IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. Appeal No. 104/2012
SC SPL LA Application No.133/2011
CA Appel No. 203/1998 (F)
D.C. Batticaloa Case No. 983/T

In the matter of an Application for Special Leave to Appeal from the Judgment of the Court of Appeal in CA Appeal No. 203/98(F) dated 26.05.2011

Parameshwary Upali De Silva (nee Parameshwary Velupillai) of
No. 6, Pansala Road,
Koddaimunai, Batticaloa,

Presently of No. 6, Ediriweera Avenue,
Dehiwala.

PETITIONER

Vs.

1. Savithiri Lokitharajah (nee Savithri Velupillai)

   Presently of 9A,
   Hydean Way,
   Stebanage, Harts, S.G.2, 9XH,
   United Kingdom.

2 Selvadurai Sivam Ganeshanandham

   Presently of No.10, Bryn Ogwer,
   Pearhes Garned
   Banger Gurnedd, LL-ST-2DX,
   United Kingdom.

3. Dr. Kandapper Murugupillai of
No. 4, Pansala Road,
Batticaloa.

RESPONDENTS

AND NOW BETWEEN

Parameshwary Upali De Silva (nee
Parameshwary Velupillai) of
No. 6, Pansala Road,
Koddaimunai, Batticaloa,

Presently of No. 6, Ediriweera Avenue,
Dehiwala.

PETITIONER-APPELLANT

Vs.

1. Savithiri Lokitharajah (nee Savithri
Velupillai)

Presently of 9A,
Hydean Way,
Stebanage, Harts, S.G.2, 9XH,
United Kingdom. (**DECEASED)**

SUBSTITUTED BY

Kandappan Lokitharajah
No. 33, Cheyney Avenue,
Cannors Park,
Edgware,
Middlesex HA8 6SA,
United Kingdom.

SUBSTITUTED 1ST RESPONDENT-RESPONDENT

2. Selvadurai Sivam Ganeshanandham

Presently of No. Bryn Ogwer,
Pearhes Garned
Banger Gurnedd, LL-ST-2DX,
United Kingdom.

2ND RESPONDENT-RESPONDENT

3. Dr. Kandapper Murugupillai of
No. 4, Pansala Road,
Batticaloa. **(DECEASED)**

3RD RESPONDENT-RESPONDENT

AND NOW BETWEEN

Parameshwary Upali De Silva (nee
Parameshwary Velupillai) of
No. 6, Pansala Road,
Koddaimunai, Batticaloa,

Presently of No. 6, Ediriweera Avenue,
Dehiwala.

PETITIONER-APPELLANT-APPELLANT

Vs.

1. Savithiri Lokitharajah (nee Savithri Velupillai)

Presently of 9A,
Hydean Way,
Stebanage, Harts, S.G.2, 9XH,
United Kingdom. (**DECEASED)**

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Kandappan Lokitharajah
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SUBSTITUTED 1ST RESPONDENT-RESPONDENT-RESPONDENT

2. Selvadurai Sivam Ganeshanandham

Presently of No. Bryn Ogwer,
Pearhes Garned
Banger Gurnedd, LL-ST-2DX,
United Kingdom.

2ND RESPONDENT-RESPONDENT-RESPONDENT

BEFORE: Sisira J de. Abrew J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: Manohara de Silva P.C., with Nirosha Munasinghe instructed
By K.U. Gunasekera for Petitioner-Appellant-Appellant

S. Mandaleswaran with P. Peramunagama for
1st Substituted-Respondent-Respondent-Respondent

ARGUED ON: 23.09.2016

DECIDED ON: 11.11.2016

GOONERATNE J.

This was a Testamentary case filed on or about 01.10.1986 in the District Court of Batticaloa to have the Last Will and Testament dated 27.04.1976 proved and for grant of letters of administration to the Petitioner-Appellant-Appellant, of her deceased father Dr. Alagaratnam Velupillai's last will. Petitioner-Appellant-Appellant pleads that she made the application to the District Court since the executor (2nd Respondent) of the last will of the said deceased, did not attempt to prove the last will.

Last will bearing No. 1058, according to the Petitioner-Appellant-Appellant, the testator had devised and bequeath the entire estate in equal share to the Petitioner and her younger sister the 1st Respondent. The 3rd Respondent was only a witness to the last will. Order Nisi of 01.10.1986 was issued and sent to all Respondents. The proceedings and material furnished to this court indicates that objections were filed by the Respondents admitting last will No. 1058, but pleaded that the testator had executed another last will subsequently on 23.05.1979, and had revoked and annulled all previous last wills and codicils inclusive of will No. 1058. However the District Court having fixed the matter for inquiry and after several days of inquiry had on 27.07.1998 dismissed the Petitioner-Appellant –Appellant's petition as she was absent from

court without reason and without giving instructions to her registered Attorney. Petitioner-Appellant-Appellant being aggrieved by the Order of dismissal appealed to the Court of Appeal and the Court of Appeal also dismissed her appeal on 26.05.2011 (X4).

This court on 12.06.2012 granted Special Leave to Appeal on the questions set out in paragraphs 18(a), (b), (d) & (e) of the petition.

The said questions are as follows:

(a) Did the Court of Appeal err by failing to appreciate that the learned District Judge has failed to adopt the correct procedure laid down in the Civil Procedure Code in determining the Petitioner's application before the District Court to have the last will and Testament dated 27.04.1976 proved and the letters of administration granted by her?

(b) Did the Court of Appeal err by failing to appreciate that the learned District Judge has failed to frame the issue which appeared to have arisen between the parties and direct them to be tried on the day appointed for inquiry/trial in terms of Section 533 of the Civil Procedure Code?

(c) Did the Court of Appeal err by failing to appreciate that Chapter XXXVIII of the Civil Procedure Code does not permit to contemplate dismissal of a testamentary action on default of the Petitioner to appear before the court?

(d) Did the Court of Appeal err by failing to appreciate that the learned District Judge has erred in ordering the Petitioner to pay a sum of Rs. 125,000/- to the 2nd Respondent for the expenses incurred by him for coming from England to give evidence in the case, since there was no proper legal basis for making such order?

The Petitioner-Appellant-Appellant argues that, what is relevant to this case are the provisions contained in Sections 532(1), 533 and 386 of the Civil Procedure. It is emphasised that Section 533 stipulates the procedure to be followed. In this regard it was submitted by learned President's Counsel that Section 533 of the Civil Procedure Code requires

(a) to frame issues which arise between parties.
(b) To fix a day to be appointed acting under Section 386 of the code.

It is the position of the learned President's Counsel that learned District Judge failed to follow the procedure as in (a) & (b) above, as such it is bad in law. Learned President's Counsel also argues that the Court of Appeal failed to appreciate the distinction between Section 533 and Section 386 of the Civil Procedure Code. Section 533 is the section which is specific to testamentary actions and Section 386 governs the procedure to be adopted in testamentary cases. The above appears to be line of argument taken by the learned President's Counsel on behalf of the Petitioner-Appellant-Appellant. He also cites several authorities, which will be considered by this court.

The 1st and 2nd Respondents on the other hand are seeking to justify the order of dismissal by the learned District Judge and the order of the Court of Appeal dismissing the appeal. I find that the main grounds as stated in their written submissions flow from the fact that the 3rd Respondent who was one of

the witnesses to both last wills bearing Nos. 1058 and No. 361 were executed by the testator the deceased Dr. Alagaratnam Velupillai. Last will bearing No. 361, the testator revoked and annulled all former wills and declared will No. 361 as his last will. It has been submitted on behalf of the above Respondents that Appellant's action be dismissed and proceedings be initiated to administer the estate of the said deceased in terms of last will No. 361 dated 23.05.1979. Objections were filed on the above basis. It is also the position of the Respondents that the Appellant has not shown any interest to prosecute the action.

One of the main points to be resolved is whether a testamentary case could be dismissed in the way it was dismissed by the District Court of Batticaloa. All questions of law are connected to above.

I state that it would be important to the case in hand to consider the provisions relating to hearing of the application as contained in the Civil Procedure Code relating to testamentary actions. Where objections are received in response to any application for the grant of letters of administration as specified in such notice, court shall proceed to hear and try such application according to the procedure laid down. Court will also for such purpose name a day for final hearing and disposal of such application. Court could also make such other order as it may consider (Section 532(1) of the Civil Procedure Code).

Section 532(2) requires the Probate Officer to submit all relevant papers to the application in question to the District Judge in his chambers for the purpose to name a date for hearing.

On the day appointed for hearing or on a date the case is adjourned for hearing, the parties filing objections are able to satisfy court that there are grounds for objecting to the application to be tried by viva voce evidence the court is required to frame issues which appear to arise between parties, and court shall direct issues to be tried on a day to be appointed for the purpose under Section 386 of the Civil Procedure Code. (Section 533 of the Code).

In terms of Section 386 of the Civil Procedure Code, when the Respondent's evidence has been taken court may adjourn the matter to enable the Petitioner to adduce additional evidence. If the court thinks it necessary, court could frame issues of facts between parties and adjourn the case to be tried by oral evidence.

There are two positions contemplated under Section 534 of the Code regarding grant of letters of administration. It could be stated as follows

(1) At the final hearing, on determination of issues it shall appear to court that prima facia proof of material averments in the application for letters of administration have not been rebutted, then the court will order the grant of letters of administration to the petitioner. (Section 534(1) (a))

(2) If prima facie proof of material averments in the petition have been rebutted court should dismiss the petition. If an objector establish his rights to have administration of the deceased's estate granted to him instead of the petitioner, court should make an order to that effect in his favour (Section 534 (1) (b))

I also note that dismissal of any application shall not be a bar for renewal of the application by the petitioner as in Section 534(2) of the Civil Procedure Code.

On the material submitted to this court (inclusive of the translation) it does not clearly appear to this court that the learned District Judge attempted to comply with (1) or (2) above. What happened in the District court (according to document 'Y') is that on 18.12.1997 an application was made by the 2nd Respondent under Sections 178/179 of the Civil Procedure Code. (evidence de bene esse) Learned District Judge allowed that application and 2nd Respondent's evidence was led. (2nd Respondent being resident in U.K) The record indicates that 2nd Respondent was cross-examined only by the Attorney-at-Law for the 1st Respondent. It is recorded that Attorney-at-Law for the Petitioner did not cross-examine the witness (2nd Respondent). Thereafter certain oral submissions had been made by the Attorneys-at-Law for 1st & 2nd Respondents. On 27.02.1998 learned District Judge made order dismissing the petition of the Petitioner and

ordered costs of the action and further Petitioner was directed to pay Rs. 125,000/- to the 2nd Respondent (Expenses incurred for travelling from U.K).

It may not be necessary for this court to refer to all the procedural steps taken by the parties concerned as regards the case in hand, i.e amended petition was filed, 3rd Respondent expired and failure to substitute etc. I observe that the learned District Judge erred in law by dismissing a testamentary case on assuming that there was a default and the District Judge seems to have acted under Chapter XII of the Code. If the petitioner was absent or the Petitioner has failed to prosecute the case, the grant of letters of administration to another suitable person in the case would be the next step for court to consider. In this regard court need to take the steps as contemplated in Section 534 (1) (a) and or 534 (1) (b) of the Civil Procedure Code. The relevant provisions do not contemplate a dismissal of the action.

Whatever the position taken up by the Respondents, I find that the following case law cited by the learned President's Counsel support the position of the Petitioner-Appellant-Appellant.

> *Perera Vs. Dias 2 NLR 66 As per Withers J.*, that "if an order nisi is properly supported, and the respondent has cause to show against its being made absolute, he must satisfy the Court by evidence, either by affidavit or oral testimony, that he has good cause"
> "When the respondent has put forward his evidence, the Court may do one of two things: either adjourn the matter to enable the petitioner, if he asks to be allowed to do so, to adduce additional evidence; or if the Court thinks it necessary, it may frame

issues to be tried between the petitioner and the respondent. It will depend on the issues framed whether the petitioner or the respondent is to begin".

In the matter of the Estate of the late *Sinne Tamby Poothepillai 2 NLR 214 as per Bonser CJ at page 216*

In *Kanagaratnam Vs. Ananthathurai 46 NLR 302* It was held that, in an application for the issue of probate of a Will or Codicil it is the duty of Court, when the respondent shows grounds of objection to the application, to frame issues as required by Section 533 of the Civil Procedure Code.

As per *Keuneman J.* "In this case the learned District Judge has failed to frame issues as he was required to do under Section 533 of the Civil Procedure Code"...

In *Wijewardena and another Vs. Ellawala 1991 (2) SLR 14* (CA), as per Wijetunga J. at page 27,

"Furthermore, the provisions of Sections 526, 533 and 534 of the Civil Procedure Code indicate that where there is prima facie proof of the due making of the will and order nisi is entered declaring the will proved, the burden is on the objector to rebut the prima facie proof of material allegations of the petition"

of a Will or Codicil it is the duty of Court, when the respondent shows grounds of objection to the application to frame issues as required by section 533 of the Civil Procedure Code.

A last will is clearly not a deed as lawyers understand it. 7 NLR at 45. A person may die testate or intestate. Where a person leaves a will during his life time, it cannot be revoked except by another will. A last will can be revoked by a declaration by the testator of his intention to revoke the

instrument and the execution of another will. The case in hand provides material to this court of the execution of another will (No. 361) by the testator. A last will is almost in every case connected to a family, and a Court of Law has no hand in it as regards the preparation of a last will by the testator. The court enters into this area only on the death of a testator, and according to the provisions of the Civil Procedure Code regarding testamentary actions. In the case in hand a last will No. 1058 was filed of record and the Respondents filed objections and also informed court of execution of another will No. 361 by the testator. As such whatever the delays that occurred, perhaps caused by the parties themselves, court cannot disregard built in statutory provisions. A will is not proved until probate has been granted by a Court of Competent Jurisdiction.

Irrespective of the question of a delay, I state that if the court is satisfied that there are grounds to object to an application, court should frame issues as in Section 533 of the Code and proceed with the matter. The District Court cannot dismiss the action. In the manner issues are framed District Court need to answer same and ensure Justice is done. The questions of law are answered as follows:

(1) Yes

(2) Yes

(3) Yes

(4) Court has the discretion in awarding costs, but it is not an unfettered discretion.

In all the facts and circumstances of this case and more particularly non-compliance of procedural requirements irrespective of delays, I set aside the Judgment of the Court of Appeal dated 26.05.2011 and the Order of the learned District Judge dated 27.02.1998. Appeal allowed as prayed for in the petition dated 06.07.2011 of the Petitioner-Appellant-Appellant.

Appeal allowed without costs.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree.

JUDGE OF THE SUPREME COURT