FERNANDO
v.
DE SILVA AND OTHERS

COURT OF APPEAL
WEERASURIYA, J. AND
DISSANAYAKE, J.
CA NO. 1045/93 (F)
DC KURUNEGALA NO. 6860 (Testamentary)
JULY 06, 2000

Testamentary Proceedings – Last Will, due execution – Not the wilful act and deed of deceased – Doubts and suspicion – Duty of propounder of the Last Will.

The petitioner-appellant filed action to have the Last Will and Testament of A proved. The 2nd and 3rd respondents-respondents objected to same stating that the Last Will was not the wilful act and deed of the deceased. The District Court dismissed the action.

On appeal –

Held:

(1) The petitioner has failed to lead evidence to remove the doubts and suspicion that have arisen in the mind of the Trial Judge to satisfy his conscience that the Last Will was the act and deed of a free and wilful executrix.

(2) It is the duty of the propounder of the Last Will to have led evidence to remove doubts and suspicions that arose in evidence.

(3) The evidence of the Proctor who prepared the Will is not conclusive as to the mental capacity of the testator.

(4) The Judge when he considers the mental condition of the testatrix at the time she signed the Will must put himself the question "Whether the mental faculties of the testator retained sufficient strength fully to comprehend her testamentary act about to be done".

APPEAL from the judgment of the District Court of Kurunegala.

Cases referred to:

1. *Meenadchipillai v. S. Karthigesu & Others* – 61 NLR 320.
2. *Anantha Thurai v. S. Kanageratnam* – 50 NLR 361.
3. *Gunawardene v. Cabraal* – 1980 – 2 SLR 20.
4. *Sithamparanathan v. Maturanayagam* – 73 NLR 53.
5. *Alim Will Case* – 20 NLR 481.
6. *Andrado v. de Silva* – 22 NLR 4.

Anil Silva with *Wasantha Perera* for substituted petitioner-appellant.

I. S. de Silva for 2nd and 3rd respondents.

Cur. adv. vult.

September 15, 2000

DISSANAYAKE, J.

The petitioner-appellant (hereinafter referred to as the petitioner) by her Petition dated 30. 01. 1986 filed this action to have the Last Will and testament of Therese Millicent Anthony, who died on 03. 09. 1985, proved. The 2nd and 3d respondent-respondents (be hereinafter referred to as 2nd and 3rd respondents) who were daughter and the husband of the deceased testatrix, respectively, by their objection dated 20. 08 1986, whilst denying the averments in the petition, averred that the Last Will was not the wilful act and deed of the deceased testatrix; it was not properly executed; the petitioner was unfit to be appointed executor, as she was subject to treatment for mental illness; and prayed for dismissal of the petition of the petitioner and prayed the 3rd respondent be appointed as the Administrator of the deceased's estate.

The case proceeded to trial on 14 issues. The learned District Judge, by his judgment dated 9th March, 1993, dismissed the Petition of the petitioner with costs and ordered the issue of letters of administration to the 3rd respondent.

The petitioner preferred this appeal from the aforesaid judgment.

The Counsel for the petitioner contended that the learned District Judge was in error when he came to the finding that there were suspicious circumstances and that the petitioner has not removed those suspicions that arose from the facts of the case, when in fact, one of the attesting witnesses to the Will testified to the fact that the said Last Will was typed and signed by the testatrix herself in her presence. The petitioner who is the sister of the testatrix did not give evidence. The 1st respondent and Randeni Aratchchige Mary Indrani, one of the attesting witnesses, gave evidence on behalf of the petitioner. The 3rd respondent gave evidence on behalf of the respondents.

The following suspicious circumstances emerged from the evidence led in the case which gave rise to the question whether the Last Will (P1) was the wilful act and deed of the testatrix :

(1) That the deceased was subject to Epileptic fits and was under treatment for it;

(2) During 1971 to 1972 she was mentally depressed and she did not understand the nature and effect of what she was doing;

(3) That she was treated by Drs. Wijenaike, H. P. Pieris and Nalaka Mendis and was on medications called Artene, Mysolene, Mogodon, etc., and tranquilizers like stellazinine, Modicot I. V. injections, etc.;

(4) That the deceased's first conception in December, 1971, ended up in an abortion and she was warded at St. Michael's Nursing Home;

(5) Thereafter, she was taken to Kurunegala by the deceased's mother, brothers and sisters and lived there with them till Christmas 1972 when her husband, the 3rd respondent, lived in Colombo and visited her during week-ends and the Last Will (P1) which is dated 22. 11. 72 has been signed during this period;

(6) The fact that none of the said three doctors was called to give evidence by the petitioner to testify to the mental capacity of

the testatrix at or about the time she executed the Last Will (P1);

(7) The 3rd respondent was not told anything about the Last Will by the testatrix or her brothers and sisters;

(8) Although the attesting witness of Last Will (P1) Randeni Arachchige Mary Indrani gave evidence that the testatrix typed and signed the Last Will (P1), still in the absence of medical evidence with regard to her mental capacity during that period, in the background of her mental health, the suspicion whether the testatrix understood the nature and effect of what she was doing has not been removed;

(9) The petitioner and the 1st respondent who were the beneficiaries of the Last Will (P1) were both sisters of the deceased and both were unmarried at the time and both of them are the sisters of the Notary, L. D. de Silva, who attested the Last Will (P1) and after the said two beneficiaries, the said property will devolve on the other sisters and brothers, including the Attorney and Notary who executed the Last Will (P1);

(10) The 3rd respondent who was the husband of the deceased did not get any rights under the Last Will (P1);

(11) Out of the 16 letters produced, which were said to have been sent to the 1st respondent in America, the letters which are in close proximity to the date of the Last Will (P1) were letter dated 11. 02. 1972 (P20) which is about 10 months prior to the execution of the Last Will (P1) and the letter dated 29. 03. 1974 (P9) which is more than one year after the execution of the Last Will (P1), which indicated from the said evidence that either after the execution of the Last Will (P1) the deceased testatrix did not send any letters to the 1st respondent during the said period of one year or the 1st respondent only produced letters carefully selected by her from among other letters;

(12) The evidence of the 1st respondent that except in the letter which accompanied the Last Will (P1) which was not produced

in Court and was said to be lost, the deceased never discussed with her any matter regarding the said Last Will even though she spent four months with her in America in 1975;

(13) And the evidence that the testatrix did not utter a word to any one with regard to the execution of the Last Will (P1) cannot be believed, if a sound frame of mind is attributed to her. The evidence that the deceased after executing the Last Will (P1) secretly posted it to the 1st respondent in America and did not ask the 1st respondent at least whether she received the Last Will (P1) is also difficult to be believed;

(14) If the Last Will (P1) has been executed devising the house to the two sisters, the 1st respondent and the petitioner, there was no necessity for the testatrix to write the letter dated 20. 09. 1975 (P12) nearly three years after the execution of the Last Will (P1), to her mother stating that she intended taking a decision towards selling of the house depending on whether her mother is going to reside in America permanently or otherwise.

It was the duty of the propounder of the Last Will, i.e. to the petitioner, to have led evidence to remove the above doubts and suspicions that arose in the evidence.

The learned District Judge in his judgment adverted to the above suspicious circumstances that have arisen in his mind with regard to the execution of the Last Will (P1).

On an examination of the evidence led in the case, the petitioner has failed to lead evidence to remove the doubts and suspicions that have arisen in the mind of the learned District Judge to satisfy his conscience that P1 was the act and deed of a free and wilful executrix.

In the case of *Meenadchipillai v. S. Karthigesu & Others*[1] 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 suspicions 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 onto those who oppose the Will to prove fraud or undue influence or whatever else they may rely onto displace the case made for proving the Will. The following circumstances were held to be suspicious in the said case :

1. Where the Testator died after 7 hours after the execution of the Will, in a hospital :

   (i) The Testator was so ill at the time of the execution of the Will that he was unable to speak or he was unable to hold the pen to write his signature;

   (ii) The Notary did not take the obvious precaution of consulting a doctor at the time he took instructions or at the time he was executing the Will.

2. The petitioner who was the widow of the Testator and to whom the bulk of the property was devised was a near relation of the notary.

3. Witnesses to the Will were not of independent character.

It has been held in *Anantha Thurai v. S. Kanageratnam*[2] where a person who writes or prepares a Last Will takes some benefit under it, this fact gives rise to a suspicion that the Last Will does not express the mind of the testator. A Court ought, in such circumstances, be vigilant in examining the evidence in support of the instrument and should not pronounce in its favour unless the suspicion is removed.

It has been also held in *Gunawardena v. Cabraal*[3] the circumstance attending the executed 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.

Again, in the case of *Sithamparanathan v. Mathuranayagam,*[4] it has been held that if a party writes or prepares a Will under which he takes a benefit or wherever a Will is prepared under circumstances which raise a well-ground 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. The Judge when he considers the mental condition of the testator at the time he signed the Will, must put himself the question "whether the mental faculties of the testator retained strength fully to comprehend the testamentary act about to be done". The evidence of the Proctor who prepared the Will is not conclusive as to the mental capacity of the testator.

In the *Alim Will case,*[5] it was held that where a suspicion attaches to a Will, the Court must be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased. The same principles were laid down in the case of *Andrado v. de Silva.*[6]

Therefore, it would appear, the findings of the learned District Judge that the petitioner has not proved the proper execution of P1, is bound to succeed and he had rightly considered the estate as one of intestacy and granted administration to the 3rd respondent.

For the above reasons I see no reason to interfere with the findings of the learned District Judge.

Therefore, I dismiss the appeal of the petitioner with costs.

WEERASURIYA, J. – I agree.

Application dismissed.