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

Hettiarachchige Hemasiri Perera,
"Nilmala",
Morris Road, Attiligoda,
Galle.

Plaintiff

C.A. No 1374/99(F)

DC (Galle) Case No:10054/T

Vs.

1. Ranjani Dahanayake,
"Nilmala",
Morris Road, Attiligoda,
Galle.

2. Devika Amarasinghe (nee Dahanayake),
No. 32, Rocksmead Road,
Sunbary of Thames, Middlesex,
United Kingdom.

3. Indranee Arachchige Subasinghe
(nee Dhanayake),
No. 359, Wackwella Road,
Galle.

4. Nadule Aroshini Indunil Mohottige
(nee Hettiarachchige Aroshini Indunil Perera),
"Nilmala",
Morris Road, Attiligoda,
Galle.

5. Hettiarachchige Chandani Kaushalya Perera,
Giyan Franco Pasaro Lucilio,
15, Napoli, Italy (80132),
Appearing by her Power of Attorney,

Aroshini Mohottige (nee Hettiarachchige Aroshini Indunil Perera),
"Nilmala",
Morris Road, Attiligoda, Galle.

Defendants

AND NOW BETWEEN

Hettiarachchige Hemasiri Perera,
(Deceased)
"Nilmala",
Morris Road, Attiligoda
Galle.

Nadule Aroshini Indunil Mohottige
(nee Hettiarachchige Aroshini Indunil Perera),
"Nilmala",
Morris Road, Attiligoda,
Galle.

Substituted – Petitioner-Appellant

VS

1. Ranjani Dahanayake,
"Nilmala",
Morris Road, Attiligoda,
Galle.

1a. Devika Amarasinghe (nee Dahanayake),
No. 32, Rocksmead Road,
Sunbary of Thames, Middlesex,
United Kingdom.
And Now
3 Victor Road,
Glenfield Leicester,
LE38AS,
United Kingdom.

2. Devika Amarasinghe (nee Dahanayake),
No. 32, Rocksmead Road,
Sunbary of Thames, Middlesex,
United Kingdom.

3 Victor Road,
Glenfield Leicester,
LE38AS,
United Kingdom.

3. Indranee Arachchige Subasinghe
(nee Dhanayake), (Deceased)
No. 359, Wackwella Road, Galle.

3a. Mewan Lasith Subasinghe Arachchi,
No. 359, Wackwella Road, Galle.

4. Nadule Aroshini Indunil Mohottige
(nee Hettiarachchige Aroshini Indunil
Perera),
"Nilmala",
Morris Road, Attiligoda,
Galle.

5. Hettiarachchige Chandani Kaushalya
Perera,
Giyan Franco Pasaro Lucilio,
15, Napoli, Italy (80132),

Defendants-Respondents

Before : P. Kirtisinghe J
&
R. Gurusinghe J

Counsel : Shiral Lakthilaka for the substituted-Petitioner-Appellant
With N.J.P. Silva
Respondents are absent and unrepresented.

Argued on : 02.05.2023

Decided on : 15.06. 2023

R. Gurusinghe J

The deceased Petitioner-Appellant (hereinafter referred to as the Petitioner) made an application to prove a purported Last Will (hereinafter referred to as the Will) of the late Henry Wilson Dahanayake and to obtain letters of administration.

The purported Will was dated 10th August 1960. The application for Proof of Will was filed on 19th November 1991.

The case was taken up for inquiry on the 5th of June 1996. Nine admissions were recorded and seven issues were raised by the petitioner. Issue nos. 8 and 9 were raised by the respondents.

As per the admissions, the following facts were admitted by the parties;

1. Wilson Dahanayake died on 15th June 1964.
2. Wilson Dahanayake's heirs were his Wife Nellie and daughters Mangala, Ranjani, Devika and Indra.
3. Mangala died on 2nd January 1991, leaving her husband the petitioner and the children.
4. Nellie, the wife of Wilson Dahanayake, died on 20th June 1991.

In the inquiry, only the Petitioner gave evidence in Court and produced documents marked P1 to P10. The respondents did not call any witnesses.

After the inquiry, the learned Additional District Judge of Galle pronounced the order on 24th June 1999, rejecting the application of the petitioner. Being aggrieved by the said order, the petitioner-appellant preferred this appeal.

On behalf of the Appellant, following issues were raised.

විසඳිය යුතු කරුණු:- නීතිඥ ජයවර්ධන මහතා විසින්.

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01. පෙත්සමේ 2වන පෙදසේ සදහන් ප්‍රසිද්ද නොතාරිස් එම්. එල්. එම්. වික්‍රමසිංහ මහතා විසින් 1960.3.10 වන දින සහතික කරනලද අංක 1995 දරණ අන්තිම කැමැති පත්‍රය, හෙන්රි විල්සන් දහනායකගේ අවසාන කැමැති පත්‍රයද?

02. ඒක විල්සන් දහනායක, පෙත්සමේ උප ලේඛණයේ සදහන් දේපල තබා මිය ගියේද?

03. ඉහත සදහන් නඩුවේ අන්තිම නැමැති පත්‍රය ඒක හෙන්රි විල්සන් දහනායක ජීවත්ව සිටි කාලයේදී ඉල්ලා අස්කර ගෙන හෝ අවලංගු කරගෙන ඇත්ද?

04. ඉහත සදහන් හෙන්රි විල්සන් දහනායකගේ දියණිය වන මංගලා පෙරේරා 1991.1.2. වන දින පෙත්සමේ 7වන පේදසේ සදහන් උරුමකරුවන් තබා මිය ගොස් ඇද්ද?

05. එහි මංගලා පෙරේරා ඉහත සදහන් පෙත්සමේ 2වන පෙදසේ සදහන් පරිදි 1995 දරණ, මිය ගිය විල්සන් දහනායකගේ අන්තිම නැමැති පත්‍රයෙන් පොල්මඃකරු වශයෙන් පත්තර ඇත්ද?

06. එහි මංගලා පෙරේරා මිය යාමෙන් පසුව ඇයට එහී විල්සන් දහනායකගේ බුදලයෙන් ලැබෙන දේපල පෙත්සම්කරුට මෙම අද්මිනිස්ත්‍රාසි බලපත්‍රය ලබා ගැනීමට අයිතියක් ඇද්ද?

07. ඉහත සදහන් විණිසදිය යුතු ප්‍රශ්ණවලට පිලිතුරු පෙත්සම්කරුගේ වාසියට ලැබේ නම්, පෙත්සම්කරුට ඉල්ලා ඇති සහන ලබා ගත හැකිද?

Issue number 1 was answered in the negative.

Issue number 1 is to the following effect.

‘ Was, the last will dated 10/03/1960 attested by M.L.N. Wickramasinghe Notary Public, referred to in para 2 of the petition, the Last Will of Wilson Dahanayake?’

The Petitioner admitted that his father-in-law Henry Wilson Dahanayake died in 1964, and the purported Will was found in 1966. The application was filed by the petitioner in 1991, that is, 27 years after the death of Wilson Dahanayake. The evidence revealed that the wife of Wilson Dahanayake

and his daughters had acted on the basis that there was no Last Will left by Wilson Dahanayake.

The evidence of the Petitioner is that his wife Mangala told him that there was a Last Will written by her father in 1966. The wife of Wilson Dahanayake had disposed of certain properties inherited by her from her husband on the basis that there was no Last Will. The petitioner and his wife, most of the time, lived under the same roof with Nellie Dahanayake and had not objected to such disposal of property by Nellie Dahanayake.

The petitioner stated that he married Mangala in 1962. The petitioner also admitted that he mostly lived in Galle except for two or three years. The petitioner had served as a Clerk in the Health Department. He had also served as a record keeper in the Magistrate's Court in Galle for about one year in 1980. He also admitted that he knew many Lawyers in Galle.

As per the purported Will, the wife of the petitioner, Mangala, was nominated as the executrix of the Will. Mangala never filed an action to prove a Will. She died in 1991.

Two subscribing witnesses and the attesting Notary were not among the living by the time the petitioner filed this action.

The Learned District Judge found that the explanation given by the petitioner for the delay of 27 years was not acceptable at all. Naturally, suspicion arises as to why the Petitioner knowing that there was a Will in 1966, waited until1991 to file an action to prove the Will.

The burden of proof in regard to the due execution is on the petitioner. The petitioner must produce evidence to prove that the purported Will was an act and deed of the deceased Wilson Dahanayake. The Petitioner had not seen the execution of the Will. He did not state that he had ever seen his father-in-law signing any documents. The petitioner did not call any witnesses to

prove that the signature in the Will is the signature of the late Wilson Dahanayake. Thus, the signature in the 'Will' was not proved.

Bertram CJ in *'the Alim's Will' case 20NLR 481* stated as follows at pages 493/494

"Before proceeding to an analysis of the evidence, I would state briefly what I understand to be the law upon the subject. It has been established by a long series of decisions, the most important of which are Barry v. Butlin,1 Baker v. Butt," Fulton v. Andrew, Tyrrell vs Painton1 (see also Orion v. Smith, Dufour v. Croft, Wilson vs Basil, Sukhir v. Kadar Nath) that wherever a will is prepared and executed under circumstances which arouse the suspicion of the Court, it ought not to pronounce in favour of it unless the party propounding it adduces evidence which would remove such suspicion, and satisfies the Court that the testator knew and approved of the contents of the instrument. It is now settled that this principle is not limited to cases in which the will is propounded by a person who takes a special benefit under it and himself procured or conducted its execution. It may very well be that a refusal to grant probate in such a case may involve an imputation of fraud upon the party propounding the will. This is no objection to the operations of that principle. (See Baker v. Butt (supra).) The Court is not necessarily bound to give a decision upon the truth or falsehood of the conflicting evidence adduced before it upon the question of fraud. What it has to ask itself is whether, in all the circumstances of the case, it will give credit to the subscribing witnesses or the other witnesses adduced to prove the execution. Nor is it an objection to the operation of this principle that the evidence which casts suspicion on the will, though it suggests fraud, is not of such a nature as to justify the Court in a finding of fraud. (See Tyrrell v Painton) The principle does not mean that in cases where a suspicion attaches to a will, a special measure of proof or a particular species of proof is required. (See Barry v. Butlin (supra).) It means that in such cases, the Court must be " vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded' does express the true will of the deceased." There are two forcible expressions used in the

cases which emphasize this principle. One is, that it is the duty of the party propounding "the will " to satisfy the conscience of the Court "; and the other is, that the onus lies upon that party " of showing the righteousness of the transaction." The law is summed up by Davey L. J. in Tyrell v. Painton (supra) as follows: " The question appears to me to be whether the learned Judge applied his mind to the right issue. If the case had been tried by a jury, and he had directed them that what they had to try was whether Tyrrell had made out to their satisfaction that the will of November 9 was obtained by fraud, I should have said that this was a misdirection. There rests upon that will a suspicion which must be removed before you come to the plea of fraud- It must not be supposed that the principle in Barry v. Butlinis confined to cases 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 raise 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. Here the circumstances were most suspicious, and the question a Judge has to ask himself is whether the defendants have discharged themselves of the onus of showing the righteousness of the transaction and, without going again over the circumstances which have been referred to, I am compelled to say that they have not. "

It was argued for the appellant that as the document is prima-facie more than thirty years old, the Court could presume that the document was duly executed. The appellant relied on the case of *Silva vs Soyza 7NLR 360,* where it was held that *"Where a will is found in the custody of the testator's widow and such custody has a legitimate origin, the Court should presume in favour of its genuineness, even if the best and most proper custodian of the will is the Court itself."*

In the same case, Thomas de Sampayo J held, *"I am of the same opinion. The word " document " as defined in the Evidence Ordinance is large enough to include a will and therefore the presumption created by section 90 applies to*

the case of a will thirty years old. The corresponding section of the Indian Evidence Act appears to have been construed in the same way in the Indian Courts. Mukkerji v. Pal Sritiratna, I.L.R. 5, Cal. 886. It has, however, been held in India, and I think rightly, that the presumption should generally be drawn with caution, and there should be at least some evidence of transactions or states of affairs necessarily or at least naturally referable to it so as to free it from the suspicion of being fabricated. (See Prasad Bai v. Chandra Bai, 6 W. R. 82; Dishit Moro v. Lahshman, I. L. R. II., Bom. 89.) In this case evidence of execution is not absolutely wanting, for the widow of the deceased swears to his having signed it. Further, transactions of the kind referred to are also shown to have taken place, as it appears that the widow and the children who were beneficiaries under the will sold some of the property of the estate, and the vendees have been in undisturbed possession for a great many years without opposition from the respondents to this appeal, who are the children of the widow by a marriage contracted subsequently to the death of the first husband, the deceased testator. I therefore think that the requirements in the proof of a will of an ancient date have been sufficiently fulfilled, including the necessity for the document to come from proper custody."

In this case, according to the purported Will, the wife of the appellant had been appointed as the executrix of the Will. As per the evidence of the appellant, the executrix had found the Will in 1966. she died in 1991. The wife of the appellant never filed an action to prove the Will. If P 3 is the Last Will of her late father and the Will is more beneficial to her, an issue arises as to why she had not filed an action to prove the Will. This is one of the suspicions the appellant should have removed.

In the case of Samarakone *v The Public Trustee 65NLR 100* it was held as follows;

"(iv) that where there are features which excite suspicion in regard to a will, whatever their nature may be, it is for those who propound it to remove such

suspicion. Suspicious features may be a ground for refusing probate even where the evidence which casts suspicion on the will, though it suggests fraud, is not of such a nature as to justify the Court in arriving at a definite finding of fraud. The conscience of the Court must be satisfied in respect of such matters."

The petitioner stated that his wife had handed over the Will to 3 lawyers to file an action. However, all such lawyers procrastinated and never filed an action. No particular reason was attributed to the two lawyers for not filing an action. With regard to the other lawyer, the petitioner stated that his wife's younger sister's husband was working in that lawyer's office as a clerk who was a retired court interpreter and therefore, he knew that no action would be filed by that lawyer. However, he had not done anything about that.

The evidence of the petitioner also reveals that the petitioner himself had served as a clerk in the District Court of Colombo and the District Court of Gampola. As such, the petitioner had knowledge about the work in the District Court. Further, he had served as the record keeper of the Magistrate's Court of Galle and admitted to have known several lawyers practicing in Galle Bar. The petitioner also admitted in cross-examination that at the time the purported Will was found, his mother-in-law, the wife of the testator, the executrix of the Will, his wife, the notary who attested the Will and the two attesting witnesses all were among the living. To the question whether he had waited 27 years until all of them were dead to file this action, the petitioner did not reply. In these circumstances, the explanation for the delay of 27 years is not satisfactory.

The learned Additional District Judge observed that the petitioner had not made any attempt to prove the signature in the alleged will to be identified or to be proved. In this case, there is absolutely no evidence of the execution of 'the Will'.

In the case of *Silva vs Soyza 7NLR 360*, the application was made by the wife of the testator and she was the executrix. Further, she had seen and witnessed the execution of the Will by her husband. As de Sampayo J noted, *there should be at least some evidence of transactions or states of affairs necessarily or at least naturally referrable to it so as to free it from the suspicion of being fabricated.*

This application was not filed by the executrix. The Will was not produced in court from the custody of the executrix. The position of the petitioner is that the executrix had the Will since 1966, but she had not taken any steps to prove the Will until her death in 1991. The petitioner filed this case in the same year after the death of the executrix and her mother. There is no evidence that the wife of the testator had any knowledge about a Last Will by her husband. Nellie Dahanayake, the wife of Wilson Dahanayake, had disposed of certain properties inherited by her from her husband on the basis that there was no Last Will. The petitioner and his wife, who lived most of the time, under the same roof with Nellie Dahanayake, had not objected to such disposal of property by Nellie Dahanayake.

The children of the testator also did not have any knowledge about a Last Will of their father. In this case, there is no evidence at all to support that the testator had signed the Will or knew about the Will. In the circumstances, there is no sufficient material to apply the presumption in section 90 of the Evidence Ordinance to this case.

On behalf of the petitioner, it was submitted that some evidence and documents that led in the abortive trial proceedings should have been taken into consideration by the learned Additional District Judge. This submission cannot be accepted. The evidence or documents in abortive proceedings, though filed of record, cannot be taken into consideration.

Further, it was argued that the answer to issue number six is wrong. When issue number one was not proved, none of the other issues raised on behalf of the petitioner can be answered in the affirmative.

It was submitted that the learned Additional District Judge has decided that since the petitioner has filed this case 20 years after the death of the testator, the petitioner cannot maintain this action as per the provisions of section 545 of the Civil Procedure Code. The learned Additional District Judge has stated that as the 20 years had already lapsed, the deeds executed were valid, and the petitioner's action was defeated by that reason. Although part of this observation is incorrect, the learned Additional District Judge has not dismissed the action on this ground. Therefore, any misdirection regarding section 545 of the Civil Procedure Code did not lead to the dismissal of the petitioner's action.

When considering the evidence of this case, the learned Additional District Judge is justified in coming to the conclusion that the 'Will' was not proved to the satisfaction of court.

For the reasons set out above, we hold that there is no reason to interfere with the order of the learned Additional District Judge dated 24/06/1999. Therefore, the appeal is dismissed without costs.

Judge of the Court of Appeal

Pradeep Kirtisinghe J.

I agree.

Judge of the Court of Appeal.