HAROLD FERNANDO
v.
FONSEKA AND OTHERS

COURT OF APPEAL
DE SILVA, J.,
WEERASURIYA, J.
C.A. NO. 354/97
D.C. COLOMBO NO. 29793/T
SEPTEMBER 16TH, 1998

Civil Procedure Code – Amending Act No. 2 of 1997 – S. 30, S. 31, S. 32 – Letters of Administration granted – Is it possible to intervene – delay – Is the court Functus Officio –

The 3rd respondent-appellant-petitioner sought to set aside the Order allowing an application to add 5th – 13th Intervenient respondents respondents as parties, this was after the petitioner was granted letters.

Held:

1. The grant of Probate/Letters of Administration is a distinct preliminary step in the testamentary proceedings independent of claims to the estate by the heirs – the question of entertaining claims to the estate on the ground that the claimant is an heir could form the basis of an inquiry at a subsequent stage of the proceedings.

2. The principle is well-established that till the estate is declared closed upon a judicial settlement of accounts, it is open to a party to prefer a claim to the estate on the basis that such party is an heir of the deceased.

3. Delay cannot defeat the claim of the Intervenient respondents to intervene in the action.

APPLICATION in Revision from the Order of the District Judge of Colombo.

Cases referred to:

1. *Odiris Appuhamy* v. Caroline Nona – 66 NLR 241.
2. *Piyaratne Unnanse v. Wahareke Sonuttare Unnanse* – 51 NLR 313.
3. *Sirimavo Bandaranaike v. Times of Ceylon Ltd.* – 1995 1 SLR 22.
4. *Biyanwila v. Amarasekera* – 67 NLR 488.
5. *Fernando v. Fernando* – 18 NLR 24.
6. *In the case of Kathirikamasegara Mudaliyar* – 5 NLR 29.

7. *Kantaiyar v. Ramoe* – 8 NLR 207.
8. *Nonohamy v. Punchihamy* – 31 NLR 220.

Chula de Silva PC with *Priyantha Fernando* and *P. Weerakkody* for 3rd respondent-appellant-petitioner.

S. Kanagasingham for 4th intervenient respondent-respondent.

Sunil F. A. Cooray with *Chithrananda Liyanage* for 6th, 7th, 10th, 12th, 13th intervenient respondent-respondents.

Cur. adv. vult.

November 17, 1998.

WEERASURIYA, J.

By this application, the 3rd respondent-appellant-petitioner (hereinafter referred to as the petitioner) is seeking to set aside the order of the Additional District Judge of Colombo, dated 24.03.1997, allowing an application to add 5th-13th intervenient respondent-respondents (hereinafter referred to as intervenient respondents) as parties in testamentary proceedings bearing No. 29793/T in the District Court of Colombo.

The facts pertaining to this application as set out by the petitioner are briefly as follows:

Meemanage Wilfred Fernando died issueless on 19. 03. 1984, leaving his wife Saputantrige Nandawathie (hereinafter referred to as original petitioner) who by petition dated 19. 10. 1984, instituted testamentary action bearing No. 29793/T in the District Court of Colombo, seeking Letters of Administration to administer the properties of the deceased in terms of section 530 (1) of the Civil Procedure Code (Act No. 20 of 1977) and an *Order Nisi* was entered on 22. 10. 1984 with a direction to serve it on the respondents named in the petition. Further, the court made order in terms of section 532 of the Civil Procedure Code (Act No. 20 of 1977) to advertise the *Order Nisi* in a local newspaper and in the *Government Gazette*. The 3rd intervenient respondent objected to the *Order Nisi* being made absolute by his statement of objections dated 21. 11. 1984. However, in the amended statement of objections dated 28. 02. 1985 he sought to add some of the intervenient respondents as parties on the basis that they have rights to the estate, abandoning his objection to the grant of Letters of Administration to original petitioner. Nevertheless,

learned District Judge disallowed the application of the original petitioner to obtain Letters of Administration and instead granted Letters of Administration to the Public Trustee. The original petitioner sought leave to appeal against that order in application bearing No. 62/88 and the Court of Appeal by its order dated 03. 07. 1990, set aside the order of the District Judge appointing Public Trustee as the administrator and directed an inquiry *de novo*. Thereafter, learned District Judge after fresh inquiry, granted Letters of Administration to the original petitioner who died on or about 09. 06. 1995; whereupon after due inquiry, District Judge by his order dated 19. 06. 1995, granted Letters of Administration to the petitioner. Thereafter, the petitioner sought to obtain possession of the premises bearing No. 21, Dickman's Lane, Colombo 5, for the purpose of preparation of inventory of the movables in the said property with a view to conclude the said testamentary proceedings. However, the 5th-13th intervenient respondents by their application dated 24. 01. 1996 sought to intervene in the said testamentary proceedings and the petitioner and the 2nd respondent-respondent objected to the said application of the 5th-13th intervenient respondents. The learned District Judge after the conclusion of the inquiry, by his order dated 24. 03. 1997, allowed the application of the intervenient respondents to be added as parties. It is from the aforesaid order that this application for revision has been filed.

At the hearing of this application, learned President's Counsel for the petitioner submitted the following matters:

(1) that the learned District Judge had no jurisdiction to make the impugned order as he was *functus officio;*

(2) that steps required to be taken in a court of law have to be done within a prescribed time limit and not as and when it suits the parties;

(3) that the learned District Judge had misdirected himself by holding –

   (*a*) that the intervenient respondents were heirs of the deceased;

   (*b*) that the court had previously ordered that notice be issued on parties disclosed by 4th intervenient respondent.

(4) that in any event, the intervenient respondents were not entitled to any relief due to undue delay and laches.

The contention of learned President's Counsel for the petitioner that District Court was *functus officio* was based on the following grounds:

(*a*) that where in terms of section 531 of the Civil Procedure Code an *Order Nisi* had been made by District Court having satisfied that there was *prima facie* proof of material allegations in the petition and in the absence of sufficient cause to rebut such proof after Order Absolute had been entered, District Court has no jurisdiction to set aside such order;

(*b*) that Order Absolute in testamentary proceedings is a decree *in rem* which cannot be varied in the same action.

He cited the following cases: *Odiris Appuhamy v. Caroline Nona*[1], *Piyaratana Unnanse v. Wahareke Sonuttara Unnanse*[2] and *Sirimavo Bandaranaike v. Times of Ceylon Ltd.*[3] in support of his contention. These cases recognise the principle that once a court makes an order such court becomes *functus officio,* unless power is conferred on such court to amend its own decree.

In terms of section 530 (1) of the Civil Procedure Code (Act No. 20 of 1977) when any person dies without making a will, every application for grant of Letters of Administration of his property shall be made on a petition by way of summary procedure in numbered paragraphs containing following particulars as prescribed by section 524 namely:

(1) the relevant facts of the absence of a will;
(2) the death of the deceased;
(3) the heirs of the deceased to the best of the petitioner's knowledge;
(4) the character in which the petitioner claims and facts which justify such application.

This application has to be supported by sufficient evidence to afford *prima facie* proof of the material allegations in the petition in which names of the next of kin of the deceased should be stated as respondents.

In terms of section 530 (1), the petitioner is further required to tender the following documents with the petition. :

(1) The declaration of property referred to in section 30 of the Estate Duty Ordinance in triplicate for transmission by court to the Commissioner-General of Inland Revenue.

(2) Draft *Order Nisi.*

(3) The requisite stamps for the *Order Nisi* and service thereof.

(4) Draft notice of Order Nisi in the form No. 84A in the 1st schedule; and

(5) Proof of payment of the estimated charges to cover the cost of advertising the notice of *Order Nisi* in a local newspaper.

Upon an application for grant of letters of Administration being made in terms of section 530 (1) of the Civil Procedure Code (Act No. 20 of 1977) if the court is of the opinion that the material allegations in the petition are proved it shall make an *Order Nisi* declaring the petitioner's status accordingly and making the grant prayed for. Such order shall be served on the respondents and on such persons as the court shall think fit to direct. It is to be noted that the words "to the best of petitioner's knowledge" which follow the words "the heirs of the deceased" are sufficient to show that the petitioner is not obliged to state with accuracy and certainty the heirs of the deceased. It may be possible to conceive of instances where the petitioner has no personal knowledge as to the heirs and that the circumstances make it difficult for the petitioner to ascertain with certainty the heirs to be named. However, there is a requirement that the petitioner has to name the next of kin of the deceased as respondents. The petitioner may also tender with the petition the consent in writing of such respondents as consenting to the application. Further, there is no requirement postulated that notice must be given to the other respondents whose consent has not been obtained. Nevertheless, it cannot be disputed that the court has discretionary power to direct that the *Order Nisi* should be served on a particular person other than those persons whose consent has been annexed.

Learned President's Counsel for petitioner cited the case of *Biyanwila v. Amarasekera*[4] in support of his contention that parties must take steps in testamentary actions before District Court within a prescribed time and not as and when it suits them.

In *Biyanwila v. Amarasekera* (*supra* – at 495) Manicavasagar, J. stated as follows :

> *"An Order Nisi is an order which court may make on a petition by way of summary procedure; as the words indicate it is an order which will take effect unless cause is shown against it".*

He further stated –

> *". . . any person who is interested in the administration of the property of the deceased, though not notified specially, has the right and is entitled to be heard in opposition to the order (section 533); . . ."*

It is to be noted that in this case the question of at what stage a claim of a person on the basis of being an heir could be entertained by court, did not come up for consideration.

In the case of *Fernando v. Fernando*[5] the widow applied for Letters of Administration to her deceased husband's estate making certain minors, respondents to her application stating that they were the children of the deceased and where on the returnable date of the *Order Nisi* appellants appeared and alleged that the minors were not the children of the deceased but were the illegitimate children of the widow, and moved for an inquiry as to who were the heirs of the deceased, but did not really oppose the grant of Letters of Administration, it was held that such an inquiry was not relevant at that stage of the case.

In the case of *Kathirikamasegara Mudaliyar*[6] an executrix named in a will applied for probate under section 524 of the Civil Procedure Code and where an *Order Nisi* was duly entered and the respondents in showing cause did not object to the will being declared proved, but objected to the validity of certain bequests in the will, in that they were in favour of certain illegitimate children of the testator born to him in adultery, it was held that at that stage of the proceedings it was not open to the respondents to raise this contention but that the applicant was entitled to probate.

In *Kantaiyar v. Ramoe*[7] where it was pointed out that Velupillai, the alleged heir was not a son of the deceased, it was held that the issue as to whether V or R is the heir should be tried subsequently when the administrator enters upon the distribution of the estate.

Upon a careful survey of these cases, two matters emerge distinctly namely :

(1) that grant of probate or letters of administration, as the case may be, is a distinct preliminary step in testamentary proceedings, independent of claims to the estate by the heirs; *and*

(2) the question of entertaining claims to the estate on the ground that the claimant is an heir could form the basis of an inquiry at a subsequent stage of the proceedings.

It is to be observed that an *Order Nisi* entered in a testamentary proceeding in terms of section 530 (1) (Act No. 20 of 1977) is a tentative order declaring the petitioner's status and making the grant as prayed for in the petition, which will take effect unless cause is shown against it. As regards the requirement to name the heirs of the deceased, one is inclined to think that this exercise is not a final and a true ascertainment of the heirs of the deceased but a declaration by the petitioner to the best of his knowledge which may or may not be correct in regard to the accuracy and the true character of the persons so disclosed. The requirement that the court must be satisfied on the material furnished before it, that there is *prima facie* proof of the material allegations does not have the effect of conferring on the persons disclosed as heirs an exclusive status upon the *Order Nisi* being made absolute.

In the case of *Nonohamy v. Punchihamy*[8] it was held that where a final account has been filed in administration proceedings and the estate declared closed the court has no power to reopen proceedings in order to entertain a claim to a share of the estate on the ground that the claimant is an heir. Thus, the principle seem to be well-established that till the estate is declared closed upon a judicial settlement of accounts, it is open to a party to prefer a claim to the estate on the basis that such party is an heir of the deceased.

The learned District Judge in his order had made a finding that the intervenient respondents were the children of Wilfred Fernando by his second marriage. The learned District Judge had erred on this matter as it was revealed that the intervenient respondents were the children of John Fernando by his second marriage. It is to be recalled that John Fernando was the father of Wilfred Fernando. The 4th

intervenient respondent in his application dated 18. 10. 1984 to intervene in the proceedings had disclosed that some of the intervenient respondents were the children by the second marriage of John Fernando. It would appear that on this assertion which had not been controverted, they seem to have a right to the estate of Wilfred Fernando. Learned District Judge was also in error when he stated that court had ordered notice on the parties disclosed by the intervenient 4th respondent and that direction was not complied with. Learned District Judge was of the view that they had a justifiable claim to the estate of the deceased having considered the material furnished by them in their application.

There remains the other question to be considered namely, whether or not there was undue delay on the part of 5th-13th intervenient respondents to make an application to intervene in the testamentary action. The 4th intervenient respondent had made an application to intervene as a party in the testamentary proceedings by his application dated 18. 10. 1984. In that application, he opposed granting Letters of Administration to the (deceased) original petitioner namely, Saputantrige Nandawathie. Thereafter, he amended his application and moved that some of the intervenient respondents be added as parties as they were the children by the second marriage of John Fernando. In this amended application he did not object to Nandawathie being granted Letters of Administration of the estate. No steps appear to have been taken to name those intervenient respondents as parties to the action. However, an application dated 24. 10. 1996 had been made when the petitioner had taken steps to bring in the parties by a process of a citation, who claim to be in possession of property described as No. 21, Dickman's Lane, Colombo. The question now before us is whether after lapse of 11 years a party could be allowed to intervene in these testamentary proceedings. A judicial settlement of accounts of the administrator form the basis of termination of proceedings in testamentary cases. In the circumstances, delay cannot defeat the claim of the intervenient respondents to intervene in the action.

For the aforementioned reasons, I refuse the application of the petitioner with costs.

DE SILVA, J. – I agree.

Application dismissed.