PIERIS

v.

WIJERATNE AND OTHERS

COURT OF APPEAL.
JAYAWICKRAMA, J.
CA 33/97 WITH
CALA 326/96.
DC GAMPAHA 1923/T.
SEPTEMBER, 03RD, 1999.

Testamentary Proceedings - Last Will - Recall of Probate - Fraud alleged - Civil Procedure Code S.516, S.524, S.536, S.537, S.839 - Inherent power of Court - Order Nisi - Order absolute.

The Application to recall the Probate filed by the Intervenient Petitioner was dismissed on the ground that, the Application was not maintainable on the ground that S.536 Civil Procedure Code provides for a recall of Probate only where an order absolute had been issued in the first instance, and in the instant case an Order Nisi had been issued in the first instance.

Held :

(1) In the instant case, the Petitioner Respondent has violated the provisions of S.516 by not depositing the will within a reasonable time after the testators death; the will was deposited in Court over one year after the decree nisi was entered, the heirs of the deceased have not been made Respondents as required by S.524 C.P.C., Criminal proceedings against the Petitioner Respondent has been initiated and the E.Q.D. has reported that the signature in the Last Will of which Probate was granted is not the signature of the deceased. Further parties have agreed in open court that an inquiry should be held to ascertain whether the lastwill is the act and deed of the deceased.

(2) Further the Petitioner Respondent had made his Application under S.516(1) and S.524(1) Civil Procedure Code to prove the will and to have the Probate thereof issued to him. The District Court had issued a Decree Nisi for the grant of Letters of Administration on the basis that the deceased has died "without making a will."

(3) Although according to S.536 Civil Procedure Code an application to recall Probate could be made only when an order absolute in the first instance has been made, in an appropriate case, depending on the circumstances, a Court has jurisdiction to act under S.839 Civil

Procedure Code and make an order as may be necessary for the ends of justice or to prevent abuse of the process of Court.

APPLICATION in Revision from the order of the District Court of Gampaha.

Cases referred to :

1. *In Re Thissera* 13 NLR 261
2. *Edoris vs Perera* 17 NLR 212
3. *Mrs. Biyanwila vs Mas Amerasekera* 67 NLR 488
4. *Birch vs Birch* (1902) Probate 130
5. *Thissera vs Goonetilake* 15 NLR 379
6. *Kathiraman Thamby vs Lebbe Thamby Hadjiar* 75 NLR 228

Faiz Musthapa P.C. with *W. Dayaratne* for Substituted 2nd Defendant - Petitioner Respondent - Petitioner.

D.M.G. Dissanayake for Petitioner - Respondent - Respondent.

Cur. adv. vult.

October 6, 2000.

JAYAWICKRAMA, J.

The Intervenient Petitioner filed a Leave to Appeal Application and a Revision Application to set aside the order made by the learned District Judge dated 06. 12. 1996 dismissing an application made by the Intervenient Petitioner to recall the Probate issued in this action. Subsequently, the Intervenient Petitioner has died and the second Intervenient Petitioner was substituted in his place. These applications were made on the basis of fraud in obtaining the Probate.

The original Intervenient Petitioner, Colonne Appuhamilage Don Peiris was the father of the deceased Piyaseeli Pushpalatha Pussella who died on 16. 06. 1988. The Petitioner-Respondent Punchi Nilame Pussella is the husband of the deceased. The Petitioner-Respondent, Pussella filed the testamentary case T 1923 to prove the last will dated 13. 06. 1998 marked X(a)(ඇ). It is to be noted that this last will bears No. 142 is hand-written

and purported to have been executed three days prior to the death of the alleged testatrix. By this will, the deceased purported to leave all the property to her husband, the Respondent, who was estranged from her at that time.

The learned Counsel for the Substituted 2nd Intervenient-Petitioner-Respondent-Petitioner submitted that the application by the husband is in breach of Section 524 of the Civil Procedure Code in that the heirs of the deceased, namely, the original Intervenient-Petitioner, the father and the mother were not made parties and contains no averment as required by Section 525 that the applicant for probate has no reason to suppose that this application would be opposed by the heirs. That application for probate itself was made on 29. 07. 1988. Prior to the institution of these proceedings i.e. T 1923, the father of the deceased had instituted the testamentary action bearing No. T 1920 making the mother of the deceased and the husband who is the present Respondent, as Respondents to that application. That application was made on the basis that the deceased has died intestate and the father who was the applicant sought Letters of Administration. An Order Nisi was issued and the husband, it is alleged evaded service of the Order Nisi and himself instituted testamentary proceedings bearing No. T 1923 seeking Probate which is the subject matter of this application.

In T 1923 instituted by the husband seeking Probate of the last will bearing No: 142 and Letters of Administration, the Court issued an Order Nisi. The learned Counsel contended that this order had been published in the "Janatha" newspaper of 08. 02. 1989. This paper has a limited circulation and published weekly apparently on Wednesday evenings. Thereafter, the Order Nisi had been made Absolute. But this publication is in relation to T 1920. According to journal entry (6) proof of publication was tendered on 07. 11. 1988. but the above publication is dated 08. 02. 1989.

At this stage it is to be noted that the Decree Nisi had been published not only on 08. 02. 1989 (PIA) but also on 09. 02. 1989 (PIB), in the same newspaper and both publications refers to T 1920 filed by the Intervenient-Petitioner and not to T 1923 filed by the Petitioner-Respondent.

On 29. 01. 1990 the original Intervenient-Petitioner made an application for the recall of Probate. In that application he averred fraud and that the alleged last will was not the act and deed of the deceased.

The learned Counsel for the Substituted-Intervenient-Petitioner submitted that the application itself did not invoke Section 535 of the Civil Procedure Code which provides for applications for recall of probate by way of summary procedure as set out in section 537. He contended that the application was by ordinary procedure and that therefore the judgments cited by the learned Trial Judge are inapplicable and distinguishable on this account.

The learned counsel for the Substituted-Intervenient-Petitioner further submitted that the C.I.D. had instituted criminal proceedings in the Magistrate's Court against the Respondent on an allegation of forgery where the will in question had been forwarded by the Magistrate's Court to the EQD. In his report, the EQD (vide para 4 page 6 of his report marked as "Y") reported that the signature on the Last Will was not that of the deceased.

The learned Counsel for the Substituted-Intervenient-Petitioner contended that the application came up for inquiry in the regular way and not by way of summary procedure. On 05. 03. 1993, the parties expressly agreed that the inquiry should be held into the question as to whether the Last Will was the act and deed of the deceased. Journal entry dated 05. 03. 1993 is as follows : "පෙනී සිටීම පෙර පරදීම දෙවෙනි වගඋත්තරකරුද සිටී. (මේ අවස්ථාවේ මෙම නඩුවට අදාල අන්තිම පත්‍රය

මියගිය තැනැත්තියගේ ක්‍රියාවක්ද? නැත්ද? යන්න සම්බන්ධයෙන් විමසිය යුතු බවට දෙපාර්ශවයෙන් එකහවේ).

Thereafter the inquiry commenced and evidence was led to decide that issue and further inquiry was postponed for 21. 07. 1993. Subsequently the learned District Judge before whom the inquiry began went on transfer and the inquiry was fixed *de novo* before his successor. On the date of inquiry the Counsel for the Petitioner-Respondent went back on the agreement entered into in open Court on 05. 05. 1993 and raised a preliminary objection that the application was not maintainable on the ground that Section 536 provides for recall of Probate only where an order Absolute had been issued in the first instance, and in the instant case, an Order Nisi had been issued in the first instance.

Written submissions were tendered by the parties on this preliminary objection and the learned District Judge made order on 06. 12. 1996 upholding the preliminary objection and dismissing the application made by the Original-Intervenient-Petitioner. It is to be noted that in the interim period the Original-Intervenient-Petitioner died and his son Wijeratne, the brother of the deceased had been substituted.

The learned District Judge upholding the preliminary objection relied upon the cases *In Re. Thissera*[1], *Edoris vs Perera*[2], *Mrs. Biyanwila vs Mrs. Amerasekera*[3].

Section 536 of the Civil Procedure Code is as follows :

"In any case where probate of a deceased person's will has issued on an order absolute in the first instance, or a grant of administration of a deceased person's property has been made, it shall be competent to the District Court to recall the said probate or grant of administration, and to revoke the grant thereof, upon being satisfied that the will ought not to have been held proved, or that the grant of probate or of administration ought not to have been made; and it shall also be competent to

the District Court to recall the probate or grant of administration at any time upon being satisfied that events have occurred which render the administration thereunder impracticable or useless."

In Edoris vs. Perera(supra) it was held "when an issue of Probate has followed upon an Order Nisi (and not upon an Order Absolute in the first instance), the summary procedure for the recall of Probate provided in Section 537 does not apply, and all parties are concluded by the issue of probate. But where there is fraud in connection with the obtaining of the probate even upon an Order Nisi, an independent action might be brought to set aside the probate." Although it was so held Lascellas C.J. observed that "but the words which I have cited from the judgment cannot be understood to mean that, when probate has been granted after order Nisi, there exists a general right on the part of interested persons to sue to have the judgment set aside and probate recalled. A judgment granting probate of a will is a judgment *in rem* and is binding on the world. It is true that where probate has been obtained by fraud an action lies, as in other cases of judgments obtained by fraud, to set aside the judgment and recall probate, the right being in some respect more extensive than in the case of ordinary judgments. *(Birch vs Birch)*[4].

De Sampayo A.J. observed in the same case that "*in Re Thissera(supra)*" this Court took the same view, and held that where probate was issued upon an Order Nisi, and not upon an Order Absolute in the first instance, the summary procedure provided in Section 537 did not apply. But I am much impressed that the opinion of Wood Renton J., in *Thissera vs. Goonetilleke*[5], that Section 537 is not so limited, and that it is intended to permit application for the recall of probate on any legal ground to be made in the testamentary case itself.

". . . . . There might, of course, be fraud in connection with the obtaining of probate even upon an Order Nisi, in which

case an independent action might in analogy to the English practice be brought to set aside the probate. There is, however, no fraud alleged in this case."

In *Thissera vs. Goonetileke Hamine(supra)* it was held that "the direction in Section 537 that all applications for recall of probate shall be in a particular way applies only to the applications which are authorised by Section 536". In that case a will which was duly proved nine years earlier by the oaths of all attesting witnesses and of the executor, and which has ever since been acted upon, the Court held that it could not be right to order that the will shall be declared to be a forgery upon the mere allegation of one person.

In *Mrs. N. Biyanwila vs. Mrs. A. Amerasekera(supra)* the head note states that "It was conceded that the power of a District Court to recall or revoke a probate which has already been granted is limited, by virtue of Section 536 of the Civil Procedure Code, to cases where an Order Absolute has been entered in the first instance. In that case Sri Skandarajah, J. in his dissenting judgment observed that "as no respondent was mentioned in the petition it was open to the Court, in the exercise of its discretion as provided for by Section 529, to enter an Order Absolute in the first instance as prayed for or an Order Nisi. In that case, the application was for an Order Absolute in the first instance, but, the learned Judge entered an Order Nisi. On that basis Sri Skandarajah, J. allowed the appeal on the basis that the Order was an Order Absolute in the first Instance. But the other two judges in their majority judgment dismissed the appeal holding that the order was a decree Nisi. In that case Sirimanne, J. in his majority decision made the following observation:- "Provisions of this Section (524 of the Civil Procedure Code) are directory, and that a failure to strictly comply with those provisions, does not render the proceedings void *ab initio*. They are, however, voidable, and in an appropriate case, a party may ask the Court for relief under Section 839 of the Civil Procedure Code.

It was held in *Kathiraman Thamby vs. Lebbe Thamby Hadjiar*[6] that "in an application for probate of Last Will, the failure of the District Judge to select a newspaper which would satisfy the object mentioned in Section 532 of the Civil Procedure Code, Viz., that "Notice of the Order Nisi should reach all persons interested in the administration of the deceased's property", is a non-compliance with a mandatory provision of law. In such a case the Order Absolute for probate is liable to be set aside by the Supreme Court upon an application in revision made by interested parties to intervene in the testamentary proceedings."

When one takes into consideration the above statements of law it is clear that although according to Section 536 of the Civil Procedure Code an application to recall the probate could be made only where an order absolute in the first instance has been made in an appropriate case, depending on the circumstances, a court has jurisdiction to act under Section 839 of the Civil Procedure Code and make an order as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

In the instant case, the Petitioner-Respondent has violated the provisions of Section 516 by not depositing the will as soon as reasonable after the testator's death. According to Journal Entry marked X(c) a motion was filed to deposit the original will in the Court safe and the will was deposited on 27. 09. 1989, over one year after the decree Nisi was entered in the testamentary case. Further on a perusal of the case record it is clear that he has not made respondents to his application the heirs of the deceased to the best of the Petitioner's knowledge, as required by Section 524 of the Civil Procedure Code.

It is to be noted that criminal prosecution against the Petitioner-Respondent, has been initiated and the EQD has reported that the signature in the last will of which probate was granted, is not the signature of the deceased. Further, as

stated above parties have agreed in open Court that an inquiry should be held into the question as to whether the last will is the act and deed of the deceased. Although the Petitioner-Respondent by his petition dated 29. 07. 1988 made his application under Section 516(1) and 524(1) of the Civil Procedure Code to prove the Will and to have the probate thereof issued to him, the learned District Judge by his order dated 29. 07. 1988 had issued a decree Nisi for the grant of letters of letters of administration on the basis that the deceased has died "*Without making a will*". His order is as follows : (Journal Entry 1).

"... අන්තිම **කැමති පත්‍රයක් නොතබා මියගිය** එකී තැනැත්තාගේ බුදලය සම්බන්ධයෙන් අද්මිනිස්ත්‍රාසි බලපත්‍රයක් ලබා ගැනීමට අයිතිවාසිකම්ද, ප්‍රකාශ කෙරෙන නිසයි ආඥවක් කරන ලෙසද ඉල්ලා සිටී.

මේ ඉල්ලීමට ඉඩදෙනු ලැබේ. අන්තිම කැමති පත්‍රයක් නොතබා මියගිය එකී තැනැත්තාගේ බුදලය පිළිබඳ අද්මිනිස්ත්‍රායි බලපත්‍ර ලැබීමට පෙත්සම්කරුට අයිතිවාසිකම් තිබෙන බව මෙයින් අන කරනු ලැබේ."

In view of the above order the substituted Intervenient Petitioner could invoke the provisions of section 536 to recall the grant of administration of the deceased persons property to the Petitioner-Respondent.

Taking into consideration the facts revealed in this case, I am of the opinion that this is an appropriate case where the Court should use its inherent power under Section 839 of the Civil Procedure Code in the interest of justice. One should not allow a party to make use of procedural errors to commit a fraud. In the instant case, there are sufficient material for the District Court to consider the validity of the last will. As agreed by the parties on 05. 03. 1993 the learned District Judge should have decided on this matter without going into the preliminary technical objection which may allow a party to commit a fraud.

In view of the above reasons I set aside the order of the learned District Judge dated 06. 12. 1996 and direct that he should proceed to decide whether the last will is an act and deed of the deceased, as agreed upon by the parties on 05. 03. 1993.

Hence the application for leave to Appeal and the Revision Application of the Substituted Second Intervenient-Petitioner-Respondent-Petitioner are allowed with taxed costs payable by the Petitioner-Respondent to the 2nd Intervenient-Petitioner-Respondent-Petitioner.

Application allowed.