SHANTHI GOONETILAKE
VS.
MANGALIKA AND OTHERS

COURT OF APPEAL.
WIMALACHANDRA. J.
CALA 321/2004.
DC COLOMBO 36054/T.
MAY 20, 2005.

*Civil Procedure Code- Sections 529, 529(2) 529(3), 531 (1) b, 531 (2),
537-Testamentary Proceedings - Order nisi entered in the first instance-
Recall of Probate/letters of administration - Permissibility ? - Applicability
of Section 537 when an order nisi in the first instance has been issued -
Difference.*

The respondent widow filed testamentary action naming the four
children of the deceased as respondents. The Court entered order *nisi* in
the first instance, and directed that the order nisi be published in the
papers, in terms of section 529. as no objections were received in
response to the publications, the Court under section 531(2) made order
granting letters. Thereafter the petitioner moved Court seeking to recall
the letters on the footing that the deceased has left a last will and the
petitioner has already filed a testamentary case seeking that she be
declared the executrix and the probate be granted to her. The District Court
refused the application. on leave being sought,

HELD:

  (1)   The petitioner has not filed any objections to the order made
          by Court to grant letters to the respondent as prescribed in
          section 529(2). Objections to granting of letters could be
          entertained in terms of section 529 (3) only if such objections

are submitted not earlier than 60 days and not later than 67 days from the date of the first publication.

When a period of time is specified by law before the expiration of which any act has to be done by a Party in a Court of Law, Court has no jurisdiction to permit that act to be done after the expiration of that time within which it had to be done.

When the petitioner has not made an application to recall the letters within the period prescribed in section 529 (3) the petitioner's application cannot be maintained.

(2)   When a Court directs an order *nisi* to be published and where there is no person in the prayer to serve the order *nisi* the power of Court to recall or revoke letters/probate is limited to cases when an order absolute is entered in the first instance.

(3)   Section 536 and section 537 of the Code must be read together. When the issue of probate is followed upon by an order *nisi* the provisions of section 537 do not apply, and all parties are concluded with the issue of probate.

Per Wimalachandra. J. :

"'Section 537 provides for the recall of letters/probate only when an order obsolute had been issued in the first instance and in the instant case only an *order nisi* had been entered in the first instance. Therefore sections 537 which deals with the power to recall or revoke probate/letters do not apply"

APPLICATION for leave to appeal from an order of the District Court of Colombo.

Cases referred to :

1.   *Ceylon Breweries vs. Fernando* 2001 1 Sri LR 270

2.   *Biyanwila vs. Amarasekera* 67 NLR 488

3.   *Adories et al vs.Perera*   17 NLR 212, 214 (FB)

4.   *Haleema Umma vs. Abdul Rahaman*   1999   2 Sri LR 293

Cur. adv. vult.

June 16, 2006.

WIMALACHANDRA, J.

This is an application for leave to appeal from the order of the Additional District Judge of Colombo dated 16.08.2004. By that order the learned judge dismissed an application made by the petitioner, Dona Sandaya Shanthi Goonathilake, that the probate granted to the Petitioner-respondent respondent (respondent), Mallika Arachchige Sumana Mangalika be recalled as the deceased, Pallewattage Chandrapala Costa had died leaving a last will.

Briefly, the relevant facts are as follows :

The widow, the said M. A. Sumana Mangalika (the respondent to this application), of the aforesaid deceased P. Chandrapala Costa who died intestate, filed the testamentary action in the District Court of Colombo bearing No. 36054/T and sought letters of administration for herself. The four children of the deceased were named as respondents. The Court did not grant an order absolute in the first instance, but entered an order *nisi*. The Court directed that the order *nisi* be published in three news papers, namely, "Dinamina" a Sinhala daily news paper., "Thinakaran" a Tamil Newspaper, and "Daily News" an English newspaper, in terms of section 529 of the Civil Procedure Code. As no objections were received in response to the publications made under section 529 of the Civil Procedure Code, the Court acting under section 531(2) of the Civil Procedure Code made order granting the letters of administration to the respondent. On 13.10.2003, the petitioner (The Petitioner to this application) filed a petition and an affidavit in the same proceedings that the letters of administration be

recalled on the footing that the deceased had died leaving a last will, and that the petitioner has already filed a testamentary action bearing No. 36386/T in the District Court of Colombo on 19.03.2004 seeking that she be declared the executor and that the probate be granted to her.

Admittedly, in the testamentary proceedings in Case No. 36054/T, order *nisi* was entered and on 30.06.2003 proof of publication was filed, and the Court made order granting the letters of administration to the respondent in terms of section 531(b) of the Civil Procedure Code. The purpose of publishing the order *nisi* in Sinhala, Tamil and English news papers is to give notice to any person interested in the administration of the estate of the deceased person. It requires any person interested to show cause why the order *nisi* entered should not be made absolute.

The first publication in terms of section 529 (2) was done on 23.04.2003. Objections to the granting of letters of administration could be entertained in terms of section 529(3) of the Civil Procedure Code only if such objections are submitted not earlier than 60 days and not later than sixty seven days from the date of the first publication referred to in section 529(2). However, the petitioner has not filed any objections to the order made by Court to grant letters of administration to the respondent as prescribed in section 529(2). When a period of time is specified by law before the expiration of which any act has to be done by a party in a Court of law, that Court has no jurisdiction to permit that act to be done after the expiration of that time within which it had to be done. (*Ceylon Breweries Vs. Fernando* [1]). Therefore when the petitioner has not made an application to recall the letters of administration within the period prescribed in secton 529(3) of the Civil Procedure Code, the petitioner's application cannot be entertained.

When a Court directs an order *nisi* to be published and where there are no persons in the prayer that the order nisi is to be served on, the power of a District Court to recall or revoke a probate (or letters of

administration) which has already been granted is limited to cases where an order absolute is entered in the first instance (see *Biyanwala Vs. Ameresekera*) [2]. This judgment relates to an application for a probate in respect of a last will but it is equally applicable to an application for letters of administration.

In the case of *Adoris et. al Vs. Perera* [3] (Full Bench) Lascelles C. J. made the following observations :

"I cannot resist the conclusion that these two sections (sections 536 and 537) must be read together. Ignoring the references to administration, the result is that probate may be recalled in the testamentary action in two cases only, namely,

(1)   Where probate has issued on an order absolute in the first instance, and as a consequence, notice of the order has not been given to interested parties, and

(ii)   Where events have occurred which render the administration under the probate useless."

These provisions (sections 536 and 537) are equally applicable to when letters of administration has been issued on an order absolute in the first instance.

In the case of *Haleema Umma Vs. Abdul Rahuman* [4] the Supreme Court held that sections 536 and 537 of the Civil Procedure Code must be read together. Consequently, when the issue of probate is followed upon by an order *nisi* the provisions of section 537 do not apply and all parties are concluded with the issue of the probate.

Section 537 of the Civil Procedure Code provides for the recall of a probate or letters of administration only where an order absolute had been issued in the first instance and in the instant case only an order *nisi* had been issued in the first instance. Therefore the Section 537

which deals with the power to revoke or recall or cancel a probate or grant letters of administration do not apply.

In the circumstances there is no basis to interfere with the order of the learned Additional District judge dated 16.08.2004. I dismiss this application with costs fixed at Rs.7,500.

Application dismissed.