

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

Nevanka Gunawardane  
Liyanapathirana,  
1895, Brush Avenue,  
St. Paul Minnesota, 55119,  
USA.  
2nd Respondent-Appellant

**CASE NO: CA/216/2000/F**

**DC COLOMBO CASE NO: 32888/T**

Vs.  
Lester Clarence Gunawardena,  
47/8, St. Peter's Road,  
Mount Lavinia.  
Substituted Petitioner-Respondent  
Aswini Gunawardane,  
8610, West 25th Street,  
St. Lewis Road,  
MN 55426, USA.  
1st Respondent-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: Harsha Soza, P.C., with Upendra Walgampaya for the  
2nd Respondent-Appellant.

Romesh de Silva, P.C., with Saumya Amarasekera for  
the Substituted Petitioner-Respondent.

Argued on: 25.07.2018

Decided on: 02.08.2018

Samayawardhena, J.

This is an appeal filed by the 2nd respondent-appellant against the Judgement of the District Judge of Colombo dated 27.03.2000 whereby the last will marked P1 was held to have been proved. This is a last will executed by the testatrix before five witnesses. Out of five, four witnesses have given evidence at the trial.

There are absolutely no suspicious circumstances surrounding the execution of the last will. It is significant to note that the last will is indisputably in the testatrix's own handwriting and the beneficiary of the last will was overseas at the time of its execution. It is interesting to note that the appellant does not allege fraud, undue influence, lack of testamentary capacity etc. in the execution of the last will, nor has any such issue been raised at the trial.

The only point made by learned President's Counsel for the appellant during the argument was that the last will is irrational in that although the testatrix had seven children she gave the property described in the last will to only one daughter who is the 1st respondent.

The fact that the said act of the testatrix mother is not irrational is amply demonstrated by the silence of all the other children except the appellant daughter.

It is noteworthy that out of these seven children, one is mentally retarded and another contracted with polio. If there was any doubt about the rationality of the decision of the testatrix to give this property to the 1st respondent, I think, it was dispelled by none other than the sole witness of the appellant himself who admitted

in evidence that those two disabled children have been looking after by the 1st respondent.<sup>1</sup>

There is no requirement in law that the rationality of the will shall be established by the propounder of the will. However I must add that if there are other suspicious circumstances surrounding the last will, the Court can take the irrationality of the will also into account in deciding whether the will is the act and deed of the free and capable testator. As I have already stated, insofar as the instant will is concerned, no such circumstances exist which excite the suspicion of the Court.

Notwithstanding a last will looks irrational, if that is the wish of the testator, Court has no alternative but to give effect to it however disproportionate the distribution of the property may be. Court cannot refuse to admit a last will for probate on the sole ground of lack of rationality. As held in *Peries v. Perera*<sup>2</sup> "*it is no part of the duty of Court to see that a testator makes a just distribution of his property, and so long as it is proved that the testator executed the will intending it to be his will, the Court cannot refuse to grant probate on the ground of suspicious circumstances.*" (vide also *Gunawardene v. Cabral*<sup>3</sup>, *De Silva v. Seneviratne*<sup>4</sup>)

Learned President's Counsel for the appellant also submitted that according to the evidence of Mrs. Dahanayake, the 5th witness-domestic aide had been in the kitchen when the last will was written and therefore "*would not have seen the testatrix writing the will.*"<sup>5</sup> I do not think that the evidence of that witness can be so

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<sup>1</sup> Vide page 157 of the Brief.

<sup>2</sup> (1947) 48 NLR 560

<sup>3</sup> [1980] 2 Sri LR 220 at 242

<sup>4</sup> [1981] 2 Sri LR 1 at 20

<sup>5</sup> Paragraph 24 of the written submissions dated 02.06.2014

interpreted as what she has stated in evidence is that the domestic aide was in and out of the kitchen attending to the necessities of those who were present in the house.<sup>6</sup> The evidence of the other three witnesses of the will admits of no doubt on that point. In any event, there is no requirement in law that all five witnesses shall be present together when the last will is being written as opposed to signing.

According to section 4 of the Prevention of Frauds Ordinance, No. 7 of 1840, as amended, in case of five witness last will, the requirement is that the "*signature shall be made.....by the testator in the presence of five or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.*"

The fact that the testator had several properties other than the property included in the last will does not in law make the last will invalid.

In the facts and circumstances of this case, the conclusion is irresistible that the last will P1 is the act and deed of the free and capable testatrix.

Appeal is dismissed with costs.

Judge of the Court of Appeal

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<sup>6</sup> Page 109-110 of the Brief