

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

C.A. No. 740/2000(F)

D.C. Colombo Case No. 33169/T

Appa Kuttige Karolis Perera,
No. 189, Madinnagoda,
Rajagiriya.

Petitioner-Appellant

Vs.

Appa Kuttige Simion Perera,
No. 183, Madinnagoda,
Rajagiriya.

And 2 others

Respondents-Respondents

Before : **A.W.A. Salam, J.**

Counsel : Donald Dissanayake for the Petitioner-
Appellant and J.H. Wimalasena for the 1st
Respondent-Respondent.

Argued on : 19.05.2011

Written submissions tendered on : 23.06.2011

Decided on : 27.10.2011

A.W. Abdus Salam, J.

This appeal arises on the judgment of the learned District Judge dissolving the decree nisi entered in the case where the petitioner sought probate in respect of the estate of late Engalthina Perera. The petitioner filed papers in the District Court seeking to have the LAST WILL of Engalthina Perera proved and admitted to probate. The learned District Judge having entered an order nisi later after inquiry came to the conclusion that the petitioner has failed to prove that the WILL in question is the act and deed of the said Engalthina Perera. This appeal has been preferred against the said decision.

The respondent has raised a preliminary objection regarding the appeal preferred by the petitioner in that he has made reference to Section 754(2) of the Civil Procedure Code which deals with appeals against orders with the leave of the Court first had and obtained. Even though the appellant has referred to Section 754(2) of the CPC apparently the reference has been so made by inadvertence. However, upon a perusal of the petition of appeal and the procedure followed in preferring the appeal it is quite obvious that the petitioner has undoubtedly intended and in fact exercised the right of appeal under Section 754(1) of the CPC. In the circumstances, I am not inclined to accept the argument that the appeal should fail in *limine* for that reason.

The petitioner in this case claimed that the testatrix of the LAST WILL was spinster and lived with him during her life time looking after his motherless children. None of the respondents who challenged the LAST WILL according to the petitioner were interested in her welfare. His position was that the LAST WILL was

properly executed before a Notary Public and in fact the act and deed of the testatrix who was of disposing mind.

The respondents challenged the LAST WILL on several grounds. One of the strongest grounds urged by the respondents is that the signature appearing in the LAST WILL bearing No. 779 dated 07 February 1989 marked as P2 had not been signed by the testatrix but a forgery. The reasons adduced by the respondents for this allegation was that the testatrix was always known as Engalthina Prera and that she has signed the LAST WILL as Engalthina Perera. The learned District Judge has carefully considered this issue and come to the conclusion that the petitioner has not established the fact that the name Engalthina Prera has been changed to Engalthina Perera during the period of 40 years. In the midst of this serious allegation the learned District Judge has also considered the lack of expert evidence as to the genuineness of the signature appearing on the LAST WILL.

Besides, the learned district judge has also rightly commented adversely against the genuineness of the seal of the Notary Public placed on the purported LAST WILL. The deeds bearing No's 776 dated 12 January 1989, 777 dated 1 February 1989, 781 dated 1 March 1989 and 782 dated 12 March 1989 attested by the same notary carry a rubber seal which is substantially smaller in circumference and much shorter in diameter and radius than the rubber seal of the Notary that appears on the purported LAST WILL 779 dated 7 February 1989. This clearly shows that immediately prior to the larger rubber seal on the purported LAST WILL the Notary has placed a much smaller rubber seal on the

instruments executed before him. The reason as to why a different type of rubber seal has been placed on the impugned LAST WILL has not been explained satisfactorily by the petitioner.

Although the petitioner is not to be penalized for the lapse on the part of the Notary, the glaring contradiction in the description of the name of one of the witnesses to the LAST WILL cannot simply be ignored in a matter of this nature. Admittedly, Instead of Kankanamedara Sudath Somarathne who claims to have witnessed the LAST WILL, the Notary has mentioned in his attestation that one of the subscribing witnesses to the LAST WILL was Kankanamedara Somarathne. The witness Sudath Somarathne in giving evidence before the learned District Judge has admitted that it is his father's name that has been inserted in the attestation, despite the fact that he signed the LAST WILL.

The question with regard to the exact time at which the LAST WILL was executed was also a subject of controversy between the two attesting witnesses. According to one witness the execution of the LAST WILL had taken place in the morning while the other witness maintained that it was executed around 5 p.m.

It is trite law that those who propound a WILL must establish that the LAST WILL in respect of which he seeks probate is the will of the testator and in addition that the testator was of sound disposing mind. For the reasons analyzed in detail by the learned District Judge, the LAST WILL bearing No. 779 cannot be said to

have been established initially by the petitioner that it forms the LAST WILL of Engalthina Prera.

For the foregoing reasons the decision of the learned District Judge to dissolve the order nisi and to dismiss the testamentary action filed by the petitioner cannot be faulted based either on legal concepts or factual matters arising in the case. Hence, this Court has no option but to dismiss the appeal.

There shall be no costs.

Judge of the Court of Appeal

NT/-