HALEEMA UMMA
v.
ABDUL RAHUMAN

SUPREME COURT
G. P. S. DE SILVA, CJ.,
WIJETUNGA J. AND
WEERASEKERA, J,
S.C. APPEAL NO. 133/97
C.A. NO. 484/92 (F)
D.C. KANDY NO. 3056/T
FEBRUARY 17 AND 26, 1999

Testamentary action – Last Will – Issue of probate after decree nisi – Jurisdiction of the District Court to recall probate – Sections 536 and 537 of the Civil Procedure Code.

The respondent filed an application dated 1.7.83 in the District Court seeking *inter alia*, that the last will marked "A" be declared the last will of the deceased, that he be declared executor thereof and probate be granted to him. No respondent was named in the petition and no reference was made to the intestate heirs of the deceased. The petitioner averred that he had no reason to suppose that his application will be opposed by anyone. On 18.8.83, the Court in the exercise of its discretion made order nisi in the first instance requiring any person to show cause why probate should not be issued. On the order of the Court, the decree nisi was published in the "Davasa" newspaper. The order was made absolute on 16.11.84 and probate was issued to the respondent.

Cosequent upon an application by the appellant, the District Court by its order dated 17.2.87 recalled probate on the basis that the order nisi had been published in a Sinhala newspaper which could not be read and understood by the appellant. Thereafter, the Court held an inquiry and by its judgment dated 31.01.92 held, *inter alia*, that the last will was not executed with the knowledge and consent of the deceased and was not her act and deed.

Held:

1. The finding that the appellant did not understand Sinhala was not supported by any material of probative value.

2. Sections 536 and 537 of the Civil Procedure Code must be read together. Consequently, when the issue of probate has followed upon an order nisi, the provisions of section 537 do not apply and all parties are concluded by the issue of probate. Therefore, the District Court acted without jurisdiction in recalling probate and proceeding to hold an inquiry which concluded with its judgment dated 31.01.92.

Cases referred to:

1. *Katiramanthamby v. Lebbethamby Hadjiyar* – (1973) 75 NLR 228.
2. *Adoris v. Perera* – (1915) 17 NLR 212, 215.

APPEAL from the judgment of the Court of Appeal.

Nehru Gunatilleke, PC with *N. Mahendra* and *Miss D. Pathirana* for respondent-petitioner-appellant.

Faisz Musthapha, PC with *Hemasiri Withanachchi* and *Sanjeewa Jayawardena* for petitioner-appellant-respondent.

Cur. adv. vult.

May 10, 1999.

G. P. S. DE SILVA, CJ.

Haji Asia Umma died on 11.11.81. The petitioner-appellant-respondent (the respondent) filed an application (petition and affidavit dated 1.7.83) in the District Court of Kandy, seeking *inter alia*, that the Last Will marked "A" be declared the Last Will of the deceased, that he be declared executor thereof and probate be granted to him. No respondent was named in the petition and no reference was made to the intestate heirs of the deceased. It was averred in the petition that he was the adopted son of the deceased. Apart from the affidavit of the respondent, there were the affidavits of the notary who attested the Last Will and the affidavits of the 2 attesting witnesses. It was further averred in the petition that he had no reason to suppose that his application will be opposed by anyone (section 525 of the Civil procedure Code).

On 18th, August, 1983, the Court made *order nisi* in the first instance requiring any person to show cause why probate should not be issued. As stated earlier, no respondent was named in the petition; nevertheless the Court in the exercise of its discretion issued an order nisi and *not an order absolute in the first instance.* On 3rd November, 1983, the Court made order directing the publication of the order nisi. The order nisi was published in the "Davasa" newspaper. Mr. Nehru Goontillake for the appellant stressed that the order nisi was published in the "Davasa" which is a newspaper published in Sinhala. The order nisi was made absolute on 16th November, 1984 and probate was issued to the respondent in this appeal.

The respondent-petitioner-appellant (the appellant) who is a sister of the deceased Haji Asia Umma by her petition and affidavit dated 27.2.85 (filed on 5.3.85) challenged the validity of the Last Will and prayed that the Last Will be rejected and that an inquiry be held for this purpose. It is to be noted that this application was made after the issue of probate upon an order nisi. Moreover, there was nothing in the petition and affidavit to suggest that the appellant could not read and understand Sinhala, the relevance of which will be seen later.

The application of the appellant was fixed for inquiry. At the inquiry an objection was taken on behalf of the respondent that the application cannot be maintained for the reason that in terms of section 536 of the Civil Procedure Code the District Court had the power to review its own order granting probate only where probate had been issued "on an order absolute in the first instance". (section 536 of the Civil Procedure Code). By its *order dated 17th February,* 1987, the District Court overruled the objection, and recalled probate on the basis that the order nisi had been published in a Sinhala newspaper which could not be read and understood by the appellant. It is true that the respondent did not seek to challenge the correctness or validity of the aforesaid order dated 17th February, 1987, but the objection taken was on a jurisdictional ground and could have been taken in the final appeal.

Consequent upon the order of 17.2.87, the parties proceeded to inquiry, issues were raised and evidence was led. By its judgment dated 31st January, 1992, the District Court held *inter alia,* that the Last Will was not executed with the knowledge and consent of Haji Asia Umma and was not her act and deed. The Last Will was accordingly rejected. Thereupon, the respondent preferred an appeal to the Court of Appeal. The Court of Appeal held that "the District Judge had no jurisdiction to vary his own order and the order dated 17.2.87 has been made without jurisdiction. Section 536 of the Civil Procedure Code provides for the District Court to recall probate only in the case where an order absolute in the first instance has been made. Vide 17 NLR 212, 13 NLR 261, 67 NLR 488. As seen, in the instant case order absolute was not entered in the first instance. As such the learned District Judge has exceeded his authority in recalling probate and holding an inquiry. . .". Accordingly, the Court of Appeal set aside the judgment of the District Court dated 31.1.92. It is of significance to note that the judgment was set aside on a jurisdictional ground. The present appeal is against this judgment of the Court of Appeal.

Mr. Nehru Goonetillake, counsel for the appellant, strenuously contended, by way of oral and written submissions, (1) that no appeal was preferred against the order of the District Court dated 17.2.87 and accordingly that order was binding on the parties; (2) the District Court by the aforesaid order of 17.2.87 recalled probate on the good and valid ground that the order nisi was published in a Sinhala newspaper (Davasa) whereas the intestate heirs were Tamil-speaking persons who could neither read nor write Sinhala; (3) parties have *not* been concluded by the issue of probate where there has been no valid publication of the order nisi in terms of the imperative provisions of section 532 of the Civil Procedure Code. *Katiramanthamby v. Lebbethamby Hadjiyar*[1].

With these submissions, I am afraid, I cannot agree. The finding reached by the District Court in its order of 17.2.87 that the appeallant cannot read and understand Sinhala was not based on evidence, either oral or by way of an affidavit. All that happened was that the appellant, who was a Muslim lady living in a "Kandyan

area", was questioned by the Court and she informed the Court that she does not understand Sinhala. It seems to me that this statement cannot form the basis for the finding that the appellant did not understand Sinhala and therefore there was no valid publication of the order nisi as required by the provisions of section 532. The "untested" information elicited by the Court is of little or no evidentiary value. A Court cannot reasonably act upon such information to reach a finding on the crucial issue, namely that there has been a failure to comply with the mandatory provisions of section 532 of the Civil Procedure Code, inasmuch as the publication of the order nisi was in a language not understood by the appellant. In short, the finding that the appellant did not understand Sinhala is unsupported by any material of probative value.

Besides, there is the jurisdictional issue upon which the Court of Appeal set aside the judgment of the District Court. The Court of Appeal itself has referred to the relevant cases as seen from the passage in the judgment cited above. It is unnecessary to burden this judgment with a discussion of the cases. It is settled law that sections 536 and 537 of the Civil Procedure Code must be read together and that "when the issue of probate has followed upon an order nisi the provisions of section 537 do not apply and that all parties are concluded by the issue of probate" – *per* De Sampayo, AJ. *in Adoris v. Perera*[2].

It is clear, therefore, that the District Court acted without jurisdiction in recalling probate and proceeding to hold an inquiry which concluded with the judgment under appeal (judgment dated 31.1.92). The judgment of the Court of Appeal is accordingly affirmed and the appeal is dismissed but, in all the circumstances, without costs.

WIJETUNGA, J. – I agree.

WEERASEKARA, J. – I agree.

Appeal dismissed.