1971 *Present:* **H. N. G. Fernando, C.J., and Weeramantry, J.**

U. KATIRAMANTHAMBY and another, Petitioners, *and*
D. LEBBETHAMBY HADJIAR, Respondent

S.C. 204/68—Application for Revision in D. C. Batticaloa, 817/T

(i) *Testamentary action—Last Will—Application for probate—Order* nisi—*Requirement of advertisement in a specified and suitable newspaper—Non-compliance—Liability of order absolute to be set aside—Civil Procedure Code, ss. 525, 532.*

(ii) *Revision—Judgment delivered in appeal preferred to Supreme Court—Subsequent application in revision to set it aside—Power of Supreme Court to grant relief.*

(i) In an application for probate of a Last Will, the failure of the District Judge to select a newspaper which would satisfy the object mentioned in section 532 of the Civil Procedure Code, viz., that " notice of the order *nisi* should reach all persons interested in the administration of the deceased's property ", is a non-compliance with a mandatory provision of law. In such a case the order absolute for probate is liable to be set aside by the Supreme Court upon an application in revision made by interested parties to intervene in the testamentary proceedings.

(ii) An appeal to the Supreme Court was decided against the respondent parties, although it would not have been so decided if the Court had been invited by the respondents to exercise its powers of revision in their favour. Within a few weeks after the decision of the appeal, the respondents sought relief by way of an application in revision.

Held, that the Supreme Court had the power, acting in revision, to set aside the order that had been made in the appeal.

APPLICATION in revision to set aside a judgment of the Supreme Court delivered in an appeal from an order of the District Court, Batticaloa.

S. Nadesan, Q.C., with *S. Sharvananda*, for the intervenient objectors-petitioners.

H. W. Jayewardene, Q.C., with *P. Nagendran*, for the petitioner-respondent.

Cur. adv. vult.

October 14, 1971. H. N. G. FERNANDO, C.J.—

The respondent to this application in revision is the executor and sole beneficiary named in the last Will of a Tamil lady who died at Batticaloa in November 1964 leaving comparatively valuable property. The deceased left no husband or issue, but it is claimed by the present petitioners that they are the sons of a sister of the deceased, and therefore her intestate heirs.

The respondent made an application for probate of the Will in November 1965. He named no respondents to his application, and averred in an affidavit that to the best of his knowledge and belief the deceased had left only himself as her sole heir. There was no averment in terms of section 525 of the Civil Procedure Code that the respondent "has no reason to suppose that his application will be opposed by any person".

The District Judge forthwith made order *nisi* declaring the Will to be proved and directed that a copy of the Order shall be published in the *Government Gazette* and twice in the *Daily News* newspaper. It appears however that the order nisi was in fact published not in the Daily News as ordered by the Court but in the *Daily Mirror*. Thereafter order absolute was entered on 25th August 1966, but probate of the Will was not actually issued by the Court.

On 31st January 1967, the present petitioners filed an application objecting to the grant of probate and seeking to intervene in the testamentary proceedings. After inquiry, the District Judge made order vacating the order absolute and allowing the intervention of the petitioners and fixed the case for further inquiry. The respondent then appealed

against the order of the District Judge vacating his earlier order, and the Supreme Court in March 1968 set aside the order of the District Judge on the ground that the latter had no jurisdiction to vacate the order absolute previously made.

The present petitioners at that stage made this application in revision in which they prayed that this Court set aside the order absolute and allow them an opportunity to show cause against the order absolute being entered.

It is relevant to note that the petitioners have claimed by affidavit that the respondent is a Muslim and a complete stranger to the deceased, and that the respondent deliberately omitted in his original petition to inform the Court that these petitioners are the lawful intestate heirs of the deceased. According to their affidavit, the deceased, the respondent, and the petitioners themselves were all residents of Valaichenai.

The principal ground on which the petitioners have relied in support of their present application is that s. 532 of the Code imperatively required the District Judge to select a newspaper for publication of the order *nisi* "with the object that notice of the order should reach all persons interested in the administration of the deceased's property". The publication of the order in the Daily Mirror, which is an English Newspaper, did not suffice to reach persons in the position of the petitioners, whose interests s. 532 was intended to protect. In the course of preparing this judgment, I have noticed the further point that in fact publication had been ordered in the Daily News. There is undoubtedly substance in the allegation of the petitioners that they did not become aware of the order nisi until January, 1967.

Mr. Jayewardene for the respondent has argued that upon a careful examination and comparison of the various provisions of Chapter 38 of the Code, the true view is that s. 532 does not apply in a case where *probate of a Will* is granted, but applies only in the case of a grant of administration with or without a Will. I agree with this submission to the extent that there appears to be some room for doubt whether s. 532 does apply in the case of a grant of probate. But it is not denied that the inveterate practice of the Courts has been to comply with the requirements of s. 532 when an order *nisi* for probate has been made; and in my opinion this practice has hardened into a rule. There is sound reason in support of such a rule, since publication of an order *nisi* for the grant of probate is for practical purposes even more important than in the case of a mere grant of administration. In the latter case the grant does not affect the rights of intestate heirs to the property of the deceased; whereas when probate is granted there is the sanction of the Court to the vesting of property according to the terms of the Will. Accordingly any doubt which may exist as to the need for publication of an Order *Nisi* granting probate must be resolved in favour of the view that s. 532 does require such publication.

I must therefore hold when the District Judge failed to select a newspaper which would satisfy the object mentioned in s. 532, he failed to comply with a mandatory provision of law, and that thus the mandatory requirement of publication was not satisfied.

The remaining question is whether our powers in revision to set aside the order absolute cannot now be exercised, because in the previous appeal the Supreme Court restored the Order Absolute made in August 1966. In that appeal however, the Supreme Court only held that the District Judge should not have set aside his own order and the judgment cites a passage from the case of *Paulusz v. Perera* [1], to the effect that "the correction of all errors of fact and law of a District Court is vested in the Courts Ordinance in the Supreme Court". While no doubt the present petitioners could at that stage have invited this Court to exercise its powers of revision in their favour, the petitioners took substantially the same course, when within a few weeks after the decision of that appeal, they made the present application in revision. We must I think take into account the fact that there appear to have been grave deficiencies in the respondent's original application for probate, and also the fact that, prima facie, this was an unusual Will.

For these reasons the application of the present petitioners is allowed; the order absolute for probate is set aside, and the petitioners will be permitted to intervene in the testamentary proceedings. The respondent will pay to the petitioners the costs of this application.

WEERAMANTRY, J.—I agree.

Application allowed.