

The parties to bear their own costs of appeal.

Appeal allowed.

HETTIARACHCHI

v

THARANGANI HETTIARACHCHI AND OTHERS

COURT OF APPEAL

SOMAWANSA, J.

EKANAYAKE, J.

CA 1170/99(F).

D.C. ANURADHAPURA 857/T.

APRIL 26, 2004.

Civil Procedure Code, sections 536 and 724(a)(1) – Testamentary proceedings – Letters granted – Recall of letters and Revocation sought – Administrator not the legal wife? – Heir not a legal heir – Evidence Ordinance, section 79(1) – General Marriages Ordinance No. 19 of 1907, section 18.

The petitioner-appellant sought and obtained letters of administration in respect of the Estate of one T, on the basis that she was the legal wife of the deceased. The intervenient petitioner-respondent a sister of the deceased sought to intervene stating that the petitioner-appellant is not the legal wife of the deceased, that the appellant's marriage to one S is still in existence and the 1st respondent is not a child of the deceased, but a child of the petitioner-appellant's marriage to one P – that neither of them are entitled to succeed to the entitlement of the deceased. The trial Judge held with the intervenient petitioner-respondent.

Held:

- (1) In terms of section 79(1) Evidence Ordinance, the marriage certificate together with the testimony of the Deputy Registrar confirmed that the petitioner-appellant's marriage to S stands genuine and valid. As it has not been legally dissolved or declared void, the subsequent marriage to the deceased becomes invalid by law.
- (2) On a perusal of the birth certificate of the 1st respondent, daughter, it is apparent that she is not the daughter of the deceased.
- (3) It is clear that the petitioner-appellant and the 1st respondent-respondent are not entitled to succeed to the Estate of the deceased. The trial Judge has come to a correct finding when he decided to revoke the letters issued in favour of the petitioner-appellant.

APPEAL from the judgment of the District Court, Anuradhapura.

Ranjan Suwandarathne for petitioner-appellant.

Sunil Cooray with *Nishanka Karunatilake* for intervenient-respondent-respondent

Cur.adv.vult.

May 28, 2004.

SOMAWANSA, J.

This is an appeal lodged by the petitioner-appellant to set 01
aside the order made by the learned District Judge of
Anuradhapura in case No. 857/T/ dated 07.05.1999 and for a
declaration that the order and judgment pronounced by him prior to
the aforesaid order are in accordance with the law.

The relevant facts are, the petitioner-appellant instituted the
instant testamentary action applying for the grant to herself of
Letters of Administration in respect of the estate of the deceased
Hettiarachchige Dharmasiri Tissera who died intestate, on the basis
that she was the legal wife of the deceased. As the 1st respondent- 10
respondent said to be a daughter of the deceased was a minor
then, she was represented by her guardian-ad-litem the 2nd
respondent-respondent. On 20th March 1990 the learned District
Judge issued Letters of Administration in favour of the petitioner-
appellant and proceedings in the said testamentary action were
terminated on 13.08.1990. Thereafter on 20.06.1995 the 1st
respondent-respondent made an application for an order making
her entitled to the share allocated to her under the scheme of
distribution. Accordingly the learned District Judge in terms of
section 724(a)(1) of the Civil Procedure Code made an order for the 20
administrator to render accounts. In the meantime on 17.06.1996
the intervenient petitioner-respondent in terms of section 536 of the
Civil Procedure Code sought the permission of Court to intervene
by filing petition against the grant of letters in favour of the
petitioner-appellant.

The position of the intervenient-petitioner-respondent was that the petitioner-appellant is not the legal wife of the deceased, that the petitioner-appellant's marriage to one Poddenige Don Simon is still in existence, that the 1st respondent-respondent is not a child of the deceased but a child by the petitioner-appellant's marriage to 30 Edirisinghe Arachchige Jackson Perera, that neither of them are entitled to succeed to the estate of the deceased, that the Letters of Administration should be recalled and the grant thereof should be revoked, that the lawful heirs to the deceased's estate are the intervenient-petitioner-respondent, the 2nd respondent-respondent, Hettiarachchige Seelawathi Tissera, Hettiarachchige Leelawathi Tissera and the heirs of the late Hettiarachchige Kularatne Tissera and that Letters of Administration be granted to herself. The intervenient-petitioner-respondent who is a sister of the deceased produced her birth certificate marked P1 to establish this fact. 40

The inquiry into the intervenient-petitioner-respondent's application commenced on 26.02.97 and at the conclusion of the inquiry the learned District Judge by his order dated 07.05.1999 held with the intervenient-petitioner-respondent.

It is contended by the counsel for the petitioner-appellant that there is no legally acceptable proof to establish any legal marriage between witness Poddenige Simon and the petitioner-appellant as alleged by the intervenient-petitioner-respondent except the mere allegation made by the said Simon and witness Palis Singho who merely made purported identification of the petitioner-appellant in 50 Court. That the oral evidence of the aforesaid two witnesses cannot be in any event be considered as independent evidence as the said two witnesses have been found out and brought in by the contesting intervenient-petitioner-respondent in order to establish their purported contention. As such their evidence should not be utilized to nullify the effect of the registered marriage between the petitioner-appellant and the deceased. In the circumstances he submits that the final order made by the learned District Judge of Anuradhapura on 07.05.1999 is a *per se* erroneous order and there was no material before Court to arrive at such a finding which has 60 the effect of completely disinheriting the widow of the deceased.

As the appeal involves questions of fact it becomes necessary to examine the evidence led at the inquiry at some length. At the inquiry the first witness called on behalf of the intervenient-petitioner-respondent was one Poddenige Simon who testified to the fact that he was married to the petitioner-appellant. To substantiate this fact, marriage certificate No. 3739 which certifies the marriage between witness Poddenige Don Simon and Kossinhala Vithanage Karaline Nona was marked P2. This witness also tendered an affidavit marked P3 confirming his marriage to the petitioner-appellant on 27.03.1991 which he said has not been legally dissolved. In the marriage certificate marked P2 the name of the female party is given as Kossinhala Vithanage Karaline Nona. Witness Poddenige Don Simon in the course of his evidence stated the the said Karaline Nona mentioned in the said marriage certificate marked P2 and who was married to him is in fact the petitioner-appellant. He also stated that 4 children were born out of the said wedlock and produced the birth certificate of one of his children Jagath Gunathunge wherein the mother's name is given as Kossinhala Vithanage Karaline.

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Thereafter the intervenient-petitioner-respondent testified and marked her birth certificate as P1. She also produced the marriage certificate pertaining to the petitioner-appellant's marriage to one Jackson Perera on 15.10.1972 marked P4. The name of the female party is given as Kossinhala Vithanage Caroline Karuna Vithana. Thereafter a number of official witnesses were called and the birth certificate of the 1st respondent-respondent was marked P7.

The 2nd respondent-respondent also gave evidence and thereafter witness S.A. Don Palis Singho was called. In his evidence he testified to the marriage of Poddenige Don Simon and identified the petitioner-appellant as the female party who got married to Don Simon. He also went on to say that he was one of the witnesses who signed at the solemnization of the said marriage.

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The petitioner-appellant in her evidence stated that she in 1968 married one Edirisinghe Arachchige Jackson Perera and on his death married the deceased on 1st July 1989. The marriage certificate pertaining to her marriage with Jackson Perera was

produced by the intervenient-petitioner-respondent marked P4 and the same was not denied or challenged by the petitioner-appellant 100 and the date of marriage as given therein is 15.10.1972.

It was also contended by the counsel for the petitioner-appellant that the name of the petitioner-appellant is Kossinhala Vithanage Karuna Vithana and the marriage certificate marked P6 registering the marriage between petitioner-appellant and the deceased Hettiarachchige Dharmasiri Tissera dated 1st July 1989 too gives the petitioner-appellant's name as Kossinhala Vithanage Karuna Vithana and that she has signed as Karuna Vithana in the said marriage certificate that as testified by the petitioner-appellant she was never married to Poddenige Don Simon, that she was 110 never known as Kossinhala Vithanage Karoline as alleged by witness Simon, that her birth certificate gives her name as Karaline and for the purpose of the identity card she changed her name as Karuna Vithana. He further contended that to determine whether there was a marriage between Simon and the petitioner-appellant there must be cogent and specific evidence and it should not be inferred by considering the allegations made by the interested parties. However on an examination of the three marriage certificates marked by the intervenient-petitioner-respondent pertaining to three marriages alleged to have been contracted by 120 the petitioner-appellant, it appears that they along with the oral evidence of the witnesses Don Simon and Don Palis Singho provide cogent and specific evidence to establish that the petitioner-appellant did contract three marriages.

In marriage certificate marked P6 (marriage to the deceased Dharmasiri Tissera) the female name is given as Kossinhala Vithanage Karuna Vithana. The petitioner-appellant also took up the position that she never used the name Caroline even though that is the name given in her birth certificate marked P8. On an examination of cage 6 of the above said marriage certificate 130 marked P2,P4 and P6 reveals that in all three marriage certificates Kossinhala Vithanage Ubediris is the father of the female party. It is also to be seen that the name and surname of father given in Cage 4 of the birth certificate of the petitioner-appellant marked P7 is the same Kossinhala Vithanage Ubediris. These facts would clearly establish that all three marriage certificates marked P2,P4 and P6 refer to three marriages contracted by the petitioner-appellant.

As contended by the counsel for the intervenient-petitioner-respondent, it is pertinent at this point to consider section 79(1) of the Evidence Ordinance No. 1 of 1946 which states as follows: 140

79(1) "The Court shall presume every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer in Sri Lanka, to be genuine.

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf."

In the light of the aforesaid provisions contained in section 79(1) of the Evidence Ordinance the marriage certificate together with the testimony of the Deputy Marriage Registrar confirm the fact that the petitioner-appellant's marriage to Poddenige Don Simon stands genuine and valid. In the circumstances provisions of section 18 of the General Marriages Ordinance No. 19 of 1907 would come into operation. The said section reads as follows: 150

"No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void."

Accordingly as the first marriage as per marriage certificate marked P2 to Poddenige Don Simon still stands valid and has not been legally dissolved or declared void the subsequent marriage of the petitioner-appellant as per marriage certificate marked P4 to Jackson Perera and P6 to the deceased Dharmasiri Tissera becomes invalid by operation of law. Hence it could be seen that the petitioner-appellant cannot succeed in this action. 160

Another matter that needs to be considered is as to whether the 1st respondent-respondent is a lawful heir of the deceased. Her birth certificate has been marked P7 wherein strangely in Cage 2 her name is given as Miula Tharangani Edirisinghe and in Cage 4 her father's name is given as Edirisinghe Arachchige Jackson Perera Edirisinghe. It appears that the aforesaid name has been substituted with the name Miula Tharangani Hettiarachchi in Cage 170

13 on 25.02.1992, subsequent to the death of the deceased and even after the termination of the testamentary proceeding and according to Cage 14 the name of person supplying particulars relating to Cage 13 is Kossinhala Vithanage Karuna Vithana the petitioner-appellant. On a consideration of the above facts the only conclusion that one can arrive at is that the 1st respondent-respondent is not a child of the deceased.

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In these circumstances, it is clear that the petitioner-appellant and the 1st respondent-respondent are not entitled to succeed to the estate of the deceased and the learned District Judge has come to a correct finding when he decided to revoke the Letters of Administration issued in favour of the petitioner-appellant. I see no reason to interfere with the order of the learned District Judge.

Accordingly the appeal will stand dismissed with costs fixed at Rs. 5000/-

EKANAYAKE, J. - I agree.

Appeal dismissed.