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

Maldeniya Arachchige
Nandalatha,
Dunkannawa,
Naththandiya.
Petitioner-Appellant

CASE NO: CA/1175/2000/F
DC MARAWILA CASE NO: 281/T

Vs.

Maldeniya Arachchige
Gunesekera,
Maldeniya Arachchige
Sumanawathie,
Both of Dunkannawa,
Naththandiya.
Respondent-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Dr. Sunil Cooray for the Appellant.
Atula Bandara Herath for the Respondents.

Decided on: 24.05.2019

Samayawardhena, J.

The petitioner-appellant filed this action in the District Court seeking to admit the last will of her deceased mother to probate. This was objected to by her two siblings who were made respondents to the case. After trial, the learned District Judge held that the will has not been proved. This appeal by the petitioner-appellant is against that Judgment.

It is well settled law that the onus is on the propounder of the will to remove all suspicious circumstances attached to the will and prove affirmatively that it is the will of a free and capable testator.

The learned District Judge has taken the view that the petitioner who is the executrix and the sole beneficiary of the last will has not removed all doubts attached to the will to the satisfaction of the Court.

The main doubt has arisen regarding execution of the last will itself. The notary in her evidence has stated that she did not know the testator before. Then how and why the testator selected this notary has not been satisfactorily explained. The two attesting witnesses to the last will are not relatives or friends of the testator. They are servants or workers of the father of the notary who has an estate.

There are admittedly several erasers, interpolations etc. on a number of important matters in the body of the last will which are not reflected in the attestation.

More importantly, there is only one property which the testator has intended to bequeath to the petitioner-appellant. That has

been described in the last will as "*the share or shares what I will get from High Court of Chilaw Case No.20206*". It is the position of the petitioner-appellant that this refers to the District Court of Marawila Partition Case No. 204/P. The last will does not refer to a partition case in the District Court. It refers to a case in the High Court. The intention of the testatrix is not clear. Learned counsel for the appellant himself has identified this as "*a patent mistake in the last will drafted by the notary public*"[1] but says that it is excusable as she is not an attorney at law. The notary shall first understand what the testatrix proposes to bequeath by way of the last will and thereafter explain it to the testatrix before the testatrix places her signature to the last will. This does not mean that the notary shall investigate title of the properties to be bequeathed. Had this been done, the notary could not have made such a blatant mistake. If the notary tried to understand what the intention of the testator was, she could have (as an experienced notary) probably suggested the testatrix to simply execute a deed instead of a last will. There is no prohibition, pending partition, to transfer to another whatever the interests a party would get from the final decree of partition. In fact, it is the evidence of the first attesting witness of the last will that what was executed was not a last will but a deed. The second attesting witness of the last will has not been called as he was said to be dead. According to the evidence of the notary[2], she has had 11 years of experience when she executed this last will and by that time 4816 instruments have been notarially executed by her. It is difficult to believe that a notary of such a

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[1] Vide paragraph 27 of written submissions dated 29.04.2019.

[2] Vide page 183 of the brief.

caliber does not have a knowledge of very basic matters in law—at least partition actions are not filed in the High Court.

The Examiner of Questioned Documents has stated that he is unable to express an opinion on the genuineness of the signature of the testatrix appearing on the last will.

Another suspicious circumstance is the delay of four years in filing the testamentary case after the death of the testatrix. The explanation of the petitioner-appellant that due to financial constraints she could not file the case early is not very convincing.

The matter in issue is essentially a question of fact and not of law. The Judgment has been delivered by the District Judge before whom all the evidence at the trial has been led. Appellate Court will be very slow to interfere with the findings of the trial judge based on evidence led before him unless there are compelling reasons to do so. I find no such compelling reasons in this case.

Appeal is dismissed without costs.

Judge of the Court of Appeal