

**DIAS
V.
DE MEL AND ANOTHER**

COURT OF APPEAL,
WIJETUNGA, J. AND WIJAYARATNE, J.,
CA/LA 137/87 (L.G.) – D.C. COLOMBO No. 2141/SPL.,
JANUARY 19, 1990.

Civil Procedure – Interim order for detention preservation or inspection of property under S. 669 of the Civil Procedure Code – Appropriate procedure when testamentary case is pending – Civil Procedure Code, S. 712 to discover property of estate – order under Section 714 of the C.P.C., – Section 21 (4) of the Judicature Act.

The plaintiff – respondents filed this suit as the executors of the Last will of the late A. M. C. Dias against the defendant-petitioner - appellant, son of the testator to recover from him certain movable property alleged to belong to the deceased testator and gifted to the testator's two daughters Swarnamali and Ratnawali subject to the life interest of his wife Ethel who too was dead. The defendant-petitioner - appellant took up the position that the said movable property was owned absolutely by the said Ethel and bequeathed to him along with the premises where they were kept (No. 4, Alfred Place, Colombo 3) by her last will.

The plaintiff moved for an order under Section 669 of the Civil Procedure Code for Swarnamali to visit the said premises No. 4, Alfred Place in the company of her lawyers, valuers, experts and artisans and prepare an inventory to make a valuation, and further to identify same, to take photographs, to make observation or experiments for the purpose of obtaining full information and to obtain an order for detention, preservation, inspection, survey and valuation of the said articles.

The defendant - petitioner-appellant further took up the position that as the late A.M.C. Dias' estate was still being administered in D.C., Kurunegala Case No. 5919/T (and the movable property was valued only at Rs. 1,000 while now it was being valued at Rs. 100,000) the proper procedure was to take steps under S. 712 of the C.P.C. for the discovery of this movable property. The District Judge however allowed the application under S. 669 of the C.P.C.

Held :

(1) The proper procedure for the executors would be to act under Section 712 of the C.P.C. in the Testamentary Case No. 5919/T, D.C., Kurunegala. When the party cited puts in an affidavit claiming he is the owner of the property or is entitled to possession thereof the Court has under Section 714 to dismiss the application and refer the executor or administrator to his civil remedy.

Further Section 21 (4) of the Judicature Act implies that the District Court can call upon executors and administrators to account for effects that may come into their hands. This can be properly done only in the testamentary case.

Cases referred to :

- (1) *Clara Fernando v. Rosa Fernando*, 9 NLR 65, 67
- (2) *Manikar v. Vanniah*, 4 Leader Law Reports 127, 3 Weerakoon's Reports 31

APPEAL from an order of the District Court of Colombo.

Miss Maurgen Seneviratne, P.C. with Hilton Seneviratne for Defendant - Petitioner - Appellant.

Plaintiff-Respondents – Respondents absent and unrepresented.

February 14, 1990

WIJEYARATNE, J.

The plaintiff-respondents filed this action on 29.3.1982 (in their capacity as executors of the last will of the late A.M.C. Dias) against the defendant-petitioner-appellant to recover certain movable property (described in the plaint) in the possession of the defendant, which movable property they alleged belonged to the said deceased and was under the last will gifted to his two daughters Mrs. Swarnamali Mendis and Mrs. Ratnavali Rodrigo, subject to the life interest of the testator's wife, Mrs. Ethel Dias, who was given the use of the said movable property during her life time.

The defendant-petitioner-appellant is the son of the testator and a brother of Swarnamali Mendis and Ratnavali Rodrigo.

The plaintiff alleges that the defendant is liable to hand over the said movable property (articles) to the plaintiffs as the executors so that they may distribute the estate in terms of the last will. The plaintiffs also have asked for a declaration that these articles belong to the said Swarnamali Mendis and Ratnavali Rodrigo.

The defendant-petitioner-appellant filed answer on 27.1.1982 stating that the articles referred to in the plaintiff were at No. 4, Alfred Place, Colombo 3, when Mrs. Ethel Dias died and were her absolute property and that she by her last will bequeathed the same to the defendant. The defendant also states that his mother Mrs. Ethel Dias gifted premises No. 4 Alfred Place, Colombo 3, to him by her last will (No. 1191 dated 2.3.1978) and that he is in possession of the said premises and the movables contained therein, and prayed for the dismissal of the action.

Thereafter the plaintiff-respondents by petition and affidavit dated 15.4.1982 have stated that the articles referred to in the plaintiff, since the death of Mrs. Ethel Dias, are in premises No. 4, Alfred Place, Colombo 3, occupied by the defendant-petitioner-appellant and moved for an order under Section 669 of the Civil Procedure Code for Mrs. Swarnamali Mendis to visit the said premises in the Company of the plaintiffs' lawyers, valuers, experts and artisans and prepare an inventory, to make a valuation, to identify the same, to take photographs and to make observations or experiments for the purpose of obtaining full information and to obtain an order for detention, preservation, inspection, survey and valuation of the said articles.

The defendant-petitioner filed his objections by affidavit dated 23.4.1982 and stated that the articles referred to in the plaintiff were the property of his mother Mrs. Ethel Dias, who has by the said last will bequeathed the said house No. 4, Alfred Place, to him together with the said articles.

The defendant-petitioner in his objections has further stated that –

- (1) the movable property of the late A. M. C. Dias in Testamentary Case bearing No. 5919/T of the District Court of Kurunegala has been valued at Rs. 1,000 while in the present case the movables which are the subject-matter have been valued at Rs. 100,000.
- (2) as this testamentary case is yet pending, the executors should have taken steps under Section 712 of the Civil Procedure Code for the "discovery" of this movable property.

The learned Additional District Judge held an inquiry on 17.7.1985 and by his order dated 26.11.1985 held that "the words in Section 669 of the Civil Procedure Code are wide enough to permit an inspection and survey of the property for the purpose of making a valuation of such property," and allowed the application for the limited purpose of obtaining a valuation.

The learned Additional District Judge further went on to say, "For that purpose Mrs. S. (Swarnamali) P. Mendis is permitted to enter the premises in the company of a valuer and the plaintiffs' Attorney-at-Law after giving two weeks' notice under registered post to the defendant and his Attorney-at-Law. Mrs. Mendis could point out to the valuer the items disclosed in the plaint to enable the valuer to value the said items. There is no need to take photographs or identify the movables with labels as the plaintiff has in the alternative prayed for the recovery of the value of the items."

Being aggrieved with said order the defendant has filed this appeal from the said order, for which leave to appeal was granted on 28th February, 1989 by order of this court.

Section 669 which corresponds to Order 39 Rule 7 (old Section 499) of the Indian Civil Procedure Code is the same except that the words "and survey" are not found in the Indian Code.

It has been held in India that the power to order an inspection implies a power to order the preparation of an inventory, but this Section cannot be used to make orders about documents like account books which are not the subject-matter of dispute but are only of evidential value and no more.

(Code of Civil Procedure – Chitely and Rao, (1963) 7th Edition at page 4086).

Learned counsel for the defendant submits that Section 669 does not empower the court to authorise or permit any person to enter into a property in the possession of any other party to identify or value movable property or to go on a voyage of discovery to uncover evidence.

However that may be, a more substantial objection to this application was made by learned counsel for the defendant-petitioner, namely that the appropriate remedy would be to proceed under Section 712 of the

Civil Procedure Code in the Testamentary Case bearing No. 5919/T of the District Court of Kurunegala. Admittedly the last will of the late A. M. C. Dias was admitted to probate in case No. 5919/T of the District Court of Kurunegala and the probate was issued to the plaintiffs as executors of the said last will.

The question arises whether the plaintiffs are entitled to make this application under Section 669 in the course of an action instituted by the executors independently of the testamentary case. To proceed by way of a separate action in the first instance would mean that neither the court administering the estate nor the creditors would be fully cognisant of the assets of the estate.

In my view the proper procedure for the executors would be to act under Section 712 in the Testamentary Case bearing No. 5919/T of the District Court of Kurunegala and "present to the court from which grant of probate or administration issued to him a petition entitled as of the action in which such grant issued, setting forth upon knowledge, or information and belief, any facts tending to show that money or other movable property which ought to be delivered to the petitioner, or which ought to be included in his inventory and valuation, is in the possession, under the control, or within the knowledge or information of a person who withholds the same from him, or who refuses to impart any knowledge or information he may have concerning the same, or to disclose any other fact which will in any way aid the petitioner in making discovery of such property, so that it cannot be inventoried or valued."

In the case of *Clara Fernando v. Rosa Fernando*⁽¹⁾ Grenier, A.J., stated in reference to Section 712 –

"The procedure laid down in a case of this kind is so plain and simple that it seems inconceivable to me why it was not followed, as it should have been followed. The sections prescribing the procedure are taken from the New York Code of Civil Procedure relating to testamentary proceedings, and are admirably adapted for the speedy and effectual discovery and conservation, for purposes of administration, of property belonging to an intestate estate which happens to be in the hands of a third party."

Thereupon when the party cited puts in an affidavit claiming that he is the owner of the property or is entitled to possession thereof the court

has under Section 714 to dismiss the application and refer the executor or administrator to his civil remedy.

(See the decision in *Marikar v. Vanniah*,⁽²⁾ which is reported in 4 Leader Law Reports 127 and also in 5 Weerakoon's Reports 31).

For these reasons the application under Section 669 is refused and accordingly I set aside the order of the learned Additional District Judge dated 26.11.1985.

I might add that at the hearing learned counsel for the defendant produced a certified copy of the order dated 26.10.1989 in the District Court of Colombo Case No. 28987/T, where the defendant in this case was the petitioner and Swarnamali Mendis and Ratnavali Rodrigo were the respondents. The learned Additional District Judge has made order declaring Last will No. 1191 dated 2.3.1978 executed by Mrs. Ethel Dias duly proved and the defendant (as petitioner in that case) was declared entitled to probate. This lends credence to the defendant's claim that he is entitled to these articles which are at No. 4, Alfred Place, Colombo 3, and which have been bequeathed to him along with this house. However I must add that this order may be now the subject of an appeal.

Section 21(4) of the Judicature Act implies that the District Court can call upon executors and administrators to account for effects that may come into their hands. This can be properly done only in the testamentary case.

Acting in revision I direct that all proceedings in this case be stayed until the plaintiffs who are executors act under Section 712 of the Civil Procedure Code in Testamentary case No.5919/T of the District Court of Kurunegala. If they do not obtain relief under Section 712, they are entitled to proceed with this action.

The plaintiffs will pay defendant - petitioner the costs of this application.

WIJETUNGE, J. – I agree.

District Judge's order in D. C. 2141/spl set aside and proceedings in case stayed pending application in Testamentary case No. D. C. Kurunegala 5919T.