

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI  
LANKA**

In matter of an application for Special Leave  
to Appeal from a judgement of the Court  
of Appeal.

S.C.Appeal No: 140/2011

S.C.SPL.LA.No:92/2009

CALA No.489/2005

D.C.Colombo No.36175/T

In the matter of the Last Will and Testament  
of the late Thimbiripolage Sushila de Silva  
nee Fernando of No.06 Annie Avenue,  
Dehiwala.

**DECEASED**

Balange Sarojin de Silva,  
of No.06 Annie Avenue,  
Dehiwala

**PETITIONER**

**Vs.**

Nalange Samanthi Sadhana Dharmabandu nee  
de Silva, of No.20 Saddle Crescent, Walkely  
Heights, South Australia, 5015, *Appearing by*  
*her Attorney* Ajantha Demetrius Wijesena of  
No.29B,2<sup>nd</sup> Lane, Koswatte, Nawala.

**RESPONDENT**

Mallika Homes Limited,  
No.45, Visakha Road,  
Colombo 04.

**INTERVENIENT-PETITIONER**

**AND**

In the matter of an application for Leave to Appeal from an order of a District Court.

Balange Sarojin de Silva, of No.06, Annie Avenue, Dehiwala.

**PETITIONER-PETITIONER**

**[deceased]**

Shan Tissaka Wijesekara,  
No.162/1 Galle Road, Dehiwala,

**SUBSTITUTED PETITIONER-  
PETITIONER**

**Vs.**

Nalange Samanthi Sadhana Dharmabandu nee de Silva, of No.20 Saddle Crescent, Walkely Heights, South Australia, 5015,  
*Appearing by her Attorney* Ajantha Demetrius Wijesena of No.29B, 2<sup>nd</sup> Lane, Koswatte, Nawala.

**RESPONDENT-RESPONDENT**

Mallika Homes Limited,  
No.45, Visakha Road,  
Colombo 04.

**INTERVENIENT-PETITIONER-  
RESPONDENT**

**AND NOW**

**Balage Sarojin de Silva**

of No.06Aniie Avenue, Dehiwala,

**PETITIONER-PETITIONER**

**[deceased]**

**Shan Tissaka Wijeyesekara**

No.162/1, Galle Road Dehiwala.

**SUBSTITUTED PETITIONER-  
PETITIONER -PETITIONER**

**Vs.**

**Nalange Samanthi Sadhana Dharmabandu**

**nee de Silva.**

Of No.20 Saddle Crescent Walkley Heights,  
South Australia 5015

*Appearing by her Attorney*

Ajantha Demetrius Wijesena of No.29B, 2<sup>nd</sup>  
Lane, Koswatte, Nawala.

**RESPONDENT-RESPONDENT-  
RESPONDENT**

Mallika Homes Limited,

No.45, Visakha Road,

Colombo 04.

**INTERVENIENT-PETITIONER-  
RESPONDENT**

Before:

Chandra Ekanayake, J

Wanasundera PC, J

Aluwihare PC, J

Counsel:

Saliya Peiris for the Substituted Petitioner-Petitioner-Appellant

Manohara de Silva, PC with Somasiri for the Intervenant- Petitioner- Respondent.

Ruwantha Coorey for the Respondent-Respondent-Respondent

Written submissions

tendered on:

By Substituted Petitioner-Petitioner-Appellant on  
09/11/2011

By Respondent-Respondent-Respondent on  
19/12/2011

By Intervenant- Petitioner- Respondent on  
10/06/2014

Decided on:

29.07.2015.

**Chandra Ekanayke J,**

(1) The Substituted-Petitioner-Petitioner-Appellant (herein after sometimes referred to as the

Substituted Appellant) by Petition dated 12/05/2009 has sought inter alia leave to appeal against the judgement of the Court of Appeal dated 02/04/2009, to set aside the same and the order dated 24/11/2005 of the Additional District Judge of Colombo, for a dismissal of the application for Probate in the District Court and for termination of these proceedings. When this application was supported on 28/09/2011 this Court had granted special leave to appeal on the questions of law set out in paragraph 13(1) (b) to (f) of the aforementioned petition to this Court. For ease of reference same are reproduced below :-

“ 13.1 (b). The Court of Appeal erred in Law in holding that the **District Court had the power to permit** a respondent to prosecute the application for probate when the Petitioner had withdrawn his application for probate.

(c). The Court of Appeal erred in Law in holding that there was **no necessity for a specific provision** of Law giving such power to the District Court.

(d). The Court of Appeal erred in holding that when the application under Section 517 of the Civil Procedure Code is withdrawn the proceedings under **Section 516 cannot be terminated**, and that in such circumstances, the District Court had a **duty to act under Section 517 or 518 or even 520**, and to grant probate or issue Letters of Administration in order to prove the Will while affording an opportunity for the opponents to challenge the same.

(e). The Court of Appeal has referred to the decision **In the matter of the Insolvency of M.L.Marikar Abdul Aziz** 1 N.L.R at 196, that the **Insolvency Ordinance** is exclusive and comprehensive in respect of insolvency proceedings, but has erred in Law by failing to note that Section 21 of that Ordinance contains a **specific provision** giving the power to the District Court to permit a creditor to take over and continue with Insolvency Proceedings when the original petitioner does not continue with it.

(f). The Court of Appeal erred in law by not following the decision in **Abeyratne v Wijemanne** 63 N.L.R. 173 at 175, where the Supreme Court held that an application for Letters of Administration **comes to an** end with the death of the applicant.”

(2) The original petitioner had made an application to the District Court of Colombo under case No.36175/T (together with his affidavit) to prove the Last Will and Testament bearing No.3141 of 16.12.2001 purported to have been left by his wife the deceased T.Sushila de Silva nee Fernando and for probate in his favour on the basis that he was the sole executor appointed under the will. The above Respondent-Respondent-Respondent namely N.S.Sadhana Dharmabandu nee de Silva (hereinafter sometimes referred to as the Respondent) had objected to the above application by statement of objections dated 20.10.2003 to the issuance of probate to her father on the ground that the aforementioned Last Will was not the act and deed of her deceased mother. Further whilst moving for a dismissal of the application of the

original petitioner she had moved for letters of administration to administer her deceased mother's intestate estate on the basis that her mother died without leaving a Last Will. Thereafter having allowed an application for intervention made by Mallika Homes Limited, it had been named as Intervenant-Petitioner-Respondent which shall be sometimes referred to as the Intervenant in this judgement.

- (3) At the commencement of the inquiry in case No.36175/T at the request of the Counsel who represented all the parties in the said case and also in the connected case bearing 36268/T both cases having been consolidated inquiry had commenced. Perusal of the District court proceedings makes it amply clear that after recording the evidence of the 1<sup>st</sup> witness and the evidence in examination -in-chief of the 2<sup>nd</sup> witness to the Last Will, the original petitioner had made an application for withdrawal of the application for probate pending before that Court. This application for withdrawal had not been objected to by the Respondent. However the Intervenant- Petitioner- (Mallika Homes Limited) whilst objecting to the application for withdrawal appears to have moved the District Court to allow it to prosecute the application with the aim of proving the Last Will as it was a beneficiary under the said Will. However after filing of case bearing No.36175/T the Respondent (Sadhana Dharmabandu) had filed a testamentary case bearing No.36268/T on the basis that no Last Will was left by her mother prior to her death and moved for letters of Administration in her favour by petition dated -- October 2003. In the above petition the deceased original petitioner and the present Intervenant had been named as 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively. Then the District Judge after considering the submissions made by all the parties had allowed the application of the original petitioner for withdrawal and ordered the inquiry to proceed from the point it was stopped with regard to the claims of the Respondent and the Intervenant. This order of the learned District Judge dated 24/11/2005 was assailed in the Court of Appeal by way of a Leave

to Appeal application bearing No.CALA/489/2005. The learned Judges of the Court of Appeal by the impugned judgement dated 02/04/2009 dismissed the above application of the Substituted-Appellant in the Court of Appeal. This is the judgement that has been challenged in this Court.

- (4) At the hearing of the Appeal in this Court the learned Counsel for the Respondent laid heavy stress on the fact that in the absence of any fresh application by the Interventient- Petitioner-Respondent (Interventient) in the District Court seeking letters of Administration (with the Will annexed), the same application cannot be proceeded with. Further it was contended that if the Court wishes to proceed the Court is mandated to order fresh publication.
- (5) It would be pertinent to note that procedure in testamentary actions is prescribed in Chapter xxxviii under 'Testamentary actions' in the Civil Procedure Code (Amendment Act No.14 of 1993). Needless to stress that Sections 516 and 517 become relevant with regard to the issue in hand.

Section 516 of the Civil Procedure Code reads thus:-

“ When any person shall die leaving a will in Sri Lanka, the person in whose keeping or custody it shall have been deposited, or who shall find such will after the Testator's death, shall produce the same to the District Court of the district in which such depository or finder resides, or in the District Court of the district in which the testator shall have died, within three months after the finding of the will, and he shall also make oath or affirmation, or produce an affidavit

in Form No.81 in the First Schedule verifying the time and place of death, and stating (if such is the fact) that the testator has left property within the jurisdiction of that or any other, and in that event what court, and the nature and value of such property ; or, if such is the fact, that such testator has left no property in Sri Lanka.

The will so produced shall be numbered and initialled by the Probate Officer and deposited and kept in the record room of the District Court”, and

Section 517 :-

(1) When any person shall die leaving a will under or by virtue of which any property in Sri Lanka is in anyway affected, any person appointed executor therein may apply to the District Court of the district within which he resides, or within which the testator resided at the time of his death, or within which any land belonging to the testator's estate is situate, within the time limit and in the manner specified in Section 524, to have the will proved and to have probate thereof granted to him; any person interested, either by virtue of the will or otherwise, in having the property of the testator administered, may also apply to such court to have the will proved and to obtain grant to himself of administration of the estate with copy of the will annexed.

(2) If any person who would be entitled to administration is absent from Sri Lanka a grant of letters of administration

with or without the will annexed, as the case may require,  
may be made to the duly constituted attorney of such person”.

(6) In terms of the provisions in Section 519 where there is no person fit and proper in the opinion of the Court to be appointed as the administrator or no such person is willing to be so appointed, the court shall appoint the Public Trustee as the administrator. It was the contention of the Appellant that when the application to obtain probate was withdrawn the application should have been dismissed altogether.

(7) On a careful scrutiny of the reasons given by the Judges of the Court of Appeal it has been concluded that an application made to the District Court under Section 517 to have the Will proved and the commencement of the proceedings under Section 516 has to be differently identified and what was withdrawn in this instance was only the application made under Section 517 which has no connection to the proceedings commenced under Section 516. Based on the above premise learned Judges of the Court of Appeal had further concluded that the procedure that has to be followed in testamentary actions should not necessarily be guided by the general provisions in the Civil Procedure Code. On that footing Respondent's contention had been rejected. Thus the above conclusions of the Judges of the Court of Appeal needs careful examination.

(8) A perusal of the order made by the Learned Additional District Judge dated 24/11/2005, makes it amply clear that the case can be proceeded with between the present Respondent- Respondent- Respondent and the Intervenient-Petitioner-Respondent on the issues framed by

them despite the original petitioner withdrawing the Petition filed by him to get the Will in issue proved. He had further concluded that in view of the circumstances which has led to the present situation, the Interventient is also entitled to amend its issues and to proceed with the new issues and also issues could be framed as to whether probate should be granted to the Interventient-Petitioner-Respondent or to the Public Trustee, if at the conclusion of the inquiry, the Last Will is held to be proved by Court. He has also held that at the conclusion of the inquiry, if the Last Will is not proved, letters of Administration could be issued to the Respondent – Respondent – Respondent. The Court of Appeal has upheld the said order of the Learned District Judge.

- (9) It was contended before us, that the District Court had no power to permit a Respondent to prosecute the application for probate when the Petitioner has withdrawn his application for probate. An examination of the issues framed in this case shows that the Interventient-Petitioner- Respondent had framed issues on the basis as to whether the said Last Will is an act and deed of the deceased and if so, should probate be issued to the original petitioner. The Respondent- Respondent- Respondent has framed issues as to whether the deceased died without leaving a Last Will [Issue No 3] and if so should the Letters of Administration be issued to her (i.e. Petitioner in 36268/T) (see Issue No.4). Those issues and the issues framed by the original petitioner have been framed in terms of Section 532 (1) and 533 of the Civil Procedure Code and the Court is obliged to try the issues so framed at the inquiry. In the circumstances if the original petitioner were to withdraw his application, it will not debar the Court from proceeding with the issues already framed upon which inquiry had commenced.

- (10) In our view the District Judge is entitled to permit the present Respondent and the

Intervient to proceed with the inquiry pending before that Court from the point it was stopped and further it is not necessary for the Intervient to file a fresh case to get the last will proved. **However, to prevent any prejudice that would be caused to the Respondent-Respondent she is also at liberty to amend her existing issues and/or frame additional issues (if necessary) with the permission of the District Judge.** The Learned Counsel for the Substituted-Appellant has contended that no express provisions are found in the Civil Procedure Code to cover the situation that has arisen in this case. But we are inclined to take the view that the District Judge is entitled to make appropriate orders exercising the inherent powers in a situation such as this.

In this regard we are compelled to cite with approval Justice Tambiah's observation in **Seneviratne Vs Abeykoon 1986 (2) SLR page 1** at page 5, which is to the following effect :

“An extraordinary situation had arisen and to deal with it, there was no express provision in the Civil Procedure Code. It is to meet such a case that s. 839 was enacted. It empowered a Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. Dealing with the corresponding section in the Indian Civil Procedure Code (s. 151) which is identical with s. 839, Chitale and Rao state (Code of Civil Procedure, 3rd Ed., Vol. 1) -

"Every Court, whether a Civil Court or otherwise, must therefore, in the absence of express provision in the Code for that purpose, be deemed to possess, as inherent in its very

Constitution, all such powers as are necessary to do the right and to undo a wrong in the course of the administration of justice (p. 1199) -

It is in the ends of justice that an injury should be remedied and needless expense and inconvenience to parties avoided (p. 1212) .

The jurisdiction to make restitution is inherent in every Court and will be exercised whenever the justice of the case demands it. (p. 1155)" and

Sarker in his "Code of Civil Procedure" (Vol. 1, at p. 842) says:

"where a contingency happens which has not been anticipated by the framer of the Civil Procedure Code, and therefore no express provision has been made in that behalf, the Court has inherent power to adopt such procedure, if necessary to invent a procedure, as may do substantial justice, and shorten needless litigation."

- (11) We are therefore of the view that, the Learned Additional District Judge has exercised the discretion vested in Court correctly and judicially in making the said order permitting the case to be proceeded with between the Respondent and the Intervenant-Petitioner-Respondent (Intervenant) and Court of Appeal has been correct in upholding the said order.
- (12) The decision **In the matter of insolvency of M.L.M Marrikar Abdul Aziz (1) NLR 196,** dealing with the provisions of the Insolvency Ordinance is irrelevant and has no application

to the case in hand. The judgement cited by the Learned Counsel for the Appellant in **Abeyratne Vs Wijemanne 63NLR 173** at 175 where it was held that, “An application for Letters of Administration comes to an end with the death of the applicant prior to the issue of letters and 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,” is equally irrelevant and has no application to the present case.

- (13) We have also considered the submission made by Learned Counsel for the Appellant that when a person other than the original petitioner seeks Letters of Administration, he should follow the procedure set out in Section 524 of the Civil Procedure Code including publication. This submission, in our view is erroneous as the present inquiry into the will has commenced upon publication and consequent response thereto. Further it is needless to stress that Civil Procedure Code, requires only one publication in respect of an estate of a deceased person and several claims/objections made thereto will be considered and proceeded with, in terms of Sections 532(1) read with 534(1) of the Civil Procedure Code at the hearing. This is also seen from the provisions contained in Section 536 of the Civil Procedure Code, which permits a party who has not responded to the notice published under Section 529, to participate at the inquiry by filing a caveat, in the same court against the allowing of the petitioners claim or a notice of opposition thereto. This is to enable the court to try all issues at the hearing of the matter conclusively. The above mentioned section 536 thus reads as follows :-

“At any time after the notice published under section 529 and before the final hearing of the petition, it shall be competent to

any person interested in the will or in the deceased person's property or estate, though not a person specified in the petition, to intervene, by filling in the same court a caveat as set out in Form 93 in the first Schedule against the allowing of the petitioner's claim or a notice of opposition thereto, and the court may permit such person to file objections, if any, and may adjourn the final hearing of the petition.”

- (14) Accordingly the issues of law set out in paragraph 13(1) (b) to (f) upon which Special Leave to Appeal has been granted by this Court are answered in the negative. This appeal is hereby dismissed subject to the variation referred to in paragraph 10 above with regard to conclusion No.5 contained in page 21 of the District Judge's order dated 24.11.2005. In all the circumstances of the case no order is made as to costs of this appeal.
- (15) The Registrar of this Court is directed to transmit copies of this judgement to the Registrars of the District Court of Colombo and Court of Appeal forthwith. She is further directed to forward the original records in the above two cases namely D.C.Colombo No.36175/T and Court of Appeal No.CALA/489/2005 to the Colombo District Court and the Court of Appeal.

JUDGE OF THE SUPREME COURT

Eva Wanasundera PC, J.

I agree.

JUDGE OF THE SUPREME COURT

Aluwihare PC,J.

I agree.

JUDGE OF THE SUPREME COURT.