

1959 Present : Basnayake, C.J., and Sinnetamby, J.

ABEYARATNE, Appellant, and WIJEMANNE and others, Respondents

S. C. 114—D. C. Colombo, 17328/T

Administration of estates—Application for letters of administration on footing that deceased died intestate—Discovery of will after death of applicant—Resulting position—Civil Procedure Code, ss. 536, 549.

An application for letters of administration comes to an end with the death of the applicant prior to the issue of letters. Accordingly, where the last will of the deceased person is discovered after the death of the applicant for letters, application for probate of the will may be made without taking any steps to vacate an order absolute entered in the previous administration proceedings.

APPEAL from an order of the District Court, Colombo.

H. V. Perera, Q.C., with H. W. Jayewardene, Q.C., G. T. Samarawickreme and D. R. P. Goonetilleke, for Petitioner-Appellant.

No appearance for Respondents-Respondents.

Cur. adv. vult.

June 10, 1959. BASNAYAKE, C.J.—

Sarah Catherine Abeyaratne is the widow of the late Charles Albert Abeyaratne who died on 7th December 1953 within the jurisdiction of the District Court of Colombo. His son Carl Albert Abeyaratne applied for the grant of letters of administration to him in testamentary proceedings No. 16128/T of the District Court of Colombo on the ground that his father had died intestate. On his application the action was transferred under section 68 of the Courts Ordinance to the District Court of Chilaw as the bulk of the deceased's immovable property was within the jurisdiction of that Court.

On 26th October 1954 the following order *nisi* was made by the District Judge of Chilaw in that action bearing the number 2551/T :—

“ This matter coming on for disposal before W. W. Mutturajah Esquire, District Judge of Chilaw, on the 26th day of October 1954 in the presence of Mr. F. Thambiyah, Proctor, on the part of the petitioner abovenamed and the affidavit of the said petitioner dated 9th July 1954 having been read.

“ It is ordered that the petitioner be and he is hereby declared entitled as the son of the deceased abovenamed to have letters of administration to the estate issued to him accordingly unless the

respondents abovenamed or any other persons or person interested shall on or before the 30th November 1954 shew sufficient cause to the satisfaction of this court to the contrary."

The time for showing cause against the order was extended several times and on 7th June 1955 no cause having been shown the order *nisi* was made absolute.

Carl Albert Abeyaratne died on 11th August 1956 before the actual issue of the letters of administration to him, and after his death his mother the widow of the deceased Charles Albert Abeyaratne found among her son's papers the will of Charles Albert Abeyaratne, the subject of these proceedings. On 8th October 1956 she petitioned the District Court of Colombo—

- (a) for an order declaring the Last Will and Testament No. 2172 dated 28th November 1939 duly attested by F. Thambiyah, Proctor, Notary Public, duly proved,
- (b) for a declaration declaring her executrix,
- (c) that probate of the said Last Will and Testament be issued to her.

Objections were taken to her application by the 4th to 9th respondents. At the hearing of the objections the following issues were formulated :—

- (1) Was the Last Will No. 2172 duly executed by the deceased ?
- (2) Has this Court jurisdiction to hear and determine the petition of the petitioner ?
- (3) Is the petitioner barred by the order made in D. C. Chilaw 2551/T from making the present application ?
- (4) Was the Last Will revoked by the deceased and the petitioner ?
- (5) (a) Were the petitioner, the 1st, 2nd and 3rd respondents and the late Carl Abeyaratne at all times aware of the execution of the will, and
 - (b) the endorsement made on the will by the deceased and the petitioner ?
- (6) Did the petitioner, the 1st, 2nd and 3rd respondents and the late Carl Abeyaratne agree that the estate of the deceased should be administered on the basis of an intestacy ?
- (7) If issues 2 and/or 3 and/or 4 and/or 5 and 6 are answered in favour of the respondents can the petitioner maintain this present application ?

On the motion of counsel issues 2 and 3 were tried as preliminary issues and the learned District Judge made order that the Court had

jurisdiction to hear and determine the petition of the petitioner, but that the petitioner was barred by the order made in D. C. Chilaw case No. 2551/T from making the present application. The present appeal is against that order.

It is not disputed that, although order absolute had been entered in D. C. Chilaw case No. 2551/T, letters of administration had not issued to the deceased petitioner. The Civil Procedure Code does not provide specifically for a case such as the present one, nor is there any provision that bars an application such as that made in the instant case. Even when a sole administrator to whom letters of administration have actually issued dies leaving a part of the deceased's property unadministered a fresh grant of administration is necessary in respect of the property left unadministered (section 549 Civil Procedure Code). An application for letters of administration comes to an end with the death of the applicant; similarly an order granting letters of administration ceases to have effect on the death of the person to whom under the Court's order letters should issue. The learned District Judge's decision that before the petitioner in this case applies for probate of the will in question she should take steps to have the order absolute entered in the Chilaw case vacated cannot be sustained. That order is a valid order and I do not see how it can be set aside. It is not alleged that it was obtained by fraud. The learned District Judge is therefore wrong in holding that before the petitioner in this case applies for probate she should take steps to have the order absolute entered in the Chilaw case vacated. Such an application does not lie under the Civil Procedure Code. With the death of the applicant those proceedings came to an end and the order granting letters of administration to the deceased son has no longer any force.

The present case is not a case which comes under section 536 which provides for the recall of the probate or grant of administration and the revocation thereof. A probate or letters of administration can be recalled only where probate or letters have been actually granted or issued and are in force and the executor or administrator is still alive and can answer the order of the Court. In the instant case letters have not issued and the applicant for letters of administration is dead and no question of recall of letters and the revocation thereof arises.

We therefore allow the appeal and set aside the order of the learned District Judge and declare that the appellant is entitled to seek to prove the will in these proceedings and that there is no requirement in law that she should have the order in the Chilaw case vacated.

The appellant is entitled to her costs both here and below.

SINNETAMBY, J.—I agree.

Appeal allowed.