AMARASOORIYA
VS
AMARASOORIYA AND OTHERS

COURT OF APPEAL
AMERATUNGA J., AND
WIMALACHANDRA, J.,
C. A. REV: 408/2003
D. C. GALLE 120/PROBATE
JULY 28, AND
AUGUST 30.2004

Civil Procedure Code, sections 150(1), 386, 528, 529(2), 532(1) and 533 – Publication – Objection to grant of letters claiming that there is a valid marriage to deceased, seeking letters – Inquiry – Who should begin?

The petitioner - respondent instituted action seeking Letters of Administration in respect of the intestate estate of one "A". Upon notice published, the petitioner filed objections denying the marriage of the petitioner respondent to the deceased and asserted that she had a valid marriage, to the deceased – and sought Letters.

The trial judge made order stating that the petitioner who filed objections should begin the case.

The petitioner does not admit the petitioner - respondent's story.

Held:

(i) that the petitioner - respondent was married to the deceased; therefore the burden is on the petitioner - respondent. It is for the petitioner to rebut this fact by leading satisfactory evidence that it was otherwise.

(ii) a person who wishes to prove anything should begin, and at such trial it is competent to the respondent to make use of the evidence adduced by the petitioner to obtain order nisi to rebut the petitioner's case.

(iii) the rules as to right to begin are also found in the Explanation to section 150 of the Code.

APPLICATION in revision from an order of the District Court of Galle.

Cases referred to :

1. *Perera vs Dias* – 2 NLR 66
2. *Aghore vs Premachand* – 7 CLR 274
3. *Gunasekara vs Lalith* – (1991) Sri LR 365
4. *Wijetunga vs Thangarajah* – (1999) 1 Sri LR 53

S. F. A. Cooray for respondent - petitioner.

J. C. Weliamuna for respondent - respondent.

Cur. adv. vult.

2nd November 2004

L. K. WIMALACHANDRA, J :

This is an application in revision from the order dated 29.11.2002 made by the learned Additional District Judge of Galle.

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

Th petitioner-respondent (hereinafter referred to as "the respondent") instituted action in the District Court of Galle on 12.10.2001 bearing No: 120/Probate, by way of petition and affidavit under section 528 of the Civil Procedure Code for letters of administration in respect of the intestate estate of the deceased Lalaka Amarasooriya. The Court ordered the required publications to be made in terms of Section 529(2) of the Civil Procedure Code. Upon the notice being published, the 3rd respondent-petitioner (hereinafter referred to as "the petitioner") filed objections admitting only the date of death of the deceased and denying, *inter alia*, the marriage of the said deceased Amarasooriya to the respondent and asserted that the respondent is not entitled to the letters of administration to the estate of the deceased.

Moreover, the petitioner in her objections has averred that she had a valid marriage to the deceased and that the marriage was registered in November 1970 at Matara. Futhermore she has asserted that she had five

children by that marriage. The petitioner, accordingly, sought letters of administration to the estate of the deceased.

The learned Additional District Judge fixed the matter for inquiry. At the inquiry the petitioner made an application that the respondent should begin the case. The learned Judge heard both parties and made order on 12.10.2004 that the petitioner should begin the case. It is against this order the present application in revision has been made. In his short order the learned Judge held that the party filing the objections must begin the case.

The procedure to be followed where there are objections to an application made under Section 524 or 528 is found in Section 532(1) of the Civil Procedure Code.

Section 532(1) states as follows :

> "If any objections are received in relation to any application under section 524 or 528 in response to a notice published under section 529, on or before the date specified in such notice in respect of such application the court shall proceed to hear, try and determine such application in accordance with the procedure herein provided and may for such purpose name a day for final hearing and disposal of such application and may, in addition, make such order as it may consider necessary under section 541 hereof."

It appears that in terms of Section 532 of the Civil Procedure Code if any objections are received in relation to any application under Section 524 or 529 in response to a notice published under Section 529 the Court is required to *hear, try and determine such application in accordance with the procedure herein provided.*

The procedure to be followed is laid down in Section 533 of the Civil Procedure Code. It states that if on the day appointed under Section 532(1) for final hearing, the person filing objections satisfies the Court that there are grounds for objecting to the application, worthy of being tried on oral evidence, then the Court must frame issues which may arise between the parties, and direct them to be tried on a day to be then fixed under Section 386.

Accordingly, it is clear that after framing the issues the inquiry should be held in terms of Section 386 of the Civil Procedure Code. According to Section 386 the issues shall be tried in conformity with, as nearly as may be, in a manner consistent with the rules prescribed for taking of evidence at the trial of a regular action.

In the case of *Perera* Vs *Dias*[1] , Bonsor, C. J. at page 67 explained Section 533 as follows :

> "The language of section 533 is somewhat ambiguous; it refers to Section 386 as to the procedure to be adopted. Grammatically, the words, for the purpose under section 386, refers to the word 'appointed', but that cannot be the meaning. They must refer to the word 'fixed'. What it means is that you are to go to section 386 to see how the issues should be tried..
>
> Now section 386 provides that 'issues', when they are framed, are to be tried in conformity with, as nearly as may be, the rules hereinbefore prescribed for the taking of evidence at the trial of a regular action, and it appears to me that, that means that the procedure is to be the ordinary procedure in a regular action, that is to say, that the person who wishes to prove anything should begin."

In *Perera Vs Dias, (supra)* Bonsor, C. J. held that the *procedure in the trial of issues framed under Section 533 is the ordinary procedure in a regular action.* That is to say, the person who wishes to prove anything should begin, and at such trial it is competent to the respondent to make use of the evidence adduced by the petitioner to obtain order *nisi* to rebut the petitioner's case. (emphasis added)

The rules as to right to begin are also found in *Explanation* I in Section 150. It states as follows :

> "Explanation I – The plaintiff has the right to begin unless where the defendant admits the facts alleged by the plaintiff, and contends that either in points of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin."

A similar provision is found in Or. 18 R. 1 of the Indian Civil Procedure Code. Sarkar's *Law of Civil Procedure* 8th edition at page 837 states that ;

> "Plaintiff had the right to begin unless defendants admitted all the 'material allegations' in the plaint (*Aghore* V. *Premachandara*,)

Cross on Evidence 6th edition at page 241 states ;

> "the plaintiff has the right to begin unless the defendant has the burden of proof on every issue, and in this context 'burden of proof may be taken to mean evidential burden"

The question as to the party who should begin the case is linked to the question on whom the burden of proof lies in a suit. According to the Explanation (1) of section 150 of the Civil Procedure Code the plaintiff will have to begin the case unless the defendant admits the plaintiff's story and contends on some point of law or additional facts to be alleged by him, that the plaintiff is not entitled to any part of the relief, he claims, the defendant has the right to begin (vide *Gunasekera* Vs. *Latiff.*[3])

For example in a vindicatory action when the legal title to the premises is admitted the burden of proof is on the defendant to show that he is in lawful occupation. Then the defendant would have to begin the case (see –*Wijetunga* Vs *Thangarajah.*[4])

In the instant case, the petitioner does not admit the respondent's story, that the respondent was married to the deceased Lalaka Amarasooriya. In this situation it seems to me that the respondent should start the case as the burden is on the respondent to prove that the deceased, Lalaka Amarasooriya was married to the respondent. Thereafter it is for the petitioner to rebut this fact by leading satisfactory evidence that it was otherwise.

In view of the foregoing reasons, the contention of the learned counsel for the respondent that the burden lay with the petitioner to begin the case cannot be maintained and is untenable. Accordingly, the order made by the learned Additional District Judge on 29.11.2002 is set aside. The application in revision is allowed. In all the circumstances of this case I made no order as to costs.

AMARATUNGA, J. - I agree.

Application allowed.