

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

In the matter of an application for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

**SC Appeal No. 44/2019**  
**SC/HCCA/LA No. 267/2018**  
**WP/HCCA/LA/GAM No. 65/2017**  
**D.C. Pugoda Case No. 1245/L**

1. Dilipan Thyagarajah,  
No.92, Kynsey Road,  
Colombo 08.
2. Dhara Levers alias Dhara Alycia Levers,  
No. 47, Graham Heights,  
Kingston 08,  
Jamaica.

**Plaintiffs**

**Vs.**

1. Liyanage Dilshan Keerthi Prasanna,  
No. 40,44, Church Road,  
Colombo 02.
2. Merennage Kingsley de Costa,  
No. 6, Somadevi Road,  
Kirulapone Avenue,  
Colombo 05.
3. Niluka P. Withanachchi,  
The Registrar of Lands,

Land Registry,  
Gampaha.

**Defendants**

**And**

1. Dilipan Tyagarajah,  
No.92, Kynsey Road,  
Colombo 08.
2. Dhara Levers alias Dhara Alycia Levers,  
No. 47, Graham Height,  
Kingston 08,  
Jamaica.

**Plaintiff-Petitioners**

**Vs.**

1. Liyanage Dilshan Keerthi Prasanna,  
No. 40,44, Church Road,  
Colombo 02.
2. Merennage Kingsley de Costa,  
No. 6, Somadevi Road,  
Kirulapone Avenue,  
Colombo 05.
3. Niluka P. Withanachchi,  
The Registrar of Lands,  
Land Registry,  
Gampaha.

**Defendant-Respondents**

**And Now Between**

1. Dilipan Tyagarajah,  
No.92, Kynsey Road,  
Colombo 08.
2. Dhara Levers alias Dhara Alycia Levers,  
No. 47, Graham Height,  
Kingston 08,  
Jamaica.

**Plaintiff-Petitioner-Petitioners**

**Vs.**

1. Liyanage Dilshan Keerthi Prasanna,  
No. 40,44, Church Road,  
Colombo 02.
2. Merennage Kingsley de Costa,  
No. 6, Somadevi Road,  
Kirulapone Avenue,  
Colombo 05.
3. Niluka P. Withanachchi,  
The Registrar of Lands,  
Land Registry,  
Gampaha.

**Defendant-Respondent-Respondents**

**Before:           Justice Buwaneka Aluwihare, PC**  
**Justice A.H.M.D. Nawaz**  
**Justice A.L. Shiran Gooneratne**

**Counsel:** Harsha Soza, PC with Anuruddha Dharmaratne **for the Plaintiff-Petitioner-Appellants.**

Upali Abeywickrema with Kithsiri Liyanage **for the 2<sup>nd</sup> Defendant-Respondent-Respondent.**

**Argued on:** 01/12/2021

**Decided on:** 16/06/2022

### **A.L. Shiran Gooneratne J.**

The Plaintiff-Petitioner-Petitioners (hereinafter sometimes referred to as “the Plaintiffs”), by Plaint dated 10/10/2013 and later an Amended Plaint dated 23/01/2014, filed action in the District Court of Pugoda, No. 1245/L, *inter-alia*, seeking a declaration of title in respect of the property described in the schedule to the Plaint, in favour of the estate of the deceased Kumaraj Chitranjan Nadarajah, ejectment of the Defendant-Respondent-Respondents (hereinafter referred to as “the Defendants”), their servants and agents from the estate of the deceased, and an annulment of Deed No. 3496 dated 03/08/2009 and Deed No. 175 dated 08/08/2011, which the Plaintiffs claim to be fraudulently executed. The Defendants raised preliminary objections to the maintainability of the action on the basis that 2<sup>nd</sup> Plaintiff had failed to file a valid Power of Attorney. Thereafter, the Plaintiffs filed an Amended Plaint dated 26/01/2017.

The learned District Judge, who overruled the objections raised by the Defendants and accepted the said Amended Plaint dated 26/01/2017, however, made order dated 23/10/2017 striking out the name of the 2<sup>nd</sup> Plaintiff from the action, on the basis that no cause of action has accrued to the 2<sup>nd</sup> Plaintiff. The said Order of the District Judge was upheld by the Judges sitting in appeal by order dated 05/07/2018 in WP/HCCA/LA/GAM/65/2017. Aggrieved by the said Order, the Plaintiffs are seeking,

*inter alia*, to set aside the said judgment of the Gampaha High Court of Civil Appeal dated 05/07/2018 and the Order dated 23/10/2017 made by the learned District Judge of Pugoda and to permit both Plaintiffs to participate at the trial and prosecute their case. It is contended that the 2<sup>nd</sup> Plaintiff is a necessary party to this action for the complete and effectual adjudication of all questions of law and fact, involved in this case and to prevent a multiplicity of actions, and any injustice and prejudice being caused to the 2<sup>nd</sup> Plaintiff.

This Court by its Order dated 06/02/2019, granted Leave to Appeal on the questions of law stated in paragraph 16 (a), (b) and (c) of the Petition of Appeal dated 08/08/2018, which are set out below-

- “ a) Have the learned Judges of the High Court of Civil Appeals of the Western Province Holden in Gampaha erred in law by failing to appreciate and consider that an executor’s conveyance was not necessary for the 2<sup>nd</sup> Plaintiff-Petitioner to jointly institute this case with the 1<sup>st</sup> Plaintiff-Petitioner?
- b) Did the learned Judges of the High Court of Civil Appeals of the Western Province Holden in Gampaha err in failing to appreciate and consider that the admission of the said Last Will No. 1890 to probate vested the 2<sup>nd</sup> Plaintiff-Petitioner with title to the property in suit?
- c) Did the learned Judges of the High Court of Civil Appeals of the Western Province Holden in Gampaha err in not considering that the 2<sup>nd</sup> Plaintiff-Petitioner is a necessary party to this case for the complete and effectual adjudication of all questions involved in this case?”

District Court Colombo Case No. DTS/00315/10, was filed in the matter of the Last Will No. 1890 of the said deceased Kumaraj Chitranjan Nadarajah. The parties to the present action are not at variance that the said Last Will No. 1890 was proved and admitted to probate and that the property in question formed part of the estate of the deceased testator. The 2<sup>nd</sup> Plaintiff, the niece of the deceased Kumaraj Chitranjan

Nadarajah, is said to be the beneficiary of the property in question, probated under the Last Will No. 1890. The District Court issued probate of the Will to the executor, the 1<sup>st</sup> Plaintiff, to administer the estate of the deceased Kumaraj Chitranjan Nadarajah. (A copy of the said Last Will No. 1890 has not been produced, while a copy of the said probate dated 23/06/2011 is in the Brief in this case).

The Court sitting in appeal in WP/HCCA/GAM/65/2017 held that the identity of the 2<sup>nd</sup> Plaintiff has been settled before the trial judge and that the proceedings of the said testamentary case are ongoing and as such it is the duty of the probate holder to protect and administer the estate. However, due to the absence of an executor's conveyance in favour of the 2<sup>nd</sup> Plaintiff, that Court held that there is no cause of action arising to the 2<sup>nd</sup> Plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and therefore, the 2<sup>nd</sup> Plaintiff is not a necessary party to this case. That Court also held that the 1<sup>st</sup> Plaintiff as the executor, could alone protect and safe guard the interests of the 2<sup>nd</sup> Plaintiff.

The position of the Plaintiffs is that an executor's conveyance is not necessary for the 2<sup>nd</sup> Plaintiff to jointly institute the case with the 1<sup>st</sup> Plaintiff and that the admission of the said Last Will No. 1890 to probate vests the 2<sup>nd</sup> Plaintiff with title to the property in suit.

In *Malliya vs. Ariyaratne 65 NLR 145*, having analyzed the scope of the applicability in Ceylon of the English law of executors and administrators, and cited the earlier dicta in extenso in order to show the development of the law, Basnayake, C.J. stated (at page 154)-

- “ a) that the executor has power over both movable and immovable property and may sell the property left by the testator in accordance with the directions in the Will.
- b) that the immovable property specially devised vests not in the executor but in the heir to whom it is devised subject to the executor's right to have recourse to it in its due order for the payment of the testator's debts.

- c) that the executor's assent or a conveyance by him is not necessary to pass title to heirs appointed in the will or the heirs at law.
- d) that the executor has power to sell the property left by the testator for the payment of his debts, but that power must be exercised with due regard to the provisions of our law."

Prior to the aforesaid judgment; in *Silva vs. Silva (1907) 10 NLR 234*, the Supreme Court, in a case of an intestacy, held, that,

*"Title to immovable property belonging to the estate of a deceased person does not vest in the administrator of the estate of such person; and a conveyance by the heir of the deceased without the concurrence or assent of the administrator is valid, subject to the right of the administrator to deal with the property for purposes of administration"*.

In this case, Hutchinson C.J., observed that, *"the personal representative retains the power to sell the property for the purposes of administration but his non-concurrence in the conveyance by the heirs does not otherwise affect its validity"*.

This position was reiterated in *Horne vs. Marikar (1925) 27 NLR 185*, where Schneider J. held (at page 188), that, *"It is settled law that title to immovable property belonging to the estate of a person dying intestate does not vest in the administrator but passes to his heirs, but that the administrator retains the power to sell the property for the purposes of administration. See Gopalsamy vs. Ramasamy Palle (1911) 14 N. L. R. 238 and Silva vs. Silva (Full Bench). (1907) 10 N. L. R. 234"*

Accordingly, it is clear that the grant of probate does not confer title of the property of the deceased testator on the executor appointed by order of Court to administer the property of the deceased testator. The title of the property of the deceased testator vests with the heirs and a conveyance by the executor is not essential to pass title of the property owned by the deceased to his devisee under his Last Will.

Therefore, the trial Court and the Court sitting in appeal erred in law in their finding that an executor's conveyance is necessary to pass title to the 2<sup>nd</sup> Plaintiff, as a devisee under the Last Will of the deceased.

Accordingly, the questions of law stated in paragraph 16(a) and (b) are decided in favour of the Plaintiff-Petitioner-Petitioners.

The Appeal Court in its impugned Order dated 05/07/2018, finds that, even though the probate has been issued, title to the properties have not been transferred to the beneficiaries listed in the Last Will and therefore, only the executor appointed therein has the right to file and seek remedies from the Defendants. This seems to be the basis in which the Court decided that there is no cause of action accrued to the 2<sup>nd</sup> Plaintiff against the Defendants and therefore, the 2<sup>nd</sup> Plaintiff's name should be struck off and the case be allowed to proceed.

As observed earlier an executor's conveyance is not necessary to pass title to the devisee to whom the property is devised. The averments in the Plaint are for a declaration of entitlement to the testator's estate admitted to probate, the annulment of the aforesaid deeds and to evict the Defendants from possession of the probated land.

The definition of cause of action contained in Section 5 of the Civil Procedure Code, *"is the wrong for the prevention or redress of which an action may be brought and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty and the infliction of an affirmative injury"*.

The Plaintiffs filed action in the District Court of Pugoda, *inter alia*, seeking, to assert their status in the estate of the deceased, in accordance with the said Last Will No. 1890 and the probate order granted by Court. The 2<sup>nd</sup> Plaintiff is a necessary party to fully enforce the obligations vested in the executor and the rights claimed in this case. Also, the 2<sup>nd</sup> Plaintiff is entitled to be a party to the action to evict the Defendants in possession and to recover the land in suit, more fully described in the schedule to the Plaint. Therefore, the 2<sup>nd</sup> Plaintiff is a necessary party in this case.



Accordingly, the question of law as set out in paragraph 16 (c) is also decided in favour of the Plaintiff-Petitioner-Petitioners.

As such, the decision to strike off the name of the 2<sup>nd</sup> Plaintiff-Petitioner-Petitioner, by the Judgment of the High Court of Civil Appeal dated 05/07/2018, and the Order of the District Judge of Pugoda dated 23/10/2017, are set aside. The learned District Judge is directed to accept the Amended Plaint dated 26/01/2017 and allow both Plaintiff-Petitioner-Petitioners to participate at the trial and to prosecute their case.

Appeal allowed. No costs ordered.

**Judge of the Supreme Court**

**Buwaneka Aluwihare PC. J.**

I agree

**Judge of the Supreme Court**

**A.H.M.D. Nawaz J.**

I agree

**Judge of the Supreme Court**