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

Lakshani Madusha Sammuarachchi,
"Suramya", Welimanna, Aranayake.
Petitioner

SC APPEAL NO: SC/APPEAL/220/2017
SC LA NO: SC/HCCA/LA/343/16
HCCA KEGALLE NO: SP/HCCA/KEG/117/2012
DC MAWANALLA NO: 24/T

Vs.

Surangi Deepika Jayawardhena,
"Suramya", Welimanna, Aranayake.
Respondent

AND BETWEEN

1. Nirmala Shiranthani Siriwardhena,
   2/55, Welimanna, Aranayake.
2. Krishan Lakshman Siriwardhena,
   "Suramya", Welimanna, Aranayake.

Intervenient Petitioners

Vs.

1. Lakshani Madusha Sammuarachchi
   Petitioner-Respondent
2. Surangi Deepika Jayawardhena
   Respondent-Respondent
   Both of,
   "Suramya", Welimanna, Aranayake.

AND BETWEEN

1. Nirmala Shiranthani Siriwardhena,
   2/55, Welimanna, Aranayake.
2. Krishan Lakshman Siriwardhena,
   "Suramya", Welimanna, Aranayake.

Intervenient Petitioner-Petitioners

Vs.

1. Lakshani Madusha Sammuarachchi
   Petitioner-Respondent-Respondent
2. Surangi Deepika Jayawardhena
   Respondent-Respondent-Respondent
   Both of,
   "Suramya", Welimanna, Aranayake.

AND NOW BETWEEN

Lakshani Madusha Sammuarachchi,
"Suramya", Welimanna, Aranayake.
Petitioner-Respondent-Respondent-Appellant

Vs.

1. Nirmala Shiranthani Siriwardhena,
   2/55, Welimanna, Aranayake.
2. Krishan Lakshman Siriwardhena
   Intervenient Petitioner-Petitioner-Respondents
3. Surangi Deepika Jayawardhena
   Respondent-Respondent-Respondent-Respondent
   Both of, "Suramya", Welimanna, Aranayake.

Before: P. Padman Surasena, J.
Yasantha Kodagoda, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Asthika Devendra with Milinda Sarathchandra for the Petitioner-Respondent-Respondent-Appellant.

Ravindra Anawaratne with D.L.W. Somadasa for the 1st Intervenient Petitioner-Petitioner-Respondent.

Pubudu De Silva for the 2nd Intervenient Petitioner-Petitioner-Respondent.

Argued on: 07.06.2022

Written submissions:

by the Petitioner-Respondent-Respondent-Appellant on 23.01.2018 and 07.07.2022.

by the 1st Intervenient Petitioner-Petitioner-Respondent on 04.07.2022.

by the 2nd Intervenient Petitioner-Petitioner-Respondent on 09.04.2018 and 06.07.2022.

Decided on: 17.11.2022

Mahinda Samayawardhena, J.

The original petitioner filed this application in the District Court of Mawanella on 17.09.2010 making her mother the respondent, seeking to admit the last will tendered with the petition to probate and to issue the probate in her name for the administration of the estate of the deceased. The deceased was the uncle of the original petitioner and by this last will he bequeathed all his property to the original petitioner subject to the life interest of the original petitioner's mother, who is the elder sister of the

deceased. Newspaper publications were properly done in terms of section 529 of the Civil Procedure Code and nobody came forward to object to the original petitioner's application. The court made order on 06.05.2011 issuing the probate to the original petitioner and follow up orders were made accordingly.

Pending termination of the proceedings, nearly one year after the issuance of the probate, the two intervenient petitioners who are the siblings of the deceased and the original respondent made an application to the District Court under section 839 of the Civil Procedure Code seeking to recall the probate and to issue the same in the name of the 1st intervenient petitioner on the basis that: the purported last will is a fraudulent document; they had no knowledge of the testamentary proceedings; and the intestate estate of the deceased should devolve on the two intervenient petitioners and the original respondent in equal shares because they are the natural heirs of the deceased. The District Court made order dated 08.06.2012 rejecting this application. On appeal, the High Court of Civil Appeal by judgment dated 02.06.2016 set aside the order of the District Court and allowed the appeal. Hence this appeal by the original petitioner.

Maasdorp's Institutes of South African Law at page 146 states "*A will is a declaration made by any person during his lifetime as to what he wishes should become of his property after his death*". In terms of section 21 of the Judicature Act No. 2 of 1978 testamentary jurisdiction is vested in the District Court. The Wills Ordinance No. 21 of 1844 lays down the substantive law regarding last wills. The Civil Procedure Code lays down the procedure to be adopted in testamentary proceedings. I must state at the outset that the testamentary procedure contained in the Civil Procedure Code is complex and complicated. This procedure has undergone a series of amendments over a considerable period of time and it will continue to change. If I may trace the recent history, the procedure

was substantially changed by the Civil Procedure Code (Amendment) Law No. 20 of 1977. Thereafter, the entire chapter 38 under the heading 'Testamentary Actions' was repealed and replaced with a new chapter by the Civil Procedure Code (Amendment) Act No. 14 of 1993. After Act No. 14 of 1993, chapter 38 was further amended by Act Nos. 38 of 1998, 34 of 2000, 20 of 2002, 4 of 2005 and 11 of 2010. There are substantial differences including the content and numbering of sections between the old procedure and the new procedure and therefore cases decided under the old procedure may not be relevant although they are cited and followed without fully appreciating the differences between the two. For instance, sections 536 and 537 governed the recall of probate under the old procedure whereas under the new procedure it is sections 537 and 538 that govern the same. Hence in referring to or citing previous decisions, care must be taken not to go by section numbers alone. A case in point might be *Shanthi Goonetilake v. Mangalika [2006] 3 Sri LR 331* where the Court of Appeal seems to have relied on the judgments decided under the old procedure to deal with an application filed under the new procedure.

In the first place, the sections relevant to testamentary procedure cannot be found in one place in the Civil Procedure Code. They are in several places: chapter 38 under the heading '*Testamentary Actions*' with sections 516-554A is in one place whereas chapter 54 under the heading '*Of Aiding, Supervising, and Controlling Executors and Administrators*' with sections 712-722 and chapter 55 under the heading '*Of the Accounting and Settlement of the Estate*' with sections 723-744 are in a completely different place. Chapter 38A under the heading '*Insolvent Testamentary Estates*' with sections 554F-554T, chapter 38B under the heading '*Foreign Probates*' with sections 554U-555BB and chapter 38C under the heading '*General and Transitional Provisions in Testamentary Matters*' with sections 554CC-554DD were introduced by the Civil Procedure Code (Amendment) Law No. 20 of 1977.

Furthermore, the law on testamentary procedure itself has been influenced by different legal systems. L.J.M. Cooray in *An Introduction to the Legal System of Sri Lanka* states at pages 26-27 "*The offices of executor and administrator are copied from English law and the rules governing executors and administrators are to be found in the Civil Procedure Code, 1977, and have been influenced by English law. But they are given effect to in a Roman-Dutch atmosphere because Roman-Dutch rules generally apply regarding heirs and testate succession.*" As pointed out by Bertram C.J. in *De Zoysa v. De Zoysa (1924) 26 NLR 472 at 476,* Wijeyewardene J. in *De Silva v. Jayakody (1941) 42 NLR 226 at 229-230* and Sirimane J. in *Pathmanathan v. Thuraisingham (1970) 74 NLR 196 at 199-200*, our testamentary law relating to chapters 54 and 55 has been taken almost verbatim from the Code of Civil Procedure of the State of New York.

All these factors have contributed to create *inter alia* redundancies, obscurities, inconsistencies, overlaps etc. within the stipulated procedure. For these reasons, in the course of this judgment I will endeavour to throw some light (albeit not comprehensively) on some practical aspects of general importance in the testamentary procedure.

In terms of section 517 of the Civil Procedure Code, when a person dies leaving a last will, the person appointed therein as executor can apply to the District Court in terms of section 524 to have the will proved and the probate issued to him; or any other interested person can apply to have the will proved and letters of administration issued with the will annexed.

> *517(1). When any person shall die leaving a will under or by virtue of which any property in Sri Lanka is in any way affected, any person appointed executor therein may apply to the District Court of the district within which he resides, or within which the testator resided at the time of his death, or within which any land belonging to the testator's estate is situate, within the time limit and in the manner*

specified in section 524, to have the will proved and to have probate thereof granted to him; any person interested, either by virtue of the will or otherwise, in having the property of the testator administered, may also apply to such court to have the will proved and to obtain grant to himself of administration of the estate with copy of the will annexed.

(2) If any person who would be entitled to administration is absent from Sri Lanka a grant of letters of administration with or without the will annexed, as the case may require, may be made to the duly constituted attorney of such person.

As the law stands today, how the application for probate shall be made is stated in section 524 of the Civil Procedure Code. Accordingly, the application shall be made by petition and affidavit (but not by way of summary procedure) and the petition shall set out *inter alia* the matters stated in section 524(1)(a)-(d). They are: the fact of the making of the will, the detail and situation of the deceased's property, the heirs of the deceased to the best of the petitioner's knowledge, the grounds upon which the petitioner is entitled to have the will proved, and the character in which the petitioner makes the claim.

524(1). Every application to the District Court to have the will of a deceased person proved shall be made within a period of three months from the date of finding of the will, and shall be made by way of petition and affidavit and such petition shall set out in numbered paragraphs-

(a) the fact of the making of the will;
(b) the details and situation of the deceased's property;
(bb) the heirs of the deceased to the best of the petitioner's knowledge;

(c) the grounds upon which the petitioner is entitled to have the will proved; and

(d) the character in which the petitioner claims (whether as creditor, executor, administrator, residuary legatee, legatee heir or devisee).

(2) If the will is not already deposited in the District Court in which the application is made, it must either be appended to the petition, or must be brought into court and identified by affidavit, with the will as an exhibit thereto, or by parol testimony at the time the application is made.

(3) Every person making or intending to make, an application to a District Court under this section to have the will of a deceased person proved, which will is deposited in another District Court, is entitled to procure the latter for the purpose of such application. Also the application must be supported by sufficient evidence either in the shape of affidavits of facts, with the will as an exhibit thereto, or of oral testimony, proving that the will was duly executed according to law, and establishing the character of the petitioner according to his claim.

(4) The petitioner shall tender with the petition proof of payment of charges to cover the cost of publication of the notice under section 529.

One of the main issues relating to the mode of application is whether compliance with all the provisions of section 524(1)(a)-(d) is mandatory or directory. If it is mandatory, for instance, failure to mention one property of the deceased or one heir of the deceased would render the entire proceedings void *ab initio*. The section requires the heirs of the deceased to be stated in the petition "*to the best of the petitioner's knowledge*". The

language itself gives the indication that it is not mandatory. If the petitioner is a stranger to the family and has no personal knowledge of the heirs of the deceased, for instance, he will not be able to list out the names of the heirs of the deceased. Hence as was held in *Biyanwila v. Amarasekere (1965) 67 NLR 488* and *Pieris v. Wijeratne [2000] 2 Sri LR 145*, the provisions of section 524(1)(a)-(d) are directory and not mandatory. However, willful suppression of material particulars will not be tolerated by court. It is in this context that Sirimane J. in the *Biyanwila* case stated at page 494 "*I am of the view that the provisions of this section [524] are only directory, and that a failure to strictly comply with those provisions, does not render the proceedings void ab initio. They are, however, voidable, and in an appropriate case a party may ask the court for relief under section 839 of the Civil Procedure Code*." Referring to the failure to name heirs as parties to the application for probate, in the Supreme Court case of *Actalina Fonseka v. Dharshani Fonseka [1989] 2 Sri LR 95 at 99*, Kulatunga J. stated "*However, such failure is a relevant fact in determining whether probate had been obtained by fraud*."

Let me now consider the application made by the intervenient petitioners seeking to recall the probate. The intervenient petitioners made this application under section 839 of the Civil Procedure Code.

> *839. Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

It is not possible for the legislature to anticipate and make provision to cover all possible contingencies. If there is no specific provision, it lies within the inherent power of the District Court in terms of section 839 of the Civil Procedure Code to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of court.

Nevertheless, express provisions cannot be made nugatory by the inherent power of the court. Inherent jurisdiction can be invoked if and only if there is no provision in the law (*Kamala v. Andris (1939) 41 NLR 71*, *Leechman & Company Ltd v. Rangalla Consolidated Ltd [1981] 2 Sri LR 373*, *Seneviratne v Abeykoon [1986] 2 Sri LR 1*, *Abeygunasekera v. Wijesekara [2002] 2 Sri LR 269*, *Ravi Karunanayake v. Wimal Weerawansa [2006] 3 Sri LR 16*).

Specific provisions are found in sections 537 and 538 to deal with recalling, revoking or cancelling probate, letters of administration or certificate of heirship. Section 537 deals with the grounds upon which probate can be recalled, and section 538 stipulates that such application shall be made by way of summary procedure. The intervenient petitioners neither filed an application for recalling the probate under section 537 nor followed summary procedure as required by section 538. As learned counsel for the original petitioner points out, it is obvious that the application of the intervenient petitioners in the District Court was procedurally flawed and the District Court ought to have dismissed it *in limine*. However the court did not do so. Nor did counsel for the original petitioner object to the intervenient petitioners' application in the District Court on that basis. The original petitioner objected to it on the basis that the intervenient petitioners did not make the application within the time stipulated in the newspaper publication made under section 529 of the Civil Procedure Code.

Unlike in a situation where there is patent or total want of jurisdiction, when the court has plenary jurisdiction to deal with a matter and the question is on invoking such jurisdiction in the right manner, a party cannot keep silent and take up an objection as to procedure when the final order is made against him. Any objection as to latent or contingent want of jurisdiction shall be taken at the first available opportunity (section 39

of the Judicature Act No. 32 of 1978; *Navaratnasingham v. Arumugam [1980] 2 Sri LR 1 at 5-6*). It is only if want of jurisdiction is patent that the matter can be raised at any time, even for the first time on appeal, in which event the whole proceedings including the judgment becomes a nullity *ab initio* due to *coram non judice* (*Beatrice Perera v. The Commissioner of National Housing (1974) 77 NLR 361 at 366-370*, *Abeywickrama v. Pathirana [1986] 1 Sri LR 120*).

In *Dabare v. Appuhamy [1980] 2 Sri LR 54* the defendant sought to dismiss the plaintiff's action on *res judicata* but the objection was overruled. On appeal by the defendant, the plaintiff submitted that the dismissal of his former action was invalid as the court had followed the wrong procedure, in that, instead of summary procedure, regular procedure had been followed. At that time, the plaintiff had not objected to the wrong procedure being followed. Rejecting that argument and allowing the appeal, the court stated that notwithstanding that the wrong procedure had been followed, the order of dismissal made by the court was valid since the court had jurisdiction to hear and determine the action and the plaintiff did not take objection to the wrong procedure being followed at that time. Wrong procedure can be validated by acquiescence, waiver or inaction on the part of the parties.

I might also mention that when the court has plenary jurisdiction, it cannot dismiss an application merely because the caption in the application refers to a wrong section. If the Judge thinks that the applicant has come under a wrong section but the court has jurisdiction to make a suitable order had the application been made under the correct section, the Judge shall not dismiss the application *in limine* on that ground alone, unless such reference to the wrong section in the caption has caused prejudice to the opposite party in meeting the applicant's case in the proper context.

Bindra on the Interpretation of Statutes (1975) 6th Ed. at page 153 states: "*It is a well-settled principle of interpretation that as long as an authority has Power to do a thing, it does not matter if it purports to do it by reference to a wrong Provision of law.*" In *Peiris v. The Commissioner of Inland Revenue* (1963) 65 NLR 457 Sansoni J. (later C.J.) stated at 458: "*It is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another Statute which conferred that power.*" This principle was recognised in *Solicitor-General v. Perera (1914) 17 NLR 413 at 416, Peiris v. The Commissioner of Inland Revenue (1963) 65 NLR 457 at 458, Jayawardane v. Ran Aweera [2004] 3 Sri LR 37 at 41* and *Kumaranatunga v. Samarasinghe [1983] 2 Sri LR 63 at 73-74*.

In the case of *Jayasekera v. Lakmini [2010] 1 Sri LR 41 at 51* the Supreme Court pointed out that even if the attention of the court has not been drawn to the relevant statutory provision through which relief could be granted, "*it is undoubtedly incumbent upon the Court to utilize the statutory provisions and grant the relief embodied therein if it appears to Court that it is just and fair to do so.*" In *Wilson v. Kusumawathi [2015] BLR 49* also the Supreme Court took the same view.

In the instant case the District Court while recognising that the intervenient petitioners could not come under section 839 nevertheless considered the intervenient petitioners' application under section 537 but held that there were no sufficient grounds to recall the probate.

The High Court of Civil Appeal set aside the order of the District Court on two main grounds: (a) failure on the part of the original petitioner to name the intervenient petitioners as respondents to the main application as necessary parties; and (b) failure on the part of the District Judge to come

to a definite finding that the last will was proved before issuance of the probate.

There is no dispute that the names of the intervenient petitioners are included in the body of the petition of the original petitioner. The High Court of Civil Appeal in several places of the impugned judgment emphasises that the intervenient petitioners are the natural heirs of the deceased in the event the testator died intestate and therefore naming them only in the body of the petition is insufficient and they ought to have been named as necessary parties (respondents) to the application. The High Court of Civil Appeal further states that non-compliance with section 524(5) makes the application of the original petitioner bad in law because if no such affidavit as required by that section was tendered, the intervenient petitioners should have been named as respondents.

Section 524(5) which stated "*If the petitioner has no reason to suppose that his application will be opposed by any person, he shall file with his petition an affidavit to that effect and may omit to name any person in his petition as respondent*" was repealed, and section 524(1)(bb) which requires the petitioner to name in the body of the petition "*the heirs of the deceased to the best of the petitioner's knowledge*" was introduced by the Civil Procedure Code (Amendment) Act No. 38 of 1998.

Whether we agree or not, as the law stands today (which was the law applicable at the time the original petitioner filed the application), in the case of proving a last will, the law does not require the petitioner (a) to name the heirs of the deceased <u>as respondents</u> to the application or (b) to file an affidavit with the petition to say that he has no reason to suppose that his application will be opposed by any person (thereby omitting to name any person in his petition as a respondent).

I must also add that less than three weeks after the filing of the application by the original petitioner in the District Court, section 524(4) was further amended by the Civil Procedure Code (Amendment) Act No. 11 of 2010 whereby the requirement of tendering with the petition "*the consent in writing of such respondents as consent to his application*" under section 524(4)(b) was also removed.

The intention of the legislature is clear by looking at section 528 of the Civil Procedure Code, which sets out what an application for letters of administration or certificate of heirship (in the case of death without a last will) should constitute. Whilst section 528(1)(c) requires the petitioner to set out in the body of the petition *"the heirs of the deceased to the best of the petitioner's knowledge"*, section 528(2) states that the petitioner "*shall name the next of kin of the deceased as respondents. If the petitioner has no reason to suppose that his application will be opposed by any person, he shall file with his petition an affidavit to that effect.*" Section 528(3)(b) further states that "*The petitioner shall tender with the petition the consent in writing of such respondents as consent to his application.*" Section 528(3) was further amended by the Civil Procedure Code (Amendment) Act No. 11 of 2010 with the introduction of section 528(3)(c) which requires the petitioner to tender with the petition "*notices on the respondents who have not consented to the application, requiring them to file objections if any, to the application on or before the date specified in the notice under section 529. Such notice shall be sent by the probate officer by registered post.*"

Let me reproduce section 528 as it stands today for convenience:

> *528(1). Every application to the District Court for grant of letters of administration or for the issue of certificates of heirship shall be made within three months from the date of death, and shall be made by way of petition and affidavit, and such petition shall set out in numbered paragraphs-*

(a) the fact of the absence of the will;

(b) the death of the deceased;

(c) the heirs of the deceased to the best of the petitioner's knowledge;

(d) the details and the situation of the deceased's property;

(e) the particulars of the liabilities of the estate;

(f) the particulars of the creditors of the estate;

(g) the character in which the petitioner claims and the facts which justify his doing so;

(h) the share of the estate which each heir is entitled to receive, if agreed to by the heirs.

(2) The application shall be supported by sufficient evidence to afford prima facie proof of the material averments in the petition, and shall name the next of kin of the deceased as respondents. If the petitioner has no reason to suppose that his application will be opposed by any person, he shall file with his petition an affidavit to that effect.

(3) The petitioner shall tender with the petition-

(a) proof of payment of charges to cover the cost of publication of the notice under section 529;

(b) the consent in writing of such respondents as consent to his application;

(c) notices on the respondents who have not consented to the application, requiring them to file objections if any, to the application on or before the date specified in the notice under section 529. Such notice shall be sent by the probate officer by registered post.

This shows that the legislature did not intend to include the requirement of the naming of heirs or next of kin of the deceased as respondents in an

application filed before the District Court to have the last will of the deceased proved.

Hence the finding of the High Court of Civil Appeal that the failure to name the intervenient petitioners as respondents to the application as necessary parties is fatal does not represent the correct position of the law.

Nonetheless I must add that although naming heirs as respondents is not mandatory, it is all the more salutary for any petitioner to name the heirs or at least potential contesting heirs of the deceased as respondents for transparency and to bring early finality to the case. In my view, if there is a statutory requirement that the heirs of the deceased to the best of the petitioner's knowledge be made respondents and notice be served on them where there is no written consent to the petitioner's application, prolonged litigation in the case of testacy can be minimised. It may be recalled that in *Biyanwila* case (*supra*), Sirimane J. at page 494 whist stating that failure to strictly comply with section 524 does not render the proceedings void *ab initio*, further remarked that *"They are, however, voidable, and in an appropriate case a party may ask the court for relief under section 839 of the Civil Procedure Code*"; and in *Actalina Fonseka's* case (*supra*) at page 99, Kulatunga J. stated "*However, such failure is a relevant fact in determining whether probate had been obtained by fraud*."

When the District Court refused the application of the intervenient petitioners for recalling the probate on the basis that there were insufficient grounds to allow the application, the High Court of Civil Appeal posed the question whether there were sufficient grounds for the District Court to issue the probate in favour of the petitioner in the first place. The High Court of Civil Appeal concluded that the issuance of probate becomes relevant if and only if the District Court comes to the definite finding that the will has been proved, but in this case the District

Judge has not done so before the issuance of the probate to the original petitioner. There is force in this finding.

A testamentary action is similar to a partition action. The District Judge hearing a testamentary action has a special duty to give effect to the intention of the testator in the case of testacy and make a proper distribution of property in the case of intestacy. In the full bench decision of the Supreme Court in *Adoris v. Perera (1914) 17 NLR 212 at 214*, Lascelles C.J. remarked "*A judgment granting probate of a will is a judgment in rem, and is binding on the world*." Further as stated by Chitrasiri J. in *Sadhana Dharmabandu v. Mallika Homes Ltd* [2009] *1 Sri LR 151 at 157* "*The purpose of testamentary actions is to ascertain the wish of a deceased person who cannot be called to court. Therefore, a duty is cast upon Court to ascertain the intention of a deceased person irrespective of adverse interests that may arise from other individuals.*" The absence of objections upon newspaper publications in terms of section 529 does not absolve the District Judge from this special duty.

For instance, in terms of section 516, when any person shall die leaving a will in Sri Lanka, the person in whose custody it shall have been deposited, or who shall find such will after the testator's death, shall produce the same to the District Court of the district in which such depository or finder resides, or to the District Court of the district in which the testator shall have died, as soon as reasonably possible after the testator's death. In terms of section 517, as I stated earlier, the person appointed executor of the last will or any interested party can make an application to the District Court under section 524 to have the will proved and probate granted to him or to have letters of administration issued to him with the will annexed. In terms of sections 518 and 519 of the Civil Procedure Code, when a will is deposited in court and no application has been made by any person to prove the will and the probate issued, it is the duty of the court

to take appropriate steps to appoint a person to administer the estate of the deceased or, if there is no fit and proper person to be so appointed, to appoint the public trustee as the administrator.

The High Court of Civil Appeal without referring to any section in the Civil Procedure Code on burden of proof or standard of proof of a will states "*In this action the petitioner-respondent has sought probate on the basis of a purported last will of the deceased executed in the presence of five witnesses. I am of the view such a document can be accepted as a valid last will if proved before a court of law and not otherwise*." The High Court of Civil Appeal seems to have taken the view that leading oral evidence to prove a last will is mandatory in each and every case. I do not think so. It is true that as a general rule the onus is on the propounder of the will to prove affirmatively that the will is the act and deed of the free and capable testator by removing all suspicious circumstances, if any, attached to the will. However I hasten to add that it is not the duty of the court to see that a testator makes a just distribution of his property. As long as it is affirmatively proved that the testator executed the will intending it to be his last will, the court cannot refuse to make a declaration that the will is proved on the ground that the distribution of the property in the will is *prima facie* unjustifiable and therefore the will is shrouded in suspicious circumstances (*Peries v. Perera (1947) 48 NLR 560*).

In terms of section 531(1), if no objections are received within the stipulated time after the newspaper publications, the court shall make order declaring the will proved if the court is satisfied that the evidence adduced is sufficient to afford *prima facie* proof as to the due making of the will and the character of the petitioner. What is necessary is *prima facie* proof and not strict proof by leading oral evidence.

> *531(1). If no objections are received in relation to any application received under section 524 and 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-

(a) in the case of an application under section 524, if the court is satisfied that the evidence adduced is sufficient to afford prima facie proof as to the due making of the will and the character of the petitioner, it shall made order declaring the will to be proved and if the applicant claims-

(i) as the executor or one of the executors of the will and asks that probate thereof be granted to him the order shall declare that he is executor, and shall direct the grant of probate to him accordingly, subject to the conditions hereinafter prescribed; or

(ii) in any other character than that of executor, and asks that the administration of the deceased's property be granted to him, then the order shall include a grant to the applicant of a power to administer the deceased's property according to the will with a copy of the will annexed; or

(b) in the case of an application under section 528-

(i) make order for the grant of letters of administration to the petitioner subject to the conditions hereinafter prescribed; or

(ii) make order for the issue of a certificate of heirship in form No. 87A in the First Schedule, to each of the heirs mentioned in the application, stating also the share of the estate which each heir is entitled to receive, if agreed to by the heirs;

(c) in the case of an application under section 528 for the issue of certificates of heirship, make order for the grant of letters of administration, instead, to some person entitled to take out administration, subject to the conditions hereafter prescribed, if in the opinion of court it is necessary to appoint some person to administer the estate.

> *(2) The certificates of heirship issued under subsection (1)(b)(ii) above shall be sufficient proof of the true heirs of the deceased referred to therein, and may be produced for the purpose of claiming any share in respect of any right, title or interest, accruing upon intestacy.*
>
> *(3) For the purpose of making an order under subsection (1), the Probate Officer shall submit all papers, relevant to the application in question, to the District Judge in Chambers on the day following the date specified in the notice published under section 529, in respect of such application and the court shall forthwith make an appropriate order.*

Although section 531(3) enacts that "*For the purpose of making an order under subsection (1), the Probate Officer shall submit all papers, relevant to the application in question, to the District Judge in Chambers on the day following the date specified in the notice published under section 529, in respect of such application and the court shall forthwith make an appropriate order*", the District Judge is not expected to make a mechanical order that the will is proved. Section 531(3) requires the Probate Officer to submit papers to the District Judge for the latter to make an "*appropriate order*".

Section 531(1)(a) states that "*if the court is satisfied that the evidence adduced is sufficient to afford prima facie proof as to the due making of the will*", the court shall declare that the will is proved.

What is meant by "*the due making of the will*"? The constituent elements of the due execution of a will are set out in section 4 of the Prevention of Frauds Ordinance No. 7 of 1840.

> *4. No will, testament, or codicil containing any devise of land or other immovable property, or any bequest of movable property, or for any other purpose whatsoever, shall be valid unless it shall be in writing*

> *and executed in manner hereinafter mentioned ; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of a licensed notary public and two or more witnesses, who shall be present at the same time and duly attest such execution, or if no notary shall be present, then such signature shall be made or acknowledged by the testator in presence of five or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.*

In the instant case, the District Court has not considered at all the requirements of section 531(1)(a) and has merely made a perfunctory order to issue the probate to the original petitioner upon realising that no objections had been filed consequent to the newspaper publications – *vide* Journal Entry No. 4 dated 06.05.2011.

What is meant by *prima facie* proof? In *Velupillai v. Sidembram (1929) 31 NLR 97 at 99* Drieberg J. stated:

> *"Prima facie proof" in effect means nothing more than sufficient proof—proof which should be accepted if there is nothing established to the contrary; but it must be what the law recognizes as proof, that is to say, it must be something which a prudent man in the circumstances of the particular case ought to act upon—s. 3, Evidence Ordinance.*

Section 3 of the Evidence Ordinance in describing what is meant by 'proved' states "*A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man might, under the circumstances of the*

particular case, to act upon the supposition that it exists." (*vide* also *Wickremasuriya v. Dedoleena [1996] 2 Sri LR 95 at 101-102*)

The learned District Judge did not exercise his judicial mind to consider whether the original petitioner had *prima facie* proved the due making of the will before he decided to issue the probate to the original petitioner. What the learned District Judge has recorded in the Journal Entry is that "*proof of publication is tendered; no objections; probate is issued in favour of the petitioner*".

I agree with the High Court of Civil Appeal that there was no definite finding that the will had been proved before the order was made to issue the probate, which is a *sine qua non* and a prerequisite to the issuance of the probate. Given the consequences which follow from that finding, it is not a curable procedural defect but non-compliance with a mandatory provision of the law. The order shall reflect due consideration of the evidence adduced by the petitioner.

It is similar but not identical to an *ex parte* judgment entered under section 85(1) of the Civil Procedure Code where the plaintiff is required to place evidence before the court in support of his claim by affidavit or oral testimony to the satisfaction of the court. Section 531 requires adducing sufficient evidence to afford *prima facie* proof of the due execution of the will, while section 85 requires placing evidence by affidavit or oral testimony to satisfy the court. Both under sections 85(1) and 531 of the Civil Procedure Code, the court cannot make a mechanical order without going into the merits of the application merely because the application is *ex parte* and there is no contesting party before court. In the instant case the District Judge did not make a mechanical order; he did not make any order at all in respect of proof of the will.

The last will in question is not a notarially attested document. It has been executed before five witnesses. In the application filed before the District Court seeking to recall the probate, the intervenient petitioners specifically aver fraud in the execution of the last will and state *inter alia* that the last will which is not an act and deed of the deceased has been prepared in the handwriting of the petitioner herself who is the sole beneficiary of it (subject to the life interest of the beneficiary's mother), and the deceased has placed his signature on a stamp issued about five years before the execution of the last will. The fact that the last will was prepared by the beneficiary in her own handwriting has not been controverted up to now. The District Court in the impugned order has not touched upon this vital matter which excites the suspicion of the court.

In *Pieris v. Wilbert (1956) 59 NLR 245*, an application for probate of a will was resisted on the ground that the testator was not in a fit state of mind at the time the will was executed. The petitioner was nominated in the will as executor and also as the sole heir of all the estate of the deceased. It was not disputed that the petitioner took an active part in getting the will executed. Against this backdrop, the Supreme Court at page 247 relied on the following passage from the judgment of Baron Parke in the Privy Council case of *Barry v. Butlin [1838] 2 Moo. P.C. 480 at 482-483*:

> *The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal and they have been acquiesced in on both sides. These rules are two: The first that the onus probandi lies in every case upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. <u>The second is that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite</u>*

> *the suspicion of the Court, and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.*

The same point, i.e. if a party writes or prepares a will under which he takes a benefit the court ought not to pronounce in favour of it unless the suspicion created by that act is removed, was highlighted in a number of cases including *The Alim Will Case (1919) 20 NLR 481*, *Arulampikai v. Thambu (1944) 45 NLR 457*, *Sithamparanathan v. Mathuranayagam (1970) 73 NLR 53*, *Ratnayake v. Chandratillake [1987] 2 Sri LR 299*.

The District Court mainly focused on the failure on the part of the intervenient respondents to file objections within the stipulated time mentioned in the newspaper publications. The explanation of the intervenient respondents is that the original petitioner, original respondent and 2nd intervenient petitioner are living at the same address but the original petitioner and her mother (the sister of the intervenient petitioners) concealed from them the existence of the last will and the testamentary case filed in court despite their names being disclosed in the body of the petition, and they came to know about the case only after they mistakenly received a postcard (as all are living at the same address) sent by the Attorney-at-Law of the original petitioner to the original respondent asking the latter to meet with the Attorney-at-Law for the testamentary case. The postcard had been tendered with the petition of the intervenient petitioners. This explanation is acceptable.

In *Actalina Fonseka's* case (*supra*) at pages 99-100, Kulatunga J. remarked:

Learned Counsel also submitted that notice of Order Nisi was advertised in the Newspaper as required by Section 532. That may be adequate in law. However, for determining whether probate was obtained by fraud it would be relevant to know whether having regard to the circumstances of the plaintiffs, such notice afforded to them an adequate opportunity of being aware of the case and whether the Defendants-Appellants kept the Plaintiff-Respondents out of the case being aware of the fact that the Plaintiff-Respondents were not likely to have read the Newspaper and become aware of the testamentary case.

On the allegations contained in the plaint the Court has to determine upon evidence whether the Plaintiff-Respondents were deliberately kept in the dark about the existence of the testamentary action to make it appear to the Court that there was no opposition to the grant of probate, whether the will is a forgery and whether probate had been obtained by fraud.

It is undeniable that the most appropriate time to object to the last will or grant of probate or letters of administration is within a date not earlier than sixty days and not later than sixty-seven days from the date of the first newspaper publication. The relevant section is section 529 of the Civil Procedure Code.

529(1). Every application to a District Court under section 524 or 528 shall be received by the Probate Officer of the District Court, and shall be registered in a separate register to be maintained for that purpose by the Probate Officer who shall thereafter cause the required publications to be made in terms of subsection (2).

(2) The Probate Officer of a District Court shall, on any day of the week commencing on the third Sunday of every month cause a notice in

form No. 84 in the First Schedule to be published in a prescribed local newspaper in Sinhala, Tamil and English, relating to-

(i) every application under section 524 or 528 received by that District Court in the preceding one month; and

(ii) every application under section 524 or 528 received by that District Court and incorporated for the first time in the notice published in respect of such District Court in the previous month,

so however that the information in respect of every application under section 524 or 528 received by every District Court is published on two separate occasions in two consecutive months.

(3) The notice published under subsection (2), shall call upon persons having objections to the making of an order declaring any will proved, or the grant of probate or of letters of administration with or without the will annexed, or the issue of certificates of heirship to any person specified in the application made under section 524 or 528, to submit their written objections, if any, supported by affidavit, before such date as is specified in the notice, being a date not earlier than sixty days and not later than sixty seven days from the date of the first publication referred to in subsection (2).

(4) Copies of such objections if any, shall be forwarded by the person making the same to the person making the application under section 524 or 528, as the case may be, and shall also be served on the other parties named in such objections.

However this is not the only occasion an objection could be raised against a declaration that the will is proved or against the grant of probate or letters of administration.

The following dicta contained in the Court of Appeal judgment in *Shanthi Goonetilake v. Mangalika [2006] 3 Sri LR 331 at 334* and made use of to dismiss applications *in limine* that "*The first publication in terms of section 529(2) was done on 23.04.2003. Objections to the granting of letters of administration could be entertained in terms of section 529(3) of the Civil Procedure Code only if such objections are submitted not earlier than 60 days and not later than sixty seven days from the date of the first publication referred to in section 529(2). However, the petitioner has not filed any objections to the order made by Court to grant letters of administration to the respondent as prescribed in section 529(2). When a period of time is specified by law before the expiration of which any act has to be done by a party in a Court of law, that Court has no jurisdiction to permit that act to be done after the expiration of that time within which it had to be done (Ceylon Breweries v. Fernando [2001] 1 Sri LR 270). Therefore when the petitioner has not made an application to recall the letters of administration within the period prescribed in section 529(3) of the Civil Procedure Code, the petitioner's application cannot be entertained*" does not, with respect, represent the correct position of the law. The law has provided for various opportunities to intervene, object and make applications for recall of probate or letters of administration etc. beyond the period stipulated in the newspaper publications. In point of fact, a person cannot make an application to recall the probate or letters of administration within the period prescribed in section 529(3) since at that time the court has not issued probate or letters of administration.

According to section 536, any person interested in the will or the deceased's property can intervene by filing in the same court a caveat before the final hearing of the petition.

> *536. At any time after the notice published under section 529 and before the final hearing of the petition, it shall be competent to any*

> *person interested in the will or in the deceased person's property or estate, though not a person specified in the petition, to intervene, by filling in the same court a caveat as set out in form No. 93 in the First Schedule against the allowing of the petitioner's claim or a notice of opposition thereto, and the court may permit such person to file objections, if any, and may adjourn the final hearing of the petition.*

In terms of section 537, probate, letters of administration or a certificate of heirship can be recalled, revoked or cancelled upon the court being satisfied that (a) the certificate should not have been issued or that the will ought not to have been held proved, (b) that the grant of probate or letters of administration ought not to have been made, or (c) that events have occurred which render administration impracticable or useless.

> *537. In any case where a certificate of heirship has issued, or probate of a deceased person's will or administration of a deceased person's property has been granted it shall be competent to the District Court to cancel the said certificate, or recall the said probate or grant of administration, and to revoke the grant thereof, upon being satisfied that the certificate should not have been issued or that the will ought not to have been held proved, or that the grant of probate or of administration ought not to have been made; and it shall also be competent to the District Court to recall the probate or grant of administration, at any time upon being satisfied that events have occurred which render the administration hereunder impracticable or useless.*

There is no time limit for an application under section 537 to be made but if the applicant says he was unaware of the newspaper publication calling for objections, such an application shall be made at the earliest possible opportunity of such applicant becoming aware of the case. The test is objective, not subjective.

In *Biyanwila v. Amarasekere* (*supra*), the appellant became aware of the fact that the respondent, her mother, had obtained the probate as executor of the last will in 1952 but about 9 years later in 1961 she came to court challenging the last will as a forgery. Whilst dismissing the appeal, Sirimane J. observed *inter alia* at 494:

> *In this case however one cannot disregard the long delay on the part of the appellant which places the respondent at an obvious disadvantage. An order revoking probate after the lapse of such a length of time, may even place the rights of third parties in jeopardy. Williams on Executors and Administrators says at page 81 of the 14th edition "Where a party who is…entitled to call in the probate and put the Executor to proof of the Will chooses to let a long time elapse before he takes this step he is not entitled to any indulgence at the hands of the Court."*

Prior to the Civil Procedure Code (Amendment) Act No. 14 of 1993 by which the whole chapter 38 under the title '*Testamentary Actions*' was repealed and replaced with a new chapter, the testamentary procedure had *inter alia* the following conspicuous features:

(a) application for probate or letters of administration shall be made by way of summary procedure – sections 524(1), 530(1)
(b) if the court is *prima facie* satisfied with the application, order *nisi* shall be issued in the first instance – sections 526, 531
(c) such order *nisi* will be served on the respondents and such other persons as the court shall think fit – sections 526, 531
(d) order *nisi* shall be published in newspapers – section 532
(e) if the petitioner has no reason to suppose that his application will be opposed by any person, he can file with his petition an affidavit to that effect and omit to name any person in his petition as respondent – section 525(1)

(f) in the case of an application for probate, if no respondent is named in the petition, the court may in its discretion make the order absolute in the first instance – section 529(1)

Except for (e) above, all these features were removed by the Civil Procedure (Amendment) Act No. 14 of 1993, and (e) was removed by the Civil Procedure (Amendment) Act No. 38 of 1998.

Under the repealed procedure, as held by the Full Bench of the Supreme Court in *Adoris v. Perera* (*supra*) "*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*."

When fraud is alleged in obtaining probate on a (purported) last will, whether under the old procedure or new procedure, institution of a separate action to unravel the fraud and cancel the probate is permissible. The same will apply in the case of letters of administration. This does not mean that the question of fraud cannot be adjudicated on in the testamentary proceedings itself; everything depends on unique facts of each case.

In *Actalina Fonseka's* case (*supra*) the Supreme Court allowed a separate action to be maintained seeking a declaration that the last will was a forgery and probate had been obtained by fraud. At page 102, Kulatunga J. stated:

> *An allegation that a will was forged intentionally to mislead the Court to granting probate for the administration of an estate which has in fact devolved on intestate heirs and that probate has been obtained by persons who forged such will without disclosing the heirs has to*

> *be viewed differently from an allegation that probate has been obtained by mere perjury. If it were otherwise it is not clear why our Courts have held that the proper procedure to impeach probate obtained on a forged will is by separate action - Tissera v. Gunatilleke Hamine 13 NLR 261; Adoris v. Perera 17 NLR 212; Biyanwila v. Amarasekera 67 NLR 488.*

Fraud cannot be suppressed by technicalities. Bertram C.J. in *Suppramaniam v. Erampakurukal* (*1922) 23 NLR 417 at 435* citing *Black on Judgments* Vol 1, Section 292-293 states "*Fraud is not a thing that can stand even when robed in a judgment*". In *Sirisena v. Kobbekaduwa, Minister of Agriculture and Lands (1974) 80 NLR 1*, Justice Vythialingam at page 66 and Justice Weeraratne at page 140 quoted with approval the following dicta of Lord Denning in *Lazarus Estates Ltd v. Bearely (1956) 1 All ER 341 at 345*:

> *No Judgment of a Court or order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is specially pleaded and proved. But once it is proved it vitiates judgments, contracts, and all transactions whatsoever.*

In *Pieris v. Wijeratne [2000] 2 Sri LR 145 at 152*, Jayawickrama J. held "*although according to section 536 of the Civil Procedure Code an application to recall the probate could be made only where an order absolute in the first instance has been made, in an appropriate case, depending on the circumstances, a court has jurisdiction to act under section 839 of the Civil Procedure Code and make an order as may be necessary for the ends of justice or to prevent abuse of the process of the Court.*"

The instant action was filed under the new procedure. As the law stands today, when applications are filed seeking probate or letters of

administration, the adoption of summary procedure, issuance of order *nisi* etc. are inapplicable (except in instances where an application for recalling probate or letters of administration is subsequently made under section 538). The parties have to follow neither the summary procedure (as contemplated in chapter 24 of the Civil Procedure Code) nor strictly the regular procedure (by way of plaint and answer) but rather a special procedure in that the application is made by way of petition and affidavit. The court makes substantive orders in the nature of order absolute in the first instance, not order *nisi*.

Interventions in testamentary actions are sought not only to challenge last wills and issuance of probate or letters of administration. Such applications are made by various persons interested in the estate for various purposes by adopting various procedures. It is not my intention to list out all such instances but I will highlight a few for better understanding of the nature and complexity of such applications.

For instance, under section 718(1) "*A creditor or any person interested in the estate, may present to the court in the action in which grant of probate or administration issued, proof by affidavit that an executor or administrator has failed to file in court the inventory and valuation, and account (or sufficient inventory and valuation, or sufficient accounts) required by law within the time prescribed therefor.*" It may be noted that this kind of application can be made by "*a creditor or any person interested in the estate*" by presenting "*proof by affidavit*" (not necessarily petition and affidavit). The correction of the inventory and accounts can be challenged in terms of section 718 (*De Zoysa v. De Zoysa (1924) 26 NLR 472*).

Section 720 provides another example: "*In either of the following cases a petition, entitled as of the action in which grant of probate or administration issued, may be presented to the court which issued the same, praying for a decree directing an executor or administrator to pay the petitioner's claim,*

and that he be cited to show cause why such decree should not be made (a) by a creditor, for the payment of a debt, or of its just proportional part, at any time after twelve months have expired since grant of probate or administration; (b) by a person entitled to a legacy, or any other pecuniary provision under a will, or a distributive share, for the payment or satisfaction thereof, or of its just proportional part, at any time after twelve months have expired since such grant." It may be noted that this kind of application can be made by "*a creditor*" or "*by a person entitled to a legacy, or any other pecuniary provision under a will, or a distributive share*" by presenting "*a petition*" (not necessarily a petition and affidavit).

Most intervention applications are in relation to claims on properties listed and unlisted in the inventory. Such movable and immovable property claims are not directly relevant to the main inquiry and are made from the time the action is instituted until the termination of the proceedings. These claims can be made *inter alia* by the parties to the case, heirs, third parties who have purchased rights from the heirs, persons claiming prescriptive rights, or any person interested in the estate.

The original petitioner shall set out in the original petition the details and the situation of the deceased's property as a requirement under sections 524(1)(b) and 528(1)(d), but this is not the inventory. The inventory is filed under section 539(1) after the court makes order on entitlement to probate or letters of administration and after the taking of the prescribed oath by the executor or administrator but before the issuance of probate or letters of administration.

> *539(1). In every case where an order has been made, by a District Court declaring any person entitled to have probate of a deceased person's will, or administration of a deceased person's property granted to him it shall be the duty of the said person, executor or administrator, in whose favour such order is made, to take within*

fifteen days of the making of such order, the oath of an executor or administrator as set out in form No. 92 in the First Schedule, and thereafter to file in court within a period of one month from the date of taking of the oath, an inventory of the deceased person's property and effects, with a valuation of the same as set out in form No. 92 in the First Schedule and the court shall forthwith grant probate or letters of administration, as the case may be.

Any application seeking inclusion or exclusion of properties before the inventory is filed under section 539 is premature. Such applications shall not be an impediment to decide the main application (i.e. proof of the last will if any and the finding of in whose favour probate or letters of administration should be issued).

In *Harold Fernando v. Fonseka [1998] 3 Sri LR 301* the Court of Appeal citing *Fernando v. Fernando (1914) 18 NLR 24*, *Kathirikamasegara Mudaliyar (1900) 5 NLR 29* and *Kantaiyar v. Ramoe (1904) 8 NLR 207* rightly held that the grant of probate or letters of administration is a distinct preliminary step in testamentary proceedings independent of claims to the estate by the heirs, and 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.

What happens if the testator includes properties in the last will which do not belong to him and what happens if the executor disposes of such properties by way of executor conveyances? According to section 2 of the Wills Ordinance No. 21 of 1844 "*It shall be lawful for every person competent to make a will to devise, bequeath, and dispose of by will all the property within Sri Lanka which at the time of his death shall belong to him, or to which he shall be then entitled, of whatsoever nature or description the same may be, movable or immovable,…*" Inclusion in the last will of properties that the testator is not the owner, does not give any rights to

the purported beneficiaries. Anybody can include others' properties in his last will and bequeath them to his next of kin as he pleases, but that does not mean that after the death of the testator the beneficiaries can stake a claim on such properties on the strength of the last will.

In *Roslin Nona v. Herat (1960) 65 CLW 55* it was held that even if the executor or administrator sells such properties with the authority of the court, the buyer does not get title to such properties. In *Rosalin Nona's* case, the administratrix of the estate of a deceased intestate applied to the District Court for authority to sell certain immovable properties that allegedly belonged to the deceased. Two parties intervened in the testamentary case objecting to the sale on the basis that they had conclusive title to two of the lands by partition decrees. These objections were dismissed by the District Court. On appeal, the Supreme Court upheld that order. H.N.G. Fernando J. (later C.J.) with the agreement of T.S. Fernando J. whilst dismissing the appeal stated:

> *The usual restriction contained in a grant of letters, which prohibits the sale of immovable property by an administrator without the authority of the Court, is a measure designed for the protection of the estate and the heirs, and not for the protection of other interests. The grant of leave to sell is merely a release of the Administrator from the restriction imposed in the letters, and is neither an adjudication upon the title, if any, of the intestate or the Administrator, nor anything equivalent to an order for a sale in execution enforceable with the aid of the process of the court.*
>
> *The common law does not prevent a person from executing a transfer of property which may, in fact, belong or turn out to belong to another, although, of course, the transferee in such a case acquires no title as against the true owner. A transferee from an Administrator cannot claim to be in any better position on the score that the transfer was*

> *executed with the leave of the Court. If, therefore, an administrator claims any property as being the property of estate or as being liable to be sold in order to repay the debts of the estate or the expenses of administration, the court does not in the testamentary proceedings have jurisdiction to determine disputes as to title between the administrator and third parties. The Appellants had no right to call upon the court to adjudicate upon their claims of unencumbered title to the two lands in question. The action, if any, which they should take at this stage to protect their interests is not a matter upon which they can be advised by this court.*

Conversely, failure to include in the inventory a property that actually belonged to the deceased does not deprive the heirs of making a claim to that property on succession (*Fernando v. Dabarera (1971) 77 NLR 127*).

The question whether a disputed proprietary claim can be decided summarily (e.g. section 718) or later in the same proceedings by way of a judicial settlement (e.g. section 736) or whether a separate action needs to be filed on that claim is a vexed question. Such disputed proprietary claims are one of the main reasons for the delay in concluding testamentary actions in the District Court. The answer to this question depends on the nature and scope of the particular claim and the stage at which it is made. The decision needs to be taken on the unique facts and circumstances of each individual application. Broadly speaking, if the claim is by a party to the case or by an heir of the estate and the claim is not a complicated one, it can be decided in the testamentary case itself. But if it is by a third party and the claim is a complicated one with distinct causes of action which require raising issues and leading evidence of several witnesses, it is prudent that it be decided in a separate action. It is not practically possible to hear a case within a case.

However, in certain instances, deciding the issue in the case itself is mandatory. Section 736(2) provides for one such instance and enacts "*Where a contest arises between the accounting party and any of the other parties respecting any property alleged to belong to the estate, but to which the accounting party lays claim, or respecting a debt alleged to be due by the accounting party to the testator or intestate, or by the testator or intestate to the accounting party, the contest must be tried and determined in the same special proceeding and in the same manner as any issue arising on a civil trial*." In *Suppammal v. Govinda Chetty (1943) 44 NLR 193 at 19*5 it was observed "*These words are clear and peremptory. They require that, if at the stage of a judicial settlement, a question such as arose here, arises between an accounting party, that is to say, between an executor or administrator, and any of the other parties, that is to say, other parties to the testamentary suit, such as the widow in this case, that question must be determined "in the same special proceeding", that is to say in the proceeding for the judicial settlement*." The reference to *"the other parties"* in section 736(2) was construed as the other parties to the action, not third parties.

In the matter of the last will and testament of Don Cornelis Dias (1986) 2 NLR 252 it was held that in the case of a petition under section 712 to discover property withheld from an executor, if the respondent in terms of section 714(3) puts in an affidavit claiming to be the owner of such property, the only thing for the court to do is to dismiss the petition remitting the parties to the machinery of an ordinary action for the determination of their rights.

Conversely, when an application is made by a creditor under section 720 seeking a decree directing the executor or administrator to pay such claim, if the executor or administrator files an affidavit setting forth facts which

show to the satisfaction of the court that the validity of the claim is doubtful, then the court can dismiss the application.

In *De Silva v. Gomes (1928) 30 NLR 249* it was held "*An administrator, who is not prepared to admit the claim of a creditor, is not entitled to place upon the court the responsibility of a decision on the matter. In such a case it is left to the creditor to establish his claim by regular proceedings against the estate.*"

In *De Silva v. Jayakody (1941) 42 NLR 226* it was held "*Where a petition is presented to court by a creditor under section 720 of the Civil Procedure Code praying for a decree directing an executor or administrator to pay the creditor's claim and the respondent denies the validity and legality of the claim, the court is debarred from acting under the section and compelling payment of the disputed claim. In such a case the petition should be dismissed without prejudice to the creditor's right to bring a separate action."*

In *Suppammal v. Govinda Chetty (supra)* it was held "*Where an application was made by an heir of an estate for a direction to the administrator to have the inventory filed by him amended so as to include certain sums of money which the administrator claimed as his own the application fell within the scope of section 718 of the Civil Procedure Code. Where a question such as the above arises between the accounting party (i.e., the executor or administrator) and any of the other parties to the testamentary case, that question may be determined in the proceeding for judicial settlement and not by separate action. It would be within the discretion of the Court to direct amendment under section 718 or to refer a party to the procedure of section 736, viz., judicial settlement, according to the nature and scope of the particular application and the stage at which it is made.*" This was quoted with approval in *Jayantha de Soysa v. Naomal de Soysa [1997] 3 Sri LR 65.*

Filing the final account is a significant step in bringing the proceedings to termination.

In terms of section 551 every executor and administrator shall file in the District Court, on or before the expiration of twelve months from the date upon which probate or grant of administration is issued or within such further time as the court may allow, a true and final account of his executorship or administration verified on oath or affirmation. The form of the final account is found in Form No. 118A in the First Schedule to the Civil Procedure Code. It may be noted that distribution of the property is part of the final account.

In terms of section 724A, if the executor or administrator has failed to file the final account in court, any person interested in the estate can make an application to court in that regard and the court shall take appropriate steps. Further, while in terms of section 724B the court can discharge the executor or administrator if he files the final account together with other documents to establish that the entire estate has been duly administered and distributed, if objections arise the court shall direct a judicial settlement of the account in terms of section 724B(7).

Judicial settlement of such account plays a vital role in the termination of testamentary proceedings. Sections 725 and 726 provide how the procedure in relation to judicial settlement of such account can be invoked. Section 729 allows an executor or administrator to move for a judicial settlement of the account as well.

> *725. In any of the following cases, and either upon the application of a party mentioned in the next section or of its own motion, the court may from time to time compel a judicial settlement of the account of an executor or administrator:-*

(a) where one year has expired since grant to him of probate or administration;

(b) where such grant has been revoked, or for any other reason his powers have ceased;

(c) where he has sold or otherwise disposed of any immovable property of the testator, or devisable interest therein, or the rents, profits, or proceeds thereof, pursuant to a power in the will, where one year has elapsed since the grant of probate to him.

726(1). The application for a judicial settlement in the last section mentioned shall be by petition, entitled as of the action in which grant of probate or administration issued, and may be presented by a creditor, or by any person interested in the estate or fund, including a child born after the making of a will; or by any person in behalf of an infant so interested; or by a surety in the official bond of the person required to account, or the legal representative of such surety.

(2) Upon the presentation thereof, citation shall issue accordingly; but in a case specified in paragraph (a) of the last preceding section the court may, if the petition is presented within less than eighteen months after the issue of probate or administration, entertain or refuse to entertain it in its discretion.

However all the complicated proprietary issues in relation to the case cannot be settled and decided by a judicial settlement of the account alone.

In *Holsinger v. Nicholas (1918) 20 NLR 417* it was held "*The object of a judicial settlement is that all matters that may arise in the course of the administration of the estate between the accounting party and the beneficiary should be dealt with promptly and in an expeditious manner, so*

that the whole question might be finally wound up in those proceedings. If the Judge thinks that the matter is of such complication and importance that it can only be inquired into by a regular action, he might suspend the settlement until that matter is determined by a regular action, or conclude the settlement subject to the determination of that matter."

This judgment was referred to in *Zain v. Sheriff (1937) 40 NLR 310* when the court decided "*Proceedings for a judicial settlement are not appropriate for the purpose of deciding a question which could not be finally determined without other persons who are not parties to the testamentary suit.*"

In *Pathmanathan v. Thuraisingham (1970) 74 NLR 196* it was held *"Disputed claims cannot be adjudicated upon in an inquiry relating to the judicial settlement of the accounts of executors and administrators under Chapters 54 and 55 of the Civil Procedure Code. In such proceedings, therefore, a legatee cannot claim as a creditor that a certain sum of money is due to him from the estate of the testator, if the claim is disputed by the executor. Such a disputed claim can only be made by way of a separate action."* This was reiterated in *Imbulmure v. The Public Trustee [2012] 2 Sri LR 413.*

This court granted leave to appeal to the original petitioner on the following questions of law as formulated by the petitioner at paragraph 18(b), (c), (d), (e), (g) and (h) of her petition. They are reproduced below with the answers:

> Q. Did the High Court err in law by coming to the conclusion that the appellant has failed to comply with section 524(5) of the Civil Procedure Code when it has been repealed by the Civil Procedure Code (Amendment) Act No. 38 of 1998?
>
> A. Yes.

Q. Did the High Court err in law by failing to consider that the petitioner-respondents should establish a *prima facie* case before the learned District Judge under section 537 read with 538 since summary procedure should be adopted in determining an application thereunder and/or that the petitioner-respondent has failed to establish a *prima facie* case before the District Court?

A. The original petitioner has not objected to the procedure before the District Court and therefore it cannot be canvassed before the Supreme Court. The intervenient petitioners have established a *prima facie* case before the District Court.

Q. Did the High Court fail to consider and/or conclude and/or give reasons as to whether the High Court was satisfied with the application of the petitioner-respondents before the District Court?

A. Reasons have been given. If the reasons are inadequate, this court has justified the conclusion of the learned High Court Judges with reasons.

Q. Did the High Court err in law by allowing intervention and filing objections even after considering the same under section 537 which only permits the court to recall the probate?

A. No. Recalling probate does not end the matter; the court shall take follow up steps.

Q. Did the High Court err in law by concluding that the petitioner-respondents are necessary parties to the appellant's application although the appellant has complied with section 524?

A. Yes. But on that ground alone the Judgment of the High Court of Civil Appeal cannot be set aside.

Q. Did the High Court err in law by allowing the petitioner-respondents' application on the basis that probate has been issued instead of letters of administration whereas it was not a ground urged by the petitioner-respondents in their application before the District Court?

A. No. A question of law can be raised for the first time on appeal. On the facts of this case, as the petitioner was not named as the executor of the will, what the District Court ought to have issued was not probate but letters of administration with the will annexed. However that matter does not go to the root of the case. In my view, that matter has been highlighted by the High Court of Civil Appeal to emphasise that the District Court did not consider the merits of the petitioner's application before issuing the probate to the original petitioner. This is understood by the following part of the judgment: "*In the instant action the learned District Judge has merely issued a probate without considering the facts presented before him. Therefore, I am of the view that the issuing of the probate has no validity in law. If the learned District Judge took care to look at the provisions as to testamentary procedure and if he was of the view that the will has been proved, it was letters of administration with the will annexed and not a probate that should have been issued.*" I accept that the finding of the High Court of Civil Appeal that "*the procedure adopted by the learned District Judge to issue probate in itself would amount to a serious miscarriage of justice*" is a misdirection in law.

At the time of granting leave, this court had allowed the intervenient petitioners to reserve the right to raise any questions of law before the appeal was taken up for hearing. Accordingly learned counsel for the 2nd intervenient petitioner has raised several questions of law in the written submissions filed prior to the argument and the same were reiterated at

the time of the argument. Learned counsel for the original petitioner has addressed those questions of law in his post-argument written submissions. In summary, these are the questions of law raised by the original petitioners:

(i) Has the learned District Judge failed to comply with section 531(1)(a) when making the order dated 06.05.2011?
(ii) Has the learned District Judge failed to follow section 524 when making the order dated 06.05.2011?

I answer (i) above in the affirmative and (ii) in the negative. By (ii) above, what the intervenient petitioners submit is that naming them as respondents in the testamentary proceedings is a legal requirement under section 524. I am unable to agree with it.

I affirm the finding and the conclusion of the High Court of Civil Appeal that the order of the District Court dated 08.06.2012 shall be set aside on the failure of the learned District Judge to satisfy himself that the will was duly made as required by section 531(1)(a) of the Civil Procedure Code before the issuance of probate to the original petitioner, which goes to the root of the case, and dismiss the appeal with costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.
I agree.

Judge of the Supreme Court