

1976      **Present : Pathirana, J., Vythialingam, J., and  
                 Colin-Thome, J.**

**A. E. EBERT and two others, Petitioners, and THE ADDITIONAL  
PUBLIC TRUSTEE, and three others, Respondents**

**S. C. 867/74—*In the matter of an Application for a mandate in  
the nature of a Writ of Certiorari and of Prohibition under the  
Provisions of the Administration of Justice Law No. 44 of 1973***

***Administration of Justice Law No. 44 of 1973—Last Will—Reference of  
matters in dispute to District Court by Public Trustee—  
Jurisdiction of Public Trustee to make orders while reference to  
court is pending—Sections 284, 286, 295, 296, 308(5).***

**Held : (1) Once the Probate Officer has referred the matters in  
dispute for adjudication to the District Court in terms of Section  
284 of the Administration of Justice Law No. 44 of 1973, neither  
he nor the Public Trustee has jurisdiction to hold an inquiry and  
make an order under section 286(2) of the said Law, before the  
Court has proceeded to hear and determine the matters in issue**

(2) Section 295 cannot be utilized by the Public Trustee to make a grant of probate or letters of administration, once a reference has been made to Court and the reference is pending.

(3) Section 308(5) does not empower the Public Trustee to appoint any person as executor or administrator.

(4) Section 284 is wide enough to cover a reference to the Court to decide the conflict of claims of persons for the grant of probate.

(5) Acquiescence in and participation in proceedings before a tribunal which has manifestly no jurisdiction to hear and determine any matter will not give that tribunal jurisdiction or legality to its proceedings.

## APPLICATION for Writs of Certiorari and Prohibition.

*M. Sivananthan* for the Petitioners.

*K. C. Kamalabayson*, State Counsel, for the 1st and 2nd Respondents.

*M. Kanagasunderam*, for the 3rd respondent.

*S. Mahenthiran*, for the 4th respondent.

*Cur. adv. vult.*

May 3rd, 1976. PATHIRANA, J.—

The petitioners filed petition and affidavit along with the Last Will of the deceased A. P. Rowlands in the District Court of Colombo on 9.8.72 in D. C. Testamentary Case No. 26592 praying that an order be made declaring that the petitioners are the executors named in the Last Will and that probate of the said Last Will and testament be granted to them. The District Court made order nisi declaring the petitioners the executors of the said Last Will entitled to probate.

The 3rd respondent filed his objections in September 1972 challenging the validity of the Last Will on the ground inter alia that the Last Will was not the free and considered act of the deceased and moved Court to vacate the order nisi declaring the petitioners the executors of the Last Will and also moved for a declaration that the said Last Will is null and void.

The 4th respondent by objections dated 11.7.73 moved that the application of the petitioners for grant of probate be refused as the petitioners were not fit and proper persons and further moved that the letters be granted with the Will annexed to the 4th respondent to enable her to administer the estate as she was the sole beneficiary under the Will. The 4th respondent's objections were first taken up for inquiry. The inquiry was fixed for 13.5.74. While the inquiry was pending the Administration of Justice Law No. 44 of 1973 came into operation and the record in the District Court case was transferred to the

Probate Office, Colombo zone, in accordance with the provisions of the Administration of Justice Law. When the matter was taken up before the Probate Officer on 25.3.74 on the basis that the order nisi entered by the District Court was deemed to be the interim order within the meaning of Section 283 of the Administration of Justice Law, the Probate Officer acting under Section 284 raised certain issues and referred the matters in dispute to the District Court, Colombo for adjudication. The Order reads as follows :

“ Under Sec. 284 Part III of the Administration of Justice Law, I refer the matter in dispute to the District Court of Colombo for adjudication on the following issues :

- (1) Is Last Will No. 231 filed of record attested by N. Chelliah N.P. valid and acceptable in law. If so :
- (2) Are the petitioners entitled to probate on the Last Will.
- (3) Are the petitioners fit and proper persons to be granted Probate ?
- (4) Is the 2nd respondent as the sole beneficiary named in the Will entitled to letters of administration with the will annexed and,
- (5) Is the 2nd respondent entitled in the first instance to the immediate possession and custody of all movables of the deceased ?

Forward record to D. C. Colombo.”

The matters in dispute therefore were, firstly, whether the Last Will was the act and deed of the deceased and secondly whether the 4th respondent (referred to in the order as the 2nd respondent) or the petitioners were fit and proper persons to be granted letters of administration with the will annexed. The Probate Officer made order forwarding the record to the District Court, Colombo.

On 29.3.74 the 3rd respondent appeared before the Probate officer and stated that he wished to withdraw his objections in the event of 4th respondent being granted letters of administration with the will annexed. The 4th respondent also moved that being the sole beneficiary under the Last Will she be given letters of Administration with the will annexed and objected to the grant of probate to the petitioners.

The Probate Officer thereupon made an order that the letters of administration with the Last Will annexed be issued to the sole beneficiary, the 4th respondent, after the Certificate from the Commissioner of Inland Revenue was received. The order of 25.3.74 to forward the record to the District Court was vacated.

On 24.4.74 Counsel appearing for the petitioners, made representations to the Additional Public Trustee, the 1st respondent, in respect of the order of 29.3.74 made by the Probate Officer at the inquiry which was held on that day, at which the petitioners were absent and not represented. The petitioners alleged that they had no notice of the inquiry that was held on 29.3.74. An inquiry into this application was held on 23.5.74 before the Additional Public Trustee, the 1st respondent, at which the petitioners represented by Counsel, the 1st respondent in person, and the 4th respondent represented by Counsel, were present. The 1st respondent formally entered an interim order and indicated that the objections filed will be deemed objections to the interim order.

After hearing the parties, the 1st respondent on 24.6.74 made an order purporting to act under Section 286 (2) of the Administration of Justice Law entering final order granting letters of Administration with the copy of the Last Will annexed to the 4th respondent. The 1st respondent in doing so was influenced by the fact that the sole beneficiary the 4th respondent was opposed to the petitioners, as executors named in the will, executing the provisions of the will and it was therefore necessary to safeguard the interests of the beneficiary. The relevant portion of the order reads as follows:

“In the interests of the beneficiary and towards the expeditious disposal of these proceedings in terms of Section 286 (2) of the Administration of Justice Law No. 44 of 1973, I direct *final order* be entered granting letters of administration with the copy of the Last Will to Daphne Muriel Driberg.”

This order is therefore in the same terms as the order made by the Probate Officer, the 2nd respondent on 29.3.74. In any event, as we shall show, the 1st and 2nd respondents could not have made these orders as in view of the conflict of claims to the grant of probate or letters of administration, these respondents had a statutory duty under Sec. 284 (1) to refer the matter in dispute for adjudication by the appropriate District Court.

Mr. Sivananthan, Counsel appearing for the petitioners, has submitted that the orders made by the 2nd respondent on 29.3.74 and by the 1st respondent on 29.3.74 are orders which they had no right to make, in view of the order made by the Probate Officer on 25.3.74 under Section 284 of the Administration of Justice Law referring the matters in dispute for adjudication by the District Court of Colombo. His submission was that once any person upon whom the interim order had been served or any other person appearing to be interested in the administration of the estate of the deceased, objects to the interim order.

the Public Trustee having referred the matter in dispute for adjudication to the District Court, the Public Trustee was functus and had no jurisdiction to hold any inquiry and to make the impugned orders. On behalf of the 3rd and 4th respondents it was submitted, on the other hand, that the Probate Officer or the Public Trustee was vested with the necessary jurisdiction to make the orders dated 29.3.74 and 24.6.74 and sought to justify the orders firstly under Sections 295 and 308 (5) of the Administration of Justice Law.

Chapter III of the Administration of Justice Law deals with testamentary procedure. By Section 276 the Public Trustee (which person includes an additional Public Trustee, a Deputy Public Trustee or any other State Officer generally or specially authorised by the Public Trustee to act on his behalf for this purpose (Sec. 314(1) ) is the sole competent authority for the purpose of granting of probate or letters of administration in respect of the property of a deceased person and for dealing with all matters relating to or connected with the grant of probate and letters of administration.

Under Section 280 (1) when a person dies leaving a will under or by virtue of which any property in Sri Lanka is in any way affected the person appointed executor therein or any other person interested either by virtue of a will or otherwise may apply to have the will proved and to have probate thereof or obtain grant of administration of the estate with a copy of the will annexed as the case may be issued to him. Section 281 (1) deals with the case of any person dying leaving property in Sri Lanka and without making a will or where the will cannot be found in which case, the widow, the widower or next of kin of such person or any other person interested can apply for the grant of the letters of administration. If the Public Trustee is satisfied that the material averments of an application made under Section 280 or 281 are prima facie proved, then under Section 283 he shall make an interim order declaring the applicant's status accordingly and making the grant prayed for. Every interim order shall be served on the applicant and the heirs of the deceased and or such other person as the Public Trustee shall consider necessary. Unless cause is shown to the contrary on or before the date specified therein the interim order shall be made final. If within the specified period, the the persons on whom the interim order had been served notify the Public Trustee that they consent to the grant, the Public Trustee shall make the interim order final (Sec. 286 (1) ).

Section 284 (1) sets out that if within the specified period any person upon whom the interim order shall be served or any other person appearing to be interested in the estate of the

deceased objects by affidavit, the Public Trustee shall refer the matter in dispute for adjudication to the appropriate District Court. In this case on 25.3.74 the Probate Officer had referred the matter in dispute to the District Court of Colombo. Under Section 284 (2) every reference under this Section shall be in writing and shall set out concisely the issues required for adjudication by the Court. The Public Trustee shall also present to such Court all documents relevant for the proper adjudication of such matter. The Probate Officer in this case has framed the relevant issues in his order dated 25.3.74.

Upon reference made the District Court shall hear and determine the issues and shall at the conclusion of its hearing communicate its order to the Public Trustee and to the parties. (Sec. 285 (1)). A party aggrieved with the order of the District Court may prefer an appeal to the Supreme Court against such order for any error of the law within a period of 14 days of such order. (Sec. 285 (2)). The order of the Supreme Court or where no appeal has been preferred the order of the District Court shall be final and conclusive and shall bind the Public Trustee (Sec. 285 (3)). Section 285 therefore lays down in categorical terms that once a reference has been made to the appropriate Court, the determination of the issues by the Court is not only final and conclusive but is binding on the Public Trustee.

At this stage it will be relevant to consider the purpose and scope of Section 286 of the Administration of Justice Law. If any person having objected and the objections have been referred for adjudication by Court and the order of the Court having been taken into consideration the Public Trustee is satisfied that the prima facie proof of the material averments of the application have not been rebutted, the Public Trustee shall make the interim order final (Sec. 286 (1)). In the event of an objector establishing this right to have grant of probate or letters of administration issued to him instead of to the applicant, then the Public Trustee shall make final order accordingly. (Sec. 286 (2)). If on the other hand the Public Trustee is satisfied that prima facie proof of the material averments in the application have been rebutted, the Public Trustee shall revoke the interim order. (Sec. 286 (3)).

In our view, Section 286 (1), (2) and (3) are integrally connected and linked with Section 284 (1) and operate as a sequel thereto. It would therefore mean that if the objector fails in the District Court or the Supreme Court then under Section 286 (1) the Public Trustee shall make the interim order final. On the other hand, if the Public Trustee is satisfied that the prima facie proof of any material averment in the application had been rebutted consequent to the order of the District Court or the

Supreme Court, the Public Trustee shall revoke the interim order (Sec. 282 (2) ). In short, once the Public Trustee refers the matter for the Court's adjudication the decision of the Court is final and conclusive and shall bind the Public Trustee. The Public Trustee being the sole competent authority under the scheme of the administration of Justice Law relating to testamentary procedure makes the final order formally granting probate or letters of Administration. This jurisdiction is taken away from the Courts and is vested in the Public Trustee. The jurisdiction of the Court is to adjudicate on the issues referred to it by the Public Trustee. Once such reference is made then the Public Trustee is bound by the order made by the Court. He has no jurisdiction to hold any inquiry and make any orders he thinks fit in the interval on the matters already referred to the Court. Even under Section 291 where the grant of probate or letters of administration had been made the Public Trustee is empowered at any time at the instance of any person interested to revoke or recall such grant upon being satisfied that the will ought not to have been held proved, or that the grant of probate or letters of administration ought not to have been made or events have occurred which render the administration there under impracticable or useless. This power is, however, subject to the provisions of Section 285 (3) we have referred to earlier. Section 285 (3) states that the order of the Supreme Court or where no appeal has been preferred, the order of the District Court, shall be final and conclusive and shall bind the Public Trustee. So that where a reference has been made and the Court has made an order thereon the Public Trustee is debarred from acting even under Section 291.

Mr. Kanagasunderam, who appeared for the 3rd respondent, and Mr. Mahenthiran, who appeared for the 4th respondent next relied on Section 295 of the Administration of Justice Law to support their contention that despite the reference to Court, the Public Trustee is vested with jurisdiction to make the orders which had been challenged in this case. We shall quote this Section :—

“Sec. 295 (1) :

In the case of a conflict of claims to have the will proved and grant of administration issued, the claim of an Attorney of an executor shall be preferred to that of all others, and the claim of a creditor shall be postponed to the claim of an intestate heir where the residuary estate is not wholly disposed of or of a residuary legatee or devisee under the will.

(2) In the case of a conflict of claims for grant of administration upon intestacy, the claim of the widow or widower shall be preferred to all others and the claim of an heir to that of a creditor.

Provided, however, that the Public Trustee may for good cause supersede the claim of the widow or widower."

This Section is one of the series of Sections which comes under the heading "Directions to the Public Trustee". We do not think that the Public Trustee when he acts under Section 295 can do so in cases where reference has already been made to the Courts. There are instances under the scheme of the Administration of Justice Law governing testamentary procedure where the Public Trustee can make a grant of probate or letters of administration in certain limited circumstances. For example, if under Sections 281, 282 and 283 there are more applicants than one and the Public Trustee is called upon to make an interim order, he can decide on the conflict of claims by resorting to Section 295 (1). Likewise under Section 296 where any legal proceedings touching the validity of a will of a deceased person or relating to grant of probate or letters of administration are pending the Public Trustee can either on the grounds of undue delay or otherwise grant letters of administration of an estate of a deceased to an administrator limited for the duration of such period, he can utilize Section 295 in the case of conflict of claims. Section 295 (1) in our view, cannot be utilized by the Public Trustee once a reference has been made to Court and the reference is pending.

It was also sought to justify the orders made under Section 308 (5) which reads as follows :—

"Sec. 308 (5) :

Where any person dies leaving property amounting to or exceeding twenty thousand rupees in value and the Public Trustee, upon representations or information received in that behalf, is of opinion that the estate is likely to be interfered or intermeddled with and that the assets of the estate are likely to be in jeopardy of being lost to the heirs or to other persons lawfully entitled to or having any interest in the same, the Public Trustee may in his absolute discretion—

- (a) take charge of such estate until the same shall be claimed by some executor or administrator lawfully entitled to administer the same ; or
- (b) take an inventory of such estate and authorise any person in possession of such estate or any other fit and proper person subject to his giving security or otherwise, to continue in possession or to take possession, as the case may be ; or



- (c) take such other steps for the protection of the estate as may be necessary or expedient in the particular circumstances of the case.

We do not think that on the facts of this case, the 3rd and 4th respondents can justify the orders made under Section 308 (5). No application was made by the 3rd respondent invoking the provisions of this Section. This Section merely empowers the Public Trustee if he is of opinion that the estate is likely to be interfered or intermeddled with and the assets of the estate are likely to be in jeopardy of being lost to the heirs or to the other persons lawfully entitled to or having any interest in the same, to take charge of such estate until the same shall be claimed by some executor or administrator lawfully entitled to administer the same; or take an inventory of such estate and authorise any person in possession of such estate or any other fit and proper person, subject to his giving security or otherwise, to continue in possession or to take possession of the estate as may be necessary or expedient in the particular circumstances of the case. This Section does not empower him to appoint any person as executor or administrator.

Another argument was advanced that as the objection by the 3rd respondent that the last will was not the act and deed of the testator was withdrawn, the only question before the Court was regarding the grant of probate. It was therefore submitted that under Section 284 the only matter that could be referred to the Court was the issue whether the will was duly executed and as this had been withdrawn the Public Trustee had jurisdiction to deal with the other issue viz. as to which party was the fit and proper person for the grant of probate, as this question was one which did not come within the jurisdiction of the District Court. In our view, Section 284 is wide enough to cover a reference to the Court to decide the conflict of claims of persons for the grant of probate. In fact, a reading of Section 296 (1) clearly shows that the Court has jurisdiction to decide not only on the matters relating to the validity of the will but also on the matters relating to the grant of probate.

As we have observed earlier the 1st and the 2nd respondents could not have made the impugned orders for the reason that in view of the conflict of claims to the grant of probate or letters of administration, the 1st and 2nd respondents were under a statutory duty under Section 284 (1) to refer the matter in dispute for adjudication by the appropriate District Court and not made the final orders.

Counsel for the 3rd and 4th respondents finally submitted that since the petitioners had participated in the proceedings before the 1st respondent on 23.5.74, they had acquiesced in and submitted to the jurisdiction of the 1st respondent and were therefore not entitled to relief by way of certiorari. Acquiescence in and participation in proceedings before a Tribunal which has manifestly no jurisdiction to hear and determine any matter will not give that Tribunal jurisdiction or legality to its proceedings. We, therefore, hold that the mere fact the petitioners participated in the proceedings held before the 1st respondent on 25.5.74 will not deprive them of relief by way of certiorari.

Mr. Kamalabayson, State Counsel, who appeared for the 1st and 2nd respondents quite properly expressed the view that he was unable to support the orders made by the 1st and 2nd respondents

We, therefore, grant the application for a writ of *certiorari* and quash the orders of the 2nd respondent dated 29.3.74 and of the 1st respondent dated 24.6.74. We also grant a writ of prohibition prohibiting the 1st and 2nd respondents from taking any steps in this case till the matters which have been referred to the District Court have been finally decided.

The Public Trustee will now take action in terms of the order made by the Probate Officer on 25.3.74. The petitioners will be entitled to the costs of this application.

VYTHIALINGAM, J.—I agree.

COLIN-THOME, J.—I agree.

*Application allowed.*

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