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

In the matter of an Appeal under against the Judgement of the Court of Appeal dated 01.06.2012 under and in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka

Jayamaha Mudalige
Karunawathie Jayamaha
No 86/21, Santa Maria Road,
Kandewatta
Ja- Ela

Petitioner

Vs.

1. Jayamaha Mudalige
   Wimalawathie Jayamaha
   181, South Batagama, Batagama

2. Jayamaha Mudalige Sarath
   Pathmasiri Jayamaha
   181, South Batagama, Batagama

3. Subadra Kankanamlage Magi
   Nona

181, South Batagama, Batagama

4. Jayamaha Mudalige Peter Jayamaha
181, South Batagama, Batagama

5. Jayamaha Mudalige Kamalawathie Jayamaha
No. 1/43, Raja Maha Vihara Mawatha,
Maharagama

6. Jayamaha Mudalige Leelawathie Jayamaha
No. 1/43, Raja Maha Vihara Mawatha,
Maharagama
(All of also No. 181, Batagama North, Ja Ela)

7. Ihala Wellage Malini Champika Wijewickreme
Jayasiri Mawatha, Colombo 5
(Also of No. 21, Kirulapone Avenue, Colombo 5)

8. Siththi Fareeda alias Chitra Iranganie Wasantha
No. 1/43, Raja Maha Vihara Mawatha,
Maharagama

9. Jayamaha Mudalige Yoshitha Langala Jayamaha
No. 21, Kirulapone Mawatha,
Colombo 5

10. Ihala Wellage Don William Wijewickreme
No. 21, Kirulapone Mawatha,
Colombo 5

Respondents

AND BETWEEN

Jayamaha Mudalige Karunawathie Jayamaha
No 86/21, Santa Maria Road,
Kandewatta
Ja- Ela

Petitioner- Appellant

Vs.

1. Jayamaha Mudalige Leelawathie Jayamaha
No. 1/43, Raja Maha Vihara Mawatha,
Maharagama
1A and 3A and 6th Respondent-Respondent

2. Jayamaha Mudalige Sarath Padmasiri Jayamaha
181, South Batagama, Batagama
2nd Respondent-Respondent

3. Jayamaha Mudalige Peter Jayamaha
181, South Batagama, Batagama
4th Respondent-Respondent

4. Jayamaha Mudalige
Kamalawathie Jayamaha
No. 1/43, Raja Maha Vihara
Mawatha, Maharagama
5th Respondent-Respondent

5. Ihala Wellage Malini Champika
Wijewickreme
Jayasiri Mawatha, Colombo 5.
7th Respondent-Respondent

6. Siththi Fareeda alias Chitra
Iranganie Wasantha
No. 1/43, Raja Maha Vihara
Mawatha, Maharagama
8th Respondent-Respondent

7. Jayamaha Mudalige Yoshitha
Langala Jayamaha
No. 21, Kirulapone Mawatha,
Colombo 5
9th Respondent-Respondent

AND NOW

Jayamaha Mudalige
Karunawathie Jayamaha
No. 86/21, Santa Maria Road,
Kandewatte,
Ja-Ela

Petitioner-Appellant-Appellant

Vs.

1. Jayamaha Mudalige
Leelawathie Jayamaha

No. 1/43, Raja Maha Vihara Mawatha,
Maharagama
(1A and 3A and 6th Respondent- Respondent-Respondent)

2. Jayamaha Mudalige Sarath Padmasiri Jayamaha
181, South Batagama,
Batagama
(2nd Respondent-Respondent-Respondent) **Deceased**

3. Samanpali Padma Perera
Proposed Substituted 2A Respondent-Respondent-Respondent

4. Jayamaha Mudalige Alikya Sachithrani Jayamaha
Proposed Substituted 2B Respondent-Respondent-Respondent

5. Jayamaha Mudalige Peter Jayamaha
181, South Batagama,
Batagama
(4th Respondent-Respondent-Respondent)

6. Jayamaha Mudalige Kamalawathie Jayamaha

No. 1/43, Raja Maha Vihara Mawatha, Maharagama
(5th Respondent-Respondent-Respondent)

7. Ihala Wellage Malini Champika Wijewickreme
Jayasiri Mawatha, Colombo 5
(7th Respondent-Respondent-Respondent)

8. Siththi Fareeda alias Chitra Iranganie Wasantha
No. 1/43, Raja Maha Vihara Mawatha, Maharagama
(8th Respondent-Respondent-Respondent)

9. Jayamaha Mudalige Yoshitha Langala Jayamaha
No. 21, Kirulapone Mawatha, Colombo 5
(9th Respondent-Respondent-Respondent)

BEFORE: **HON. E.A.G.R. AMARASEKARA, J.**
HON. K.KUMUDINI WICKREMASINGHE, J.
HON. K. PRIYANTHA FERNANDO J.

COUNSEL: Romesh De Silva PC for the Petitioner- Appellant-Appellant

Rohan Sahabandu PC with Chathurika Elvitigala, Sachini Senanayake and Pubudu Weerasuriya instructed by H.L. Karawita for the 7th Defendant- Respondent- Respondent

Thishya Weragoda with Chamodi Wijeweera, Shanika Sanjana and Kalani Dissanayake for the 9th Respondent-Respondent- Respondent

WRITTEN SUBMISSIONS: By the Petitioner-Appellant-Appellant on 24.06.2015 and 17.12.2024.

By the 7th Respondent-Respondent -Respondent on 25.06.2015 and 30.12.2024.

By the 9th Respondent-Respondent -Respondent on 25.06.2015 and 18.02.2025.

ARGUED ON: 28.11.2024

DECIDED ON: 12.06.2025

K.KUMUDINI WICKREMASINGHE, J.

The Petitioner-Appellant-Appellant (hereinafter referred to as the Appellant) being the executrix of the Last Will bearing No.962 dated 24.05.1989 attested by R C B Joseph, Notary Public, filed a petition dated 01.02.1994 in the District Court of Negombo seeking inter alia a probate be issued to the Appellant. The Appellant pleaded inter alia that she was the elder sister of the deceased one Jayamaha Mudalige Kamalasairi Mahinda. The 2nd, 4th and 5th Respondents (hereinafter referred to as 2nd Respondent, 4th

Respondent and 5th Respondent respectively) are the brothers and sisters of the deceased.

The 7th Respondent- Respondent- Respondent (hereinafter referred to as the 7th Respondent) was the wife of the deceased by first marriage and the 9th Respondent (hereinafter referred to as the 9th Respondent) is the child born out of that marriage.
The 8th Respondent- Respondent- Respondent (hereinafter referred to as the 8th Respondent) was the wife of the deceased by second marriage.

The deceased bequeathed his property by the said Last Will bearing No.962 to inter alia the Appellant, 2nd, 4th, and 5th Respondents (his siblings) with life interest to his mother S K Maginona (the original 3rd Defendant in the District Court Proceedings who is now deceased) and to his wife by second marriage, the 8th Respondent.

The deceased had not, however, bequeathed any of his assets to the 7th Respondent or to the child born out of that marriage, the 9th Respondent. The 7th Respondent filed case number 882/T on the basis of Intestacy seeking Letters of Administration to the estate of the deceased.

The 7th Respondent thereafter, objected to the application for probate filed by the Appellant on the basis that the said Last Will was a fraudulent document while challenging the signature of the Testator thereon and averring that she had filed a case based on intestacy bearing case no 882/T claiming that the properties owned by the deceased at the time of his death for herself and the child. The brothers and sisters of the deceased filed objections in the said case, stating, inter alia, that it was the 7th

Respondent who was responsible directly and/or indirectly for the death of the deceased with whom she was estranged at the time of his death. Given the parallel proceedings the cases were amalgamated, with Case bearing No T/11 being the lead case.

The 7th Respondent who was objecting the application of the Appellant did not lead any evidence whatsoever. The Learned District Judge on 08.03.2002 dismissed the application of the Appellant with costs.

Aggrieved by the order of the Learned District Judge, the Appellant appealed to the Court of Appeal. The Honourable Justice of the Court of Appeal thereafter, dismissed the appeal of the Appellant, upholding the judgement of the Learned District Judge.

Aggrieved by which the Appellant appealed to the Supreme Court. This court on 06.03.2014 granted leave to appeal on the questions of law in paragraph 19 (a) to (d) of the Petition. However, when the case was taken up for argument on 28.11.2024, Counsel for all parties agreed to limit their arguments to the Questions of law set out in paragraph 19 (c) and (d) of the petition dated 12.07.2012.

In the Judgement of the Court of Appeal dated 01.06.2012, it was held that at the time of the death of the Testator the original of the Last Will could not be found. The Honourable Justice of the Court of Appeal further held that, based on the evidence led at trial that the Last Will was not available to be produced, an inference could be drawn from the presumption that the Will was destroyed by the Testator.

As per the written submissions of the Appellant, the Appellant submitted that for the presumption of revocation of a Last Will to be drawn, the Testator had destroyed the Last Will with intention of revoking it and if the presumption of revocation is drawn merely because it was missing and was lost would be an error. It was further submitted by the Appellants that the relationship between the Testator and his or her remaining spouse is a vital factor to be taken into consideration in applying the concept of *animus revocandi* of the Last Will as per ***Ramanathan Law Report 1877***.

The Appellants stated the surrounding facts and circumstances of the case were as follows:

a. The Last Will was signed by Kamalsiri Mahinda (Testator) before the Notary Public (Bruno Joseph) and the Testator handed over the Last Will to Palitha Sirisena (Attesting Witness) who gave evidence and deposed to the fact that, he had deposited in the wall cupboard.
b. Thus, it was not the Testator but Palitha who had control and custody of the original Last Will and Palitha's evidence in cross examination is that he saw it on 19.12.1989 in the cupboard.
c. The very next day, the Testator was found dead.
d. In the period of just one day there is nothing to even remotely suggest that the Testator might have destroyed the Last Will.

Based on the above factors the Appellants contended that the Last Will in question stood proved as a validly executed and attested Last Will as decreed by Section 4 of the Prevention of Frauds Ordinance read with section 63 of the Evidence Ordinance through secondary evidence.

In the Written Submissions of the 7th Respondent, the 7th Respondent averred that she was the lawful wife of the deceased and the 9th Respondent was a 4 year old minor at the time of death of the deceased and according to the content of the purported Last Will, the 9th Respondent was completely disinherited from the estate of the deceased.

The 7th Respondent submitted that, in the circumstances of the Last Will not being found with the possessions of the Deceased, and not being discovered in reasonable time, the presumption that the Will was destroyed by the Testator with *animo revocandi*. Where the Last Will is traced to the custody of a Testator and it cannot be found upon death, the presumption is that the Will was destroyed by the Testator prior to death.

The 9th Respondent stated that it was abundantly clear that the Original of the purported Last Will was in the possession of the Deceased at the time of death. There is no evidence to establish on a balance of probability that the said document was extracted by any third party upon his death.

Now I will proceed to answer the questions of law on which leave has been granted. Since all parties decided to limit their arguments to questions (c) and (d) of paragraph 19 of the petition, I will deal with the question set out in (d) first for the purposes of clarity. Namely That **"The Court of Appeal has failed to duly and properly consider the applicable principles relating to the revocation of a Last Will".**

The Learned President's Counsel appearing on behalf of the Appellant submitted that the only objections raised by the Respondents in the District Court was regarding the forgery of the Last Will. The Learned District Court

Judge held that there was no forgery. However, the Learned District Court Judge held that Last Will was null and void due to the subsequent marriage in lieu of section 6 of the Prevention of Frauds ordinance.

The Learned President's Counsel for the 7th Respondent submitted that the duly executed Last Will of the deceased was not produced at the trial.
The Learned President's Counsel submitted that the Court accepts as valid a Last Will on protocol and grants probate on the same contingent on the fact that the original Last Will has been proved and the Original Last Will must be proved in order to remove suspicion.

Relying on section 6 of the Prevention of Frauds Ordinance, the Learned President's Counsel submitted that, when the Last Will can be traced back to the Testator at the time of death, but cannot be found after the death a presumption arises that the Last Will has been destroyed by the Testator. This presumption can be rebutted, however it has not been rebutted in this case and thus it is contended that the Last Will was destroyed.

The Learned Counsel for the 9th Respondent stated that where the Last Will can be traced to the Testator and where the Last Will cannot be found with the Testator at the time of death, the presumption arises that the Last Will has been destroyed. Such presumption can be rebutted through evidence.

Citing Bertram CJ, the Learned Counsel submitted that there are two elements for this principle to apply, 1. that the Last Will cannot be found and 2. Has the Last Will been in the possession of the Testator at the time of death? According to evidence led at trial by one Sirisena, it has been

established that the Last Will was last seen in the possession of the Testator and as such both elements have been duly fulfilled.

In the further written submissions of the Appellant, the Appellants submitted that before this court, the Respondents took two main defences, namely that: a. the Testator had revoked the Last Will by destroying it and b. The Last Will was not valid because the Testator contracted the 2nd marriage after the date of the Last Will. As such the Appellants submitted that the Respondents can only raise such defences in the event there is in fact a valid Last Will. Since the 7th Respondent and 9th Respondent had argued that the Last Will is a forgery, they are now estopped by stating that the Last Will was destroyed and/or revoked by a subsequent marriage.

The Appellants further submitted that no issue was raised in the District Court regarding the revocation of the Last Will by the deceased. The 8th issue raised relates to whether probate can be issued on the Protocol because the original of the Last Will has not been produced to court and not revocation by destruction. The Appellants submitted that no issue was raised on *animus revocandi* and that such a presumption would only arise in the event the Last Will was not in the possession of the deceased at the time of death. The Appellants submitted that it is trite law that actions are decided on issues, thus without an issue on this point the Respondent cannot rely on the destruction of the Last Will.

Furthermore, the Appellants submitted that the law clearly states that the presumption will only arise if the Last Will is traced to the custody of the Testator and cannot be found at his death. Relying on Bertram CJ in ***Attapattu v Jayawardena*** **[1921] 22 NLR 499 "***It is a necessary condition*

to come into effect the presumption that the Court should be satisfied that the will was not in existence at the time of the death. The onus of this is on those who assert it". The 7th Respondent had not asserted that the Last Will was not in existence at time of the death of the Testator nor led any evidence to the same.

The Appellants further stated that Issue no 08 raised at the trial related to a purely procedural matter on whether probate can be issued without the original Last Will being submitted and is not relevant to revocation. In the circumstances if the Last Will has been duly proved, it automatically follows that probate has to be issued.

The Appellants relying on section 540 of the Civil Procedure Code submitted that probate can be granted on a copy and that the presence of the original of the Last Will is not mandatory. The Appellants rely on the decision of Justice Thambiah in ***Weerasinghe v Nagahawatte and Others*** **[1984] 1 SLR 411** where it was held that probate can be granted on a Protocol.

In the further written submissions of the 7th Respondent, the 7th Respondent submitted that relying on ***Machihamy v Abeyselere et al*** **[1911] 15 NLR 479** where it was held that *"Where a will is made by a testator and is shown to the custody of a testator and cannot be found at his death, the presumption is that he destroyed it himself, but this presumption can be rebutted by evidence leading to a contrary conclusion."*

The 7th Respondents relied on the judgement ***Attapattu v Jayawardena*** **[1921] 22 NLR 499** and interpreted Bertram CJ at page 498 in a different manner "*it is settled law that if a will was in duplicate, and the testator had*

the custody one part and it cannot be found after his death, the presumption of law is that he destroyed it animus revocandi". The 7th Respondent submitted that based on the evidence the Last Will could be traced back to the Testator.

The 7th Respondent further submitted that the first set of issues of the Defendant were framed on the basis that the Last Will is fraudulent. However as the Appellant did not produce the original, the Respondents raised an additional issue based on the evidence led by the Appellant, namely that: "*whether without producing the original of the Last Will, the Petitioner could maintain the action*".

The 7th Respondent submitted, relying on ***Pure Beverages Ltd v Shanil Fernando*** **[1997] 3 Sri LR 202** that issues need not be raised in the pleadings. In the circumstances that the Defendant raised the consequential issues and then dropped the other issues the court answered those issues against the Appellant.

The 9th Respondent in his further written submissions, stated that proving the existence of the purported Last Will at the time of death of the Testator rests on the party who seeks to assert on it and in this instance the burden of proof in terms of section 101 of the evidence ordinance is on the Appellant.

The 9th Respondent further submitted that the law can be summarised as follows: a. The Last Will must be shown to have been in the possession of the Testator, b. The Last Will is not forthcoming upon the death of the Testator, c. Then it is presumed to have been destroyed *animo revocandi*.

Perusing the judgement of the Court of Appeal, the Honourable Justice of the Court of Appeal has held that the 7th Respondent objected to the Last Will mainly on two grounds. That the deceased had destroyed the Last Will and drew inferences in favour of the presumption that the Last Will was destroyed as the Testator did not intend to give effect to it, and that the Testator had married after the Last Will was executed and pleaded section 6 of the Prevention of Frauds Ordinance. However in perusal of the Record of the trial at the District Court the issues raised by the Respondents relate to forgery and consequently on the maintainability of the action based on non submission of the Original of the Last Will to court. Consequently two other issues were raised regarding the application of section 6 of the Prevention of Frauds Ordinance relating to contracting of the second marriage by the Testator and not regarding the revocation by destruction of the Last Will.

The Learned District Court Judge, based on all the evidence presented, has come to the conclusion that the Last Will in question is in fact the Last Will of the Testator and not a forgery as contended by the 7th Respondent. The Learned District Judge has correctly held that if an issue regarding forgery is raised, the onus of proving the same lies with the 7th Respondent. Which she has failed to do.

The Learned District Court Judge has refused granting probate even though the validity of the Last Will has been proved on the basis that the original Last Will cannot be found, the Testator did not intend for the Last Will to be executed.

Section 6 of the Prevention of Frauds Ordinance No. 07 of 1840 sets out "*No will, testament, or codicil, or any part thereof, shall be revoked otherwise*

than by the marriage of the testator or testatrix, or by another will, testament, or codicil executed in manner herein before required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will, testament, or codicil is herein before required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator or testatrix, or by some person in his or her presence, and by his or her direction, with the intention of revoking the same."

At the trial, a certified copy of the Last Will marked P5 and the protocol of the Last Will marked P7 were produced. The evidence of the notary public who executed the Last Will along with the evidence of Sirisena who was the attesting witness of the Last Will, the copy of the Protocol marked P7 which was sent to the Land Registry has been marked as P5, which the notary has confirmed. A monthly list submitted by the Notary Public has also been marked and confirmed through the evidence of a witness who was an official of the Land Registry. As such the evidence led at trial is more than sufficient to establish the validity of the Last Will. The Learned District judge has also reached the conclusion that Last Will presented was in fact the Last Will of the Testator**.**

Now addressing the aspect of the presumption that the Last Will has been revoked as the Testator did not intend for it to be executed. In order to determine the intention of the Testator the court must look at the evidence presented at trial and the circumstances of the Testator's death. Based on the evidence of Sirisena who was the attesting witness of the Last Will the original of the Last Will was in the possession of the Testator and was last seen one day before the death of the Testator in a cupboard which was not locked. The Testator was killed in the insurrection of 1988-89 and his

house was ransacked thereafter. If the Testator's death had taken place under less violent circumstances it is reasonable for the court to assume that the Testator has destroyed the Last Will. However, in this case since the Last Will was last seen only one day prior to the Testator's death, it is unlikely that he intended to revoke his will in that one day's time.

The presumption that arises when an original Last Will cannot be found can be rebutted by evidence. Both the 7th and 9th Respondents have asserted that the Last Will was in the possession of the Testator at the time of death. As such relying on the principle laid down in ***Attapattu v Jayawardena*** **[1921] 22 NLR 499** in order to rely on the effect of the presumption it must be satisfactorily proved to the court that the Last Will was in existence at the time of the death. In the event the 7th Respondent relies on the application of the presumption she must first raise it as an issue and prove it. I am inclined to agree with the learned President's Counsel for the Appellant that **missing** and **destroyed** carry two very different meanings. In the case of ***Sergdan & Others v Lord S. T. Leonards & Others*** **[1976] 1 P D 254**, **at page 220** it was held that where a Will had not been destroyed by the testator with the intention of revoking, but is missing and is lost, parol evidence of the contents of the lost Will may be received ; otherwise, as Cockburn, C. J. said- "*it would enable any person who desired, from some sinister motive, to frustrate the testamentary disposition of a dead man, by merely getting possession of the Will to prevent the possibility of the Will of the deceased being carried into execution*"

The Learned President's Counsel for the Appellant has correctly submitted that it is trite law that actions are decided on issues and without an issue

raised on the point of revocation by destruction, the 7th Respondent cannot rely on this point.

In a District Court trial, proceedings begin with the marking of admissions and the framing of issues where the parties disagree. According to Section 72 of the Civil Procedure Code, if the defendants admit to the plaintiff's claim, the court must enter judgment based on those admissions. Additionally, under Section 146, when parties agree on certain facts, such facts must be recorded as admissions, and if they concur on the matters requiring determination, these are recorded as issues.

However, Section 146(2) stipulates that if the parties do not agree, the court must identify the key points of contention based on the plaint, interrogatory responses, and submitted documents. The court may also examine the parties as necessary to determine the material facts and legal issues in dispute. The trial judge has a duty to frame the issues that are essential for resolving the case before evidence is recorded.

In the case of ***Cynthia De Alwis v Marjorie D'alwis And Two Others*** **[1997] 3 Sri L. R. 115** it was discussed in detail the law regarding framing of issues, it was held that "*See the decision in* ***Attorney-General v Smith at 241.*** *In this decision Chief Justice Layard referred to the differences in Indian Civil Procedure and the English Procedure. He observed that in England parties frame their own pleadings and the case is tried on issues raised in the pleadings and if an issue is objected to the judge has to decide on the sufficiency or insufficiency of pleadings and if the pleadings are insufficient, leave is given to amend ... But under the Indian system, which is akin to the provisions of the Sri Lankan Civil Procedure Code, the court does not as in England try the case on the pleadings; it can use the plaint the defendants' statements, if any, to ascertain what are the issues to be adjudicated on. They*

are supplemented by the examination of the parties, documents produced by them and also by the statements of the respective pleaders. It is the duty of the court in India from such material to frame the issues to be tried and disposed of in the case. Our Civil Procedure Code follows the Indian counterpart in this matter except that it requires the defendant to file an answer unlike the Indian Code. However, it does not allow the court to try the case on the parties pleadings but requires specific issues to be framed. By the provisions of section 146 of the Civil Procedure Code, if the parties are agreed, the issues may be stated by them. If not agreed, then the court must frame them".

In the case of ***Peiris And Another v Siripala*** **[2009] 1 Sri LR 78** it was held that "*Once issues are accepted by court the case goes to trial on those issues and the case is tried and determined on the admissions and issues raised at the trial. The pleadings become crystallized in the issues and the pleadings recede to the background.*"

In the case of ***Ahamed Lebbe Assanar and another v Kose Mohamed Sulaiha Umma of Udanga, Summanthurai*** **[SC APPEAL 174/2011 decided on 4th October 2023]** Justice Priyantha Jayawardena held that: A plain reading of Section 146 of the Civil Procedure Code does not strictly prohibit framing issues beyond the pleadings. Its purpose is to enable the court to identify the key issues for a just decision. However, Explanation (2) to Section 150 prevents a party from presenting a case at trial that materially differs from their recorded pleadings, ensuring the opponent is not caught off guard. The facts a party seeks to establish must align with the material aspects of their case that remain disputed.

In the case of ***Setha v Weerakoon*** **[1948] 49 NLR 225** Howard CJ stated that, *"A new point which was not raised in the issues or in the course of the*

trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it all the requisite material for deciding the point, or the question is one of law and nothing more."

In this case, two additional consequential issues were raised in the course of proceedings on 2/8/2001:

1. Did the testator enter into a new marriage after signing the last will on 24/5/1989
2. If so, is the said Last Will void/invalid under and in terms of the provisions contained in section 6 of the Prevention of Frauds Ordinance?

However these two issues do not relate to revocation or destruction of the Last Will. As such, since an issue regarding revocation or destruction of the Last Will was not raised at trial, it is incorrect for the court to hold that the Last Will was destroyed by the Testator in terms of section 6 of the Prevention of Frauds Ordinance.

The Learned District Court has held that the protocol is not the original Last Will as such probate cannot be granted. He has come to this conclusion relying on the case of ***Raliya Umma v Mohamed*** **[1954] 55 NLR 385.**

As such the main question which has to be considered in this regard is whether probate can be granted on a protocol without the original Last Will being presented to court. This has been raised as issue no 08 at the trial. Section 540(a) of the Civil Procedure Code sets out the law related to

granting probate which states that: "*It is competent to the District Court to make a grant of probate or a grant of administration, limited, either in respect to its duration, or in respect to the property to be administered thereunder, or to the power of dealing with that property which is conveyed by the grant, in the following cases :-*
(a) When the original will of the deceased person has been lost since the testator's death, but a copy has been preserved, probate of that copy may be granted, limited until the original be brought into court".

In the case of ***Weerasinghe v Nagahawatte*** **[1984] 1 Sri LR 420** it was held that "*the proposition that where the circumstances giving rise to the presumption - destruction by the testator animo revocandi- are absent, and the Will has been irretrievably lost or destroyed, its contents may be proved by secondary evidence. In the former case it was proved by parol evidence ; in the latter, by the production of the draft of the Will. A protocol is a copy of the original Will (per Gratiaen, J. (supra))"*.

Based on the above, it is clear that the issue related to the non production of the Last Will at trial and not regarding the destruction of the Last Will. Owing to which, I answer the second question of law on which leave was granted in the positive.

I will now proceed to answer the first question of law on which leave was granted. Namely that: "**the Court of Appeal has failed to duly appreciate the significance and/or impact of the marriage certificate 19/4/1989 which surfaced during the course of the hearing"**.

The deceased had married the 7th Respondent in the year 1984, the Appellant contended that there were constant quarrels between the two as evidenced by the police statements marked P2 and P3 at the trial. The 7th Respondent had left the matrimonial home in or about December 1986 after an incident and thereafter filed for divorce from the deceased, who passed away before the divorce action was concluded. In the interim, the deceased converted to Islam and contracted a marriage with the 8th Respondent under Muslim Law in 1989.

The Learned District Court Judge held that the subsequent marriage of the Testator invalidated the Last Will. The Learned District Judge has come to the conclusion that the Last Will has been revoked by subsequent marriage of the Testator relying on section 06 of the Prevention of Frauds Ordinance. The 7th respondent has raised the application of section 6 of the Prevention of Frauds Ordinance to the subsequent marriage as two additional issues at trial in 2001.

The Learned President's Counsel for the Appellant submitted that the Learned District Court Judges observations were completely wrong as the Learned District Court Judge criticises the Appellant for not providing the marriage certificate. However, it is the duty of the 7th Respondent to prove the date of the second marriage if they intend to challenge the Last Will based on the second marriage.

The 7th Respondent submitted that, both at trial and before the Court of Appeal, the position of the Appellant was that the deceased converted to Islam and contracted a second marriage with the 8th Respondent. However, at the trial no marriage certificate was adduced but the evidence of the

Appellant, the 5th Respondent and one Sirisena (the attesting witness of the Last Will in contention) was that the deceased entered into a marriage with the 8th Respondent the day after the execution of the purported Last Will.

It was the position of both the 7th Respondent and the 9th Respondent that during the course of Arguments before the Court of Appeal, the Appellant submitted to Court a purported Marriage Certificate between the deceased and the 8th Respondent. The 7th Respondent stated that no application has been made nor an opportunity to object was granted for the reception of fresh evidence not produced before the Trial court being adduced in the Court of Appeal. The 7th Respondent further submitted that a proper application has not been made for the advancement of fresh evidence in terms of section 773 of the Civil Procedure Code and/or Article 139(2) of the Constitution, as such there is no evidentiary value in the purported document submitted to the Court of Appeal.

The 9th Respondent stated that the Court of Appeal had not considered the said purported material submitted to Court and in the circumstances the decision of the court not to consider the said material is correct and in accordance with the law.

It is the position of the Appellant that when they tried to mark and produce the marriage certificate, this was objected to by the Respondents as it was after the leading evidence had closed. The Learned District Court Judge had denied the Appellants from submitting the Marriage Certificate at that point in trial. However, the Learned District Judge in his judgement states that the Appellants have not submitted the marriage certificate. It is quite unfortunate that the Learned District Judge has not directed attention to

the fact that the Appellants did in fact apply to submit the relevant marriage certificate but they were out of time and as such the request was denied.

The Honourable Justice of the Court of Appeal has come to the conclusion that the second marriage has been contracted after the impugned Last Will was executed. This conclusion has been reached by the Honourable Justice relying on the evidence of Sirisena on page 325 of the appeal brief, the Honourable Justice has further held that since the Last Will was not produced at the trial, the evidence of Sirisena is sufficient to establish that the second marriage of the Testator has been contracted after executing the impugned Last Will.

However the Learned President's Counsel for the Appellant submitted that in the proceedings of the Court of Appeal, her Ladyship of the Court of Appeal acting under and in terms of of Article 139(2) of the Constitution called for the marriage certificate in respect of the second marriage of the deceased in order to establish the date the second marriage took place, as this document was not permitted in the course of the trial at the District Court.

The said marriage certificate has thereafter been filed at the Court of Appeal with the Written Submissions. However this has not been considered in the judgement of the Honorable Justice of the Court of Appeal.

When considering the possibility of accepting fresh documents at the appeal stage, ***Beatrice Dep v Lalani Meemaduwa*** **[1997] 3 Sri L.R** Ismail J. at page 379 stated that,

"In order to justify the reception of fresh evidence or a new trial three conditions must be fulfilled:
i) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.
ii) Evidence must be such that if given it would probably have an important influence on the result of the case, although it need not be decisive.
iii) The evidence must be such as is presumable to be believed or in other words it must be apparently credible although it need not be incontrovertible."

However, it must be noted, that despite the order of the Honourable Court of Appeal Justice, the marriage certificate has been tendered for the first time before the appellate courts through written submissions. It would be inappropriate to consider the marriage certificate as such a mode of tendering a document to court is procedurally flawed. In accordance with established legal principles, the introduction of new evidence at the appellate stage must be supported by an affidavit and notice must be given to the opposing party to afford them an opportunity to respond. When a document is merely annexed to written submissions without agreement between the parties as to its admissibility, the opposing party is denied the opportunity to challenge or address its contents.

In the absence of a duly admitted marriage certificate, the only relevant material before the court appears to be the testimony of Sirisena and the Appellant. However, the date of marriage forms part of the contents of the marriage certificate, and it is a well-established rule that the contents of a document cannot be proved by oral evidence unless the document is formally marked and admitted into evidence, except in the case of

customary marriages, for which there appears to be no supporting evidence in this instance. Therefore, any reference to the date of marriage based on oral testimony must be disregarded, as it lacks evidentiary value.

In perusal of the judgement of the District Court, I am inclined to agree with the Learned President's Counsel for the Appellant that the Learned District Court Judge has erroneously cast the burden of proving the marriage on the Appellant. It is trite law that the burden of proving an assertion lies with the party who raises the same.

Section 103 of the Evidence Ordinance is set out as follows: "*The Burden of Proof of any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie with any particular person.*"

Justice Prasanna Jayawardena, P.C., held in ***Seylan Bank Limited v Clement Charles Epasinghe and Another*** **[SC Appeal 39/2006, decided on 01.08.2017 at page 8]**, "*the scope and ambit of the trial had been defined by the admissions and issues which were framed at the commencement of the trial, in terms of section 146 of the Civil Procedure Code..... If the additional issues are issues of law, the parties should be given an opportunity to make submissions. If the additional issues are issues of fact or issues of both fact and law, the parties should be given an opportunity to lead evidence on that issue and make submissions thereon.*"

In the case of ***Hameed v Cassim*** **[1996] 2 Sri LR at Page 30** it was held that *"It is not necessary that the new issue should arise on the pleadings. A new issue could be framed on the evidence led by the parties orally or in the*

form of documents. The only restriction is that the Judge in framing a new issue should act in the interests of justice, which is primarily to ensure the correct decision is given in the case."

In ***Vanderbona v Justin Perera*** **[1985] 2 Sri LR 65** it was held that "*The rule regulating the burden of proof is contained in sections 101 to 103 of the Evidence Ordinance'. "The true meaning-of the rule." states Monir in the Law of Evidence, 5th Ed. page"400, in regard to those sections of the Indian Evidence Act, (which correspond With ours) is -*

'that he who asks the court to believe in the existence of a certain fact or set of facts, must prove that fact or set of facts exist. Non-existence of a fact is as much a fact as the existence of a fact and, therefore, the non-existence of a fact is as much within the meaning of sections 103 and 101 as the existence of a fact. Thus interpreted, these two sections of the Evidence Act may be taken to lay down the general rule that where a given allegation, whether affirmative or negative, forms an essential part of a party's case,the proof of such allegation rests on such party, and that is how the rule is stated in the English Cases "..... Monir then elaborates it as follows : "the rule applicable to all such cases is that where a claim or defence rests upon a negative allegation, the one asserting such claim or defence is not relieved of the onus probandi by, reason of the form of the allegation, or the inconvenience of proving:a negative. Where in order to show a right to relief, it becomes necessary for a party, under.the substantive law, to prove the non-existence of a fact, the burden of proving such 'negative allegation' will be on him ..... and indeed, in every case in which the plaintiff grounds his right of action upon a negative allegation and the establishment of this negative is consequently an essential element in support of his claim."

It is the 7th Respondent who raised two additional issues regarding the date of the second marriage of the Testator which invalided the Last Will and the application of section 6 of the Prevention of Frauds Ordinance, as such the onus on proving the same lies with the 7th Respondent. However, the 7th Respondent has not led any evidence at trial and failed to discharge the burden cast upon her.

In any event, as correctly asserted by the Learned President's Counsel for the Appellant, the Testator's divorce proceedings with the 7th Respondent had not been finalised at the time he entered into marriage with the 8th Respondent under Muslim Law. Consequently, the second marriage was inherently invalid.

This position has been firmly established by a five-judge bench decision of the Supreme Court in the case of ***Natalie Abeysundere v Christopher Abeysundere and Another*** **[1991] 1 Sri LR at page 26** which held that a marriage contracted under Muslim Law is null and void unless the first marriage is dissolved in terms of the Roman Dutch Law.

Based on the above, the second marriage of the Testator was invalid in the eyes of the law and had no bearing on the validity of the Last Will No 962. When considering all the circumstances discussed above, it is evident that the Appellant in the present case has correctly proved the validity of the purported Last Will. On the other hand, the Respondents have failed to bring conclusive evidence to defend their position.

Having examined the facts of the case, and the material placed before this court, I allow the appeal of the Appellant, answering both questions of law on which leave was granted in the affirmative.

I hold that the Appellant is entitled to granting of probate on the Last Will No.962.

The judgment of the Court of Appeal dated 01.06.2012 and the judgment of the District Court of Negombo dated 08.03.2002 are set aside.

Appeal Allowed.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J

I had the privilege of reading the draft Judgment written by Her Ladyship Hon. Justice Kumudini Wickremasinghe.

I also agree with the final conclusion of Her Ladyship to allow the appeal and set aside the Judgments of the Courts below. With all due respect to the views expressed by her Ladyship, I based my decision on the following reasons.

The burden is on the Propounder of the Last Will to prove the Will and remove any suspicion attached to it. Even if it is considered that there is suspicion attached to the Last Will since the child from the first marriage is not a beneficiary and the executrix is also a beneficiary of the Last Will, the Appellant, in the hearing before the learned District Judge had

proved the due execution of the Will by calling the Notary Public who attested it and one of the witnesses to the execution of the Last Will to prove it and the evidence led at the hearing established that the first wife and child from that marriage did not live with the Testator and Testator did not intend to give anything to the first wife- vide evidence of the Appellant. As the child was a minor of tender age at that time, owing to the fact that whatever given to that child would be enjoyed by the first wife there was a possibility for not giving anything to the child of the first marriage. Hence, after proving the Will was duly executed, the burden was with the 7th and 9th Respondents who challenged the Last Will on the ground of that it was not an act and deed of the Testator and it is a fraudulent document to prove those grounds. It appears that neither evidence had been led in that regard by the said Respondent before the learned District Judge nor sufficient material divulged through the cross-examination in that regard. Thus, I cannot find fault with learned District Judge answering the Issues No. 1 – 4 raised by the Appellant before the District Judge in her favour and Issues No. 5- 7 raised by the Respondents against the said Respondents.

Now it is argued that the Will should have been considered as destroyed by the Testator as the original of it was not forthcoming after his death. The Issue No. 8 raised during the hearing, only questions the Appellant's right to proceed with the hearing without the original Will. By raising issues, parties had demarcated the scope of the dispute that had to be resolved by the learned District Judge. Now in appeal, it is not proper to allow any party to take up a different stance that was not within the dispute referred to the learned District Judge. Thus, on one hand, whether it was destroyed by the Testator or whether it is presumed to be destroyed by the Testator is not a matter that should be considered

during this appeal. On the other hand, even if it is considered, in my view this Court cannot hold in favour of the Respondents on the following grounds.

- There is no direct evidence that indicates that it was destroyed by the Testator. Thus, what should be considered is whether it should be presumed that the Testator destroyed the Last Will with the intention of revoking it.
- It is true that there is a presumption that where a Will is traced to the custody of a Testator and cannot be found or forthcoming at the death of the Testator it has been destroyed by the Testator *animo revocandi*. However, this is a rebuttable presumption- vide **Manchihamy v Abeyasekera** 15 N L R 479, **Attapattu v Jayawardene** 22 N L R 497, **Rosaline Nona v Mango Nona** 66 N L R 33. Anyhow, to apply this presumption, there must be evidence that the Will was not available at the time of the death of the Testator. In the matter at hand, there was evidence that the Will was available even on the day before the Testator's death took place due to some violent Act. The witness, Sirisena, categorically states that it was there in the wall cupboard when he was checking the books relevant to the estates belonging to the Testator prior to leaving to said estates with the Testator. Further, the evidence clearly shows that on the following day, a group of people came to the house and abducted the Testator and killed the Testator. It is also in evidence that this group of people ransacked the house including the room where the said cupboard was. In the circumstances, without any indication expressed by the Testator within that one-day period prior to his death of his intention to destroy or revoke the Will, it is not proper to presume that the

missing Last Will indicates a destruction by the Testator as the evidence does not suggest that it was not available at the moment of his death due to its destruction by the Testator.

Thus, in my view, the application of that presumption must fail.

The other contention relied upon by the Respondents is that the second marriage of the Testator invalidates the Last Will in issue as it has been executed prior to the said 2nd marriage. In this regard, the Respondents rely on Section 6 of the Prevention of Fraud Ordinance and have raised the last two issues on 02.08.2001 during the hearing. It is true that the witnesses of the Appellant before the District Judge speak of the fact of executing the Last Will a day prior to the function of the 2nd Marriage took place in a hotel. However, the Appellant in her evidence had stated that the function took place on 25.05.1989 and as per the records of Muslim marriages it took place in April 1989, indicating that in fact, the 2nd marriage took place prior to the executing of the Will. But no marriage certificate was marked through her evidence. Thus, learned Judges below erred in deciding that the Will is not valid due to the reason it was executed before the 2nd Marriage considering only the date of the function at a hotel and without seeing the marriage certificate. In my view, it is not lawful to consider the marriage certificate tendered through written submission filed in the Court of Appeal after referring to it during the oral submissions made in that Court. It appears that even the Court of appeal has not considered it. It is true that the Appellant after the closing of the evidence in the original court had moved to mark that document but it had been refused by the learned District Judge. It must be noted that the 8th Respondent who did not object to the Petition of the Appellant before the District Court and who also is a beneficiary of

the Last Will is the wife of the purported 2nd Marriage. She should have known the date of marriage and the certificate of marriage should have been available with her. Thus, there was every possibility to tender acceptable evidence as to the date of marriage during the hearing. It itself is a ground not to accept new evidence in appeal – vide **Beatrice Dep v Lalani Meemaduwa** (1997) 3 Sri L R 379 and **Ratwatte v Bandara** 70 N L R 231. On the other hand, there must be proper application to tender fresh evidence while giving an opportunity for the other side to oppose to it. After considering the application, the Appellate Court may have to decide the mode of producing the fresh evidence as mere producing a document without an opportunity giving to the opposite party will open gates to unverified, untested documents to be considered as evidence causing irreparable harm to the opposite party. Even a bogus document may come in as evidence by allowing such documents without giving an opportunity for the opposite party to challenge it in a proper manner. Thus, in my view this Court should not consider said marriage certificate filed during the appeal. However, as per evidence, it is indicated that this second marriage took place before the divorce action was concluded between the Testator and the first wife. If so, there cannot be a valid marriage. It is said that the second marriage was done in terms of Muslim law. In **Natalie Abeysundere v Christopher Abeysundere** (1997) 1 Sri L R 26 it was held that the marriage contracted under Muslim Law is null and void unless the first marriage is dissolved in terms of the Roman Dutch Law. Thus, in fact there is no second marriage before law proved before the Courts below to consider that the Last Will is repudiated by the second marriage.

Thus, this appeal has to be allowed and the judgments of the Courts below have to be set aside and the Appellant is entitled to the granting of probate to her.

Appeal Allowed.

JUDGE OF THE SUPREME COURT

K. PRIYANTHA FERNANDO, J.

I had the privilege of reading the draft Judgment written by Her Ladyship Hon. Justice Kumudini Wickremasinghe and also the added reasoning adduced by His Lordship Hon. Justice E.A.G.R Amarasekara.

I agree with the conclusions reached and the reasons given by both Justice Kumudini Wickremasinghe and Justice E.A.G.R Amarasekara.

JUDGE OF THE SUPREME COURT