ELLAWALA
V.
WIJEWARDENA AND ANOTHER

SUPREME COURT.
FERNANDO, J., KULATUNGA, J. & DHEERARATNE, J.
S. C. SPL. LEAVE APPLICATON NO: 118/91
CA/LA (SC) NO: 15/91
CA NO: 323/89 (F) WITH
CA (REV) APPLICATION NO: 1031/89
DC COLOMBO CASE NO: 29901/TESTY
DECEMBER 10TH, 1991.

Appeal - Special Leave to Appeal to Supreme Court - Testamentary capacity - Suspicious circumstances - Failure to consult medical opinion on the Testator's mental condition - Duress and undue influence.

The deceased who was ill and hospitalised at a private hospital got down his regular legal adviser/notary public and after necessary consultations and instructions executed his last will having revoked his previous last will. He bequeathed his assets to his wife and the younger daughter (the 1st respondent) to the exclusion of his elder daughter (the petitioner) who was married and was residing away from the parental home. The petitioner had been disinherited under the previous last will as well executed several years back. The petitioner challenged the last will on grounds of (a) lack of testamentary capacity by reason of illness (b) duress and undue influence by the deceased's widow; and (c) the last will was not lawfully executed. The District Judge upheld the objections and invalidated the last will, held that the deceased had died intestate and dismissed the application for probate.

The Court of Appeal set aside the order of the District Judge and ordered that the last will be declared proved and be admitted to probate. On an application by the petitioner for Special Leave to Appeal from the Judgment of the Court for Appeal,

Held:

1. The finding of the Court of Appeal did not call for review. The last will is a rational or natural will. The evidence does not warrant the suspicion that the testator lacked testamentary capacity; and the failure of the attesting notary to consult the testator's medical advisers as to his mental condition before executing the last will was not, in the circumstances, a suspicious circumstance.

2. According to applicable principles of law, undue influence, if it is to vitiate the will, must be something in the nature of coercion or fraud existing at the time of the making of the will.

3. The fact that the son-in-law and the daughter of the attesting notary public who are his partners and assistants were witnesses to the signing of the last will, is, neither in law nor as a matter of ethics, a matter affecting due execution. In the absence of any suspicion or impropriety touching the attesting notary it is of no relevance on the question of testamentary capacity.

APPLICATION to the Supreme Court for Special Leave to Appeal from judgment of the Court of Appeal.

Miss Maureen Seneviratne P.C., with *R. K. W. Goonesekera* and *R. Rajapaksa*, *W. Wijewardana*, *Miss K. Perera* and *R. Perera* for Petitioner.

P. A. D. Samarasekara, P.C., with *R. de Silva, P.C.*, *G. Jayasinghe*, *S. Mahendran* and *A. R. Surendhran* for *Respondent*.

Cur.adv.vult.

December 19, 1991.

KULATUNGA, J.

At the close of the hearing of this application, we refused special leave to appeal from the judgment of the Court of Appeal against which the intervenient petitioner - respondent - petitioner (hereinafter called the intervenient-petitioner) sought to appeal and reserved the reasons for that Order. We now state our reasons.

The intervenient-petitioner is the elder daughter of the deceased D. J. Wijewardene. At the time of the death of the deceased she had been married to one Mr. Ellawala and was residing away from her parental home. In the District Court she successfully challenged the last will of the deceased by which the deceased devised and bequeathed his assets to his wife and his younger daughter, the 1st petitioner-appellant-respondent (hereinafter called the 1st petitioner-respondent) to the exclusion of the intervenient-petitioner. The deceased also created a trust over one immovable property in favour of his grand daughters who are the children of the 1st petitioner-respondent. The deceased appointed the 1st petitioner-respondent and another person (the 2nd petitioner-respondent) who is a close family friend of the deceased as the executors under the will.

On the application of the petitioners, the District Court entered order *nisi* declaring the will proved and issued a limited grant of probate to the petitioners necessary for the efficient and effective management of the companies of which the deceased had been a share holder.

Upon the publication of the order *nisi*, intervenient-petitioner entered an appearance and objected to the grant of probate on the said will. After inquiry the District Judge upheld the grounds of objection and made order (a) declaring that the last will had not been duly proved and the same cannot be admitted to probate, (b) holding that the deceased had died intestate, (c) dismissing the application for probate, (d) declaring the limited probate granted to the petitioners-respondents null and void and recalling the same. On an appeal by the petitioners-respondents the Court of Appeal set aside the order of the District Judge and directed that the order *nisi* be made absolute. The Court further ordered that the last will be declared proved and be admitted to probate and probate be accordingly granted to the petitioners-respondents.

Special leave to appeal was sought on the basis that in the District Court the intervenient-petitioner had challenged the last will on the grounds (a) that it was not the act and deed of the deceased in that he lacked testamentary capacity by reason of illness, (b) that the last will was obtained by duress and undue influence by the deceased's widow, and, (c) that the last will was not lawfully executed in that the attesting notary had as witnesses to the said will his daughter and son-in-law who with him are the registered Attorneys-at-Law for the petitioners.

In seeking Leave to Appeal the intervenient-petitioner is particularly aggrieved by the observation of the Court of Appeal that in the instant case the testamentary capacity of the testator was never in question; it has neither been pleaded nor put in issue. Learned Counsel for the interveneint -petitioner submits that this opinion is plainly erroneous-in that the lack of testamentary capacity due to grave illness affecting the testator's mind had been pleaded in the statement of objections; and that this very question arose for decision under the first issue raised by the petitioners-respondents namely whether the disposition under consideration was a lawful and valid last will of the deceased. The counsel further submits that by forming an erroneous opinion in the matter, the Court below deprived itself of the opportunity of fairly considering the most vital issue in the case, namely, the issue relating to testamentary capacity.

There is considerable force in the intervenient-petitioner's submission that the statement of objections and the issues were wide enough to allow the question of testamentary capacity to be raised. Thus one of the objections which was raised was that the last will was not the act and deed of the deceased; and the statement of objections specifically states that at the time of the execution of the said will on 07.01.1985 the testator was an inmate of a private hospital undergoing medical treatment for an illness to which he succumbed on 14.01.1985.

The opinion of the Court of Appeal to which the intervenient-petitioner has taken exception appears to be the result of a failure to scrutinise, in the light of the pleadings and the issues raised, a submission on the question of testamentary capacity made by the counsel for the petitioner-respondents. That opinion has also been influenced by certain answers given by Ellawala the husband of the intervenient-petitioner in the course of which he said that the ground for attacking the will is undue influence exercised over the testator over the years to exclude the intervenient-petitioner from benefiting under the will. However, Ellawala does not appear to have taken up the position that undue influence is the sole ground for challenging the last will.

Notwithstanding the opinion complained of, we see no reason, in the light of the available evidence, to permit an appeal on the question of testamentary capacity. The Court of Appeal itself has considered the evidence and concluded that the last will with which we are concerned is a rational or natural will; that the evidence does not warrant the suspicion that at the time of the execution of the will the testator lacked testamentary capacity; and that Mr. Murugesu, the attesting notary was not obliged to consult medical opinion on the testator's state of mind before attesting the will, as was held by the District Judge. In coming to this finding the Court of Appeal has been guided by the correct principles of law set out in judicial decisions.

We are ourselves satisfied that the facts adduced before the District Court do not establish suspicious features sufficient even to create a doubt as to the testamentary capacity. Briefly the facts relied upon by the intervenient-petitioner are as follows:—

(a) THE PHYSICAL CONDITION OF THE TESTATOR

The testator had been admitted to the Frazer Nursing Home, Colombo on 18.12.1984 and was under constant treatment. He had cirrhosis of the liver, chronic

diarrhoea coupled with enlargement of the liver and the spleen and a heart condition due to a leak in the microvalve of the heart. According to the medical reports he was feeble. However, it has not been shown that this physical condition had in any way affected the mental condition of the testator. Thus on 02.01.1985 he got down Mr. Neelakandan and gave instructions to prepare a power of attorney which he wished to sign on 04.01.1985 as he contemplated going abroad for treatment. He also arranged for Mr. Murugesu to bring a copy of his previous last will as he wished to execute a new last will. On 04.01.1985 he signed the Power of Attorney and gave instructions for the preparation of a new last will; this he did after perusing the previous last will and the codicil. On 07.01.1985 Mr. Murugesu brought the new last will and the testator read it seated on the bed; he also wanted clarification of certain matters which were explained after which he signed the last will. Mr. Murugesu knew that the testator was ill but found his mental capacity quite normal and that he was capable of making a decision and did not have the slightest doubt as regards his competence. This is supported by the evidence of Dr. A.T.S. Paul who had been a frequent visitor at the hospital though not in a medical capacity, and found the testator mentally quite alert.

(b) **RELATIONS BETWEEN THE INTERVENIENT PETITIONER AND THE TESTATOR**

They were estranged from about 1974. In his previous last will made in 1975 the testator left nothing to the intervenient-petitioner. In a codicil in 1980 he confirmed that will subject only to a change of executorship. There is some tenuous evidence of attempts at reconciliation, spoken to by Ellawala, the intervenient-petitioner's husband consisting only of four or five tel-

ephone conversations between the testator and Ellawala. The testator had no contact at all with the intervenient-petitioner.

(c) CIRCUMSTANCES SURROUNDING THE EXECUTION OF THE LAST WILL

The last will in question was attested by Mr. Murugesu the testator's regular legal adviser. In making the previous will in 1975 the testator instructed Mr. Murugesu to specifically exclude the intervenient-petitioner. The testator said that she was a difficult character and gave many other reasons which Mr. Murugesu did not wish to mention in Court. Mr. Murugesu thought that it was "a paternal break". The testator told him that she was not worthy of being his daughter. In the last will in question the testator again excluded the intervenient-petitioner and merely made some minor adjustments between his wife and the other daughter, the 1st petitioner-respondent. The fact that the son-in-law and the daughter of the attesting notary public who are his partners and assistants were witnesses to the signing of the last will is, neither in law nor as a matter of ethics, a matter affecting due execution. The Court of Appeal has upon a consideration of authorities and judicial decisions so concluded; and we agree with that opinion. In different circumstances such execution might have been a suspicious circumstance. However, in the absence of any suspicion or impropriety touching Mr. Murugesu, it is of no relevance on the question of testamentary capacity.

(d) FAILURE OF THE NOTARY TO CONSULT THE TESTATOR'S MEDICAL ADVISORS

The District Judge held that the attesting notary was obliged to consult the testator's medical advisors as to his mental condition before the execution of the

last will and that in the absence of such medical opinion the petitioners-respondents failed to establish that the last will was duly executed. We are of the view that in the circumstances of this case such failure or the failure to get a doctor to be a witness to the will is not per se a suspicious feature where the notary had no doubt in his mind as to testamentary capacity.

The District Judge was also of the opinion that the deceased was over a period of time under the influence of his wife and had a poor degree of independence. She was herself present at the time of the execution of the last will. The District Judge said that it was difficult to believe that the deceased had not been influenced when he gave instructions for the preparation of the will. Accordingly, he held that the will was obtained by duress or undue influence. The Court of Appeal held that according to the applicable principles of law, undue influence, if it is to vitiate the will, must be something in the nature of coercion or fraud existing at the time of making the will; and that in the instant case evidence of such undue influence is woefully lacking. We see no reason to disagree with that finding.

In the result we are of the view that the application for special leave to appeal does not raise any question fit for review by this Court.

FERNANDO, J. — I agree.

DHEERARATNA, J. — I agree.

Application refused.