SIRIMANNE
v.
KOTTEGODA AND ANOTHER

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
KULATUNGE, J.
RAMANATHAN, J.
S.C. APPEAL NO. 83/95
C.A. APPEAL NO. 761/86(F)
D.C. MT. LAVINIA NO. 993/T
FEBRUARY 19 AND 22, 1996.

Civil Procedure Code – Last Will – Right to probate or grant of administration – Conflict of claims – Section 523 of the Civil Procedure Code.

The widow and the devisee under the last will of the deceased applied to the District Court for Letters of Administration with the will and codicil annexed. The executor named in the will intervened and objected to the application.

Held:

(1) The pleadings in the case disclosed a "conflict of claims" between the widow and the executor within the meaning of Section 523 of the Civil Procedure Code, in view of which the claim of the executor has to be preferred to that of the widow. The expression "conflict of claims" cannot be confined to a situation where there are opposing applications.

(2) The right of the executor to be granted probate is paramount.

Case referred to:

1. *Kumarajeewa v. Susan Fernando* 52 N.L.R. 393, 394

APPEAL from the judgment of the Court of Appeal

N. S. A. Goonatillake, P.C. with *M. Mahendran for appellant.*

J. W. Subasinghe, P.C. with *J. A. J. Udawatte for 1st and 2nd respondents.*

Cur. adv. vult.

March 7, 1996
G. P. S. DE SILVA, C.J.,

The 1st respondent is the widow of H. A. Kottegoda who died on 15th November 1981, leaving a last will together with a codicil. The executors named in the last will were the appellant and the 2nd respondent.

The 1st respondent (widow and devisee under the last will) made an application on 8.1.84 to the District Court seeking Letters of administration with the last will and codicil annexed. The appellant, though nominated as a co-executor in the last will, was not made respondent to the application. The respondents to the application were the two children of the deceased, one of whom was a co-executor. It is the case of the appellant that he became aware of the application made by the 1st respondent only upon the publication of the order *nisi*. As the 3rd intervenient-petitioner, he filed his objections to the application. In his objections dated 25.6.84 he averred that he was at all times willing to "administer the estate and obtain probate" but he was unable to do so by reason of the conduct of the 1st respondent (widow) and the 2nd respondent (co-executor). He categorically opposed the grant of Letters of Administration with the will and codicil annexed to the 1st respondent and pleaded that she is not in law entitled to it.

After inquiry, the District Court by its order dated 10.2.86 upheld the objections filed by the appellant and dismissed the application of the 1st respondent for Letters of Administration with the will and codicil annexed.

Against this order of the District Court, the 1st respondent filed an application "for leave to appeal" and also an appeal. Both matters were taken up for hearing together before the Court of Appeal. The Court of Appeal allowed the appeal and set aside the order of the District Court. Hence the appeal to this Court by the co-executor-appellant.

Special leave to appeal was granted by this court only on the following question:- "Is the Court of Appeal in error in holding that there is no conflict of claims within the meaning of section 523 of the Civil Procedure Code." The material part of section 523 reads thus: "In case of a conflict of claims to have the will proved and probate or grant administration issued, the claim of an executor or his attorney shall be preferred to that of all others ... "

The principal submission of Mr. Subasinghe for the 1st and 2nd respondents is that the expression "conflict of claims" in section 523

contemplates two or more opposing applications. Counsel contended that in the present case there are no such opposing applications and therefore the provisions of section 523 are not applicable. Mr. Subasinghe urged that the words "conflict of claims" means "a clash of applications or incompatible applications" (to use Counsel's own words). At the time of the inquiry or even at the time the court made the order there was only one application. Neither the appellant nor, the 2nd respondent had applied for the issue of probate.

With these submissions I am afraid I cannot agree. The expression "conflict of claims" cannot be confined to a situation where there are opposing applications; that would be to construe these words in a narrow and unduly restrictive sense. The purely literal construction sought to be placed on the words "conflict of claims" does not commend itself to me.

As submitted by Mr. Nehru Goonetilake, counsel for the appellant, the pleadings in the case clearly disclose a "conflict of claims". The appellant as one of the executors named in the last will claimed the right to have probate issued to him while the 1st respondent as the widow claimed a right to the issue of Letters of Administration with the will and codicil annexed. This in itself necessarily gives rise to a "conflict of claims" within the meaning of section 523.

Moreover, the evidence led at the inquiry before the District Court establishes the fact that the appellant had accepted the office of executor. Thus in the letter P2 dated 20.10.93, addressed to the attorney-at-law for the 2nd respondent, the appellant states, *inter alia*, "having been nominated by the deceased I consent to function as an executor. Please be good enough to send me copies of papers prepared by you for the administration of the estate of the deceased, so that I may ascertain whether all his assets have been included or whether any property which did not belong to him has been included. Also I would like to verify the value given for the various properties". In theses circumstances, when the 1st respondent applied for Letters of Administration with the will and codicil annexed it is reasonable to conclude that there was a "conflict of claims". It is also relevant to note that the position of the appellant was that he was unable to

make an application to court to have the will proved because all relevant documents were with the 1st respondent.

On a consideration of the matters set out above, it seems to me that the Court of Appeal was in error when it held that there was no conflict of claims" and therefore section 523 of the Civil Procedure Code was not applicable.

Mr. Subasinghe next submitted that the evidence established that the appellant had shown no interest in taking steps to have the will proved. To use Counsel's own words "the appellant had lapsed into silence and inaction." Mr. Subasinghe contended that the conduct of the appellant gave rise to an "estoppel" in the sense that he is "estopped from claiming the right to be an executor." Assuming that the appellant had remained "inactive" (a position which was strongly contested by Mr. Goonetilake) yet, in my view, the plea of "estoppel" cannot be maintained. It was neither pleaded nor put in issue at the inquiry before the District Court; it was not a matter which was raised even before the Court of Appeal. It certainly cannot be raised for the first time before this Court.

There remains to consider the submission of Mr. Goonetilake that the right of an executor to be granted probate is "paramount". In support of his submission Counsel relevantly cited the following passage from a judgment of Nagalingam J., in *Kumarajeewa v. Susan Fernando* [1].

> "A testator's right to dispose of his property in any way that he may think proper or to appoint any man with any history to the office of a executor cannot be questioned by a court. The only case that I think of where an executor may be passed over by court in favour of another person is where the executor appointed becomes *non compos mentis* and incapable of taking upon himself the very office of executor. An utterly unworthy man is one who in the opinion of the majority of people or of mankind in general is regarded as such. But so far as the family of that utterly unworthy man may be concerned, he may be the best person to protect the rights and their interest, so

that if a testator chooses to appoint one who by ordinary standards is unworthy of trust, such an appointment would not necessarily invoke the disapprobation of court to the extent of denying to him the right conferred on him by the testator, who is the sole and the exclusive authority to appoint an executor to carry out his testament. I would emphatically say that the court has no right to ignore or supersede the appointment made by a testator. That would be to substitute for the testator's mind the mind of the Court – a course totally indefensible."

The evidence on record does not reveal any grounds upon which the appellant's right as executor to be granted probate could be displaced.

For these reasons I hold that the Court of Appeal was in error when it reversed the order of the District Court. The appeal is allowed, the judgment of the Court of Appeal is set aside and the order of the District Court is restored. In all the circumstances I make no order as to costs of appeal.

KULATUNGA, J. – I agree.

RAMANATHAN, J. – I agree.

Appeal allowed.