IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRILANKA

Merusinghe Pahalage Nandika,

Ankokkawala,

Galle.

Petitioner

C A 919 / 2000 (F)

D.C. Galle No. 9898 / T

Vs.

1. Gonsal Koralalage Mahindasena,
   Yatagala
   Unawatuna.
2. Weligoda Gamage Gnanawathie,
   Gamagewatta, Attaragoda,
   Yatagala, Unawatuna.

Respondents

NOW BETWEEN

2. Weligoda Gamage Gnanawathie,
   Gamagewatta, Attaragoda,
   Yatagala, Unawatuna.

2nd Respondent Appellant

Vs.

Merusinghe Pahalage Nandika,

Ankokkawala,

Galle.

Petitioner Respondent

1. Gonsal Koralalage Mahindasena,
   Yatagala,
   Unawatuna.

1st Respondent-Respondent

BEFORE	:	UPALY ABEYRATHNE, J.
COUNSEL	:	D.M.G. Dissanayake with K.K. Farooq for the Appellant
		Maduranga Ratnayake with Dinesh Abeysundara for the Petitioner Respondent
ARGUED ON	:	13.12.2011
DECIDED ON	:	03.05.2012

UPALY ABEYRATHNE, J.

The Petitioner Respondent (hereinafter referred to as the Respondent) instituted the said action in the District Court of Galle seeking to have a will No. 5431 dated 26.09.1988 attested by S.P. Gunawardena, Notary Public, proved and to grant Probate. The 2nd Respondent-Appellant (hereinafter referred to as the Appellant) filed a statement of objection against the said application. The Appellant's position was that the Last Will annexed to the Petition was a forgery. The learned District Judge after inquiry delivered an order in favour of the Respondent. Being aggrieved by the said order dated 30.08.2000 the Appellant has appealed to this court.

The learned counsel for the Appellant submitted that the propounder of the last will should prove that it is an act and deed of the testator and should adduce evidence to remove all suspicious circumstances when there were materials to shock the conscience of the court. I now deal with the said submission.

Where an application for probate of a will is made the propounder of the last will should prove that the instrument sought to be admitted is an act and deed of the testator. The burden of proof can be discharged by proof of due execution of the last will. If there is nothing inherently 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. If there is no such evidence adduce by the objector a will be held to be proved on the evidence of due execution of the last will unless suspicion attaches to the instrument by its very nature.

In the case of Gunasekera Vs. Gunasekera 41 NLR 351 Nihil J held 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."

In the case of De Silva and Others Vs Seneviratne and Others (1981) 2 SLR 7 it was held that "The propounder of a Last Will must prove that the document in question is the act and deed of a free and capable testator; that the testator was not only aware of but also approved of the contents of the said document; that the testator intended the document to be his Last Will; that the said document had been duly executed according to law. If there exists facts and circumstances which arouse the suspicion of the Court in regard to any matter which has to be proved by the propounder then it is the duty of the propounder to remove all such doubts and prove affirmatively the various elements which must be proved by him and the Court should then scrutinize the evidence led by the propounder with jealousy and should pronounce the alleged Last Will to be valid only if its conscience is satisfied in regard to the said matters. As to whether the evidence so placed before the Court is such as to satisfy the conscience of the Court is ultimately a question of fact for the trial judge."

In regard to the items of suspicious circumstances in the evidence of the case the learned counsel for the Appellant submitted that the testator was a person who could read and write. Mohomad Ailam, a coconut trader, who was the sole witness for the case of the Appellant, in his evidence producing a receipt (2V1), has said that the Testator has signed the said receipt. On the said evidence he further submitted that the Testator has signed the said document after the date of execution of the Last Will and therefore it has cast a doubt as to why the Testator placed his thumb impression on the Last Will.

Although the Appellant attack the validity of the Last Will on the aforesaid basis he did not opt to give evidence in this regard. He has closed his case leading only the evidence of Said Mohomad Ailam who has stated that during a period of 5 to 6 years he bought coconuts from Kalu Mahaththaya, the Testator and Kalu Mahaththaya signed the said document 2V1 dated 30.09.1988. Said Ailam has not said in evidence anything other than that.

On the other hand the Respondent has led evidence of 09 witnesses inclusive of the Respondent, the Notary Public who attested the Last Will and two witnesses to the Last Will. The Notary Public has stated that upon the instructions of the Testator the Last Will was drawn-up and after it was read out the Testator signed the Last Will placing his thumb impression and thereafter the two witnesses put their signature on it at the same time. The Appellant has not contradicted the said evidence.

In the case of Gunawardena Vs. Cabral and Others [1980] 2 SLR 220 it was held that "The onus of proving the will lies on the party propounding the will. 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. 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."

In the case of D.M. Abeysekera Vs. Vernon de Livera 71 NLR 465 Alles,J. observed that "but if the authenticity of the Will is challenged on the ground that the deceased was induced to sign the Will by the exercise of undue influence by a legatee, the objector must furnish sufficient particulars concerning the nature of the acts of undue influence, so as to enable the other side to meet the case even after fresh issues are framed by the Court in terms of section 146 of the Civil Procedure Code. The objections should not be "loose and vague" and must be "clear and specific and calculated to raise a reasonable doubt as to the genuineness or validity of the alleged Will".

Hence in the said circumstances it is safe to conclude that the alleged Last Will No 5431 dated 26.09.1988 was an act and deed of a free and capable person.

It must be placed on record the functions of an Appellate Court regarding questions of fact since the testamentary capacity being such a question of fact, it is a matter within the purview of the trial court. It should be noted that it is not for this Court to decide whether the deceased had testamentary capacity but whether the trial judge was plainly wrong in holding that the Petitioner has not discharged that burden.

In *De Silva v Seneviratne*, [1981] 2 Sri LR 7 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 Vs. Chandani Perera and Others [1990] 1 Sri LR 246.

For the foregoing reasons I dismiss the appeal of the Appellant with costs.

Appeal dismissed.

Judge of the Court of Appeal