IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

CIVIL PETITION No: CBV 0010 of 2018
[On Appeal from Court of Appeal No: ABU 0080 of 2015]

BETWEEN	:	**VIJENDRA SHARMA**
		Petitioner
AND	:	**1. ATENDRA SHARMA &**
		2. RAJ KUAR SHARMA
		Respondent
Coram	:	**Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court** **Hon. Mr. Justice Priyantha Jayawardene, Judge of the Supreme Court** **Hon. Mr. Justice Madan B. Lokur, Judge of the Supreme Court**
Counsel	:	**Mr. Prakash P, and Mr. Nadan S, for the Petitioner** **Mr. Singh R, and Ms. Rakai M, for the 1st and 2nd Respondent** **Mr. O' Driscoll for the 3rd Respondent**
Date of Hearing	:	**23 August 2019**
Date of Judgment	:	**30 August 2019**

JUDGMENT

Gates, J

1. I have read in draft the judgment of Lokur J. I agree with its conclusions reasons and proposed orders.

Jayawardene, J

2. I agree with the findings and the conclusions of the draft judgment.

Lokur, J

3. The question for consideration is rather narrow: Is the last Will and Testament dated 9th February, 2006 of Narendra Sharma (the Testator) a valid Will? An earlier Will dated 7th October, 2005 had been probated on 24th May, 2006 after which the last Will and Testament dated 9th February, 2006 was propounded by Vijendra Sharma (the Petitioner). The High Court held the Will is not valid and dismissed the proceedings initiated by the Petitioner. The Court of Appeal dismissed his appeal against the decision of the High Court. Now, the Petitioner seeks leave to appeal to this Court.

A broad conspectus of the facts

4. The Testator had executed his last Will and Testament on 7th October, 2005 (the first Will). In terms of this Will he made the following bequests:
   (i) half acre to Vijendra Sharma (Petitioner)
   (ii) half acre to Atendra Sharma (Respondent No.1)
   (iii) one acre to Sushil Sharma (another son)
   (iv) life interest of the residue in the estate to his wife Mrs. Raj Kuar Sharma (Respondent No.2) and upon her death to Respondent No. 1.

5. The Testator passed away on 10th March, 2006. Thereafter, Respondent No. 1 and Respondent No. 2 applied for and were granted a Probate of the first Will on 24th May, 2006 after due completion of all formalities..

6. Much later, perhaps sometime in February 2007, Respondent No. 2 learnt of another Will dated 9th February, 2006 (the second Will) having been executed by the Testator. Accordingly, on 19th February, 2007 she sent a notice through her lawyer Gordon & Co. submitting that the Probate granted in respect of the first Will was null and void and to cooperate in having it revoked "so that a new and proper grant can be issued based on the latter and proper will of

the deceased.". By a communication of 14th March, 2007 the lawyer for Respondent No. 1 (S. B. Patel & Co.) denied that the Testator had made another Will and contended that the second Will was forged.

7. Subsequently, Respondent No. 1 initiated a civil action on 20th August, 2008 for the enforcement of the Probate and execution of all necessary papers for this purpose. On their part, the Petitioner and Respondent No. 2 initiated a Probate action on 17th March, 2009 based on the second Will. In response, a Statement of Defence and Counterclaim was filed by Respondent No. 1 on 22nd March, 2010 in which he stated that the signature on the purported Will dated 9th February, 2006 is not that of the Testator and it was never signed by him. A Reply was filed to the Statement of Defence and a Defence to the Counterclaim by the Petitioner and Respondent No. 2 on 14th April, 2010.

8. Briefly, the first Will bequeathed (as already mentioned above):
    i. half acre to Petitioner
    ii. half acre to Respondent No. 1;
    iii. one acre to Sushil Sharma (another son)
    iv. life interest of the residue in the estate to Respondent No. 2 and upon her death to Respondent No. 1.

9. The second Will made the following bequests:
    i. one acre to Petitioner
    ii. half acre to Respondent No. 1
    iii. life interest of the residue in the estate to Respondent No. 2 and upon her death to Sushil Sharma.

10. In support of their case, the Plaintiffs (the Petitioner and Respondent No. 2) produced three witnesses. PW-1 was Jogan Prasad one of the attesting witnesses to the second Will. He testified that the second Will was executed in his presence by the Testator and that the other attesting witness Om Prakash (since deceased) had also signed in his presence. PW-2 was Dr. Sushil Sharma (son of the Testator and brother of the Petitioner). He was a resident of Saudi Arabia and explained the circumstances in which he came into possession of the second Will

and the delay in bringing it to the notice of his mother Respondent No. 2. PW-3 was the Petitioner who explained how he came to know of the existence of the second Will and the delay in knowledge. The Defendant (Respondent No. 1) entered the witness box to explain the discrepancies on the basis of which he alleged that the signature on the second Will was not signed by the Testator.

Decision of the High Court

11. The High Court rendered its decision on 30th September, 2015 and it took the view that the second Will was forged and the Probate be returned to the Defendant Respondent No. 1.

12. It was contended by the Plaintiffs that there was no pleading to the effect that the second Will was a forgery and this caught the Plaintiffs off-guard. This contention was negatived by the High Court noting that the Statement of Defence was to the effect that the second Will was prepared by the Petitioner and never signed by the Testator. It would therefore not be correct on the part of the Petitioner to contend that he was taken off guard on the allegation of forgery or that there was no pleading regarding forgery.

13. Respondent No. 1 sought to place reliance on a letter by Linda Morrell a Forensic Document Examination and Handwriting Expert who had opined on being shown a copy of both the first Will and the second Will that "…. the evidence tends to suggest that the questioned signature is probably an attempted copy of a genuine signature by another writer. …… this opinion is not conclusive as I only have a copy of the Will for examinations and comparisons….. To reach an unqualified opinion I strongly recommend that the original of the Will be examined." This reliance was objected to on behalf of the Petitioner on the ground that a copy of her report had not been forwarded to the lawyer as required by the Civil Evidence Act. The objection was upheld by the High Court.

14. On the merits of the case, the High Court rejected the testimony of PW-1 in paragraph vv of the judgment in the following words:

"I do not accept the evidence of PW-1 that he witnessed the signing of the will of 9 February, 2006 by the testator. It emerged in his evidence in chief that he knew the first plaintiff [The Petitioner] very closely, as corroborated by the defendant. The first plaintiff's share increases in the later will to an acre from half an acre under the will of 7th October, 2005. PW 1 was reticent on the question as to whether Om Prakash had taken instructions from the deceased to prepare the will."

15. The High Court did not find PW-2 to be an honest witness as held in paragraph ww of the judgment:

"His propensity to embellish his evidence had a negative impact on his credibility and reliability. His counsel had to caution him to "just" testify to the facts. He clearly expressed his entitlement to what he regarded as his inheritance "for sentimental reasons, my father worked hard." He referred to the defendant, his adopted brother as his nephew."

16. On a consideration of the evidence of PW-3 (the Petitioner) and the evidence of the Defendant (Respondent No. 1) it was held in paragraph eee of the judgement:

"On a review of the totality of the evidence, in particular, the surface of the will allegedly from Saudi Arabia several months after probate was granted under the will of 7th October, 2005, and the significant differences in the testator's signature. I have come to the conclusion that the will of 9th February, 2006, is a forgery."

Decision of the Court of Appeal

17. Feeling aggrieved by the decision of the High Court, the Petitioner preferred Civil Appeal No. ABU 0080 of 2015 in the Court of Appeal. The appeal was heard and dismissed by a judgment and order dated 1st June, 2018.

18. The Appellant/Petitioner made four submissions before the Court of Appeal. The submissions were:

(i) The fact of forgery "had not been pleaded or properly pleaded";

(ii) The learned Judge had not followed the principles laid down in ***Dharmawati v. Sat Narayan & Ashok Naidu***[1];

(iii) The learned Judge had failed to take into account the mandatory rule in Order 76 Rule 15(4) of the High Court Act; and

(iv) The learned Judge had failed to assess the evidence adduced including the need to have required the assistance of an expert witness before he reached the conclusion that the impugned last Will was a forgery.

19. As far as the first submission is concerned, the Court of Appeal took the view that it was specifically pleaded by Respondent No. 1 in his Statement of Defence that "… any signature on the purported Will dated 9th February 2006 is not that of Narendra Sharma (the alleged testator)" and "… the Will was prepared by the 1st Plaintiff but never signed by the late Narendra Sharma." This coupled with the issues framed including the issue "Whether the signature on the Will dated 09th February, 2006 is that of the deceased Narendra Sharma" was good enough to direct the attention of the Petitioner to the question of forgery [***Rajeshwar Dayal & Others v. Watisoni Vunivi & Others***[2]] and to anticipate or expect to meet an allegation of forgery [***Shankar v. Fiji Foods Ltd***[3]].

20. As regards the second ground of appeal, the Court of Appeal summarily rejected it on the view that ***Dharmawati*** was inapplicable. In the cited decision, it was held by the Court of Appeal that:

> *"Even if [there is] no strict compliance with the formal requirements of the Wills Act the Courts will still uphold the last Will of the deceased as the last wishes of the testator."*

[1] FCA Civil Appeal No. 0010/2009
[2] (FCA) Civil Appeal No. 46 of 1991
[3] FCA No. 113 of 1985

21. In the opinion of the Court of Appeal, the present case did not concern itself with formal requirements but concerned itself with the signature of the Testator being a forgery, which effectively went to the heart of the matter in issue.

22. The third ground of appeal was dealt with by the Court of Appeal from different perspectives. The interpretation of Order 76 Rule 15(4) of the High Court Act was in question. This provision reads:

> *"Before it is served a probate counterclaim must be endorsed with a memorandum signed by the Registrar showing that the counterclaim has been produced to him for examination and that three copies of it have been lodged with him."*

23. Learned counsel for the Defendant (Respondent No. 1) admitted that this provision had not been complied with. The Court of Appeal took the view that though the provision was couched in mandatory terms, the High Court did not err in concluding, by relying on ***Viveka Nand v. Kavita Devi***[4] that the defect of non-compliance could be cured in the interest of justice. Nor did the High Court commit any error in referring the Counterclaim to the Chief Registrar for the required endorsement. Two reasons were given by the Court of Appeal in so concluding – firstly, the Petitioner had not objected to non-compliance of the provisions of Order 76 Rule 15(4) of the High Court Act and secondly, procedure is a handmaid of justice and not its mistress [***Re Coles and Ravenshear***[5] and ***Nothman v. Barnet London Borough Council***[6]] meaning thereby that justice could not be tied down by procedure.

24. The fourth ground related to the assessment of the evidence and the need to have expert evidence on the alleged forgery of the second Will. The Court of Appeal noted that the

[4] (2004) HPP 61/96L (unreported)
[5] [1907] 1 KB 1: "Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.
[6] [1978] 1 WLR 220 : "Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind."

formalities prescribed by Section 6 of the Wills Act 1972[7] had been complied with. The Defendant (Respondent No. 1) had sought to lead expert evidence regarding the allegation that the signature on the second Will was not that of the Testator. However, he was shut out from doing so on a valid objection raised by learned counsel for the Plaintiff (Petitioner). The Court of Appeal then went on to hold that under these circumstances, "*it was incumbent on the part of the Appellant to have made an application to call for expert evidence through a handwriting expert at that point which he did not do*." [Paragraph 36 of the decision]. This left the learned judge of the High Court with no option but to scrutinize the signature of the Testator on the second Will to ascertain its authenticity or genuineness. Reference in this regard was made to ***Wintle v. Nye***[8] wherein it was held:

> *"....a suspicion that must be removed by the person propounding the will. In all cases the court must be vigilant and jealous. The degree of suspicion will vary with the circumstances of the case. It may be slight and easily dispelled. It may, on the other hand, be so grave that it can hardly be removed."*

25. The learned judge then examined the two Wills and referring to the evidence of the Defendant (Respondent No. 1), he found major discrepancies between the signatures of the Testator in the first Will and the second Will.

26. Was the learned judge right in examining the two Wills in the absence of expert evidence? The Court of Appeal found that the learned judge did not exceed his jurisdiction in this regard. Reliance was placed on the following passage from Coomaraswamy (a legal scholar from Sri Lanka) in "The Law of Evidence" (2nd Edition, 1989, Volume 1 page 627):

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[7] Section 6. – **Execution generally** – A will is not valid unless it is in writing and executed in the following manner –
(a) it is signed by the testator or by some person in his or her presence and by his or her direction in such place on the document as to be apparent on the face of the will that the testator intended by such signature to give effect to the writing as his or her will;
(b) such signature is made or acknowledged by the testator in the presence of at least 2 witnesses present at the same time; and
(c) the witnesses attest and subscribe the will in the presence of the testator,
but no form of attestation is necessary.

[8] [1959] 1 WLR 284

"The correct position as to the value of the evidence of the handwriting expert seems to be that his evidence must be treated as a relevant fact and not as conclusive of the fact of genuineness or otherwise of the handwriting: His opinion is relevant but only in order to enable the Judge himself to form his opinion. It is not in the class of the opinion of finger print expert."

27. In this context the learned author made a reference to ***Bhagwan Kaur v. Krishan Sharma & Others***[9].

Submissions in this Court

28. Being aggrieved by the decision of the Court of Appeal, the Petitioner is before us. He has sought leave to appeal against the judgment and order of the Court of Appeal and has contended that the Court of Appeal was in error in:

    a. Holding there was proper or adequate pleading and/or cause of action of forgery/or fraud by the First Respondent raised in his Defense and in not applying the fundamental requirement of Order 18 Rule 11 of the High Court Rules 1988 relating to such pleadings and particulars before it is allowed as a cause of action and/or issue.

    b. Not applying the correct onus of proof in Probate proceedings by not holding there is a presumption of law that a will signed and witnessed by two witnesses with a proper attestation clause is valid and that strong and compelling evidence is required to reject that presumption based on good and accurate pleadings. Such pleadings must allow the person (s) propounding the will to know exactly what allegations they are dealing with.

    c. Holding there was sufficient evidence adduced to show forgery when it was accepted by the Court that the last will had been made available for inspection

[9] AIR 1973 SC 1346 in which it was held: "The evidence of a handwriting expert, unlike that of a fingerprint expert, is generally of a frail character and its fallibilities have been quite often noticed. The courts should, therefore, be wary to give too much weight to the evidence of handwriting expert.
In ***Sri Sri Kishore Chandra Singh Deo v. Babu Ganesh Prasad Bhagat and Ors***, [1954] 1 SCR 919 = AIR 1954 SC 316, this Court observed that conclusions based upon mere comparison of handwriting must at best be indecisive and yield to the positive evidence in the case."

by the Respondent's expert before the trial. (Not mentioned by the High Court) and in holding that as the First Respondent having only tried to get expert handwriting evidence in at the late stage of the trial and the failed onus was on the Petitioner to then apply and get an expert to examine the will.

d. Upholding the Trial Judge that it was not mandatory to obtain an endorsement by the Chief Registrar before lodging a counterclaim under Order 76 Rule 15(4) of the High Court Act 1988 which is in mandatory terms.

e. Upholding the first Respondent's counterclaim that the Deed by which the Second Respondent had made appointing the Petitioner a Trustee was null and void.

Leave to appeal

29. The question whether leave to appeal should or should not be granted is governed by Article 98(4) of the Constitution read with Section 7(3) of the Supreme Court Act 1998.

30. Article 98(4) reads: "An appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal."

31. Section 7(3) reads: "In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant leave to appeal unless the case raises –

(a) a far-reaching question of law;

(b) a matter of great general or public importance;

(c) a matter that is otherwise of substantial general interest to the administration of civil justice."

32. The question of grant of leave to appeal has been the subject of consideration in ***Chand v Fiji Times Ltd*** [10] and ***Bulu v. Housing Authority***[11]. It is not necessary to repeat the views expressed by this Court in these two decisions. Suffice it to say that this Court considered the decision of the Privy Council in ***Daily Telegraph Newspaper Company Limited v. McLaughlin***[12] and ***Prince v. Gagnon***[13] which held that appeals would not be admitted "*save where the case is of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.*" Earlier, this Court had considered this question in ***Elsworth v. Yanuca Island Ltd***[14] which in turn had considered ***Matalulu v. Director of Public Prosecutions***[15] wherein it was held:

> *"Petitioners for special leave should ensure that when they frame their petitions, they do so with care.* ***The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. It will not be granted lightly.*** *Too low a standard for its grant would undermine the authority of the Court of Appeal and distract this court from its role as the final appellate body by burdening it with appeals that do not raise matters of general importance or principle or, in the criminal jurisdiction, 'substantial and grave injustice'."* [Emphasis supplied].

Discussion on whether leave should be granted on the grounds urged

33. Keeping the dicta laid down by this Court on several occasions and the requirement of Article 98(4) of the Constitution read with Section 7(3) of the Supreme Court Act 1998, we are of the view that **ground (a)** has been adequately dealt with by the High Court and the Court of Appeal. It cannot be said by any stretch of imagination that the Petitioner was caught off-guard or caught unawares with respect to the allegation of forgery. He was put to notice of the direction that the defence would be taking, and if he chose to ignore it, it was at his own peril.

[10] [2011] FJSC 2
[11] [2005] FJSC 1
[12] [1904] AC 776
[13] [1882-83] 8 AC 103
[14] [2003] FJSC 16
[15] [2003] FJSC 2

Moreover, no objections were raised by the Petitioner during the proceedings that the alleged absence of pleadings caught the Petitioner off guard. In the circumstances of the case, the pleadings and materials on record were quite sufficient to caution the Petitioner.

34. We may add that in the case of proving a Will, unlike in other disputes regarding proving a document, the onus is always on the propounder of a Will to prove its validity to the satisfaction of the Court. Even if no plea is taken, but suspicious circumstances emerge that cast some doubt on the authenticity of a Will (as in the present case), the propounder is obliged to satisfy the conscience of the Court on the genuineness of the Will. In ***Purnima Devi v. Kumar Khagendra Narayan Dev***[16] it was held by the Supreme Court of India that:

> *"The **onus of proving the will was on the propounder** and in the absence of suspicious circumstances surrounding the execution of the will proof of testamentary capacity and signature of the testator as required by law was sufficient to discharge the onus. **Where, however, there were suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the will could be accepted as genuine.** If the caveator alleged undue influence, fraud or coercion, the onus would be on him to prove the same. **Even where there were no such pleas but the circumstances gave rise to doubts, it was for the propounder to satisfy the conscience of the Court**."* [Emphasis supplied].

35. It is only when the propounder of the Will is able to overcome the initial onus of proving its validity by removing the hurdle of suspicious circumstances that the burden of proving fraud or forgery would shift to the objector. The significance of the pleadings assumes importance at that stage, which did not arise in the present case since that the Petitioner was not able to discharge the burden on him and satisfy the conscience of the Court.

[16] [1962] 3 SCR 195

36. Learned counsel for the Petitioner drew our attention to a passage on page 616 of Tristram and Coote's Probate Practice (20th Edition, 1955) on the substance of the case. However what is more important is the passage on the previous page that the onus of proof "is a shifting one" – first on the person propounding the Will, then on the objector and depending upon the cross examination of witnesses, or pleadings and evidence, again on the propounder.

37. The question of pleadings raised by the Petitioner in **ground (a)** is not a question of law or one of general or public importance but is essentially a question of fact that concerns only the beneficiaries under the second Will, and is not of substantial general interest, but is limited to the interest of the parties. Moreover, the nature of pleadings depends on each case and the facts pleaded and in the present case, the Petitioner was sufficiently cautioned. We decline to grant leave to appeal in respect of this ground.

38. The issue of onus of proving a Will is a question of general public importance. Accordingly, we grant leave to appeal in respect of **ground (b)** and **ground (c)**. These grounds urged by the Petitioner are different facets of the same issue, namely, that he had discharged the presumption of the validity of the second Will by producing an attesting witness in the witness box. According to the Petitioner, the High Court and the Court of Appeal erroneously did not require Respondent No. 1 to prove forgery of the second Will and instead required him (the Petitioner) to prove the validity of the second Will despite the presumption of its validity. In this context, reliance was placed on ***Sherrington v. Sherrington***[17] and ***Channon & Channon v. Perkins & Others***[18].

39. ***Sherrington*** was a case in which the validity of a Will was under question. Reference was made to the view expressed (and referred to in the written submissions) by Lord Penzance in ***Wright v Rogers***[19] to the following effect:

> *"The Court ought to have in all cases the strongest evidence before it believes that a will, with a perfect attestation clause, and signed by the testator, was not duly*

[17] [2005] EWCA Civ 326
[18] [2005] EWCA Civ 1808
[19] [1869] LR 1 PD 678

executed, otherwise the greatest uncertainty would prevail in the proving of wills. The presumption of law is largely in favour of the due execution of a will, and in that light a perfect attestation clause is a most important element of proof."

40. Reference was also made to the two principles laid down in ***Barry v Butlin***[20] that is:

> *"[T]he first [is], that the onus probandi lies in every case upon the party propounding a Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator. The second is, that if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to 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."*

41. ***Channon & Channon*** followed ***Sherrington*** and the reasons (practical and principled) for having the "strongest evidence" was explained in the following words:

> *"There is good reason for the requirement that one must have "the strongest evidence" to the effect that a Will has not been executed in accordance with section 9 [of the Wills Act 1837] when, as in this case, it appears from the face of the Will that it has been properly executed in all such respects and where there is no suggestion but that the contents of the Will represented the testator's intention. Where a Will, on its face, has been executed in accordance with section 9, and where there is no reason to doubt that it represented completely the wishes of the testator, there are two reasons, one practical and one of principle, why the court should be slow, on the basis of extraneous evidence, to hold that the Will was not properly executed.*

[20] [1938] 2 Moo. P.C. 480

The practical reason is that oral testimony as to the way in which a document was executed many years ago is not likely to be inherently particularly reliable on, one suspects, most occasions. As anyone who has been involved in contested factual disputes will know, people can, entirely honestly and doing their very best, completely misremember or wholly forget facts and events that took place not very long ago, and the longer ago something may have taken place the less accurate their recollection is likely to be. Wills often are executed many years before they come into their own.

…. …. ….

The principled reason for being reluctant to hold that a Will, properly executed on its face, representing the apparent wishes of the testator, should be set aside on extraneous evidence, is that one is thereby declining to implement the wishes of the testator following his death. That would be unfortunate, especially in a case he has taken care to ensure, as far as he can, that his wishes are given effect in a way which complies with the law."

42. What is "the strongest evidence" was discussed by Lady Justice Arden in the following words:

"Lord Penzance refers to the need for the "strongest evidence" before the court will hold that such a will was not duly executed. I accept that, as Mr Robert Arnfield, for the respondent, submits, the requirement for the strongest evidence does not mean that there could be no other evidence that could be stronger. If that were the meaning of the phrase used by Lord Penzance, there would be no case in which anything less than perfect recollection of execution in accordance of the attestation clause could satisfy section 9 of the Wills Act.

So the question of what constitutes the "strongest evidence" for the purposes of this kind of case remains to be explored. As I see it, there is a sliding scale according to which evidence will constitute the strongest evidence in one case but not in another. ***What constitutes the "strongest evidence" in any particular case will depend on totality of the relevant facts of that case, and the court's***

evaluation of the probabilities. *The court must look at all the circumstances of the case relevant to attestation. The more probable it is, from those circumstances, that the will was properly attested, the greater will be the burden on those seeking to displace the presumption as to due execution to which the execution of the will and the attestation clause give rise. Accordingly the higher will be the hurdle to be crossed to meet the requirement of showing the "strongest evidence", and the stronger that evidence will need to be.*

Likewise, if the evidence of due attestation is weak, then the burden of displacing the presumption as to due execution may be more easily discharged and the requirement to show the strongest evidence satisfied. Allegations that were not made, or were not pursued, and mere suspicion, have to be put on one side." [Emphasis supplied].

43. It was also submitted by the Petitioner that the decision in ***Wintle v. Nye***[21] was misunderstood by the Court of Appeal. ***Wintle*** dealt with one species of suspicious circumstance relating to the genuineness of a Will. In that case, the Testatrix was not versed in business. She signed a Will and subsequently a codicil prepared by her solicitor who was not an intimate friend. Through this process, the solicitor was named as the sole executor of the Will and after making provision for various legacies and gifts, the residue of her large estate was bequeathed to him. The validity of the Will and codicil was challenged on the ground that the Testatrix did not know or approve of the contents of the Will and the codicil. In this context, the House of Lords held:

"It is not the law that in no circumstances can a solicitor or other person who has prepared a will for a testator take a benefit under it. But that fact creates a suspicion that must be removed by the person propounding the will. ***In all cases the court must be vigilant and jealous. The degree of suspicion will vary with the circumstances of the case. It may be slight and easily dispelled. It may, on the other hand, be so grave that it can hardly be removed.*** *In the present case the*

[21] [1959] 1 WLR 284. Also see ***Wintle v. Nye***, [1959] 1 All ER 552

*circumstances were such as to impose on the respondent as heavy a burden as can well be imagined. Here was an elderly lady who might be called old, unversed in business, having no one upon whom to rely except the solicitor who had acted for her and her family; a will made by him under which he takes the bulk of her large estate; a will made, it is true, after a number of interviews extending over a considerable time, during which the details of her property and of her proposed legacies and annuities were said to have been put before her, but in the end of a complexity which demanded for its comprehension no common understanding ……..**All these facts and others that I do not pause to enumerate demanded a vigilant and jealous scrutiny by the judge** in his summing-up and by the jury in the consideration of their verdict."* [Emphasis supplied].

44. Undoubtedly, the decisions relied upon by learned counsel for the Petitioner hold that when the formalities for executing a Will are carried out, the presumption is that the Will is validly executed and cogent and strong evidence is needed to rebut that presumption. But, the presumption is nevertheless rebuttable and if there are surrounding suspicious circumstances, the judge must scrutinize the evidence carefully and satisfy his or her conscience that the Will was or was not validly executed.

45. ***H. Venkatachala Iyengar v. B.N. Thimmajamma and Others***[22] is a leading case decided by the Supreme Court of India on the validity of Wills. This decision has been followed over the years including in ***Smt. Jaswant Kaur v. Smt. Amrit Kaur***[23], ***M.B. Ramesh v. K.M. Veeraje Urs***[24] and ***Mahesh Kumar v. Vinod Kumar***[25]**.** The principles laid down have been summarized in ***Mahesh Kumar*** and to the extent that they are relevant for our purposes, they are as follows:

1. ....

2. ....

[22] AIR 1959 SC 443
[23] AIR 1977 SC 74
[24] (2013) 7 SCC 490
[25] (2012) 4 SCC 387

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. ***Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.***

4. ***Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing.*** *A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them.* ***The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.***

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of ***satisfaction of the judicial conscience*** *has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.*

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then ***it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter****."* [Emphasis supplied].

46. It is in following the dicta laid down by various decisions that the High Court evaluated the evidence on record. The High Court also had the benefit of not only hearing the testimony of the witnesses, but also seeing their demeanour. On an overall evaluation of the material on record, the High Court did not find the evidence of the Petitioner's witnesses to be credible and nothing has been shown to us to suggest that the view of the High Court was palpably and manifestly incorrect. In the absence of expert evidence produced by Respondent No. 1 and also by the Petitioner on whom the onus lay to prove the validity of the second Will by overcoming the suspicious circumstances, the High Court had no option but to examine the first and second Wills and satisfy its judicial conscience. In doing so it came to the conclusion that the second Will was not a valid Will of the Testator. On the evidence and material on record and keeping in mind the law laid down over the years, there is no reason to take a view different from that taken by the High Court and the Court of Appeal. Ground (b) and (c) are dismissed.

47. The final two grounds of appeal, **ground (d) and ground (e)** are dependent and consequential upon the decision on the earlier grounds. Since we have not agreed with the contentions urged on behalf of the Petitioner, leave to appeal on these grounds is declined. In any event, they are peculiar to the facts of the case and are not of general or public importance to warrant consideration.

48. The Petitioner has not advanced any cogent reason for disturbing the view taken by the High Court and the Court of Appeal in its judgment and order of 1st June, 2018. Accordingly, the appeal is dismissed.

Order of the Court;

1. Leave is granted to the Petitioner only on the two grounds (b) and (c) mentioned above. These grounds have been considered in light of the written and oral submissions but there is no merit in them. The appeal is dismissed in respect of these grounds.

2. Leave is declined to the Petitioner in respect of the other grounds urged.

3. The Petitioner will bear the costs of the present proceedings.

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Hon. Justice Anthony Gates
Judge of the Supreme Court

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Hon. Justice Priyantha Jayawardena
Judge of the Supreme Court

.....
Hon. Justice Madan B. Lokur
Judge of the Supreme Court

Solicitors:

Mishra Prakash & Associates for the Petitioner.

Sherani & Company for the 1st and 2nd Respondent.

O' Driscoll & Company for the 3rd Respondent.