
**KALAI KUMAR
VS.
SARASWATHEY AND OTHERS**

COURT OF APPEAL.
SOMAWANSA, J. (P/CA).
WIMALACHANDRA, J.
CA 1200/2004.
DC NUWARA ELIYA 693/T.
MAY 25th, 2005.

Civil Procedure Code - Testamentary provisions, sections 718, 736, 736(2), 839 - Letters of Administration granted - Right of a claimant to intervene and claim property in the same action?-Basis of prior transfer - What is the proper cause of action?-Inherent powers of Court?-Substantial justice - Delay - Is it perse fatal?-Miscarriage of justice.

The petitioner respondent S. instituted testamentary proceedings in respect of the estate of LA who died on 28.02.1973. Letters were granted to S. The claimant petitioner sought to intervene and claim a certain land, which was included in the inventory. The claimant petitioner's position was that the deceased had transferred the said land to one L in 1971 who had subsequently transferred to the claimant petitioner in 1982 .

The trial Judge dismissed the application of the petitioner. The claimant petitioner moved in Revision.

HELD :

Per Wimalachandra, J.

"The learned District Judge has failed to appreciate that the estate of a deceased person should consist of properties the deceased owned at the time of his death.

Any dispute with regard to immovable property included in the inventory where a contest arises between the administrator/ executor and any of the other parties to the testamentary case shall be determined in the same special proceedings and in the same manner as any issue arising in a civil suit.

Per Wimalachandra, J.

"It is seen that section 736(2) is silent - when a party other than a party to the testamentary action claims a property, in such a situation when the Code is silent and no express provision has been made in that behalf can the court use its inherent power to adopt such procedure as may do substantial justice - in my view, the District Court must hold an inquiry as to the genuineness of the claim of the petitioner. When it is apparent that a particular land has been disposed of by the deceased can the administrator include it in the inventory?"

Quarere

"When the Code is silent and no express provision is made in that behalf, can the Court use its inherent power to adopt such procedure as may do substantial justice"

APPLICATION in revision from an order of the District Court of Nuwara Eliya.

Cases referred to :-

1. *Jayantha de Soysa vs. Naomal de Soysa* – 1997 3 Sri L. R. 65
2. *Suppamal vs. Govindha Chetty* – 44 NLR 193 at 197
3. *Leechman and Company Ltd. vs. Rangalla Consolidated* 1981 2 Sri LR 373
4. *Narsing Das vs. Mangal Dubey* – 5A 163 at 172
5. *Hewavitharana vs. Themis Silva* – 68 at 72
6. *Seneviratne vs. Abeykoon* – 1986 2 Sri LR 1 at 5 and 6
7. *Fernando vs. De Silva and Others* – 2000 3 Sri LR 29 at 46

Rohan Sahabandu for claimant – petitioner.

M. Abdul Najeem with *P. Atukorale* for petitioners-respondent.

S. N. Vijithsinghe for 3rd and 7th respondent

September 02, 2005.

WIMALACHANDRA, J.

The claimant-petitioner has filed this application in revision from the order of the learned District Judge of Nuwara Eliya dated 29.04.2004.

Briefly, the facts relevant to this application as stated in the petition are as follows:

The petitioner-respondent, namely, Loganathan Saraswathy instituted testamentary proceedings in the District Court of Nuwara Eliya in respect of the intestate estate and effects of late Loganathan Arunasalam who died on 28.02.1973. The District Court granted the Letters of Administration to the said Loganathan Saraswathy appointing her as the administratrix. The matter relevant to this application is that the claimant-petitioner, namely, Ramanathan Kalikumar, sought to intervene and claim the land called Hawa Eliya Patana in extent of 1A. 2R. 16P which was included in the inventory filed by the administratrix. The said claimant-petitioner demanded that the aforesaid property called Hawa Eliya Patana should be excluded from the inventory as he is the owner of the same. The claimant-petitioner's position is that the deceased, the late Loganathan Arunasalam had transferred the said land by deed No. 126 dated 08.12.1971 prior to his death to one Letchchaman and subsequently the claimant-petitioner had purchased the said property from the said Letchchaman, and hence he is entitled to have the said property excluded from the inventory. On this application, the learned Judge made order dated 29.04.2004 rejecting the claimant-petitioner's application to have the said property excluded from the inventory. It is against this order the claimant-petitioner has filed this application in revision.

The learned Judge in his order had stated that since the claimant-petitioner had bought the property in 1982 whilst the testamentary proceedings were pending, the claimant-petitioner has no right to seek exclusion of the said property from the inventory. It is to be observed that the learned Judge has failed to recognise or notice the fact that the deceased had transferred the said property in 1971 by deed No. 126 dated 08.12.1971, nearly two years prior to his death. Moreover, when there is no allegation that the said two deeds are fraudulent, it would imply that the two deeds are genuine. The learned District Judge has failed to appreciate that the estate of a deceased person should consist of properties the deceased owned at the time of his death.

In the case of *Jayantha de Soysa vs. Naomal de Soysa*⁽¹⁾, one of the contentious issues was whether Olaboduwa Estate formed a part of the estate of the deceased and consequently whether it should have been included in the inventory of the deceased person's property filed by the joint Administrators. Ismail, J. at page 69 cited with approval the observations made by Soertsz, J. in the case of *Suppammal vs. Govindha Chetty*⁽²⁾, at page 197;

“Such a case as this appears to me to be within the scope of section 718 more appropriately than it would under section 736”. He held further, “in short, the amendment of an inventory may be ordered either under section 718 or under section 736, and it would be in the discretion of the Court to direct amendment under section 718 or to refer a party to the procedure of section 736 according to the nature and scope of the particular application and the stage at which it is made.”

The above decision clearly indicates that any dispute with regard to immovable property included in the inventory, where a contest arises between the accounting party (the administrator or executor) and any of the other parties to the testamentary case, should be determined in the

same special proceedings and in the same manner as any issue arising in a civil suit. As Soertsz, J. pointed out in *Suppammal vs. Govindha Chetty (supra)* an amendment of an inventory may be ordered either under section 718 or under section 736 of the Code, and it would be in the discretion of the Court to direct amendment under section 718 or refer a party to the procedure of section 736 according to the nature and scope of the particular application and the stage at which it is made. Accordingly, the Court can hold an inquiry into such application in the testamentary case itself and if the Court is satisfied, the Court can exclude from the inventory the said immovable property. It was held further, that where a question arises between the executor or administrator and any other party, that question may be determined in the same proceedings and not by separate action.

In the instant case learned District Judge refused the claimant-petitioner's application mainly on the ground that the petitioner has filed this application twenty-five years after the institution of the testamentary proceedings. It appears that the right of the claimant-petitioner to have the said property excluded from the inventory has been denied solely on the basis of delay. However, the testamentary case has not yet reached the stage of judicial settlement of accounts.

The question that arises is when a third party claims an exclusion of a property from the inventory, what is the proper course of action? In *Suppammal Vs. Govindha Chetty (supra)* at page 197 Soertsz, J. expressed the view that so far as third parties are involved, separate actions would be the proper course. However in the instant case the facts are rather different. When it is apparent that a particular land has been disposed of by the deceased prior to his death, can the administrator include it in the inventory? Section 736(2) of the Civil Procedure Code permits that where a contest arises between the accounting party (administrator or probate holder) and any of the other parties respecting any property alleged to belong to the estate, but to which the accounting party lays claim, the contest must be tried and determined in the same manner as any issue arising in a civil trial. It is seen that section 736(2) is silent when a party other than a party

to the testamentary action claims a property. In such a situation when the Code is silent and no express provision has been made in that behalf, can the Court use its inherent power to adopt such procedure as may do substantial justice?

In the case of *Leechman & Company Ltd. Vs. Rangalla Consolidated Ltd.* ⁽³⁾ Soza, J. held that section 839 of the Civil Procedure Code saves the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. Where no provisions exist, it is the duty of the judge and it lies within his inherent power to make such order as the justice of the case requires.

In an Indian case, *Narsing Das Vs. Mangal Dubey* ⁽⁴⁾, at page 172, Mahmood, J. said:

“Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibition cannot be presumed.” This dictum has been followed by the Supreme Court of Sri Lanka in several cases (see - *Hewavitharana Vs. Thamir Silva* ⁽⁵⁾ at 72) *Seneviratne Vs. Abeykoon* ⁽⁶⁾ at 5 & 6, *Fernando Vs. De Silva and others* ⁽⁷⁾.

Section 839 of our Civil Procedure Code is identical to section 151 of the Indian Civil Procedure Code.

Sarkar's Law of Civil Procedure, 8th edition, volume 1 at page 483 states thus:

“In 1968, Peacock CJ, said: Since laws are general rules, they cannot regulate for all time to come so

as to make express provisions against all the cases that may possibly happen.....It is the duty of the Judges to apply the laws, not only to what appears to be regulated by their express dispositions but to all the cases to which a just application of them may be made, and which appear to be comprehended either within the express sense of the law, or within the consequences that may be gathered from it”.

However, the inherent power of the Court is intended to supplement the other provisions of the Code when the Code is silent and does not contain specific provisions which would meet the necessities of the case. As Sarkar in his book, *The Law of Civil Procedure*, pointed out. “The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties.”

In these circumstances when the accounting party (administrator or probate holder) has included a property in the inventory and *prima-facie* if it appears to be a property not belonging to the deceased person, in my view, the District Court must hold an inquiry as to the genuineness of the claim of the petitioner. If the property does not form a part of the estate of the deceased person then it is not proper to administer the said property. Moreover if the said property does not form a part of the estate of the deceased then the District Court has no jurisdiction to make any order with regard to that property.

The learned District Judge had dismissed the claimant-petitioner's application mainly on the ground of delay without considering the merits of the application. The learned Judge failed to appreciate that the delay in concluding the testamentary case was due to a number of appeals made to the Court of Appeal by the other parties to the testamentary action and that the claimant-petitioner was not responsible for them. The learned

Judge was misled into believing that the petitioner bought the land in 1982 when the testamentary case was proceeding but failed to recognise that the deceased person sold the property in 1971 prior to his death to another person and from whom the claimant-petitioner bought the said property. Consequently, it appears that the claimant-petitioner has made out a strong case amounting to a positive miscarriage of justice. Having regard to the special and exceptional circumstances of the case the claimant-petitioner is entitled to invoke the revisionary powers of this Court.

For these reasons, we allow the application in revision and set aside the order of the learned District Judge dated 29.04.2004, and order that a fresh inquiry be held in respect of the application made by the claimant-petitioner as early as possible. The claimant-petitioner is entitled to recover the costs of this application fixed at Rs. 7500 from the petitioner-respondent.

ANDREW SOMAWANSA, J.(P/CA) – I agree.