IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRILANKA

CA No :1223/96(Final)

D.C.(Colombo) NO.29745/T

Mode Jenewe Elnora
Wijesinghe
No.608,Aluthmawatha
Para,
Colombo 15.
PETIONER-RESPONDENT
VS
Rosary de Silva
230, Kopiyawatha,
Ragama.
Presently at :256
A4,Polgahena,
Ragama and others
PLAINTIFF-RESPONDENT

BEFORE: A.W.A.SALAM, J

COUNSEL: HARSH SOZA P.C WITH RAJINDRA PERERA FOR THE PETITIONER-APPELLANT AND H. G.HUSSAIN FOR THE RESPONDENT-RESPONDENTDR.

ARGUED ON : 23.01.2012

WRITTEN SUBMISSIONS FILED ON : 04.05.2012

DECIDED ON : 22.01.2014.

A W A Salam, J

This is an appeal from the judgment dated 13 May 1996 pronounced by the learned additional district judge of Colombo as to the validity of the Last Will written by the testator in his own handwriting before five

witnesses in accordance with the provisions of section 4 of the prevention of frauds Ordinance. The learned additional district judge held inter alia that the Last Will in question had not been proved and proceeded to hold that the Last Will is a forgery and that it contained not the signature of the author whose name is mentioned in the will but a similar signature placed fraudulantly on it and that the said will is not a document that can be legally acceptable in Law. Accordingly, the learned additional district judge held that the estate of the deceased should be administered as if he had died without leaving a Last Will. The present appeal has been preferred against the said judgment and decree entered by the learned Addl. district judge.

Quite surprisingly, in the impugned judgment the learned district that has not analyzed the evidence adduced as to the existence of the will giving such weight to the evidence pointing to the testamentary capacity of the author of the Last Will. For reasons of her own, the learned additional district judge has raised the question in the judgment as to what made the author of the will to prepare and sign the same one and a half years before his death had occurred at the time when he was really in good health. This clearly suggests that the learner district judge was of the opinion that the will written before a period of one and a half years before the death of someone cannot be considered as his act and deed and that it should be written in close proximity to the occurrence of death. This opinion held by the learned additional district judge is not consistent with the law governing the subject and has in fact resulted in great prejudice being caused to the propounder of the will.

No doubt, the burden to prove the Last Will that has been put forward before the learned district judge was on the propounder of the will and it was his duty to satisfy the conscience of the court that the Last Will is the act and deed of a free and capable testator. The learned additional district

judge unfortunately has failed to address her mind to this legal requirement before she came to the conclusion that the Last Will did not contain the signature of the testator.

A perusal of the reasoning adopted by the learned district judge clearly points to a travesty of Justice. In the circumstances, I set aside the impugned judgment and send the case back for retrial.

No order for costs of this appeal is made as the respondents are not to be blamed for the case being referred back to the original court for retrial.

Judge of the Court of Appeal

NR/-