

1914.

[FULL BENCH.]

*Present:* Lascelles C.J., Pereira J., and De Sampayo A.J.ADORIS *et al v.* PERERA.

25—D. C. Colombo, 35,474.

*Order nisi declaring will proved made absolute—Recall of probate—Fraud—Separate action.*

When an issue of probate has followed upon an order nisi (and not upon an order absolute in the first instance), the summary procedure for the recall of probate provided in section 537 does not apply, and all parties are concluded by the issue of probate. But where there is fraud in connection with the obtaining of probate even upon an order nisi, an independent action might be brought to set aside the probate.

THE defendant in this case produced in testamentary proceedings No. 3,546, D. C. Colombo, a joint last will purporting to have been executed by the defendant and his wife, whereby the survivor became entitled to the property belonging to either of them.

Probate of the last will was granted to the defendant.

Plaintiffs brought this action for the recall of the probate granted to defendant in respect of the will of defendant's wife (Ran Etana.)

Plaintiffs averred in the plaint—

- “ (5) Plaintiffs were not aware of the production of the last will or of the probate granted in respect thereof.
- “ (6) The said Ran Etana had no children, and the plaintiffs are some of the heirs in the event of her having died intestate.
- “ (7) The plaintiffs say that the last will produced and proved in the said action No. 3,546 was not the act and deed of Ran Etana, and probate should not have been granted in respect thereof.”

The learned Additional District Judge (L. Maartensz, Esq.) overruled an objection of the defendant that the plaintiffs cannot maintain this action in view of the provisions of section 537 of the Civil Procedure Code or apart from the section.

The defendant appealed.

*E. W. Jayewardene*, for defendant, appellant.—Section 537 of the Civil Procedure Code lays down the procedure for the recall or revocation of probate. Sections 536 and 537 should not be read

together. Section 537 is not limited to the grounds of recall specified in section 536, but it was intended to permit applications for recall of probate on any legal ground. *Tissera v. Goonetilleke*.<sup>1</sup> A separate action for the recall of probate does not lie in Ceylon. The procedure laid down in the Civil Procedure Code is a very convenient way of dealing with questions as to the recall or revocation of probate.

1914.  
*Adoris v.  
Perera*

*Wadsworth*, for plaintiffs, respondents.—Sections 536 and 537 must be read together. Section 536 gives power to the District Court to recall or revoke probate or grant of administration in certain cases only, and section 537 only lays down the procedure to be followed when such power is to be exercised. *Tissera v. Gunatilleka Hamine*.<sup>2</sup> The only course open to a person contesting a will admitted to probate is to bring a regular action. When probate has been obtained by fraud, for instance, an action lies to set aside the judgment in the testamentary action and to have the probate recalled. *Birch v. Birch*.<sup>3</sup> [Lacelles C.J.—But here you do not allege fraud.] Not directly, but the averment in the plaint that the will was not the act and deed of the deceased amounts to an allegation of fraud. The fraud lies in the averring of a false statement in the application for probate. Even otherwise, the plaintiff may be allowed an opportunity to specially aver fraud on the part of the defendant in obtaining probate.

*Jayewardene*, in reply.

*Cur. adv. vult.*

March 18, 1914. LASCELLES C.J.—

The plaintiffs, who were not parties to the testamentary action, sue for the recall of the probate of the will of Ran Etana granted to her husband, the defendant. The ground of action assigned in the plaint is that the will produced in Court “was not the act and deed of Vithanage Ran Etana.”

The first issue framed was as follows:—

“Can plaintiffs maintain this action in view of the provisions of section 537 of the Civil Procedure Code, or apart from that section, for recall of probate?”

By agreement the question of law involved in this issue was tried first, and the learned District Judge, considering himself bound by the decision of this Court in *Tissera v. Gunatilleka Hamine*,<sup>2</sup> answered the question in the affirmative.

On appeal the matter was reserved for consideration by the Full Court, in view of conflicting decisions. The conflicting decisions are *Tissera v. Gunatilleka Hamine*<sup>2</sup> and *Tissera v. Goonetilleke*.<sup>1</sup>

<sup>1</sup> (1912) 15 N. L. R. 379.    <sup>2</sup> (1910) 13 N. L. R. 261.    <sup>3</sup> (1602) *Probate* 130.

1914.

LASOELLE

C.J.

*Adoris v.**Perera*

In the former case it was held that, where an order *nisi* declaring a will proved has been made absolute, an application for the recall of probate cannot be made by summary procedure under section 537 of the Civil Procedure Code, and "that the person attacking the will must bring an action for the purpose in the ordinary way and must prove his case."

But the words which I have cited from the judgment cannot be understood to mean that, when probate has been granted after order *nisi*, there exists a general right on the part of interested persons to sue to have the judgment set aside and probate recalled. A judgment granting probate of a will is a judgment *in rem*, and is binding on the world. It is true that where probate has been obtained by fraud an action lies, as in other cases of judgments obtained by fraud, to set aside the judgment and recall the probate, the right being in some respects more extensive than in the case of ordinary judgments (*Birch v. Birch*<sup>1</sup>). But in the present case there are no averments in the plaint which would support a claim to set aside the judgment in the testamentary case.

In *Tissera v. Goonetilleke*<sup>2</sup> Wood Renton J. was disposed to take a different view of the scope of sections 536 and 537 of the Civil Procedure Code. Section 537, the learned Judge was disposed to think, was not limited to the grounds of appeal specified in section 536, but was intended to permit applications for the recall of probate on any legal ground, whether under the Code of Civil Procedure or not. But this case merely indicates the disposition of the mind of the learned Judge, and is not an adjudication on the point. In these circumstances it is necessary to give a ruling as to the scope of sections 536 and 537.

I cannot resist the conclusion that these two sections must be read together. Ignoring the references to administration, the result is that probate may be recalled in the testamentary action in two cases only, namely, (1) where probate has issued on an order absolute in the first instance, and, as a consequence, notice of the order has not been given to interested parties, and (2) where events have occurred which render administration under the probate useless. In both these cases application for the recall of probate must be made in the manner prescribed by section 537, that is, in pursuance of the rules of summary procedure.

These provisions, of course, in no way effect the general jurisdiction of the Court to entertain actions to set aside judgments that are vitiated by fraud.

The result is that the first issue must be answered in the negative. The plaintiffs cannot maintain the action, because, if the circumstances were such that probate could be recalled under section 536 (which is not the case), application should have been made for the

<sup>1</sup> (1902) *Probate* 130.<sup>2</sup> (1912) 15 *N. L. R.* 379.

purpose by way of summary procedure in the testamentary action, and, apart from sections 536 and 537, because the plaintiff does not aver such fraud as is necessary to impeach a judgment.

I would allow the appeal, and dismiss the action with costs here and in the Court below.

1914.  
 LASCELLES  
 C.J.  
*Adoris v.*  
*Perera*

PERERA J.—I entirely agree.

DE SAMPAYO A.J.—

In my judgment in *Silva v. Cooray*<sup>1</sup> I ventured to express an opinion that sections 536 and 537 of the Civil Procedure Code must be read together, and that under the procedure laid down in section 537 probate could be recalled only on the grounds mentioned in section 536. In *re Tissera*<sup>2</sup> this Court took the same view, and held that where probate was issued upon an order *nisi*, and not upon an order absolute in the first instance, the summary procedure provided in section 537 did not apply. But I am much impressed with the opinion of Wood Renton J. in *Tissera v. Goonetilleke*<sup>3</sup> that section 537 is not so limited, and that it is intended to permit applications for the recall of probate on any legal ground to be made in the testamentary case itself. I would have been prepared to assent to such an interpretation of these provisions of the Code, as that procedure would be more convenient than and equally affective as an independent action, but what is important is to make a definite ruling, and I agree to the holding that when the issue of probate has followed upon an order *nisi* the provisions of section 537 do not apply, and that all parties are concluded by the issue of probate. There might, of course, be fraud in connection with the obtaining of probate even upon an order *nisi*, in which case an independent action might in analogy to the English practice be brought to set aside the probate. There is, however, no fraud alleged in this case. The plaintiff only says in effect that the will produced is a forgery, and all that this amounts to is an allegation that the Court in the testamentary case ought not, on the material before it, to have held the document to have been executed by the deceased. I therefore agree that this appeal should be allowed.

*Appeal allowed.*

<sup>1</sup> (1904) 4 *Tamb.* 38.

<sup>2</sup> (1912) 15 *N. L. R.* 379.

<sup>3</sup> (1910) 13 *N. L. R.* 261.