the fact of its having been signed by the testator."

I cannot, therefore, see why Mr. Neelakandan should not have been an attesting witness, by reason of his having taken down the instructions. For the reasons stated above, I am also of the view that there was no impropriety in Mr. and Mrs. Neelakandan being attesting witnesses to the said Last Will.

I shall now turn to the grounds upon which the learned trial judge has held that the Will has not been duly proved and, therefore, cannot be admitted to probate. She has held

that the petitioners have failed to satisfy the Court that the testator had sufficient testamentary capacity and disposing mind at the time of execution of the Will. She states that there is hardly any medical evidence as regards the testamentary capacity of the testator at the time of signing the will as well as at the time of giving instructions for the preparation of the will. She considers the Notary's failure to consult a doctor, at either of these stages, regarding the competency of the testator as a suspicious circumstance.

Admittedly, the Notary had not sought such medical opinion, though the testator was then an inmate of the Joseph Frazer Nursing Home. His position has been that he was fully satisfied on his observations that the testator was competent and had he the slightest doubt in his mind, he would have consulted medical opinion.

But, the Court has placed much reliance on the case of *Meenadchipillai v. Kathigesu* (2) where it has been held that where an application for probate of a will is resisted and circumstances exist which excite the suspicion of the Court, '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.'

The other case relied upon by the trial judge is *Sithamparanathan v. Mathuranayagam,* (3) where the Privy Council held that in an application for probate of a Will where the testamentary capacity or disposing mind of the testator at the time of the execution of the Will is called in question, the onus lies on those propounding the Will to affirm positively the testamentary capacity, even in the absence of a plea of undue influence or fraud and that the evidence of the Proctor who prepared the Will is not conclusive as to the mental capacity of the testator.

Learned counsel for the petitioners, however, submitted that the facts and circumstances of those cases are totally different from those of the instant case where the question of the testamentary capacity of the deceased was neither pleaded nor put in issue. He cited a number of authorities to demonstrate that where a will is rational and has been duly executed, there is a presumption that the testator had testamentary capacity and no burden lies on the propounder to lead evidence in proof of that fact and the obligation to place such evidence arises only where the testamentary capacity is challenged in evidence.

Cross on Evidence, 2nd Edition at page 104 states that if a rational will is produced, and shown to have been duly executed, the Jury ought to be told to find in favour of the testator's competence. The legal burden rests on the party who propounds the will, but the rule that he does not have to adduce evidence of capacity in the first instance is sometimes said to raise a presumption of sanity in testamentary cases."

Jarman on Wills (1951) 8th Edition, Volume I states at page 50 that if a will is rational on the face of it, and appears to be duly executed, it is presumed, in the absence of evidence to the contrary, to be valid.

So also, Williams on 'Law of Wills' (1952 Edition) states at pages 16 and 17 that "it is presumed that the testator was sane at the time when he made his will but, if the question of his sanity is contested, the onus is on the person propounding the will to prove that the testator was of sound disposing mind at the time when he made his will. A will not irrational on its face, duly executed, is admitted to probate without proof of competence unless such competence is contested."

Lee : South African Law of Property, Family Relations and Succession (1954 Edition) states at pages 180 and 187 that if a will appears to be formally valid, the burden of proving that it is invalid lies on the party who challenges it; and that a will is

invalid if the testator when he made it was mentally incapable of appreciating the nature and effect of his act but the burden of proving this rests on the person alleging it.

Further, Corbett & Hahle : Law of Succession in South Africa states at page 67 that 'the onus of proving that the testator did not have the necessary testamentary capacity is on the person alleging that this is so and it has been said that this onus must be discharged in the clearest manner."

Woodroff & Ameerali : Law of Evidence (1941 Edition) also states at page 762 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.

Our Courts too have followed these principles over the years.

It has been held in *'Gunasekere v. Gunasekera (4),,* that where the propounder of a last will proves the due execution of the document, a presumption would arise that the testator knew and approved of its contents, unless suspicion a *priori* attaches to the document by its very nature.

If, after proof of due execution, there is nothing intrinsically unnatural in the document, the burden is shifted to the objector to show that there was undue influence or fraud or that the deceased was not of a sound disposing mind when he made the will.

It has been stated in *Peries v. Perera, (5)* that in the facts and cirumstances of that case "had the will been found in the

possession of the testator at his death, it can hardly be disputed that on proof of the signature of the testator and of the attesting witnesses and of the notary, the presumption *omnia rite esse acta* would have applied, and the will would have been admitted to probate without any further evidence".

In *Abeysekera v. de Livera (6),* where issue No. 3 raised by the objector was : 'Did the deceased have at the time of the execution of the said will, testamentary capacity and a sound disposing mind?' the Court has stated at page 467 that "the burden of proving this fact is on the propounder of the will and the notary who executed the last will has filed an affidavit... that to all appearances he verily believed the deceased to be 'of sound mind, memory and understanding' at the time of the execution of the will. It would be the task of the objector to rebut this fact by leading satisfactory evidence that it was otherwise"

Furthermore, the provisions of Sections 526, 533 and 534 of the Civil Procedure Code indicate that where there is *prima facie* proof of the due making of the will and order *nisi* is entered declaring the will proved, the burden is on the objector to rebut the *prima facie* proof of the material allegations of the petition.

In the instant case, however, the testamentary capacity of the testator was never in question. It has neither been pleaded nor put in issue. The statement of objections filed by the intervenient makes it clear that the Last Will was being challenged on the basis that it was obtained by duress and/or undue influence exercised on the deceased by his widow and/or the 1st petitioner. That position is further clarified by the evidence of Ellawala, the husband of the intervenient, who has stated in answer to questions as follows:

"Q: Your grounds for attacking this will is that it is not a natural will because one daughter, i.e. your wife has not been provided for in the will because your wife has been cut out off from inheriting anything?

A: Yes, there was an on going attempt to make me and my wife look as outsiders who had to be kept alone.

Q: Therefore, you are asking the Court to reject the Last Will because it is not natural and there were attempts to say that your wife was disinherited?

A: Unduly keep off. That there was undue influence on him over the years to keep her out."

Regarding the execution of the will itself, the only ground of attack specified in the objections is that it has not been executed in accordance with the law on account of the fact that the attesting notary had as witness to the said Last Will and testament, his daughter and son-in-law who with him are the registered Attorneys-at-Law for the petitioners. I have already dealt with that aspect of the matter.

The learned trial judge, however, has been of the view that as hardly any medical evidence had been placed before Court, the petitioners have failed to satisfy the Court that the testator has sufficient testamentary capacity at the time of making the will. The case of *Sithamparanathan v. Mathuranayagam* (supra) on which she relies in this connection, however, would, apply only where the testamentary capacity or disposing mind of the testator at the time of execution of the will is called in question. That was certainly not the position in this case. Further, the facts and circumstances of *Sithamparanathan's case* are wholly different from the facts and circumstances of the instant case. In that case, unlike in the instant case, the competency of the deceased to execute the Last Will was specifically put in issue. The conclusions of the trial judge in that case have been summarised as follows :-

"(a) the physical weakness of the testator was apparent from his-shaky and illegible signature (the Proctor asked him to sign a second time because the first signature 'did not seem good'),

(b) the Judge accepted the evidence of one Wilbert that the testator had been given a blood transfusion before the will was signed,

(c) Two doctors, one the testator's son, who was the appellant in that case and the other an attesting witness to the will, were present when the will was signed. The trial judge viewed with suspicion the failure to lead the evidence of either of those doctors as to the actual condition of the testator.

There was the further circumstance that the trial Judge viewed with reasonable suspicion the claim that the testator on his death- bed had abandoned completely his earlier fixed intention to institute a trust for religious purposes (as manifested in his two earlier wills) and had decided instead to leave all his property to his children. The evidence led apparently did not suffice to satisfy the conscience of the Judge that the testator did indeed decide upon so complete a change in his disposition. The Privy Council there observed that "this is not readily described as an unnatural will but it is a will which makes a radical departure from recent considered testamentary intentions."

There was also a conflict between the two medical witnesses who gave evidence and the Judge did not find the medical evidence satisfactory.

It is in these circumstances that it was held in that case that the evidence of the Proctor who prepared the will is not conclusive as to the mental capacity of the testator.

The other case relied on by the learned trial Judge, viz. *Meenadchipillai v. Karthigesu* (supra) is even more remote from the facts and circumstances of the instant case. The testator in that case was so ill at the time of execution of the will that he was unable to speak or to hold a pen to write his signature. He died within seven hours of the execution of the

will. It was in that context that the Court made the observation that the Notary did not take the obvious precaution of consulting a doctor at the time he took instructions from the testator or at the time of executing the will.

But what is the position in the instant case? Admittedly the testator was an inmate of the Joseph Frazer Nursing Home at the time he gave instructions for the preparation of the will, as well as when the Will was executed. The learned trial judge adverts to his having been treated by Dr. Wijenaike and Dr. Attygalle for cirrhosis of the liver, chronic diarrhoea coupled with enlargement of the liver and the spleen and a heart condition due to a leak in the microvalve of the heart. She says that "no medical evidence had been placed before Court by the petitioners that the testator who has been suffering from all these complicated illnesses had the testamentary capacity at the time of signing the will."

She has, however, mentioned the fact that Dr. Wijenaike who had treated the testator had given evidence (before her predecessor) and stated that till 12.1.85 the testator was able to discuss things with him, his mental condition was quite normal and he had a clear mind; but there was nothing on record to show that, though his cross-examination had commenced, his evidence had been concluded. The Court has, quite rightly, I think, disregarded that evidence.

The next witness was Dr. Paul who again did not give evidence as a medical witness but as a layman and a friend of the testator, having known each other from the age of about 5 years when they were students at school. He had visited the testator practically every other day at the Nursing Home from about the middle of December, 1984 to about 10th of January, 1985. He was to have accompanied the testator to London for further treatment. He has categorically stated that he had seen and talked to the testator during this period and found him mentally quite alert. He was able to discuss various matters including various problems. Though Dr. Paul had been a surgeon attached to the General Hospital, Colombo for about 25 years and had retired as Chief Surgeon, he declined to give

medical evidence for the reason that he had not treated the testator. His opinion as a layman, however, in regard to the mental capacity of the testator was entitled to due consideration by the Court.

Then there was Mr. Murugesu, Attorney-at-Law, Solicitor and Notary Public who, when he gave evidence in 1987, was already 38 years in practice. He is the senior partner of a firm of lawyers and knew the testator for about 10 years. The testator was not only his professional client but also a friend. He had not only done notarial work for him but had also been consulted by the testator in regard to his business and other matters, in his capacity as a Lawyer. He has stated in evidence that when he went to execute the last will he found the mental capacity of the testator to be quite normal. He did not consider it necessary to consult medical opinion in regard to the competency of the testator as he was satisfied that though he was suffering from some illness, he appeared normal and capable of making a decision and had the capacity to know what he was doing and he did not have the slightest doubt in his mind as regards his competency.

Further, the testator has signed the will with a firm and steady hand, (which has a bearing on his physical condition at the time), as on previous occasions when he had placed his signature on other notarially executed documents such as Deed of Gift No. 1123 dated 22.8.75 (P1), Deed of Trust No. 1148 dated 4.11.75 (P2), Last Will No. 1147 dated 3.11.75 (P3) Codicil No. 1620 dated 12.5.80 (P4), all attested by V. Murugesu, Notary Public, to some of which I will advert later.

Thus, those two cases are clearly distinguishable from the facts and circumstances of the instant case.

The next matter that needs consideration is whether this is a rational or natural will. But, before I get to this question, it becomes necessary to deal with the circumstances in which the will came to be executed and also dispose of other contentious matters relating to the previous Last Will (P3) and the Codicil (P4).

On receipt of a telephone message from the deceased requesting him to come to the Joseph Frazer Nursing Home, Mr. Neelakandan had gone there on 2.1.85. The deceased had told him that he wanted a Power of Attorney executed as he intended going to the United Kingdom for treatment. He had wanted it to be signed on 4.1.85. The deceased had further told him that Mr. Murugesu had attested a last will for him and had requested Mr. Neelakandan to bring Mr. Murugesu also on 4.1.85 with a copy of that last will as he wanted to execute a new last will. Accordingly, Mr. Murugesu and Mr. Neelakandan had gone to the said Nursing Home on 4.1.85 and Mr. Neelakandan had executed the Power of Attorney No. 475 dated 4.1.85 (P6). Mr. Murugesu had taken the previous Last Will No. 1147 dated 3.11.75 (P3) and Codicil No. 1620 dated 12.5.80 (P4). The deceased had perused the last will and the codicil and had then given instructions regarding the preparation of a fresh last will. Mr. Neelakandan had taken down those instructions which have been produced marked (P7). A date had then been fixed for the signing of the last will, viz, the 7th of January. On that day Mr. Murugesu, Mr. Neelakandan and Mrs. Neelakandan had gone to the Nursing Home at about 6 or 6.30 p.m. Mr. Murugesu had handed over the new last will to the deceased who had been seated on his bed. He had taken it in his hand and had read it and had been satisfied with it. The deceased had wanted clarification on certain matters which had been explained to him by Mr. Murugesu and the deceased had signed the last will in the presence of Mr. Neelakandan and his wife who too had signed same as attesting witnesses and it had been attested by Mr. Murugesu as Notary.

It would be convenient at this stage to examine whether the previous last will (P3) and the codicil (P4) were properly in evidence before the Court. The record indicates that they were marked in evidence subject to proof but at the end of the petitioners' case the documents (P1) to (P7) (including the said last will and the codicil) had been read in evidence without objec-

tion and the petitioners' case closed. The last will (P3) had been produced in evidence through Mr. Murugesu who was the attesting notary. The codicil (P4) too had similarly been produced in evidence through Mr. Murugesu, who had also attested the same. One of the attesting witnesses to the said codicil had been Mr. Neelakandan who has identified his signature as well as that of the other attesting witness, K. Murugesu. Thus, in regard to the codicil, the attesting notary and one other attesting witness had given evidence. Even learned counsel for the intervenient, therefore, accepted before us that though the codicil had been produced subject to proof, it had been proved in evidence later.

The codicil refers to the previous last will (P3). The deceased had, by the last will (P3), appointed his wife to be the executrix and if she should be unwilling or unable to act, his son-in-law Wadugodapitiya to be the executor. By this codicil (P3) he had once again appointed his wife to be and if she should be unwilling or unable to act, then he had appointed his daughter, the 1st petitioner to be the executrix, followed by two other persons. Paragraph 3 of the said codicil states that "in all other respects I hereby confirm the said Last Will and Testament No. 1147 which shall be in force and shall be read and construed with this Codicil."

The codicil having been admittedly proved in evidence, the existence of the previous last will (P3), which had thereby been confirmed, was never in doubt. It was the contention of learned counsel for the intervenient that Section 68 of the Evidence Ordinance had not been complied with in regard to the previous last will under which section 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.

She further submitted that the petitioners should have proved the previous last will in terms of the provisions of Section 524 of the Civil Procedure Code. That section deals with

the mode of application and proof of a will for the grant of probate thereon. But, the petitioners in this case were not seeking to obtain probate as executors of the previous last will, but only to use that last will as an item of evidence for the purposes of the present case. To so use it in evidence, Section 68 of the Evidence Ordinance requires an attesting witness at least to be called for the purpose of proving its execution. While learned counsel for the petitioners argued that by reason of it being produced in evidence through Mr. Murugesu who was the Notary who had attested the said last will, there was sufficient compliance with Section 68 of the Evidence Ordinance, learned counsel for the intervenient submitted that it was not properly in evidence before the Court.

It has been held in *Wijegoonetilleke v. Wijegoonetillake* (7) that a Notary who attests a deed is an attesting witness within the meaning of that expression in Sections 68 and 69 of the Evidence Ordinance. The contention in that case too was that a Notary was not an attesting witness for the purpose of Section 68 of the Evidence Ordinance, but the Supreme Court held otherwise.

Learned Counsel for the intervenient, however, submitted that, that authority refers to the attestation of a deed but not to that of a last will and sought to distinguish that case. But it is relevant to note that Section 4 of the Prevention of Frauds Ordinance too uses the words "in the presence of a licensed notary public and two or more witnesses who shall be present at the same time" in regard to wills, as Section 2 does in regard to deeds. The decision in *Wijegoonetilleke v. Wijegoonetilleke (supra)* is as to 'who is an attesting witness?' I see no difference in the manner of proof of execution of either class of documents and I am of opinion that the aforesaid decision applies with equal force to a will that is produced as an item of evidence.

When the petitioners' case was closed reading in evidence (P1) to (P7) (which includes (P3) the previous last will) no objection was taken by the intervenient. It has been held in *Hemapala v. Abeyratne,* (8) where a deed was marked in evidence and when the case for the plaintiff was closed his counsel read the deed in evidence along with other documents, it was too late to raise the plea in appeal that no evidence has been called to prove due execution of the deed in terms of Section 68 of the Evidence Ordinance.

So also, in *Gunasekara v. Resanona* where a lease bond was produced by the plaintiff without any objection or protest and no issue was suggested either at the commencement of the trial or later, raising the question of the due execution of the said lease bond, it has been held that in these circumstances Section 68 of the Evidence Ordinance would not require the notary or an attesting witness to be called; being a document which is not 'forbidden by law to be received in evidence', the failure to object to it being received in evidence would amount to a waiver of the objection.

I am, therefore, of the view that the previous last will (P3) was also properly in evidence before the Court and could be considered for all purposes relevant to the matter in issue.

The previous last will (P3) is indeed very relevant for the purposes of this case as it provides an insight into the mind of the testator. The most significant factor is that both under the previous last will (P3) as well as under the present last will (P5), the intervenient was excluded and thereby disinherited.

In regard to the period when the previous last will (P3) came to be made in 1975, Mr. Murugesu has stated in evidence *inter alia* as follows: "Mr. Wijewardena consulted me regarding the first last will and he wanted me to specifically exclude the other daughter. I dissuaded him. That is because after his death there was a chance that family relationships will become harmonious... He mentioned to me that the other daughter

was a difficult character and there were many other reasons which I do not like to mention in Court. He did not have anything to do with her. It was a paternal break. He told me that she was not worthy of being his daughter."

Mr. Ellawala himself has stated in evidence that he and his wife (the intervenient) had ceased to visit the deceased from 1974, that from about 1974 to 1979 their feelings were very strained and that they were not on talking terms. This evidence clearly supports Mr. Murugesu's evidence that there had been a paternal break and that the deceased had nothing to do with the intervenient.

What the intervenient was seeking to establish is that though there was this state of strained feelings at that stage, there was a change in their relationship from about 1980 and if not for the undue influence exercised on the deceased over the years, the intervenient would not have been left out by the deceased under the last will in question.

One must not, in that context, lose sight of the fact that the deceased had, by the codicil dated 12.5.80 (P4), confirmed the previous last will dated 3.11.75 (P3) in all respects other than in regard to the matter of executorship. So that, even in mid-1980, the intervenient continued to remain disinherited.

The only evidence of the alleged change in the relationship between the deceased and the Ellawala family comes from witness Ellawala, the husband of the intervenient. Even he makes reference only to three or four telephone conversations between him and the deceased over a period of about 5 years. His wife, the intervenient, and the deceased had not spoken to each other right up to the time of his death. The fact that they had not visited each other needs no emphasis. Ellawala, however, attributes their inability to have had a closer relationship with the deceased to the attitude of his mother-in-law, the wife of the deceased.

He has given a detailed account of the telephone conversations. Towards the end of 1980, the deceased had telephoned him in his office and had told him that he had heard that Ellawala and his wife had been away in England and the children had been all alone and had inquired as to why he was not informed and why the children were left alone. The deceased had further told Ellawala that Wadugodapitiya (the former husband of the 1st petitioner) had been giving trouble and was out of the company and that the 1st petitioner and the children were back at home and that he had been misled.

The next telephone call from the deceased had been in 1981 when he had told Ellawala that all attempts to reconcile had failed and that the 1st petitioner had filed a divorce action.

Ellawala then refers to two occasions in 1984 when the deceased contacted him, on the first of which he discussed the question of discharging a mortgage bond (R5) in respect of their house and then again in September, 1984 when the deceased mentioned about the 1st petitioner planning to get married in Church but seemed very unhappy about it.

Ellawala has virtually summed up his view of the attitude of the deceased at or about the time when the last will in question was executed in these words: "I think he had at that time realised that some harm had been done to us by believing stories. In my view, the testator had come to a stage where he wanted to reconcile but he was frightened to take the initiative because he would have opposition from his wife".

From these items of evidence the learned trial judge comes to the following conclusions:—

"It is quite clear from his evidence that the relationship he had with the father-in-law (the deceased) was a cordial one and the father-in-law's attitude towards his wife too was a kind one... Further, it is quite evident from this witness' evidence that the relationship he had with the deceased was not only a cordial one, but quite a close and friendly one."

She then proceeds to state that any Court should believe this witness' evidence in its entirety without any hesitation. The only reason adduced by the learned trial judge is that "though this witness was subjected to lengthy cross-examination, the position taken up by him in examination-in-chief was quite satisfactorily maintained by him in cross-examination."

But, unfortunately the trial judge has made no attempt to analyse or evaluate the evidence of this witness against the backdrop of the other evidence in the case, both oral and documentary. The 'lengthy cross-examination' which she refers to runs into barely 6 pages, whereas the evidence-in-chief covers about 20 pages.

Even taking Ellawala's evidence at its very highest, it does not in any way establish that the relations between the intervenient and the deceased were cordial during the period in question. He himself does not claim that apart from the telephone conversations eferred to above, there was any personal contact between him and the deceased. In this state of the evidence, one sees no basis for the trial judge's conclusion that the relationship between Ellawala and deceased was not only a cordial one but quite a close and friendly one. There is also no evidence to show that the deceased's attitude towards the intervenient was a kind one.

In regard to the discharge of the mortgage bond (R5) in respect of the residential premises of the intervenient, there is only Ellawala's word that the deceased treated it as a gift from him. But, the instrument of discharge No. 750 dated 4.6.84 attested by J. Eardley Seneviratne, Notary Public (R9) specifically states that all sums due on the said mortgage bond, whether on account of principal, interest or otherwise had been paid by the intervenient to the deceased on 30.3.84.

Thus, in the absence of satisfactory evidence of a radical change in the attitude of the deceased towards the intervenient at or about the time that the last will was executed in January, 1985, one sees nothing unnatural or irrational in that will.

In *Karthelis Appuhamy v. Siriwardene*(10), where the testator excluded certain blood relations from specific devises of his acquired property, it has been held that the will was not unreasonable or unnatural and that the actual feelings of the testator towards his relatives should be considered in deciding whether a will is reasonable and natural or not.

In my opinion, therefore, the last will (P5) is a rational or natural will.

As discussed above, where a will is shown to be rational and duly executed, there is a presumption that the testator had testamentary capacity. Ordinarily, therefore, such a will would be admitted to probate unless the competence of the testator is called in question. But as was laid down in the leading case of *Barry v. Butlin.* (11), 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 principle laid down in *Barry v. Butlin* (supra) was supplemented in *Tyrell v. Painton,* (12) (1894) Probate 151 where it was stated that wherever 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 the instant case, I have already demonstrated that the will was both rational and duly executed. What remains to be examined is whether the material placed before the Court by the propounders was sufficient to satisfy the conscience of the Court and if well-grounded suspicions did exist, whether they had been removed.

Learned counsel for the intervenient submitted that suspicious circumstances did exist. She sought to categorise them as follows:—

(i) the condition of the testator's mind was feeble
(ii) the dispositions were unfair

(iii) the testator was overawed by powerful minds
(iv) the propounder had taken a prominent part in the execution of the will.

It should be remembered that such suspicious circumstances should have been existing at the time of and surrounding the preparation and execution of the will. (vide Davis v. Mayhew (13)).

The learned trial judge has, in the course of the judgement, made the following observations:—

> "The deceased being a person who almost had no degree of independence and who has had no freedom to act according to his own free will (as evidenced by how the deceased had given the house and property to the intervenient making it look as a mortgage), when giving instructions as to the preparation of the will too, it is difficult to believe that he had no influence by his wife who had been present there".

The house and property transaction referred to by the judge relates to the purported sale of the residential house to the intervenient by the deceased by deed No. 1222 dated 12.1.74 (R4) and the mortgage of the same to the deceased by deed No. 1223 of the same date (R5), the latter transaction apparently been kept a secret from the wife of the deceased. Does this not indicate that whatever the pressures may have been from his wife, the deceased had the capacity to find ways and means of achieving his objectives and giving effect to his intentions?

As regards the propounder, the judge states as follows:—

> "According to Mr. Neelakandan's evidence, the 1st petitioner had been near the door of the room at the time of execution. In *Fernando v. Peiris* (14) the observation was made that the mere presence of the petitioner (a devisee under the will) at the time of exe-

cution is insufficient. The 1st petitioner's presence at the time of execution has to be treated as a natural fact"

So, even the learned trial judge herself does not say that the propounder had taken a prominent part in the execution of the will.

There is also no evidence to indicate that the condition of the testator's mind was feeble at the time of execution of the will. The Nurses' Reports of the Joseph Frazer Nursing Home (R11A) to (R11R) and (R12) are not of any assistance in determining the condition of the testator's mind.

I have already referred to the absence of evidence pointing to a change in the attitude of the testator towards intervenient in or about January, 1985. Consequently, the dispositions cannot be termed 'unfair' from the point of view of the testator. As was said in *Andrado v. Silva* (15) it is not part of the duty of the Court to see that a testator makes a just distribution of his property so long as he properly appreciates what he is doing.

I am, therefore, unable to persuade myself that any of the suspicious circumstances mentioned by learned counsel for the intervenient did exist at the time of making the will.

But, what the trial judge considered to be a suspicious circumstance is the failure of the Notary to seek medical opinion as regards the competency of the testator at the time of taking instructions for the preparation of the will or at the stage of executing it.

In the instant case, the testamentary capacity of the testator was never in issue. I have, at a previous stage, referred to the non-medical evidence that has been given in regard to the competency of the testator. Instances when the Courts have relied on the testimony of non-medical witnesses to decide whether a testator had a sound disposing mind are seen in

Perera v. Perera, (16) *Andrado v. Silva* (15) and *Gunasekera v. Gunasekera* (4), I do not think it is the law that medical evidence is a *sine qa non* for proving the mental capacity of a testator in each and every case. The Nurses' Reports (R11A) to (R11R) and (R12), also do not lead one to the conclusion that the testator lacked mental capacity. Therefore, to my mind, the failure of the Notary to consult medical opinion in this regard per se is not a well grounded suspicious circumstance.

I shall now turn to the learned trial judge's finding, on the basis of the affirmative answer to issue No. 4, that the said last will was signed under undue influence, intimidation and illegal compulsion. This was not even Ellawala's position. He only stated that there was undue influence on the deceased over the years to keep the intervenient out. He has not even claimed that any undue influence had been exercised over the deceased at the time of making the will.

It has been held in *Peiris v. Peiris,*, (17) that undue influence is not to be presumed but must be proved by the party alleging it and in order to be undue, the influence must amount to coercion or fraud.

It has again been held in *Gray v. Kretser,* (18) that in order to establish undue influence, there must be something in the nature of coercion or fraud.. It must in fact be shown that the document impeached is not really that of the maker, in the sense that he had not a consenting mind to its terms.

So also, in *Andrado v. Silva,* (15) it has been held that the burden of proof of undue influence is on those who allege it and that it cannot be presumed.

In *Brampynona v. Vithanage,* (19) it has been held that there must be evidence that there was the exercise upon the mind of the testator of coercion or mental ascendency which is the equivalent of coercion.

Suffice it to say that in the instant case such evidence is woefully lacking. One fails to comprehend how the learned trial judge could have answered that issue in the affirmative. Intimidation and illegal compulsion apart, there is not even a semblance of evidence of undue influence exercised on the testator at the time of signing the will.

Learned counsel for the intervenient addressed us at length on the functions of an Appellate Court regarding questions of fact and submitted that testamentary capacity being such a question of fact, it was a matter within the purview of the original court. She urged that it was not for this Court to decide whether the deceased had testamentary capacity but whether the trial judge was plainly wrong in holding that the petitioners had not discharged that burden.

In *De Silva v Seneviratne*, (20) Ranasinghe, J. (as His Lordship the Chief Justice then was) dealt comprehensively with this question and summarised the principles applicable to the review of findings of fact by an Appellate Court as follows:—

(a) Where the findings on the 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 his advantage of seeing and listening to the witnesses and the Appellate Court is convinced by the plainest considerations that it would be justified in doing so;

(b) That however 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 a trial judge;

(c) Where it appears to an Appellate Court that on either of these grounds the findings of fact by a trial judge should be reversed then the Appellate Court "ought not to shrink from that task."

This judgement has been cited with approval in *Lily v. Chandani Perera and Others* (21).

As stated above, the learned trial judge was in gross error in regard to the findings of fact. As the judgement came to be written over two years after the conclusion of the evidence, whatever advantage the trial judge may have had by reason of seeing and listening to the witnesses would also have been greatly diminished on account of the long delay. I have already made my observations with regard to the non-evaluation of the evidence by the trial judge. Applying the principles laid down in *de Silva v. Seneviratne*, this case calls for a reversal of the findings of fact by the learned trial judge, as the basis of such findings is clearly and demonstrably erroneous.

I would accordingly set aside the order of the learned District Judge dated 28.11.89 and direct that the order nisi made on 22.2.85 be made absolute. I would further make order that the Last Will No. 2137 dated 7.1.85 attested by V. Murugesu, Notary Public, be declared proved and that the same be admitted to probate and that probate be accordingly granted to the petitioners.

The appeal is allowed with costs.

In view of this order, no further order is necessary in Revision Application No. 1031/89. As the appeal and that application were taken up for argument together, I make no order as regards costs in respect of that application.

ANANDACOOMARASWAMY, J.— I agree.

WEERASEKERA, J. — I agree.

Appeal allowed.

(Note by Editor: Leave to appeal to the Supreme Court was refused by the Court of Appeal on 02.08.1991.. Application No. 118/91 to the Supreme Court for Special Leave to appeal was also refused on 19.12.1991. This order is being reported.)