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

Deallas Hector Edward Dirckze,
63, Esplanade Road,
Kegalle.
6th Respondent-Appellant

CASE NO: CA/1157/2000/F
DC KEGALLE CASE NO: 33/T

Vs.

Palihawadana Arachchige Noel
Desmond Stephen Perera,
"Wood Norton",
Vidyala Road,
Kegalle.
Petitioner-Respondent
And 7 Other Respondents

Before: Mahinda Samayawardhena, J.

Counsel: 6th Respondent-Appellant appears in person.

L.M.K. Arulanandam, P.C., with Shamika Seneviratne for the Petitioner-Respondent.

Palitha Bandaranayake with D.M. Siriwardena for the 7A and 8th Respondent-Respondents.

Decided on: 02.09.2019

Mahinda Samayawardhena, J.

This is an appeal filed by the 6th Respondent-Appellant (Appellant) against the Judgment of the learned District Judge of Kegalle dated 06.10.2000 whereby the Last Will No.7 dated 28.01.1996 marked P2 at the trial was declared proved and admitted to probate.

Both in the District Court and in this Court, the Appellant appeared in person.

In the statement of objections dated 26.03.1998 filed before the District Court, the Appellant, whilst praying for a declaration that the Last Will is not an act and deed of the testator, also prayed for exclusion of the properties under item No. 4 of the Last Will and item No. 5 of the schedule to the petition on the basis that the said two properties did not belong to the testator.

If the Last Will is a forgery as he claims, I cannot understand why he seeks exclusion of some of the properties from the Last Will. There lies, in my view, the real grievance of the Appellant.

It is interesting to note that, at the trial, the Appellant raised no issues.

On behalf of the Petitioner-Respondent (Respondent) who is the executor of the Last Will, two issues were raised. They are, whether the said Last Will is an act and deed of the testator, and, if so, whether the Letters of Administration shall be issued in the name of the Respondent.

The 7th and 8th Respondents through an Attorney-at-Law filed a statement of objections dated 26.03.1998 and prayed for exclusion of the property described in item No. 2 of the schedule to the petition (which is also item No. 2 of the Last Will), if the Court decides that the Last Will is an act and deed of the testator. It is noteworthy that the 7th and 8th Respondents did not in the statement of objections expressly state that the Last Will is not an act and deed of the testator or a forgery.

The 7th and 8th Respondents neither raised any issues nor cross-examined any witness at the trial.

At the trial, on behalf of the Respondent, the Attorney-at-Law and Notary Public who attested the Last Will has given evidence and marked documents P1-P6 without any objection, and the Respondent's case has been closed.

Thereafter the Appellant has given evidence and closed his case without marking any documents.

The Notary in his evidence has stated that the testator who was a friend of him gave written instructions to prepare his Last Will to be executed before the testator leaving Sri Lanka. The Last Will marked P2 has been executed in the night of 28.01.1996 at the testator's house where the Notary and two other Attorneys-at-Law have been invited for dinner, and according to the Passport of the testator marked P6, the testator has left the island on the following day. The aforesaid two Attorneys-at-Law have been signed as subscribing witnesses to the Last Will. It is the evidence of the Notary that the testator has read the Last Will before signing and questioned the Notary about some

matters which he could not understand. He has stated that the testator signed the Last Will before him and two witnesses present at the same time. The Death Certificate marked P1 goes to show that the testator has died more than one year and three months after the execution of the Last Will, and the first witness to the Last Will has been stated in P1 as the informant of the death.

Section 4 of the Prevention of Frauds Ordinance, No.7 of 1940, as amended, which deals with the execution of a Last Will reads as follows:

> *No will, testament, or codicil containing any devise of land or other immovable property, or any bequest of movable property, or for any other purpose whatsoever, shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of a licensed notary public and two or more witnesses, who shall be present at the same time and duly attest such execution, or if no notary shall be present, then such signature shall be made or acknowledged by the testator in 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 two attesting witnesses and the executor of the Last Will have not given evidence.

The executor of the Last Will who is the Respondent is not a beneficiary of the Last Will.

I cannot agree with the submission of the learned counsel for the 7th and 8th Respondents that it is a "mandatory requirement in Testamentary Law" to lead evidence of the propounder of the Will. There is no such legal requirement. In order to prove a Last Will, who shall be called to give evidence depends on facts and circumstances of each individual case.

In the instant case, it is abundantly clear that the grievance of the Appellant and also the 7th and 8th Respondents is that the testator has included in the Last Will some properties which did not belong to him. The Appellant in his evidence (at pages 132-133 of the Brief) has clearly admitted that he is unable to state with certainty whether or not the deceased executed the Last Will, and the only worry he has is the deceased bequeathing the property described in item No. 4 of the Last Will to Edward Dirckze who is living in Spain.

As I have already stated, it is significant to note that, none of the documents marked by the Notary in his evidence as P1-P6 has been moved to be marked subject to proof. This includes the affidavits of the two attesting witnesses to the Last Will marked P4 and P5. Hence there was no necessity to call the attesting witnesses to give oral evidence.

In the facts and circumstances of this case, the learned District Judge, after trial, answered the two issues raised by the Respondent in the affirmative and granted probate to him. It is against that Judgment the Appellant has filed this appeal.

The Appellant for the first time in appeal challenges P4 and P5 on the basis that jurat in each of the affidavit is defective as jurats do not say whether the deponents have sworn or affirmed thereto. However, the deponents at the beginning of the affidavits have stated it and it is a sufficient compliance. (*De Silva v. L.B. Finance Ltd [1993] 1 Sri LR 371*)

In any event, that cannot be raised for the first time in appeal. If the Appellant wanted, when P4 and P5 were marked in evidence, he could have moved them to be marked subject to proof compelling the Respondent to call the said attesting witnesses to give oral evidence. This has not been done.

I shall also add that, it is not a must to call all the attesting witnesses to prove a Last Will.

Section 68 of the Evidence Ordinance reads as follows:

> *If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.*

It is now settled law that the Notary is an attesting witness contemplated in section 68 of the Evidence Ordinance if he knew the executant personally. (*Marian v. Jesuthasan (1956) 59 NLR*

348, Wijegoonetilleke v. Wijegoonetilleke (1956) 60 NLR 560, The Solicitor General v. Ava Umma (1968) 71 NLR 512) The Notary has given clear evidence that he knew the executant personally. The learned District Judge has believed the evidence of the Notary.

Let me now advert to the other points raised by the Appellant in his written submissions.

The Appellant says that the case has been filed five months and eighteen days after the death of the testator, which delay has not been explained. That is not, in my view, a delay which needs special explanation.

Then the Appellant says that the Last Will does not have a schedule but the Respondent has included a schedule in the petition which is tantamount to a fraud. I cannot understand how inclusion of a schedule in the petition becomes a fraud.

Although the Appellant's position in the statement of objections filed before the commencement of the trial in the District Court was that the properties described under item No. 4 of the Last Will and item 5 of the schedule to the petition did not belong to the testator, in the written submissions filed before this Court, his position is that "*This Appellant firmly states that the deceased Lindon Laurie Phillip Dirckze did not own any property mentioned in the purported subject Will.*" This shows the seriousness of the Appellant on that point.

In the Petition of Appeal, the Appellant's main complaint is the failure on the part of the learned District Judge to send the Last

Will for a report from the Examiner of Questioned Documents (EQD) to ascertain the genuineness of the signature of the testator. This application has been made by the Appellant but has not diligently pursued in that specimen signatures of the testator have not been provided to the Court. It is the submission of the Appellant that the Court could have taken specimen signatures from the documents (such as proxies) filed in other cases where the deceased testator was a party and called for an EQD report.

The Appellant shall understand that the system of justice which prevails in our country is not inquisitorial but adversarial and therefore the Judge is not expected to take steps in a trial on behalf of one party against the other in the guise of due administration of justice. The Judge shall decide the case as it is presented before him by two competing parties.

It was held in *Pathmawathie v. Jayasekara [1997] 1 Sri LR 248*:

> *It must always be remembered by Judges that the system of civil law that prevails in our country is confrontational and therefore the jurisdiction of the Judge is circumscribed and limited to the dispute presented to him for adjudication by the contesting parties.*
>
> *Our civil law does not in any way permit the adjudicator or judge the freedom of the wild ass to go on a voyage of discovery and make findings as he pleases may be on what he thinks is right or wrong, moral or immoral or what should be the correct situation. The adjudicator or Judge is duty bound to determine the dispute presented to him and*

> *his jurisdiction is circumscribed by that dispute and no more.*

The Supreme Court in *Saravanamuthu v. Packiyam [2012] 1 Sri LR 298* observed:

> *It must be remembered that the jurisdiction of the Court is limited to the dispute presented for adjudication by the contesting parties.*

In *Bandaranaike v. Premadasa [1978-79] 2 Sri LR 369 at 384* Soza J. had this to say:

> *When we speak of the adversary or accusatorial system as distinguished from the continental inquisitorial system, we refer to a particular philosophy of adjudication whereby the function of the counsel is kept distinct from that of the Judge. It is the function of counsel to fight out his case while the Judge keeps aloof from the thrust and parry of the conflict. He acts merely as an impartial umpire to pass upon objections, hold counsel to the rules of the game and finally to select the victor. This common law contentious procedure has its defects and has been criticised by jurists like Roscoe Pound (see Landmarks of Law ed. Hensen-Beacon series pp. 186, 187) but it is the Anglo American system and prevails in India and Sri Lanka too. In fact the Foster Advisory Committee in its Report on the English Civil Procedure (1974) recommends the retention of the adversary system of procedure-see the Stevens publication of the report-chapter 5 paragraph 102 pp. 28, 29. This system is built on the English notion of fair play and justice*

> *where the Judge does not descend into the arena and so jeopardise his impartiality. Under this system it is counsel's duty to prove the facts essential to his case with the other party striving to disprove these facts or to establish an affirmative defence.*

In any event, the EQD report or any expert evidence is not decisive. The Court is not bound by the opinion expressed by expert witness. The evidence of a handwriting expert is only a relevant fact, which the Judge may take into account in forming his own opinion whether the signature of the testator found in the Last Will is genuine. (*Charles De Silva v. Ariyawathie De Silva [1987] 1 Sri LR 261*)

The Appellant has found fault with the learned District Judge in his written submissions stating that the learned District Judge has granted reliefs not prayed for by the Respondent. He contends that when the Respondent has sought Letters of Administration on the Last Will, it is wrong on the part of the Court to have issued Probate. That submission has no merit because once the Court decides that the Last Will is proved, the Court shall issue Probate to the executor of the Will if he is alive and makes no objection. Court can otherwise issue Letters of Administration with the Will annexed in the name of another if the executor is dead or unwilling to accept that responsibility. Plain Letters of Administration are issued to a suitable person when there is no Last Will proved before Court. In all three instances, the purpose is the same, which is, to administer the estate of the deceased. In this instance, the learned District

Judge is correct to have issued Probate instead of Letters of Administration on proof of the Last Will.

The main contention of the Appellant and the learned counsel for the 7th and 8th Respondents in their written submissions is that a person cannot effectually dispose by Will property that he does not own, and therefore this action is unsustainable. There cannot be any dispute that no person can effectually dispose of others' properties by way of a Will or otherwise. If one does so by Will or any other mode of disposition, such as sale or gift, no title would pass to the beneficiary by such disposition. As H.N.G. Fernando J. (later C.J.) stated in *Roslin Nona v. Herat (1960) 65 CLW 55,* "*The common law does not prevent a person from executing a transfer of property which may, in fact, belong or turn out to belong to another, although, of course, the transferee in such a case acquires no title as against the true owner.*" However, that does not warrant the testamentary action to be dismissed *in limine.*

As the learned District Judge has rightly pointed out in the Judgment, this is not the stage to address the Appellant's and also the 7th and 8th Respondents' grievance for exclusion of the properties from the estate of the deceased. The application of the Appellant and the 7th and 8th Respondents is, to that extent, premature. This is the stage to consider whether the Last Will has been proved and can be admitted to probate.

The concern of the Appellant and the 7th and 8th Respondents that the testator has included properties which did not belong to him in the Last Will can be considered after the Inventory, may

be together with the Final Account, is tendered to Court, which comes subsequent to the issuance of the probate.

Section 539(1) of the Civil Procedure Code reads as follows:

> *In every case where an order has been made, by a District Court declaring any person entitled to have probate of a deceased person's will, or administration of a deceased person's property granted to him it shall be the duty of the said person, executor or administrator, in whose favour such order is made, to take within fifteen days of the making of such order, the oath of an executor or administrator as set out in form No. 92 in the First Schedule, and thereafter to file in court within a period of one month from the date of taking of the oath, an inventory of the deceased person's property and effects, with a valuation of the same as set out in form No. 92 in the First Schedule and the court shall forthwith grant probate or letters of administration, as the case may be.*

It is a different question whether disputed proprietary claims can be decided in the testamentary case itself. This Court need not go into that matter in this appeal. The Judgment in *Roslin Nona v. Herat (supra)* might, *inter alia*, throw some light in deciding that matter.

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 who heard the case had been satisfied that the said onus has satisfactorily been discharged by the Respondent. There is no reason for this Court to take a contrary view.

Appeal is dismissed. No costs.

Judge of the Court of Appeal