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

In the matter of an appeal under the provisions of

Section 755(3) of the Civil Procedure Code.

D.C.Mount Lavinia

Case No: 2379/T

C.A.Appeal No: 543/95(F)

Mahapatabendige Edmund Piyasena formerly of

No:11, Old Waidya Road,

Dehiwela.

(Deceased)

Chula Subadra Dissanayake Mahawela also

Known as Chula Piyasena of

No:11, Waidya Road,

Dehiwela.

-PETITIONER

-vs-

R.M.Seelwathie Menike Piyasena of

No: 44, Waidya Road,

Dehiwela.

-INTERVENIENT-PETITIONER

AND NOW BETWEEN

Chula Subadra Dissanayake Mahawela also known as

Chula Piyasena of

No: 11 Old Waidya Road,

Dehiwela.

-PETITONER-APPELLANT

-vs-

R.M.Seelawathie Menike Piyasena of

No: 44 Waidya Road,

Dehiwela.

-INTERVENIENT PETITONER-RESPONDENT.

Counsel:Faiz Mustapah P.C. with H. Wittanachi
for the Petitioner/Appellant.
S.F.A.Cooray with Ruwan Gallage for the
Intervenient/Petitioner/Respondents.

Arguments:10-11-2010,23-11-2010

Written Submissions: 30-11-2009, 23-11-2011

Before: Rohini Marasinghe J

Judgment: 3. 5. 2011

CA 543-95

The Petitioner was the widow of one Edmund Piyasena. She had instituted action in the District Court seeking probate as the sole beneficiary of a Last Will. The said will was marked as P1. The respondent was the Widow of one Norman who was the brother of the said deceased Edmund. After inquiry the trial Judge had rejected the evidence of the petitioner and dismissed the action. This appeal is against that dismissal.

At the trial the petitioner, the Notary who executed the last Will and the attesting witnesses to the Last Will had given evidence. The respondent had given evidence against the Petitioner.

The learned trail Judge held;

1. The evidence of the petitioner was suspicious for the following reasons.

(i) She was told about the fact that her late husband had left a Will when they were on a way to kandy. A person who had done an

important act as writing a Last Will would not have told about it to his wife so casually.

(ii) She was told by her late husband who the beneficiaries under the Will were, but she could not remember what the late husband told her at that moment. And she did not ask the late husband who the beneficiaries of the Last Will were.

(iii) Until one week had passed after the information she received from her late husband that he had left a Last Will, She had not read the Will to find out who the beneficiaries were.

(iv) Her evidence that the relationship between her and the respondent family were not on good terms were inconsistent,

The Facts that her late husband was in good health and that the late husband and widow were living together in harmony were not in dispute. Throughout her evidence the petitioner maintained the fact that her late husband had informed her that he wanted to leave this property for her. And that they did not have money for stamp duty to write a deed of gift in her favour before his death. And she had further stated that she was aware that her late

husband would leave the property in her name and had no intention of leaving the property for anybody else.

The respondent claimed that said Edmund was in good health and had died intestate. Consequently, she claimed that this Will was not the act and deed of late Edmund.

The Notary who executed the Last Will also had given evidence. His evidence was;

That he knew said Edmund for about 20 years. Edmund tried to sell the house but could not sell the house. He had also tried to write a deed of gift. But Edmund found it difficult to provide the stamps for the registrations of the deed of gift. Edmund wanted to gift the house in issue to his wife and when he could not afford the stamp duty, he had sought his advice to write a Last will. Edmund gave the instructions of his intentions and he had written the instructions on a piece of paper. These instructions were put in the proper format and the Last Will was signed by Edmund and two witnesses on 7-12-1990. Edmund had brought along with him

one witness namely, the witness called Farook and the other witness was provided by the notary. Her name was Rita Perera. She was the notary's clerk. In the Last Will sole beneficiary was his wife. By the said Will, Edmund had bequeathed the house and property bearing assessment No's, 11 and 15, Old Waidaya Road Dehiwela. And the Last Will further states that "I hereby device and bequeath all the residue of my estate movable and immovable of whatever nature and where ever situate whether in possession expectancy or reversion nothing excepted unto my said wife CHUASUBADRA DISSANAYAKE KAHAWELA'. Consequently, the petitioner became the sole beneficiary under the Last Will of her deceased husband.

The Last Will was read by Edmund. And, after Edmund placed his signature the two witnesses had signed the Will on the same day. He had retained the protocol and the original had been given to Edmund. He was cross examined by the counsel for the respondent. In answer to one of the questions he admitted that he was suspended from office as a notary for one year. The reason being that in some other civil action a sum of rupees 10,000 was deposited with him by the plaintiff to be given to the defendant in

that action. He had failed to give that sum of money to the defendant as directed. As a result his office as a lawyer had been suspended in the year 1980 for a period of one year. This Last Will was written almost 8 years after the lapse of that suspension. He was questioned by court with regard to the piece of paper on which he wrote the instructions given by the deceased. But that sheet of paper was not annexed to the Last Will. The learned trial judge had commented on this fact in the impugned judgment. And had stated that, the notary not keeping the sheet of paper on which the instructions of the testator were written could not be believed by court.

The trial judge had also referred to the fact of suspension of the office of the lawyer for a period of one year. And the Judge also had mentioned that the stated fact was not relevant for this case as the suspended period had lapsed at the time the last Will was executed. Even though the trial judge had said it was irrelevant, as those facts had already gone into the record as evidence there was a strong likelihood of that evidence prejudicing the mind of

the trial judge when assessing the credit worthiness of that witness.

The first attesting witness to the Last Will was one Farook. He had given evidence and stated that he knew Edmund since 1970. He had requested him to sign as a witness and had taken him to the office of the Notary. He had signed the Will after it was signed by Edmund. It was signed in the office of the Notary.

The next attesting witness was Rita Perera. She was the court clerk of the notary. She also had given evidence and stated that she had signed the Will on the instructions of the notary.

The witness Farook was cross examined by the counsel for the respondent. He admitted signing the Will. That fact was not contradicted. He was asked whether he had seen Edmund sign any other document prior to that. His answer to that question was that he had not seen Edmund sign any other document prior to that, but he saw Edmund sign this document. The trial judge had rejected the evidence of this witness solely because he had not seen the signature of Edmund prior to this date.

The next witness was Rita. She was a clerk at the office of the Notary. She had been working as a clerk since 1981. She does not know Edmund. She had known Farook. Edmund had requested her to sign as a witness. The Notary had given her permission and she had signed the document as a witness. The only reason for the trial judge to reject the evidence of this witness was because she was a clerk of the Notary and had been in the habit of signing as a witness for Deeds and Wills prepared by the Notary.

I am of the view that the trial judge had rejected the evidence of the two witnesses unreasonably and not according to the rules of evidence pertaining to the proof of Wills.

Every Will to be valid should be executed in the manner provided in section 4 of the Prevention of Frauds Ordinance. A Will executed by a notary must be in writing and signed at the foot or at the end of the Will by the testator, in the presence of the two attesting witnesses who have acknowledged the signature of the testator by signing after the testator at the same time and at the same place. All such parties should sign in the presence of a

licensed Notary. Therefore, attestation is made by statute a necessary (compulsory) condition to the valid execution of any Will. Consequently, it is a settled rule that no Will which was attested could be proved otherwise than calling the witnesses or by proof of their signature in special cases such as – that the witnesses are dead or out of the jurisdiction of the court, or insane, or is missing and cannot after honest and diligent inquiry be found or incompetent to testify in the particular proceedings by reason of interest. In such cases it is sufficient to prove the identity of the signature. But this must be taken subject to this qualification that such evidence of his hand writing or signature can only be give where no other attesting witness can be produced. The handwriting or the signature being thus proved, the attestation clause become evidence of everything that is stated in it, as that the document was duly signed, published and delivered in the presence of the attesting witnesses by the party who purports to have so signed published and delivered. Consequently, under the provisions of the statute it is compulsory to call at least one attesting witness to prove the due execution of the document. There is no requirement for the petitioner to give

evidence for the purpose of proving the Will. Therefore, even if the evidence of the petitioner was weak that is not a ground to dismiss the Will. In this case the intervenient petitioner does not suggest that the petitioner and the deceased Edmund were not living on good terms and intended to eliminate her from being the sole beneficiary of his wealth. The case of the intervenient petitioner was that the testator was in good health and therefore did not leave a Will and alleged that the Will was written after his death. There had been an attempt by court to call for an E.Q.D report. The submissions on this point were that the EQD had informed court that the specimen signatures sent to him were insufficient for comparison. Therefore, the EQD had been unable to provide a report.

The intervenient petitioner attempted to impeach the Will on the ground of forgery or fraud. But the intervenient petitioner could not establish this fact either by proving that the notary, the attesting witnesses and the petitioner acted in collusion in preparing the Will. She had not established to court that the two attesting witnesses had reasons to forge the Will. She had neither established their bad character that could have made

those witnesses unreliable. The fact that the Notary was suspended from office in the year 1980 for a period of one year was admitted by the trial judge as irrelevant for this case.

In this case as mentioned earlier both attesting witnesses have given evidence. They have identified their signatures. They have acknowledged the signature of the testator by stating that they have signed after the testator had signed on the document. The attestation clause further identified these witnesses by writing their names in the attestation clause. All these witnesses were known to the notary. That evidence was not disputed.

The attesting witnesses need not be familiar with the signature of the testator. They have only to affirm and acknowledge the signature of the testator by signing in the presence of the testator at the same time and at the same place. The fact that the attesting witnesses have signed after the testator had place his signature in the document in their presence is sufficient proof of 'affirming and acknowledging' the signature of the testator as required by the statute. Furthermore, there is no requirement in law that the witnesses should be known to the testator. The trial

judge should not have rejected the evidence of the two attesting witnesses for the reasons mentioned in the impugned judgment.

Additionally, in the impugned judgment the trial judge had stated that he was unable to be satisfied with the genuineness of the Will only on the evidence of the Notary. In support of this determination he had cited the case of **N. Sithmaparanathan v Mathuranayagam 73 NLR page 53.** In earlier part of the impugned judgment he had cited the case of **Barry v Butlin (1838) 2 Moo PC 480**. And in the written submissions the counsel for the respondent had cited the case of **Tyrell v Paynton (1894) Probate 151**. The issue in Sithamparanthan case was whether the testator was a person of testamentary capacity. In an application for probate of a Will If the testamentary capacity of the testator at the time of execution of the Will is called in question, the burden lies on those propounding the will to affirm positively the testamentary capacity to the satisfaction of court. (ibid 53) In this case before us the testamentary capacity of the testator was never an issue. As stated in the case of **Robins v National Trust**

company (1927) A.C. 515 at 519 and quoted in the Sithamparam case ,

"in ordinary cases if there is no suggestion to the contrary an man who is shown to have executed a Will in ordinary form is presumed to have testamentary capacity, but the moment the testamentary capacity is called in question then at once the onus lies on those propounding the will to affirm positively the testamentary capacity ".

These are cases where the court is required to consider the mental condition of the testator at the time the Will was signed. "The Judge when he considers the mental condition of the testator at the time when he signed the Will must put himself the question "Whether the mental faculties of the testator retained sufficient 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". (ibid page 53) In such circumstances there must be cogent evidence from independent witnesses as to the testamentary capacity which satisfy the conscience of the court that the Will was the act and deed of the deceased. In such cases the fact that

he was competent to make a will is a pure question of fact. And the principle is that the trial judge's findings of fact on admissible evidence will not be interfered with, except in a very exceptional case. This case does not fall within those circumstances.

The other case cited refers to circumstances "where the person who prepares the Will is the person who takes the benefit under it –that is one state of things which raises a suspicion; but the principle is that wherever a will is prepared under circumstances which raises 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:. (case of Tyrell v Payton) In the case heard before us the petitioner submitted that her deceased husband left a Last Will. In cases of this nature as pointed out in the written submissions of both parties the *onus probandi* lies in every case on the party propounding the to satisfy the conscience of the court that this is the Last Will of a free and capable person. Secondly, if a party writes or prepares a Will , under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court and call upon it to be vigilant in examining the evidence in support of the

instrument. And the court should not pronounce in favour of the Will unless the suspicion is removed. (Case of Barry v Dutlin) Even though the facts of that case were not applicable to this case as this will was not prepared by the petitioner, I have endeavoured to examine the principle that was pronounced by the said case. In my view if a will was written or prepared by a person who receives some benefit from that will, the court must not hold in favour of the will unless it is fully satisfied that the instrument did express the real intention of the deceased. As I have mentioned earlier, in this case the testator had read the Will himself. That is the most satisfactory proof of the fact that the testator had knowledge of the contents of the instrument. And that fact was not contradicted. The petitioner and the deceased husband were living affectionately. There was also evidence that they had travelled together for a wedding few months prior to his death. They were even trying to sell this house. The late husband had suggested gifting this property to the petitioner. All these facts show the relationship between the petitioner and the deceased. These facts were not contradicted.

Finally, in this case even if the petitioner was silent, that could not be held against her, as the notary who prepared the will and the two attesting witnesses had given evidence and confirmed the genuineness and the due execution of the will. The learned trial had rejected the application of the petitioner for grounds that are not relevant for proof of a will under the statue.

The appeal is allowed. I order taxed costs.

Rohini Marasinghe J

Judge of the Court of Appeal.