RATNASINGHAM
v.
TIKIRIBANDA DASSANAIKE AND OTHERS

SUPREME COURT
FERNANDO, J.
WIJETUNGA, J. AND
SHIRANI BANDARANAYAKE, J.
S.C. APPEAL NO. 35/96
CALA 57/94
CALA 294/94
C.A. (REVISION) NO. 62/95
D.C. MT. LAVINIA NO. 121/83/T
JUNE 5 AND 19, 1997.

Probate of last will – Jurisdiction of the Court to grant probate – Last will dealing with movable property abroad – S. 21 of the Judicature Act – Sections 516 and 518, Sections 650 and 653 of the Civil Procedure Code.

Held: (Shirani Bandaranayake, J. dissenting)

On an interpretation of the provisions of S. 21 of the Judicature Act and sections 516 and 518 of the Civil Procedure Code the District Court has

no jurisdiction to grant probate of a last will which dealt exclusively with movable property abroad, and which did not in any way, affect any property in Sri Lanka.

Per Fernando, J.

"It is a fallacy to argue that merely because section 516 imposes a duty on the custodian of a will to produce it in Court, such custodian has the right to probate. S. 516 confers no such right. It is section 518 which deals with the right to probate, and there the legislature expressly confined that right to wills affecting property in Sri Lanka".

Per Fernando, J.

"Whether a grant of probate or administration ought to be made is a question of administration; how the estate devolves is a question of succession. The fact that the latter is a matter (and that, too, not exclusively) for the courts of the domicile does not mean that the former is also a matter for them. Whether a will should be admitted to probate is governed by the rules relating to administration".

Cases referred to:

1. *Pathmanathan v. Thuraisingham* (1970) 74 NLR 196.
2. *Hevavitharana v. de Silva* (1961) 63 NLR 68, 72.
3. *Seneviratne v. Abeykoon* (1986) 2 Sri LR 1, 6.
4. *Luke v. IRC* (1963) AC 557, (1963) 1 All ER 655.
5. *Magor & St. Mellons RDC v. Newport Corp* (1951) 2 All ER 839, 841.
6. In the goods of Tucker (1864) 3 Sw & Tr 585.
7. In the goods of Coode (1867) LR 1 P & D 449.
8. Re Wayland (1951) 2 All ER 1041.
9. In the goods of Tamplin (1893) P. 39.
10. In the goods of Murray (1895) P. 65.
11. *Le Mesurier v. Le Mesurier* (1895) 1 NLR 160.
12. *Seneviratne v. Francis Fonseka* (1986) 2 Sri LR 1, 6.

APPEAL from the judgment of the Court of Appeal.

P. A. D. Samarasekara, PC with *M. K. Jayakrishnan* for appellant.

J. W. Subasinghe, PC with *D. J. C. Nilanduwa* and *J. A. J. Udawatte* for 1st respondent.

Cur. adv. vult.

October 17, 1997

FERNANDO, J.

I have had the benefit of reading, in draft, the judgment of Bandaranayake, J. with whose reasoning and conclusion I find myself unable to agree.

The question of law which arises in this appeal is whether the District Court had jurisdiction to grant probate of a Last Will which dealt exclusively with movable property abroad, and which did not, in any way, affect any property in Sri Lanka. That involves the interpretation of section 21 of the Judicature Act, No. 2 of 1978, and section 518 of the Civil Procedure Code (CPC), read with section 516.

Whilst the proceedings were pending in the District Court, sections 516 and 518 were replaced by the present sections 516 and 517, by the amending Act No. 14 of 1993 which came into operation on 1.9.93. However, in so far as this appeal is concerned, the changes were not material.

Section 21 of the Judicature Act provides:

"Every District Court shall have full power and authority **subject to and in accordance with the law in force for the time being–**

(1) to appoint according to the law in force for the time being administrators of the estates and effects of any persons dying either intestate, or who may not by any Last Will or testament have appointed any executor or trustee for the administration of such estates or effects, whether such estates may be within such district or any other district or districts **within Sri Lanka;**

(2) to inquire into and determine upon the validity of any document or documents adduced before it as and for the last will of any person who may have died **leaving property in Sri Lanka,** and to record the same, and to grant probate thereof;....." [emphasis added].

The relevant portions of sections 516 and 518, CPC, are:

"516 (1) 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 to the District Court of the district in which the testator shall have died, *within three months after the finding of the will* and [as soon as reasonably may be after the testator's death. And] he shall also make oath or affirmation, or produce an affidavit (form No. 81, 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..."**

"518 (1) When any person shall die leaving a will ***under or by virtue of which any property in Sri Lanka is in any way 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, to have the will proved and to have probate thereof issued to him ***within the time limit and in the manner specified in section 524;*** [also] 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." [emphasis added]

The amending Act of 1993 added the words which I have italicized, and deleted the words I have put in square brackets. In this judgment I will refer to the sections by the numbers which they bore prior to the 1993 amendment.

FACTS

It is not in dispute that the deceased died on 30.4.92. According to the petitioner-respondent-appellant ("the petitioner") he left a Last Will dated 1.11.91, made in Sri Lanka, which disposed only of shares in three Malaysian companies; no property, movable or immovable, in Sri Lanka was in any way affected by it. Those shares were

bequeathed to the deceased's three children, the 1st respondent-petitioner-respondent ("the 1st respondent"), and the 2nd and 3rd respondents-respondents-respondents ("the 2nd and 3rd respondents").

The petitioner filed a petition in the District Court of Mount Lavinia on 20.8.93 (i.e. before the amending Act No. 14 of 1993) stating that the Last Will had been in her custody and for an enjoining order and an interim injunction, restraining the 1st respondent from interfering with or misappropriating the shares due to the other two respondents. No enjoining order was granted.

As the custodian of the Will, the petitioner was obliged to produce it to the District Court, and section 516 also required her to state what property the deceased had left, or, if that was the fact, that he had left no property in Sri Lanka. She failed to comply with the latter requirement. Further, section 524, CPC, required her to set out in her petition for probate "the details and situation of the deceased's property", and all she disclosed were the Malaysian shares.

It is not disputed that the 1st respondent was a permanent resident of the United Kingdom. In his statement of objections dated 16.9.93, he pleaded that the court "has no jurisdiction to make an order against [him] in respect of property outside its jurisdiction". In his written submissions, it was submitted that "none of the property dealt with by the Last Will is, or was, in Sri Lanka. In this context the question to be asked is – does this court have jurisdiction in respect of a Last Will which deals only with property. . . which is located entirely outside Sri Lanka" : section 518 was cited.

In the meantime, the petitioner made a second application, dated 24.1.94, for an order under section 653, CPC, for the seizure and sequestration of the only property which the 1st respondent owned in Sri Lanka. In his objections, dated 11.3.94, the 1st respondent stated that he had disposed of that property by a Deed of Sale dated 24.1.94; and that he was participating in the proceedings to show that the court has no jurisdiction.

Thereafter the District Court, on 18.3.94, ordered the issue of probate and granted the interim injunction prayed for:

"1st respondent has stated in his. . . objections *that this court has no jurisdiction to take a decision on these shares since they are outside the limits of Sri Lanka.* But however I hold that this court has the jurisdiction in terms of . . . *Pathmanathan v. Thuraisingham*[1].

In view of the fact that the 1st respondent has not taken any objections for granting the probate to the petitioner and since the 1st respondent has accepted the Last Will . . . to be genuine, I issue the probate."

On 31.3.94 the 1st respondent made an application for leave to appeal against that order (CA/LA 57/94); he stated that on 29.3.94 the District Court had set aside the order for the issue of probate as having been made *per incuriam* – because the Order Nisi had not been duly advertised – and that is borne out by the record. However, while that application was pending in the Court of Appeal, probate was issued on 26.10.94.

The petitioner made a third application, dated 15.3.94, averring that the 1st respondent was a permanent resident of the United Kingdom whose stay in Sri Lanka was temporary, and that he had disposed of his only property in Sri Lanka, which enhanced the possibility of his early departure from Sri Lanka. She prayed for the seizure and sequestration of the proceeds of sale of that property, and for the arrest of the 1st respondent under section 650. In undated written submissions filed – in response to the second or the third application – the 1st respondent contended that "he has taken up the position that this Court has no jurisdiction in respect of a Last Will which deals only with movable property located outside Sri Lanka".

On 6.12.94, dealing with the second application, the court ordered the seizure of the property, but said nothing about its sale and the disposal of the proceeds of sale. Against that order the 1st respondent made applications, for leave to appeal (CA/LA 294/94) on 22.12.94, and for revision (CA 62/95) on 24.1.95. No order seems to have been made in regard to the (third) application made on 15.3.94.

The first application (CA/LA 294/94) came up for consideration on 23.1.95. According to the journal entry, counsel for the petitioner submitted that the order dated 18.3.94 challenged in those proceedings

was vacated by the District Court in regard to the grant of probate, but not in regard to the interim injunction; that subsequently the publication was made and probate issued. Counsel for the 1st respondent stated that the court had no jurisdiction to grant probate. All three applications were called on 13.6.95, and counsel agreed that the matter be decided on written submissions. In the written submissions the lack of jurisdiction was strenuously urged by the 1st respondent and equally strongly resisted by the petitioner.

Ranaraja, J. in the Court of Appeal, did not consider the merits of the impugned orders in his judgment delivered on 21.9.95. Instead, having referred to section 21 of the Judicature Act which conferred and defined the testamentary jurisdiction of the District Court, he held that this "clearly restricts the jurisdiction of the District Court to make orders on the validity of Last Wills and to issue probate only to cases where the deceased had left property in Sri Lanka . . . and thus all orders made by [the District Court of Mount Lavinia] are void for want of jurisdiction and have to be set aside". He went on to hold that, apart from the lack of jurisdiction, the petitioner had no right to make an application for probate because section 518, CPC, denied a person named as executor the right to apply for probate unless the testator had died leaving property in Sri Lanka.

It is apparent that if that finding that the District Court lacked jurisdiction was wrong, then all three applications must be sent back to the Court of Appeal. In any event, therefore, I cannot agree with the order of Bandaranayake, J. restoring the judgment of the District Court, without any consideration of the merits of those three applications.

The submission of Mr. Samarasekera, PC, for the petitioner, was two-pronged: the order of the Court of Appeal was (*a*) procedurally wrong, because it dealt with a matter which had not arisen for determination at that stage, and (*b*) wrong in law, because the District Court did have jurisdiction.

THE PROCEDURAL QUESTION

The petitioner's first contention was that:

> "the main point that is urged is that the Court of Appeal dealt with a matter which did not arise before it for decision, namely the validity of the probate granted to the petitioner . . . . in neither of these applications had leave been granted when the Court of Appeal delivered judgment dated 21.9.95. At best the jurisdiction of the Court of Appeal at that stage was only to grant leave. In respect of [the sequestration order] there was also a revision application . . . . but it did not seek to set aside anything except the sequestration order. Thus there was no appeal on either application before the Court of Appeal regarding the probate granted to the petitioner. In fact when probate was granted there was a right of appeal against it, which was not exercised by anyone and all parties have acquiesced in the grant of probate."

Neither in his oral nor his written submissions did Mr. Samarasekera refer to the repeated objection taken by the 1st respondent that the court had no jurisdiction to make an order in respect of property outside Sri Lanka, or the fact that on 29.3.94 the District Court had set aside the order for the issue of probate, although it was in that background that CA/LA 57/94 was filed, and the question of jurisdiction decided.

It may be technically plausible to urge that the leave to appeal applications were not yet, procedurally, ripe for final determination, because although filed in 1994 leave to appeal had not been granted in either case. However, the two impugned orders had been resisted in the District Court on the ground of want of jurisdiction, and the issue was again raised, squarely, in the Court of Appeal on 23.1.95, and pursued in the written submissions. It is difficult to imagine that Counsel only wanted the court to decide whether to grant leave. There was no point in considering whether the District Court should have granted an injunction or ordered sequestration, if it did not have jurisdiction over the action – the application for probate. The question of jurisdiction therefore had to be decided, and counsel obviously wanted it decided.

It was in those cricumstances, that the Court of Appeal decided the question of jurisdiction: a pure question of law, whether there was a patent want of jurisdiction. If after a full argument, and in a reserved and reasoned judgment, the Court of Appeal concluded that the District Court had no jurisdiction, should it nevertheless have merely granted leave to appeal and issued notice, fixed the matters for hearing for another day, and on that day proceeded to re-hear and determine the very same question again? I think not, but I need say no more because although special leave to appeal was sought upon that very question, leave was granted (and that, too, by a majority) only on the following, purely legal, question:

> "Whether the Court of Appeal is correct in its interpretation of section 21 (2) of the Judicature Act and section 518, CPC".

THE JURISDICTIONAL QUESTION

The Petitioner's contentions

Mr. Samarasekera submitted that under section 21(2) of the Judicature Act, the District Court has jurisdiction if the testator had left property in Sri Lanka; "in fact this testator has left property in Sri Lanka although in the application for probate they have not been set out . . . if this objection was taken in the lower court, [the petitioner] would have immediately filed the papers, and challenged the objection . . . still inventory has not been filed and at the stage of inventory all the properties of the testator will be disclosed". Further, sections 516 to 519:

> "deal with different ways in which a last will could be proved . . . [they] do not deal with the question of jurisdiction of the court but deal with the manner of making the application. The reference in section 517 to *'a will under or by virtue of which any property in Sri Lanka is in any way affected'* is not calculated to resist the jurisdiction of the court. It enables a party having such instrument where property is in Sri Lanka to apply [for] and obtain probate. In that section there is no reference to the situation that would arise where the will did not deal with property in Sri Lanka although the testator lived and died in Sri Lanka . . ."

Mr. Samarasekera also stressed the aspect of convenience: that the named executor, the attesting Notary and the witnesses are all in Sri Lanka, and the beneficiaries are all Sri Lankans and were in Sri Lanka at all relevant times, although the 3rd respondent was temporarily away: and that "the only person who complains to the Court of Appeal is the 1st respondent . . . . . who raised no objection to jurisdiction or to the grant of probate". There would be great hardship to the petitioner if she had to prove the will abroad, whereas if probate was granted in Sri Lanka, it could be resealed abroad. There is, he urged, "no prohibition which expressly bars the District Court of Mount Lavinia from dealing with this will". *Hevavitharana v. de Silva,*[2] and *Seneviratne v. Abeykoon,*[3] were cited, in support of the contentions that "as a matter of general principle prohibitions cannot be presumed", and that, on the contrary, "the court has inherent power to adopt such procedure, if necessary to invent a procedure, as may do substantial justice and shorten needless litigation".

He further submitted (citing *Luke v. IRC)*[4]

". . . when the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which would never have been intended by the legislature, the court may modify the language used by the legislature or even do some violence to it so as to achieve the obvious intention of the legislature and produce a rational construction. The court may also in such a case read in to the statutory provision a condition which though not expressed is implicit as constituting the basic assumption underlying the statutory provision."

Finally, he contended that:-

"Dicey and Morris in Conflict of Laws, 12th edition, volume 2, at page 1021 explains the position with regard to the jurisdiction of foreign courts. It would appear that as far as movable assets are concerned the courts of the country in which the testator was domiciled has testamentary jurisdiction . . . Similarly in the same work at page 916 a distinction is drawn between movables and immovables and it goes on to state the importance of the distinction between movable and immovable is most apparent in the field of succession, because succession to movables is in general governed by the *lex domicilii* of the deceased whereas succession to immovables is in general governed by the *lex situs.*"

Judicature Act and Civil Procedure Code

Sub-sections (1) and (2) of section 21 confer jurisdiction – **"subject to and in accordance with** the law in force for the time being" – on a District Court, to appoint administrators, to determine the validity of a document put forward as being a Last Will, and to grant probate thereof. Those sub-sections make that jurisdiction dependent on whether the deceased left property *in Sri Lanka,* whether in that district or in any other district; they not only require that jurisdiction to be exercised "in accordance with the law in force for the time being" (which "law" would obviously include the relevant provisions of the CPC), but also make that jurisdiction **"subject to"** that law: and that clearly includes section 518. There can be no doubt that section 21 was "subject to" all the limitations imposed by section 518 and other provisions of the CPC. It referred to "the law for the time being in force", and therefore even future limitations were included, although the legislature might not have foreseen them. Here, however, section 518 contained, in relation to section 21, a pre-existing limitation, of which the legislature could not but have been aware. Section 518 plainly and unambiguously restricted the class of Wills which the District Court could admit to probate: not **all** Wills, but only those "under or by virtue of which any property in Sri Lanka is in any way affected". The jurisdiction which section 21 conferred was, and is, therefore, subject to that limitation. The plain meaning of section 21, read with section 518, is that the District Court has no jurisdiction to grant probate of a Will dealing exclusively with foreign movables. The language used admits of no other construction. Further, the person entitled to apply for probate is the "person appointed executor **therein"**, which thus refers back to "a Will under or by virtue of which any property in Sri Lanka is in any way affected".

To disregard that plain meaning, and then to say, subjectively, that this is a situation in which provision should have been made in the CPC, and thereafter, simply because there is no such provision, to adopt the "interpretation" for which the petitioner contends, would be to do what the House of Lords condemned in *Magor & St. Mellons RDC v. Newport Corp*[5]*:*

> ". . . What the legislature has not written, the court must write. This proposition . . . . . cannot be supported. It appears to me a naked usurpation of the legislative function under the thin

guise of interpretation, and it is less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act".

That is very clear in this case when we consider the extent of the guesswork which becomes inevitable once we start on that slippery path. Can probate be granted of a Will made in Sri Lanka (attested by a Sri Lankan Notary, etc.) by, say, a Malaysian tourist who falls seriously ill, and dies, while in Sri Lanka, even though that Will disposed only of his property in Malaysia? Or would we then "interpret" section 518 further, by adding words to exclude foreigners? If it was not a Malaysian tourist, but a Sri Lankan resident in Malaysia, would we interpret section 518 as conferring jurisdiction or not? Again, what about the Will of a Sri Lankan (resident or national) dealing only with foreign ***immovables***? Would we then add further restrictions to exclude foreign ***immovables***, and if so on what basis do we justify that differentiation? In asking us to accept his interpretation, Mr. Samarasekera stressed the fact that the testator and the executrix lived in Sri Lanka: what if one of them had been living abroad? Again, what if some of the beneficiaries were resident abroad, or if the testator had died while he was abroad? Section 518 prescribes one clear and unmistakable condition precedent for jurisdiction: Did it affect property in Sri Lanka? To adopt the petitioner's interpretation the Court would have to give effect, not to the policy of the legislature as expressed in the enactment, but to its own notions of policy regarding nationality, domicile, residence, place of execution, etc. If the court were once to depart from the plain words used by the legislature, the court would be compelled to make many more amendments, additions, exceptions and qualifications – just as is done in legislation – to meet other eventualities.

Certainly, legislative intervention may be desirable. When the Courts Ordinance and the CPC were first enacted, perhaps the possibility of a Sri Lankan leaving a Will dealing only with his foreign property was not thought of. But the likelihood of an Englishman making a Will disposing only of his property in England was probably contemplated: but is it at all likely that the legislature would have intended Sri Lankan Courts to have probate jurisdiction, in respect of such a Will made by an Englishman, rather than the English Courts? Today, however, with so many Sri Lankans going abroad for employment,

legislation on the lines of the English Administration of Justice Act, 1932 (to which I will refer presently) may well be desirable - but that is a policy decision for the legislature, not a matter of judicial interpretation.

Yet another contention in the petitioner's written submissions was based on section 519, CPC:

> "Section 519(1) Upon any such application being made, **and, in every case in which the estate of the testator amounts to or exceeds in value twenty thousand rupees, whether any such application shall have been made or not,** it shall be obligatory on the court to, and the court shall, issue probate of the Will to the executor or executors named therein. . ."

It was contended that the first limb refers to "the provisions of section 518 (1) wherein the executor makes applications regarding the property in Sri Lanka", and that it is the second limb (i.e. the words emphasised) which "applies to the facts of this case".

While I think that the second limb is not capable of that interpretation, but applies only where "any **such** application" (i.e. an application permitted by section 518 (1)) could have been made, it is unnecessary to say more, because by 1993 that second limb had long ceased to be in operation, having been deleted by amending Act No. 79 of 1988.

Pathmanathan v. Thuraisingham, (supra) cited by the District Court, is of little assistance. A Last Will disposed of property in Sri Lanka and abroad. It was held that the executor who obtained probate in Sri Lanka was liable to account to the court in Sri Lanka for the proceeds of sale of, and income from, the foreign property, **where such proceeds or income had been brought into Sri Lanka.**

Legislative history and context

The oral and written submissions on behalf of the petitioner show a basic acceptance of the plain meaning of section 518 (1), that for the District Court to have jurisdiction to grant probate, it is essential that the Will affects property in Sri Lanka. What is really urged on behalf of the petitioner is that the plain meaning should be departed

from, either because a contingency has arisen which the legislature did not anticipate, or that the plain meaning needs modification to overcome some injustice, absurdity, inconvenience, etc.

Legislative omissions are not to be lightly presumed. As Maxwell (Interpretation of Statutes, 12th ed.) observes:

> "It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference *that the legislature intended something which it omitted to express.* Lord Mersey said: "It is a strong thing to read into an Act of Parliament words which are not there, and *in the absence of clear necessity* it is a wrong thing to do." "We are not entitled," said Lord Loreburn, L.C., "to read words into an Act of Parliament *unless clear reason for it is to be found within the four corners of the Act itself."* A case not provided for in a statute is not to be dealt with merely because there seems no good reason why it should have been omitted, and the omission appears in consequence to have been unintentional." (p 33) [emphasis added]

It is necessary to remember also that we are dealing with two important enactments, tracing their ancestry to the Courts Ordinance and the original Civil Procedure Code, both enacted in 1889. Indeed, Mr. Subasinghe traced the testamentary jurisdiction back to the Administration of Justice Ordinance No. 11 of 1868, the Charter of 1833 and the Rules made thereunder, and Article LII of the Charter of Justice of 1801. The petitioner, however, has endeavoured to discover an omission by looking only at the present state of these two enactments, without any consideration of their history, which I think is essential.

Section 69 (section 67 in the LEC, 1956) of the Courts Ordinance provided:

"Every District Court shall have full power and authority –

> (1) To appoint administrators of the estates and effects of any persons dying within its district, either intestate, or who may not by Last Will or testament have appointed any executor or trustee for the administration of such estates or effects, whether such estates or effects may be within such district or any other district or districts **within the Island;**

(2) To inquire into and determine upon the validity of any document or documents adduced before it as and for the last will and testament of any person **who may have died within its district,** and to record the same, and to grant probate thereof: . . . "

Sections 516 and 518, CPC, as originally enacted as Ordinance No. 2 of 1889, were in all material respects the same as in 1993.

The Courts Ordinance and sections 516 to 554 of the CPC were repealed by the Administration of Justice Law, No. 44 of 1973, which provided:

"276 It is hereby declared that the Public Trustee of Sri Lanka shall be the sole competent authority –

(1) for the purpose of the grant of probate and all letters of administration in respect of the property of deceased persons;

(2) for the recognition and resealing of foreign probates in Sri Lanka; and

(3) for dealing with all other matters relating to or connected with the grant of probate and letters of administration.

278 (1) When any person shall die leaving a will in Sri Lanka, it shall be the duty of the person in whose keeping or custody such Will shall have been deposited, or who shall find such will after the testator's death, to forward the same to the Public Trustee.

(2) The original or a copy of the will may be so forwarded, and shall be accompanied by a declaration in the prescribed form stating the date and place of the death and the nature and value of the property of the testator.

280 (1) When any person shall die 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 the will or otherwise, in having the property of the testator administered, may apply to have the will proved and to have probate thereof or to obtain grant of

administration of the estate with copy of the will annexed, as the case may be, issued to him."

It will be seen that section 69 (2) of the Courts Ordinance gave the District Court jurisdiction to grant probate in respect of a person who died "within its district"; and so it might have been argued that such jurisdiction was not confined to wills affecting property in Sri Lanka.

However, that limitation was imposed by section 518, CPC. But there was no express provision as to which enactment would prevail in the event of inconsistency. I do not need to consider that problem because now the matter is clear. Section 21 of the Judicature Act has not only substituted for the words "who may have died **within its district**", the words "who may have died **leaving property in Sri Lanka**", but is itself **"subject to"** the CPC. The concept is that a grant, whether of probate or of administration, depends on the deceased having left property within the jurisdiction, and in the case of probate, that the will must actually affect property within the jurisdiction.

It is also of some relevance to consider what the English law was at that time, for it is the rules of private international law as applied by the English Courts that our Courts would have applied. The decisions in *In the goods of Tucker,*[6] *In the goods of Coode,*[7] and *Re Wayland*[8] – which I will refer to more fully – confirm that the English courts would not have made a grant of probate of a will which did not dispose of property in England, nor a grant of administration where the deceased left no property in England. It is therefore not easy to presume that in 1889 there was a legislative intention – found within the four corners of those two enactments – to give our courts a more extensive jurisdiction, having an extra-territorial flavour, which even the English courts did not then have.

By 1932 the position in England had changed by virtue of statutory amendment. No similar amendment was made in Sri Lanka although amendments in respect of testamentary jurisdiction were considered on several occasions thereafter.

The Civil Courts Commission (Sessional Paper XXIII of 1955) apparently saw no reason for change, because its recommendation (Order LXXVII, rule 3) was in substance the same as section 518.

In 1973 although section 276 of the Administration of Justice Law adopted a somewhat broader formulation – making no reference to property in Sri Lanka, yet section 280 re-enacted the same limitation which appears in section 518 (1) throughout. Section 276 was therefore qualified by, and subject to, section 280.

In 1977–78 the legislature had yet another opportunity to reconsider the matter. However, in 1977 the CPC was reintroduced by Law No. 20 of 1977, leaving section 518 unaltered. Section 21 of the Judicature Act, as already mentioned, reintroduced the former Courts Ordinance provision, but made it "subject to" the CPC, including section 518.

Even when Chapter XXXVIII of the CPC was repealed and replaced by a new Chapter by the amending Act No. 14 of 1993, section 518 was substantially re-enacted.

In that background to think that successive legislatures inadvertently overlooked the possibility that a person, whether of Sri Lankan or foreign nationality or domicile, might die in Sri Lanka leaving a will dealing only with property, movable or immovable, abroad, is unreal. On the contrary, it is very clear indeed that the ligislature deliberately refrained from giving the District Court probate jurisdiction in such cases.

Indeed, section 516 (1) shows – conclusively, in my view – that from 1889 there was no omission. That section provides that where a person dies in Sri Lanka, leaving a will, the custodian of that will, even if it did not deal with property in Sri Lanka, must produce it to the appropriate District Court stating (on oath or affirmation, or by affidavit in Form 81), if such is the fact, that the testator left no property in Sri Lanka. Thus even where a will does not affect property in Sri Lanka, the legislature was concerned to **ensure its safe custody.** But when it came to the **proof of wills**, the legislature carefully drew a distinction in section 518: it gave the District Court jurisdiction only in respect of wills affecting property in Sri Lanka. In respect of other wills, the Court would continue to be the custodian, and no more.

It is a fallacy to argue that merely because section 516 imposes a **duty** on the custodian of a will to produce it in court, such custodian has **a right** to probate. Section 516 confers no such right. It is section 518 which deals with **the right** to probate, and there the legislature expressly confined that right to wills affecting property in Sri Lanka.

I have already referred to the old section 519. That, too, was replaced in 1993 by a new section 518 – which is inapplicable to this appeal, because it deals only with cases of wills deposited in court **after** the coming into operation of the new Chapter. However, that section provides for the grant of probate, where no application has been made by any person for probate,

> "in accordance with the procedure set out in respect of the grant of probate or letters of administration **on application made thereto, . . . "**

to the executor named in the will or letters of administration with the will annexed "to some person who by the provisions of the last preceding section is competent to apply for the same". The right to probate therefore is in accordance with the old section 518, and the new section 518 does not give any wider right.

The (old) section 540, substantially re-enacted as the (new) section 542, is also relevant:

> "if no limitation is expressed in the order making the grant, then the power of administration, which is authenticated by the grant of probate, or is conveyed by the grant of letters of administration, extends to every portion of the deceased person's property, movable and immovable, **within Sri Lanka. . . "**

Recourse to the legislative history, and the context, of the two sections in question, discloses neither a legislative intention, nor an inadvertent omission, to confer probate jurisdiction over wills not affecting property in Sri Lanka.

Probate and Administration in English Law

The present English law is set out in section 2 (1) of the Administration of Justice Act, 1932:

> "Notwithstanding anything in s. 20 or any other . . . the High Court shall have jurisdiction to make a grant of probate or administration in respect of a deceased person **notwithstanding that the deceased person left no estate."**

The position in England **before** 1932 was described in *Re Wayland (supra):*

> "In *In the goods of Tucker,* (supra) the deceased had died in France, leaving personal estate there, but none in England. The headnote reads:
>
> > '. . . It was alleged, that by the law of France her husband, from whom she had eloped, could not establish his claim to her property there without a grant from this court – Held, that **the court had no jurisdiction to make a limited grant to enable him to substantiate his claim to the property in the courts of France'.**
>
> In his judgment Sir James Wilde said:
>
> > 'The foundation of the jurisdiction of this court is, that there is personal property of the deceased to be distributed within its jurisdiction. In this case **the deceased had no property within this country, and the court has therefore no jurisdiction'.**
>
> In *In the goods of Coode,* (supra) Sir James Wilde held to the same effect, and for the same reasons, that this **court could not make a grant where there was no property".**

In *Re Wayland,* (supra) the testator – a British subject, domiciled in England – had executed two Wills in Belgium, dealing only with his Belgian property, and had executed another Will in England dealing only with his property there. The question which the court had to consider was "whether there is any power **to admit the Belgian Wills to probate** in England **since they do not dispose of any English property".** That is comparable to the question which we have to decide in this appeal.

It was held:

> **"Before 1932 there is no doubt that this court would not have admitted them to probate. . . "**

But the argument that, **after** the 1932 Act, the *ratio decidendi* of *In the goods of Tucker* and *In the goods of Coode* had disappeared, was upheld. The court held that **"by virtue of the Act [it was] entitled to make a grant in respect of the Belgian Wills".**

I must also mention *In the goods of Tamplin,*[9] where (before 1932) the court refused to grant probate of a will duly executed in accordance with English law, which referred only to property in Russia; see also *In the goods of Murray*[10]. In both cases, there was other property in England.

Halsbury, Laws of England, 4th ed., is to the same effect:

> **"Will solely of property abroad;** The object of a grant is to enable the executor or administrator to administer the property in England and Wales. If there is no such property a grant is normally refused, for there is no purpose in making it . . . "

Reference is then made to the 1932 Act in support of the further statement that:

> "but the court has power to make a grant where there is no property within the jurisdiction." (vol. 17, para 834)
>
> "An English grant of representation vests in the personal representative all the deceased's movable and immovable estate which at the date of his death is situated in England. It does not vest in him assets outside England, that matter being governed by the law of the country where they are situated". (vol. 4, para 668)

Mr. Samarasekera referred to the convenience of granting probate, so that it could be re-sealed abroad. *In the goods of Coode* (supra) the submission that the object of asking for probate of the foreign will "was simply to clothe the applicant with the character of executor" with a view to proceedings abroad was summarily rejected: "the object of this court in making grants is to enable the executor or administrator to administer property in this country, and is not founded on any such considerations as those suggested".

Section 518 confines jurisdiction to wills **under or by virtue of which any property in Sri Lanka is in any way affected** – i.e. adopting the pre-1932 English law principle. What the petitioner asks this court to do is – by interpretation, or substitution, or addition, or otherwise – to equate that to the phrase **"notwithstanding that the deceased person left no estate"** which parliament used in the English Act of 1932. This court cannot introduce by interpretation such statutory modifications.

Omission, injustice, absurdity, inconvenience, etc.

It is not the function of the courts to provide for every situation for which the legislature has made no provision. Further, legislative "omissions" are of two kinds: omissions to give jurisdiction to the courts, and omissions to provide for procedures in respect of an undoubted jurisdiction. We are dealing with the former.

It is only where an examination of a statute reveals a legislative intention which would be defeated by reason of the absence of some provision that it is permissible to infer an inadvertent omission by the legislature. Here section 21 of the Judicature Act has to be interpreted together with section 518, CPC; those two provisions disclose no legislative intention that the District Court should have probate jurisdiction over Wills affecting only foreign property. Indeed, both the immediate context (sections 516, 519 and 524) and legislative history suggest otherwise. The position in English law as at 1889 is of some relevance, because of the impact of private international law; and there is no reason to believe that the legislature intended to make a significantly different provision for Sri Lanka.

I have already referred to the serious difficulties which will inevitably arise if we assume an omission. If we hold that there is jurisdiction in this case because the testator, the executrix, the Notary, the witnesses, and some of the beneficiaries were resident in Sri Lanka, and the will was made in Sri Lanka, what if just one of these elements was lacking? Or if the Will dealt only with foreign immovables?

I must turn to the authorities cited by Mr. Samarasekera. *Seneviratne v. Abeykoon* (*supra*), was an extraordinary case where the landlord's action for the ejectment of his tenant had been dismissed; while his appeal was pending in the Court of Appeal, he took the law into his

own hands and dispossessed the tenant, and the tenant then asked the District Court to restore him to possession; thereafter the landlord's appeal was abated, and the court restored the tenant to possession. The landlord then asked the Court of Appeal to revise that order, arguing that the District Court had no jurisdiction, except in a separate action, to restore the tenant to possession. The decision of the Court of Appeal was based on two distinct grounds: first, that it would not exercise its discretionary revisionary jurisdiction because of the landlord's conduct and non-disclosure of material facts, and second, that the court had an inherent power under section 839 – because it was a **contingency not anticipated** and for which, therefore, **no express provision had been made.** The distinction between jurisdiction and procedure was not considered, perhaps because the District Court did have jurisdiction over the pending tenancy action, in the course of which it made the impugned order. Here, however, the 1st respondent's contention is that the District Court had, patently, no jurisdiction whatever in respect of the application for probate. Further, it can hardly be said in the present case that we are faced with a contingency not anticipated by the legislature for which the legislature failed to make express provision: on the contrary, the legislature was aware of the contingency and deliberately did not grant the District Court jurisdiction.

Hewavitharana v. de Silva (*supra*), dealt with a provision in the Partition Act that the interlocutory decree may include certain orders, but which did not expressly restrict the power of the court to only such orders. Recourse was again had to section 839 in holding that the court could exclude a lot wrongly included in the corpus. That was a case where the intention of the enactment would have been defeated by compelling the court to determine – in a partition action – title to lands other than the corpus to be partitioned.

The submission for which *Luke v. IRC, (supra)* is cited as authority, is not really supported by the judgments in that case. What Lord Reid said was:

> "To apply the words literally is to defeat **the obvious intention of the legislation** and to produce a wholly unreasonable result. To achieve **the obvious intention** and to produce a reasonable result, we must do some violence to the words."

Further, the judgments of Lord Pearce and Lord Guest suggest that that was a case in which the court was faced with a choice between two possible interpretations.

In the present case, it can hardly be said that the two enactments disclose an **obvious** intention to confer jurisdiction in respect of a will dealing exclusively with property abroad; or that an interpretation consistent with the English law until it was changed in 1932 (and the rules of private international law, to which I will refer later) is a **wholly unreasonable result.** Indeed, the judgments of Lord Pearce and Lord Guest show that two interpretations were possible, but that the literal interpretation would have defeated the purpose of the legislation; necessarily, the other interpretation had to be preferred. Here we are not being asked to make a choice between two interpretations, but to ignore the **only** possible interpretation, consistent with the apparent legislative intention.

Turning to the question of absurdity, injustice, inconvenience, and the like, the principles are no different (see Maxwell):

> "A sense of the possible injustice of an interpretation ought not to induce judges to do violence to well-settled rules of construction, *but it may properly lead to the selection of one rather than the other of two reasonable interpretations.* Whenever the language of the legislature *admits of two constructions and, if construed in one way, would lead to obvious injustice,* the courts act upon the view that such a result could not have been intended, unless the intention to bring it about has been manifested in plain words. "If the court is to avoid a statutory result that flouts common sense and justice it must do so not by disregarding the statute or overriding it, but by interpreting it in accordance with the judicially presumed parliamentary concern for common sense and justice." But the possibility of injustice which leads the courts to adopt a particular construction must be a real one: if the injustices suggested in argument are purely hypothetical, and may never or only rarely occur in practice, the court will remain unmoved." (p 208)

> "The same general rule applies where the result of *one of two interpretations* would be to lead to an absurdity". (p 210)

Indeed, it might have been argued in *In the goods of Tucker* (*supra*) that a similar "injustice" or "absurdity" arose: that the husband could not establish his claim to his deceased wife's movable property abroad without a grant from the English court. The court held that it had no jurisdiction to make a grant – even a limited grant – in England, in the absence of property in England, and quite rightly made no attempt to widen its jurisdiction on the pretext of avoiding injustice.

"The deceased in fact had property in Sri Lanka"

Mr. Samarasekera's submission is that the District Court had jurisdiction because the deceased did leave other property in Sri Lanka. This submission fails both on the facts and the law.

If jurisdiction to grant probate of the will depended on the deceased having left property in Sri Lanka, proof that there was such property was a condition precedent to the grant of probate. It was not open to the court to grant probate of the will, and then ask for proof of the facts. Here, despite the provisions of sections 516 and 524, the petitioner did not disclose any particulars of any property in Sri Lanka, although her petition was filed 15 months after the death of the deceased. Therefore, even if Mr. Samarasekera is right on the law, nevertheless there was a patent want of jurisdiction to grant probate. Even at the stage of the second appeal, the petitioner has not furnished any evidence that the deceased had property in Sri Lanka.

However, in my view, that submission fails on the law as well. If a person were to leave two wills, one dealing exclusively with property abroad and the other exclusively with property in Sri Lanka (cf. *Re Wayland*), section 518 confers jurisdiction to grant probate only in respect of the latter. It follows that if there was no will dealing with his property in Sri Lanka, the court would only have jurisdiction to issue letters of administration in respect of the estate in Sri Lanka.

"The failure to object to the grant of probate"

This contention, too, is without merit both on the facts and the law. I have already referred to the 1st respondent's several objections to jurisdiction. Indeed, the 1st respondent went further, claiming that the shares owned by the deceased had been duly disposed of (though

this was disputed by the petitioner) before his death. That amounted to saying that the deceased had left no property at all.

But even if the 1st respondent had failed to take the objection, that default or acquiescence would not have cured a patent want of jurisdiction. The will, *ex facie*, did not affect property in Sri Lanka, and the petitioner had therefore failed to establish an essential jurisdictional fact. That was a patent want of jurisdiction, however much the 1st respondent may have acquiesced or consented.

If the District Court had no jurisdiction to entertain the petitioner's application for probate (and because any grant which it could make did not extend to property outside Sri Lanka, in terms of section 540) it followed that it could make no orders for the purpose of ensuring the due administration of property situated abroad. The Court of Appeal was quite justified, therefore, in considering the question of jurisdiction – whether the objection had been taken or not – before considering the orders relating to the interim injunction and sequestration. What took place in the Court of Appeal on 23.1.95 suggests that the petitioner, too, wanted that question decided.

Rules of Private International law

The contention advanced on behalf of the petitioner that as far as movable assets are concerned, the courts of the country in which the testator was domiciled has testamentary jurisdiction, is not borne out by the authority cited. The passage cited from Dicey and Morris (Conflict of Laws, 12th ed., p 1021), deals with Rule 132 (which is Rule 135 in the 11th ed., p 1003):

> **"Rule 132:** The courts of a foreign country have jurisdiction to determine the succession to all movables wherever situated of a testator dying domiciled in such country. Such determination will be followed in England".

As the chapter heading indicates, this does not deal with administration or testamentary jurisdiction, but with succession, and there is a very clear distinction between the jurisdiction to determine questions of succession, and the jurisdiction to grant administration. This has been lucidly explained by Cheshire and North:

"One of the cardinal rules of private international law, as we shall see later, is that the movable property of a deceased person, so far as concerns either testate or intestate succession, is regulated by the law of that country in which he died domiciled. **It might be thought, therefore, that the courts of that domicile have jurisdiction to make a grant of administration, merely on the ground of domicile and regardless of whether there are assets actually within the jurisdiction.** Theoretically this principle is tenable, but there are two facts that militate against its application.

First, such a grant would be ineffective if there were no assets within the jurisdiction.

Secondly, the jurisdiction of the old ecclesiastical courts, of which the high court exercising jurisdiction in probate matters is the successor, was universally founded on the presence within the jurisdiction of movables belonging to the deceased.

The rule, in fact, for many years has been **that an English court can grant administration only if there is property in England,** though it **now** has statutory authority to make a grant notwithstanding that the deceased left no estate, provided, probably, that the testator died domiciled in England." Cheshire & North, Private International Law, 11th ed., pp 824-5).

Indeed, Dicey and Morris explain Rule 132 in this way:

"If a deceased person is at the moment of his death domiciled abroad, the courts of his domicile have jurisdiction, **though not necessarily exclusive jurisdiction,** to decide upon the right to succeed to his movables: and if they exercise their jurisdiction, English courts will follow their decision.

'Although the parties claiming to be entitled to the estate of a deceased person may not be bound to resort to the tribunals of the country in which the deceased was domiciled, *and although the courts of this country may be called upon to administer the estate of a deceased person domiciled abroad,* and in such case may be bound to ascertain as best as they can who, according

to the law of the domicile, are entitled to that estate, yet where the title has been adjudicated upon by the courts of the domicile, such adjudication is binding upon, and must be followed by, the courts of this country'." (pp 1021-2; 11th ed., p 1003)

Whether a grant of probate or administration ought to be made is a question of **administration;** how the estate devolves is a question of **succession.** The fact that the latter is a matter (and that, too, not exclusively) for the courts of the domicile does not mean that the former is also a matter for them. Whether a Will should be admitted to probate is governed by the rules relating to administration.

Dicey and Morris deal with administration thus:

"Until 1932 the High Court could assume jurisdiction to make a grant only on the same grounds as the ecclesiastical courts would have done so. Although it did not matter where the deceased had been domiciled, it was necessary to show that there was property to be administered within the jurisdiction of the court. This requirement could be very inconvenient. When an English domiciliary died leaving property abroad, the foreign court would sometimes refuse to make a grant of representation until a grant had been obtained in England. If the deceased had left no property in England the result was an impasse. In 1932 the jurisdiction of the High Court was therefore extended to allow it to make a grant in respect of any deceased person." (11th ed., p 981)

Where there are two wills the position is as follows:

"Testators sometimes make separate wills disposing of their property in England and abroad. If one document confirms the other, they both together constitute the will of the testator, and an executor seeking a grant of representation must take probate of both. But if the wills are dependent on each other, the court had until 1932 no jurisdiction to make a grant in respect of the will which disposed only of property situated abroad. The present practice is to admit only the English will to probate unless there is some reason for making a grant of probate in respect of the foreign will as well." (Dicey & Morris pp 983-4; cf. Cheshire & North, p 825)

I find, therefore, that the plain meaning of the two provisions we have to interpret is consistent with the relevant rules of private international law as well (unlike section 597, CPC, which the Privy Council considered in *Le Mesurier v. Le Mesurier*[11]. There is no justification to depart from that plain meaning.

ORDER

For these reasons, I hold that Ranaraja, J. in the Court of Appeal correctly interpreted section 21 (2) of the Judicature Act and section 518, CPC, in concluding that the District Court had no jurisdiction to grant probate of the will in question, and that the petitioner had no right to make an application for probate of that will. The appeal is dismissed, but I make no order for costs.

WIJETUNGA, J. – I agree.

Appeal dismissed.

SHIRANI BANDARANAYAKE, J.

This is an appeal from a judgment of the Court of Appeal which dealt with three (3) applications made by the 1st respondent against the orders of the District Court, Mount Lavinia for,

a. granting an interim injunction;
b. seizure and sequestration of property; and
c. sale of the petitioner's property and his arrest under the Civil Procedure Code.

The petitioner in this case, is the executrix of the last will left by Mr Ivan Tiddy Disanaike, bearing No. 3432 dated 01st November 1991 and attested by S. S. Pillai, Notary Public of Colombo (P2). According to the petitioner, Mr. Disanaike died on 30th April 1992. In terms of the aforesaid last will the deceased devised and bequeathed certain properties to his three (3) children, the respondents to this application. The properties bequeathed are shares in certain companies in Malaysia and the shares are controlled by the Barclays Registrars of England.

The 1st respondent was living in London but at the time of the institution of this action in the District Court, he was in Sri Lanka. The petitioner had reliably understood that the 1st respondent was

endeavouring to intermeddle with the shares which constituted the property left by the deceased and which were bequeathed to the three (3) respondents, with the intention of defrauding and misappropriating the shares to his personal benefit. The petitioner instituted action in the District Court of Mount Lavinia to prove the last will and to obtain probate praying for an interim injunction restraining the 1st respondent from interfering with, meddling with or misappropriating the shares due to the 2nd and 3rd respondents until the final determination of the action (P1). An interim injunction, as prayed for by the petitioner, was granted by the District Court, Mount Lavinia (P4). The District Court admitted the last will to probate and granted the petitioner probate without any objection from anyone (P7).

The 1st respondent was making arrangements to sell the property belonging to him and when the petitioner came to know about this she made an application to District Court, Mount Lavinia, for sequestration before judgment of the property belonging to the 1st respondent (P8). This application was allowed by the District Judge (P10). The 1st respondent made an application to the Court of Appeal for leave to Appeal and Revision in respect of the aforesaid order. The Court of Appeal made order not only allowing the application made by the 1st respondent but even dismissing the petitioner's application for probate (P16).

The principle question which arises for consideration in this appeal is whether the Court of Appeal is correct in its interpretation of section 21 (2) of the Judicature Act and section 518 of the Civil Procedure Code or section 517 of the amending Act, No. 14 of 1993, which came into effect on 01.09.1993.

Section 21 (2) of the Judicature Act, No. 2 of 1978, reads as follows:

> Every District Court shall have full power and authority subject to and in accordance with the law in force for the time being-
>
> 1. . . .
> 2. to inquire into and determine upon the validity of any documents adduced before it as and for the last will and testament of any person who may have died leaving property in Sri Lanka, and to record the same, and to grant probate thereof; . . .

The Court of Appeal was of the view that,

> This section clearly restricts the jurisdiction of the District Court to make orders on the validity of last wills and issue probate for the administration of estates only to cases where the deceased has left property in Sri Lanka.

As the property in question was shares in Malaysian Companies, the Court of Appeal was of the view that the District Court of Mount Lavinia had no testamentary jurisdiction to entertain the application for probate.

Furthermore, the Court of Appeal was of the view that under section 518 of the Civil Procedure Code, which was amended by the amending Act, No. 14 of 1993 (section 517, which came into effect on 01.09.1993) the executrix had no right to make an application for probate or any of the other orders she had prayed for in her petitions. The Court of Appeal, citing the amended section 517 and section 518 of the Civil Procedure Code, went on to say that,

> Both these sections specifically deny any person named in a last will as executor, to apply for probate unless the testator had died leaving property in Sri Lanka.

Section 517 of the Civil Procedure Code states as follows:-

> When any person shall die leaving Will under or by virtue of which any property in Sri Lanka is in any way affected . . .

Section 517 of the Civil Procdure Code, falls under Chapter 38, which deals with the testamentary actions. The learned President's counsel for the appellant-administratrix, contented that sections 516, 517, 518 and 519 of the Civil Procedure Code deal with different ways in which a last will could be proved. According to the learned counsel, the appellant was the executor named in the will and the person with whom the will was deposited. Therefore she was under a duty not merely to bring the will before court but also to seek to prove the will and obtain probate which would enable her to use it abroad to carry out the directions of the testator.

The learned President's counsel for the respondents insisted upon the words 'property in Sri Lanka', used in section 517 of the Civil Procedure Code. The learned counsel was of the opinion that an executor or an executrix, as in this case, is not empowered to apply for probate where the Last Will relates to property outside Sri Lanka. Accordingly it was contended that the order granting the probate (P4) on 18.03.1994 and the probate (P7) on 26.10.1994 are nullities which were made without jurisdiction.

Section 517 of the Civil Procedure Code deals with the way in which a last will could be proved. When a person is named in a last will appointing him or her as the executor or the executrix, a burden is cast on the person not only to bring the will before the court but also to take steps to prove the will and obtain probate. This is what exactly the executrix had done in this case.

An examination of both sections, viz. section 21 (2) of the Judicature Act and section 517 (1) of the Civil Procedure Code reveals that the situation of the property is a key factor in obtaining the probate. Section 21 (2) of the Judicature Act, makes provision for the District Court to have 'full power and authority' over testamentary jurisdiction, 'of any person who may have died leaving property in Sri Lanka'. Section 517 (1) of the Civil Procedure Code on the other hand, provides for 'any person appointed executor therein to apply to the District Court' in order to obtain letters of probate or administration. However, for this purpose, according to section 517 (1) it is essential that the person should have died 'leaving a Will under or by virtue of which any property in Sri Lanka is in anyway affected'.

Mr. P. A. D. Samarasekera, the learned President's counsel for the appellant, contended that in section 517, there is no reference to the situation that would arise where the last will did not deal with property in Sri Lanka, although the testator lived in Sri Lanka and the executor with whom the will was deposited also lived in Sri Lanka. It was his contention that in such a situation it would be necessary to take into consideration the legal position pertaining to the jurisdiction of foreign courts. Mr. Samarasekara cited Dicey and Morris in Conflict of Laws (12th edition at p 1021) with regard to the jurisdiction of foreign courts. In that, as far as the movable assets are concerned, the courts of the country in which the testator was domicile will have the testamentary jurisdiction. Dicey and Morris drew a clear distinction between movable and immovable property and stated that,

> the importance of the distinction between movables and immovables is most apparent in the field of succession, because succession to movables is (in general) governed by the *lex domicilii* of the deceased, whereas succession to immovables is (in general) governed by *lex situs.* (Conflict of Laws, 12th edition, p 916)

Regarding this question, Mr. Subasinghe, the learned President's counsel for the respondents, cited Cheshire and North on Private International Law and drew our attention to the law relating to procedural matters. According to Cheshire and North,

> The substantive rights of parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the *lex fori.* (Private International Law, p 74)

Mr. Subasinghe contends that section 517 of the Civil Procedure Code is mandatorily applicable to the instant testamentary action. I agree with the view expressed by Mr. Subasinghe that section 517 of the Civil Procedure Code should mandatorily apply to this case. However, it is my view that section 517 of the Code does not provide for a situation where a Sri Lankan testator had left property in a foreign country. Furthermore, in my opinion, the Civil Procedure Code entrust a duty on an executor to apply to the District Court in order to obtain probate. When sections 516 and 517 of the Civil Procedure Code are taken together, a person in whose custody a will kept, becomes responsible to produce it before the District Court in order to obtain probate. In the event such person wilfully or knowingly fails to comply with the provisions of the Civil Procedure Code, he/she shall become guilty of an offence and shall be liable to a fine equivalent to the value of the estate dealt with in the will.

In a situation where the deceased, who was domiciled in Sri Lanka, had left a will leaving property outside the country, the executor would be faced with a difficult situation in obtaining the probate. According to Mr. Subasinghe's argument, to which I concede, the Civil Procedure Code is mandatorily applicable to testamentary proceedings. However, if the Civil Procedure Code does not provide for a particular situation, it is my view that as contended by Mr. Samarasekera, it would become necessary to look into the legal position pertaining to the jurisdiction of foreign courts.

Mr. Samarasekera relied on a passage from Sarker on Code of Civil Procedure (volume 1 p. 842) cited with approval and followed in the case of *Seneviratne v. Francis Fonseka*[12]:

> Where a contingency happens which has not been anticipated by the framers 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 litigtion.

I am in complete agreement with the view expressed by Sarker, and it is my view that a contingency arose in this particular case. In such a situation I am of the view that the theory adopted by Sarker could apply. This is a situation in which provision should have been made in the Civil Procedure Code. In the absence of such provisions, I am inclined to accept the view expressed by Mr. Samarasekera, that succession to movables should be governed by the laws of the domicile of the deceased. According to Cheshire and North,

> The general rule established both in this country and in the USA is that testamentary succession to movables is governed exclusively by the law of the domicile of the deceased as it existed at the time of his death. (Private International Law, p 834)

For these reasons I allow the appeal and set aside the judgment of the Court of Appeal. There will be no costs.

Appeal allowed.

By majority decision appeal dismissed.