

**SADHANA DHARMABANDU  
VS  
MALLIKA HOMES LTD AND OTHERS**

COURT OF APPEAL  
BASNAYAKE. J  
CHITRASIRI. J  
CALA 498/2005  
DC COLOMBO 36175/T  
MARCH 3, 2009

*Civil Procedure Code - Section 6, Section 516, Section 520, Section 524, Section 517 - Testamentary proceedings - Application to obtain probate withdrawn - Should the application to prove the last will be dismissed? - Should the procedure set out in granting probate start afresh? - Object of the legislature - Applicability of Section 56 of the Code - Duty of Court in testamentary matters?*

The District Court allowed the application of the petitioner to withdraw his application to grant probate in respect of the last will of one X and permitted the intervenient petitioner-respondent to prosecute the action from where it was stopped.

The petitioner sought leave to appeal against the said order, and leave was granted on the question 'whether an application to prove a last will should be dismissed when the petitioner is allowed to withdraw his application to obtain probate.'

**Held:**

- (1) Testamentary actions are governed by the provisions contained in Cap. 38 of the Code. The object of the legislature seems to have been to make it mandatory to have a will proved in a Court of Law and to administer the estate of a deceased person according to the wish of the deceased. A duty is cast upon the Judge of the District Court in which a will is deposited to have the probate issued and also to have a will proved or rejected according to law.
- (2) In the premises, it is not possible for a Judge in a District Court to dismiss an action merely because an application to obtain the grant of

probate made under Section 517 is withdrawn especially when a will is deposited in Court under Section 516. In such a situation, Court cannot and should not dismiss the action bringing the entire process to a halt.

- (3) No specific provisions in law are required to cover the situation under consideration, since it is the normal course of action that a Judge should take in judicial manner.

Per Chitrasiri, J.

“Procedure in testamentary action is dealt with separately in a separate chapter in the Code. Section 6 should not be blindly applied when it comes to procedural issues in testamentary actions. The procedure in testamentary actions should be interpreted judicially and it shall not necessarily be guided by the general provisions in the Code”.

Held further

- (4) Procedure set out in granting probate or letters need not start afresh by making publications in the newspapers etc., it is not necessary to follow those steps all over again merely because the application to obtain probate was withdrawn.

**Case referred to:-**

*M. L. Marikkar vs. Abdul Aziz* - 1 NLR 196

*A. P. Niles with Arosha Silva* for petitioner.

*Romesh de Silva PC with Sugath Caldera* for respondent-respondent

*Manohara de Silva PC with David Weeraratne* for intervenient petitioner-respondent.

Cur. adv. vult

April 2, 2009

**CHITHRASIRI, J.**

This is an application seeking leave of Court to appeal from the order dated 24<sup>th</sup> November 2005 made by the Additional District Judge of Colombo. In the said order the learned Additional District Judge permitted an application by the Petitioner - Petitioner (herein after referred to as the Petitioner), to withdraw his application to grant Probate in respect of the last Will executed by the deceased

Petitioner's wife. The learned Additional District Judge whilst allowing this application of the petitioner also permitted the Intervient-Petitioner-Respondent (hereinafter referred to as the 2<sup>nd</sup> respondent) to prosecute the action from the point where it was stopped. Being aggrieved by this order the petitioner sought leave of this Court to have the original application made to the District Court dismissed on the ground that his application to prove the Will was withdrawn.

When the matter was argued in this Court, it transpired that there is a question of law which has arisen as to whether an application to prove a Last Will should be dismissed when the Petitioner is allowed to withdraw his application to obtain probate. Thus, it is clear that the leave of this Court should be granted in this instance. However, since this Court has decided to take up both the question of leave and the main issue simultaneously, I will now consider the matters connected to the main issue involved here in this application.

At the out-set, I will refer to the facts of the case in brief. The Petitioner made an application to the District Court of Colombo to prove a Last Will purported to have been written by his wife the deceased Susila de Silva. In that, Respondent-Respondent, (hereinafter referred to as the 1<sup>st</sup> Respondent) namely B.S.S. Dharmabandu nee De Silva, was named as the Respondent. She is the only child of the Petitioner and the deceased. At the time the said action was filed, petitioner deposited the aforesaid Last Will in Court in keeping with Section 516 of the Civil Procedure Code. 1<sup>st</sup> Respondent having appeared in Court objected to the issue of Probate to her father, the Petitioner, on the ground that the said Will is not the act and deed of her deceased mother. Therefore, Mallika Homes Limited 2<sup>nd</sup> Respondent made an application for intervention and its application was allowed and it was named as the Intervient Respondent.

Whilst the inquiry into the application to obtain probate was pending, the Petitioner moved Court that he be allowed to withdraw the said application to obtain probate. It is pertinent to note the two witnesses to the Will had already testified in the District Court by then. The 1<sup>st</sup> Respondent did not object to this application of the petitioner. However, the 2<sup>nd</sup> Respondent moved Court to allow it to prosecute the action with the intention of proving the Last Will though no serious objection to withdraw the application to grant Probate was taken up. Having considered the submissions made by the parties on the issue, learned Additional District Judge made order allowing the Petitioner's application to withdraw his application to obtain probate and also allowed the 2<sup>nd</sup> Respondent to prosecute the action. Thus, the issue before this Court is to determine whether the order of the learned Additional District Judge allowing 2<sup>nd</sup> Respondent to prosecute the action should stand or should the main application to prove the Will be dismissed.

Testamentary actions are governed by the provisions contained in Chapter XXXVIII of the Civil Procedure Code. Accordingly, when any person dies leaving a Will in Sri Lanka, the person in whose custody it shall have been, should deposit the same in the District Court of the district in which such depositor resides or in the District Court of the district in which the testator shall have died. (Section 516 of the Civil Procedure Code). Admittedly, the purported will of the deceased in this case has been deposited in the District Court of Colombo in terms of the aforesaid Section 516 of the Civil Procedure Code. When a will is deposited in Court as set out above, any person appointed by the said Will may apply to the District Court of the district within which he resides, or within which the testator resided at the time of his death, or within which any land belonging to the testator's estate is situated to obtain the grant of probate or the issue of letters

of administration, in the manner specified in Section 524 of the Civil Procedure Code. (Section 517 of the Civil Procedure Code)

When looking at these two provisions, it is apparent that;

- \* the deposit of the Will,
- \* the application to prove the same, and
- \* to have the Probate issued,

are different situations and are considered as separate acts that should be performed separately.

This proposition is further established by the way in which Section 517 (1) of the Civil Procedure Code is drafted. It stipulated that any person interested either by virtue of the Will or otherwise also can apply to prove the Will and to obtain grant of Letters of Administration of the estate of a deceased person. Moreover, Section 518 of the Civil Procedure Code makes it compulsory to have the Will proved and the grant of Probate or the issue of Letters of Administration. Furthermore, Section 520 of the Civil Procedure Code contemplates even the Public Trustee being appointed as an Administrator to manage the estate of a deceased person whenever no fit and proper person as required by the preceding provisions is available.

In the circumstances, it appears that the sections referred to herein before make it compulsory to have a Will properly administered by a fit and proper person. Thus, the object of the Legislature seems to have been to make it mandatory to have a Will proved in a Court of Law and to administer the estate of a deceased person according to the wish of the deceased. Accordingly, a duty is cast upon the Judge of a District Court in which a Will is deposited to have the Probate

issued and also to have a Will proved or rejected according to law.

In the premise, it is not possible for a Judge in a District Court to dismiss an action merely because an application to obtain the grant of probate made under Section 517, is withdrawn especially when a will is deposited in Court under section 516, as in this case. Therefore in such a situation, Court cannot and should not dismiss the action bringing the entire process to a halt. Therefore, I am of the view that when an application made under Section 517 of the Civil Procedure Code is withdrawn the proceedings initiated under Section 516 of the Civil Procedure Code cannot be terminated.

In the circumstances, I decide that the learned District Judge has come to the correct conclusion by allowing the 2<sup>nd</sup> Respondent namely, Mallika Homes Limited to prosecute the action even though the Petitioner has withdrawn his application to prove the Will. Then, it is the duty of that Court to act under Section 517, 518 or even under Section 520 and to grant probate or issue Letters of Administration in order to prove the Will affording an opportunity for the opponents to challenge the same.

The contention of the Petitioner in this instance was that no specific provision in Law is found to cover the situation that has arisen in this instance like in the Partition Law and the Companies Act allowing another party to come to the shoes of the plaintiff or to the petitioner to prosecute the action. He has therefore argued that this action should be dismissed when the application to obtain the grant of probate is withdrawn. However, as I have explained herein before an application to prove the Will made under Section 517 and the commencement of the proceedings under Section 516 of the Civil Procedure Code has to be differently identified. It is only the application made under Section 517 is withdrawn

in this instance and it has no connection to the proceedings commenced in terms of Section 516 of the Civil Procedure Code. Therefore, the contention of the learned Counsel for the Petitioner cannot relate to the issue at hand with situations in the Partition Law and the Companies Act. However, I hold that no specific provision in law is required to cover the situation under consideration since it is the normal course of action that a Judge should take in a judicious manner.

The learned President's Counsel for the 1<sup>st</sup> Respondent referring to Section 6 of the Civil Procedure Code contended that all actions are based on applications and when such applications are withdrawn the action also should stand dismissed.

Procedure in testamentary actions is dealt with separately in a separate chapter in the Civil Procedure Code. Therefore, Section 6 of the Civil Procedure Code should not be applied blindly when it comes to procedural issues in testamentary actions. The purpose of testamentary actions is to ascertain the wish of a deceased person who cannot be called before Court. Therefore, a duty is cast upon Court to ascertain the intention of a deceased person irrespective of adverse interests that may arise from other individuals. Therefore, the procedure in testamentary actions should be interpreted judiciously and it should not necessarily be guided by the general provisions contained in the Civil Procedure Code. Therefore, I am not inclined to agree with the contention of the learned President's Counsel.

Moreover, in the case of *M.L.Marikkar v. Abdul Aziz* <sup>(1)</sup> at 196. Wither, J said "Action is not an apt-term to describe insolvency proceedings, the procedure in regard to which is regulated by Insolvency Ordinance No. 7 of 1853 ....

The Civil Procedure Code has nothing whatever to do with insolvency matters”

When the provisions of the Civil Procedure Code are not followed in respect of insolvency matters, it is not incorrect to adopt a suitable procedure in testamentary actions as well without giving a strict interpretation hanging on to the provisions contained in the Civil Procedure Code. **However, it must be noted that I have adopted a procedure different to the procedure in the Civil Procedure Code in this instance.**

The 2<sup>nd</sup> Respondent has also taken up the position that the procedure set out in granting Probate or issue of Letters of Administration should start afresh by making publications in the news papers etc. when the original application to prove the Will has been withdrawn. I do not think it is necessary to follow those steps over and over again merely because the application to obtain Probate has been withdrawn. When those publications are made in the newspapers once, it amounts to sufficient publicity for persons to come forward and to participate in court proceedings initiated in respect of a deceased person. Therefore, the formalities that have already taken place in this connection need not be taken again as in a fresh application since the purpose of those formalities are now been achieved.

In the circumstances, I am of the view that the order made by the learned District Judge allowing the Interventient-Petitioner-Respondent to prosecute the action from the point it was stopped is correct.

Hence, I dismiss the application of the Petitioner-Petitioner with costs.

**BASNAYAKE, J.** - I agree

*Application dismissed.*