WIJEWARDANE
v.
DE SOYSA

COURT OF APPEAL
TILAKAWARDANE, J., AND
UDALAGAMA, J.
CA NO. 1034/98 (F)
DC MT. LAVANIA NO. 209/95/T
APRIL 2, 2001

Last will – Undue influence – Testamentary capacity of testator – Rules of law in proving a last will – Onus probandi.

Held:

(1) There are two relevant Rules of Law in proving a Last Will. The first is that *onus probandi* lies in every case upon the party propounding the Will, and he must satisfy the conscience of the Court that the instrument so propounded was the Last Will of a free and capable testator. The second is that if a party prepares a Will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and calls upon it to be vigilant and jealous in examining the evidence in 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 free will of the deceased.

(2) The onus of proving fraud or undue influence is upon those who oppose the Will. To impeach a Will on the ground of undue influence, it must be proved that the influence exercised amounted to coercion. The fact that a person is a friend and confidante of the testator is not proof that there was *undue influence.*

(3) The evidence does not disclose that there was a well grounded suspicion that the Will did not express the mind of the testator.

APPEAL from the District Court of Mt. Lavinia.

Cases referred to:

1. *N. Sithamparanathan v. Muthuranayagam* – 73 NLR 53.
2. *Tyrell v. Painton* – 1894 Probate 151 at 159.
3. *Barry v. Buttin* – 1838 2 Moo PC 430.
4. *Perera v. Perera* – (1901) AC 354.
5. *Parker v. Felgate* – (1883) 8 PD 171.

M. H. B. Morais for defendant-appellant.

N. R. M. Daluwatte, PC with *Gamini Silva* for plaintiff-respondent.

Cur. adv. vult.

May 30, 2001

SHIRANEE TILAKAWARDANE, J.

This Appeal has been preferred against the judgment of the District 1
Judge, Mt. Lavinia dated 09. 09. 1998 wherein he had granted probate to the petitioner and dismissed the objections of substituted respondents.

The only matter to be decided by this court was whether the Last Will of the deceased Molligoda Usliyanage Lionel Surasena de Silva bearing No. 2716 dated 12. 03. 1989 (A) attested by Earl Russell de Soysa, Notary Public, was the act and deed of the testator.

The Counsel for the substituted defendant-appellant submitted that the testator had been unduly influenced at the time the Last Will was 10
prepared and signed. He submitted that, therefore, it should be set aside, as on the grounds of undue influence it could not be considered to be the act and deed of the testator.

It has been held in the case of *N. Sithamparanathan v. Muthuranayagam*[1] that, "whenever a Will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind or Will of the testator a Court should not pronounce in favour of the testator unless and until that suspicion is removed".

Wherever such circumstance exists, and whatever their nature may be it is for those who propound the Will to remove such suspicion, and to prove affirmatively, that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the Will to prove fraud or undue influence, or whatever they rely on to displace the case made for proving the Will. (*Tyrell v. Painton*[2]).

There are two relevant Rules of Law in proving a Last Will. The first is that the *onus probandi* lies in every case upon the party propounding the Will; and he must satisfy the conscience of the Court that the instrument so propounded was the Last Will of a free and capable testator. The second is that if a party writes or prepares a Will under which he takes a benefit, that is circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased. (*Barry v. Butlin*[3]).

Ordinarily, those who propound a Will must show that the Will which probate is sought was the act and Will of the testator, and that the testator was a person of testamentary capacity.

In the case where there was no suggestion to the contrary, a person who was shown to have executed a Will in the ordinary form will be presumed to have testamentary capacity. The moment however that the capacity is called in question then at once the onus lies on those propounding the Will to affirm positively the testamentary capacity of the testator.

The first matter to be considered by this Court was whether there were well-grounded suspicions regarding the testamentary capacity of the testator or whether the Will was really the act and deed of the testator.

Admittedly, the petitioner was no relation of the deceased. The petitioner had been a close friend with the deceased from 1967. The testator was employed in the FAO division of the UNDP. The petitioner was employed in the UNDP as an Administrative Officer, a job that the deceased had secured for him. Their friendship was such that they met on a daily basis, and would be seen almost every evening sharing a drink at the club. The petitioner had regularly driven the testator around over the many years of their association. The testator had prepared and earlier Will which the petitioner had signed as a witness. The testator had referred to him as his 'dear friend' in his Will bearing No. 2716 dated 12. 03 1989 (P3), which had been prepared after the demise of his sister. There was no doubt that they were "inseparable friends" as observed by the District Judge. The petitioner had been with the testator during his last days in Delmon Hospital and after the death of the testator on 10. 01. 1995 he had informed a relative of the deceased, one Douglas Sirimanne. The petitioner had made all the funeral arrangements.

According to the evidence disclosed at the trial the only relation the testator had associated with in his lifetime was his sister, Kusumawathy, who had been residing with him. In fact, under his earlier Will bearing No. 2048 dated 24. 08. 1978 (P4) she had been his sole beneficiary. In 1988 she had predeceased the testator. Thereafter, he had written a fresh Will (A) bequeathing all his movable and immovable property to the petitioner. Before he prepared the Will he had given written instructions (P3) regarding the preparation of the Will to his Notary who produced it at the trial.

Counsel for the substituted defendant-appellant submitted that one of the 'suspicious' circumstances was that the obituary notice of the testator had not contained the names of other members of the immediate family. The petitioner explained this by producing P5, the press notice pertaining to the death of Kusumawathy, the sister who predeceased the testator. He was able to prove that in that notice too the names of other members of the family had been excluded. Mention had only

been made in the said press notice of the testator. The petitioner explained that apart from his relationship with this sister the testator hardly had any other dealings with his other relations. He thereby proved that the only relative who had been associated with the testator was Kusumawathy, his deceased sister. The testator clearly appears to have deliberately cut off association with his other relatives as he had estranged relationships with them.

It is evident therefore that the press notice regarding the obituary of the testator had similarly been inserted in accordance with his wishes. The names of his other relatives being accordingly omitted even when notifying the relatives of the testator's death he had followed the pattern that had been followed by the testator concerning the death of Kusumawathie. At that time the testator had only informed Douglas Sirimanne who had in turn informed the others. When the testator died the petitioner too had only informed the same Douglas Sirimanne.

So it cannot be inferred that grounds for suspicion existed either because their names had not been included in the obituary or because the petitioner had failed to inform them individually of the testator's death. I, therefore, find that on the evidence of this case no circumstances of suspicion have arisen as to the conduct of the petitioner. His conduct regarding the press notice and the notification of the testator's death to his relatives can be reasonably explained in the light of the aforesaid antecedent circumstances.

This Court is also satisfied that the petitioner had proved that the Will was the act and deed of a capable testator who had sufficient mental faculties to fully comprehend the testamentary act he had done. The evidence does not disclose that there was a well-grounded suspicion that the Will did not express the mind of the testator. He clearly knew and approved of the contents of the Will P3. In this case no circumstances of suspicion as to the free volition of the testator was evident in the case.

The next matter to be considered was the allegation by counsel appearing for substituted defendant-appellant that there was undue influence brought upon the testator at the time he drew up his Will. This was not pleaded nor raised at the trial as an issue by the defendants.

The onus of proving fraud or undue influence is upon those who oppose the Will. To impeach a Will on the ground of undue influence, it must be proved that the influence exercised amounted to coercion. That it compelled the testator to do something he did not want to do. The fact that a person is a friend and confidante of the testator is not proof that there was undue influence. There may have been influence, but unless that influence amounted to coercion or where it compelled the testator to do what he did not want to do, it was not illegal. The existence of a relationship even a fiduciary one does not create a presumption of undue influence. A person having a relationship may legitimately importune a testator for a legacy so long as the importunity does not amount to coercion or fraud.

Counsel submitted that as the petitioner knew the Notary, and he had personally escorted the testator to the drawing of the Will it showed undue influence. Both these are matters that are equally consistent with the degree of their intimacy as it appears that the petitioner regularly escorted the testator on his errands. Even after the execution of the Will it had been the petitioner who had collected the Will on the testator's authorization (page 104). In any event the Will had been drawn in 1989 and the testator had died in 1995. This gave the testator several years to consider the contents of his Will and if he so desired to change its contents. He had chosen not to do so.

Counsel has also referred this Court to certain minor discrepancies regarding matters relating to the form of the Will. The Notary and witness Gordon Peiris contradicted the petitioner with regard to the place of execution and attestation. But, since the former says

Mt. Lavinia and the latter says Ratmalana, Lumbini Road (which is situated between Ratmalana and Mt. Lavinia) and even counsel referred to it as a "minor difference" it does not bear much significance.

Additionally, the testator had given specific written instructions (P3) that are clearly consistent with the contents of the disputed Will. 150
It has been held that *it is sufficient* if the testator, at the moment of execution, believes the Will to be and if the Will is in accordance with the instructions previously given (*Perera v. Perera*[4] *Parker v. Felgate*[5]).

In all these circumstances I find that there is no evidence to sustain the allegation that there had been undue influence on the testator or that he had been forced to do what he did not wish to do. I accordingly dismiss the appeal with taxed costs payable by the substituted defendant-appellant to the petitioner-respondent.

TILAKAWARDANE, J. – I agree.

UDALAGAMA, J. – I agree.

Appeal dismissed.