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

Wijesekera Weerawickrema
Wickremasinghe Mudiyanselage
Dharmapala
188/8, Pathiragoda Road,
Navinna, Maharagama
Plaintiff

SC/APPEAL/137/2019
SC/HCCA/LA/447/2016
WP/HCCA/MT/59/2013(F)
DC NUGEGODA 116/08/SPL

Vs.

1. Thanippuli Achchige Seelawathie
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
2. Polgahawattage Upali Sigera
   No. 92, Kanatta Road, Nugegoda
3. Polgahawattage Swarna Sigera
   No. 92, Kanatta Road, Nugegoda
4. W.W.W.M. Shalika Prasadi
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
5. W.W.W.M. Sarika Krishadi
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
6. W.W.W.M. Chanaka
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita

Defendants

AND BETWEEN

Wijesekera Weerawickrema
Wickremasinghe Mudiyanselage
Dharmapala
188/8, Pathiragoda Road,
Navinna, Maharagama
Plaintiff-Appellant

Vs.

1. Thanippuli Achchige Seelawathie
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
2. Polgahawattage Upali Sigera
   No. 92, Kanatta Road, Nugegoda
3. Polgahawattage Swarna Sigera
   No. 92, Kanatta Road, Nugegoda
4. W.W.W.M. Shalika Prasadi
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
5. W.W.W.M. Sarika Krishadi
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
6. W.W.W.M. Chanaka
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
   Defendant-Respondents

AND NOW BETWEEN

1. Thanippuli Achchige Seelawathie
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
2. Polgahawattage Upali Sigera
   No. 92, Kanatta Road, Nugegoda
3. Polgahawattage Swarna Sigera
   No. 92, Kanatta Road, Nugegoda
4. W.W.W.M. Shalika Prasadi
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
5. W.W.W.M. Sarika Krishadi
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita
6. W.W.W.M. Chanaka
   No. 127, Shantha Niwasa,
   Halpita, Polgasowita

   Defendant-Respondent-Petitioners

   Vs.

   Wijesekera Weerawickrema
   Wickremasinghe Mudiyanselage
   Dharmapala
   188/8, Pathiragoda Road,
   Navinna, Maharagama

   Plaintiff-Appellant-Respondent

Before: Hon. Murdu N.B. Fernando, P.C., J.
Hon. Shiran Gooneratne, J.
Hon. Mahinda Samayawardhena, J.

Counsel: Rohan Sahabandu P.C. with Chathurika Elvitigala for the Defendant-Respondent-Petitioners.
Ranjan Suwandaratne with Anil Rajakaruna for the Plaintiff-Appellant-Respondent.

Written Submissions:

By the Appellant on 16.08.2019 and 10.04.2023
By the Respondent on 07.10.2019

Argued on: 27.02.2023

Decided on: 29.01.2024

Samayawardhena, J.

Background

Wilson was the owner of the property in dispute. He had no children. He and his wife legally adopted Rupawathie as their child. Wilson gifted the property to Rupawathie. Rupawathie married to Ariyaratna. They too had no children. When Rupawathie died on 10.12.2006, both her parents and her husband had already died. Then the property should devolve on brothers and sisters of her parents and their children, in accordance with the Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876, as amended.

Wilson has had several brothers and sisters. One of them is Dharmasena who had 10 children. Out of those 10, one is Kiribanda and another is the plaintiff. After Rupawathie's demise, Seelawathie, the wife of Kiribanda, filed testamentary case No. 2684/07/08 in the District Court of Mt. Lavinia (as seen from the administrative conveyance No. 300 dated 30.04.2006 marked P5), on the basis that Kiribanda, and Rupawathie's husband's brother and sister are the only three heirs of Rupawathie.

Although the plaintiff and Kiribanda are brothers and the plaintiff is in possession of the property in dispute and the plaintiff also was an heir of Rupawathie, the plaintiff was not made a party to the testamentary case. The District Court granted letters of administration to Seelawathie and Seelawathie in turn transferred the property in dispute to the said three parties by the aforesaid administrative conveyance, which was registered in the land registry.

The plaintiff filed the instant action against the six defendants including the aforementioned three parties in the testamentary case, on the basis that Seelawathie fraudulently filed the testamentary action and obtained orders in her favour without disclosing the lawful heirs of the deceased, including himself. He sought cancellation of the administrative conveyance P5 as the main relief.

The defendants do not deny that the plaintiff is an heir of Seelawathie and he (the plaintiff) is in possession of the property. They took up the position in the District Court that the testamentary action was concluded following the proper procedure and therefore the plaintiff could not challenge the executive conveyance in a separate action.

After the closure of the plaintiff's case, the defendants closed their case without leading any evidence.

The learned District Judge by judgment dated 20.05.2013 dismissed the plaintiff's action for want of jurisdiction on the sole basis that the plaintiff ought to have made the application for recalling letters of administration in the same testamentary proceedings in terms of sections 537 and 538 of the Civil Procedure Code rather than filing a separate action to cancel the executive conveyance.

On appeal, the High Court of Civil Appeal set aside the judgment of the District Court and directed the District Court to enter the judgment in

favour of the plaintiff on the basis that, in the circumstances of this case, a separate action can be maintained to cancel the executive conveyance. The High Court relied on the Full Bench decision in *Adoris v. Perera* (1914) 17 NLR 212.

This Court has granted leave to appeal on several questions but learned President's Counsel for the defendant-appellants at the argument correctly acceded that the essential question to be decided on this appeal is:

> *Did the High Court of Civil Appeal err in law when it decided that the plaintiff could seek to cancel the executive conveyance prepared on letters of administration issued by another Court without making an application under sections 537 and 538 of the Civil Procedure Code to recall letters of administration in the previous action?*

The principal submission of learned President's Counsel for the defendants is that the dicta in *Adoris v. Perera* are inapplicable to the facts of the instant case since the law was changed by Civil Procedure Code (Amendment) Act, No. 14 of 1993.

The law relating to the recalling of probate was extensively discussed by me in the case of *Sammuarachchi v. Siriwardhena and Others* [2021/22] BLR 469.

The question in this case revolves around the recalling of letters of administration.

The mode of application for letters of administration

If a person dies without leaving a last will having left property in Sri Lanka exceeding four million rupees, administration of such property is compulsory. Any person interested in administering the property can

apply for the grant of letters of administration. If no one is forthcoming, the Court can appoint some person.

Sections 525-527 reads as follows:

> *525. When any person shall die in Sri Lanka without leaving a will, it shall be the duty of the widow, widower, or next of kin of such person, if such person shall have left property in Sri Lanka amounting to or exceeding in value four million rupees, within one month of the date of his death to report such death to the District Court of the district in which he shall have so died, and at the same time to make oath or affirmation or produce an affidavit verifying the time and place of such death, and stating if such is the fact, that the intestate has left property within the jurisdiction of that or any other, and in that event what court, and the nature and value of such property.*
>
> *526. When any person shall die without leaving a will or where the will cannot be found, and such person shall have left property in Sri Lanka-*
>
> *(a) any person interested in having the estate of the deceased administered may apply for the grant to himself of letters of administration; or*
> *(b) any heir of the deceased may apply for the issue of certificates of heir ship to each of the heirs entitled to succeed to the estate of the deceased.*
>
> *Such application shall be made in accordance with section 528 to the District Court of the district within which the applicant resides, or within which the deceased resided at the time of his death, or within which any land belonging to the deceased's estate is situate.*

527. In case no person shall apply for the grant of letters of administration or for the issue of certificates of heirship, as the case may be, and it appears to the court necessary or convenient to appoint some person to administer the estate or any part thereof, it shall be lawful for the court in its discretion, and in every such case where the estate amounts to, or exceeds in value, four million rupees, the court shall in accordance with the procedure set out in this Chapter appoint some person, whether he would under ordinary circumstances be entitled to take out administration or otherwise, to administer the estate, and the provisions of sections 518 to 521, both inclusive, shall apply, so far as the same can be made applicable, to any such appointment.

What constitutes a proper application for letters of administration is set out in section 528.

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.

The procedure for newspaper publication and the timeline for objections are specified in section 529.

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.

If no objections are received, in terms of section 531, the Court can make an order for the grant of letters of administration to the applicant.

If objections are received, in terms of section 532-534, the Court shall hear the parties and make a suitable order.

Recalling letters of administration

In terms of section 529, the objections to the grant of letters of administration shall be tendered not later than sixty-seven days from the first newspaper publication.

However, this is not the only occasion an objection could be raised against the grant of 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*" do not, with respect, represent the correct position of the law.

The law has provided for various windows to intervene, object and make applications for recall of probate or letters of administration 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.

In *Biyanwila v. Amarasekere* (1965) 67 NLR 488, Sirimane J. stated at page 494 that although some provisions of the testamentary procedure are only directory, "*in an appropriate case a party may ask the court for relief under section 839 of the Civil Procedure Code*."

In *Actalina Fonseka v. Dharshani Fonseka* [1989] 2 Sri LR 95 at 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.*

In terms of section 537, the Court can recall the letters of administration if the Court is satisfied that the grant of letters of administration ought not to have been made or 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.*

Section 537 deals with the grounds upon which letters of administration can be recalled, and section 538 stipulates that such application shall be made by way of summary procedure.

> *538. All applications for the cancellation, recall or revocation of certificates of heirship, probate or grant of administration shall be made by petition, in pursuance of the rules of summary procedure, and no such application shall be entertained unless the petitioner shows in his petition that he has such an interest in the estate of the deceased person as entitles him in the opinion of the court to make such application.*

There is no time limit for an application under section 537 to be made. However, if the applicant claims to have been unaware of the newspaper

publication calling for objections, such an application shall be made at the earliest possible opportunity upon the applicant becoming aware of the case.

In *Biyanwila v. Amarasekere*, the appellant became aware of the fact that her mother had obtained probate as the 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."*

Before the Civil Procedure Code (Amendment) Act, No. 14 of 1993, which replaced Chapter 38 titled 'Testamentary Actions', the testamentary procedure had, *inter alia*, the following notable attributes:

(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.

Fraud as a ground for recalling letters

Under the repealed procedure, as held by the Full Bench of the Supreme Court in *Adoris v. Perera*:

> *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 last will in the case of testacy or letters of administration in the case of intestacy, whether under the old procedure or the new procedure, the person applying to recall probate or letters of administration has two options: he can either make the application in the same proceedings or institute a separate action.

In *Actalina Fonseka v. Dharshani Fonseka*, 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. Kulatunga J. stated at page 102:

> *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.*

The defendants do not want to contest the case on the merits. They do not say the allegation of fraud is false. Instead, they attempt to conceal fraud by technicalities. Such stratagem is not permitted in law.

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, Vythialingam J. at page 66 and Weeraratne J. 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 *Takhar v. Gracefield Developments Ltd. and Others* [2019] UKSC 13, a significant item of evidence led before the trial Court was a scanned copy of a profit share agreement, seemingly signed by the plaintiff-appellant, which supported the defendant-respondents' case. The appellant's pre-trial application to obtain evidence from a handwriting expert was denied. The trial Court held against the appellant. Following the trial, the appellant engaged a handwriting expert, who stated conclusively that the signature on the agreement had been transposed from an earlier document. The appellant moved to have the judgment set aside on the ground that it had been obtained by fraud. The respondents resisted it stating that it was an abuse of process. The Court did not agree that the claim was an abuse of process. However, the Court of Appeal set aside that order holding that a person who seeks to have a judgment set aside on account of fraud had to show that the fraud could not have been discovered by reasonable diligence. The Supreme Court of the United Kingdom did not agree with the Court of Appeal and unanimously allowed the appeal. Lord Kerr held at para 52:

> *The idea that a fraudulent individual should profit from passivity or lack of reasonable diligence on the part of his or her opponent seems antithetical to any notion of justice. Quite apart from this, the defrauder, in obtaining a judgment, has perpetrated a deception not only on their opponent and the court but on the rule of law.*

Lord Kerr further remarked at para 53:

> *It appears to me that the policy arguments for permitting a litigant to apply to have judgment set aside where it can be shown that it has been obtained by fraud are overwhelming.*

The principle, "fraud vitiates everything", is followed in Australian jurisdiction as well. In *Cabassi v. Vila* [1940] 64 CLR 130, Williams J. in the High Court of Australia stated at page 147:

> *A judgment which is procured by fraud is tainted and vitiated throughout. If the fraud is clearly proved the party defrauded is entitled to have the judgment set aside in an action [Hip Foong Hong v. Neotia & Co. (1918) A.C. 888; Jonesco v. Beard (1930) A.C. 298]. In some of the older cases in the House of Lords it has been stated that where a judgment has been so obtained it may be treated as a nullity [Shedden v. Patrick (1854) 1 Macq. H.L. 535; R. v. Saddlers' Co. (1863) 10 H.L.C. 404]. In the last-mentioned case at page 431, Willes J. said: "A judgment or decree obtained by fraud upon a court binds not such court, nor any other; and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding [Phillipson v. Lord Egremont (1844) 6 Q.B. 587; Bandon v. Becher (1835) 3 Cl. & Fin. 479; Shedden v. Patrick (1854) 1 Macq. H.L. 535: see also Tommey v. White (1853) 4 H.L.C. 313]."*

In *Pieris v. Wijeratne* [2000] 2 Sri LR 145 at 152, Jayawickrama J. held:

> *[A]lthough 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 to later make it absolute, issuance of order absolute in the first instance etc. are inapplicable. 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 after the inquiry.

For completeness, let me consider what happens:

(a) if the testator includes properties in the last will which do not belong to him; or
(b) if the executor or administrator disposes of such properties by way of executor conveyances; or
(c) if properties which do not belong to the deceased are included in the inventory and disposed of in the same way unknown to the true owners?

According to section 2(1) of the Wills Ordinance, No. 21 of 1844, as amended, a person can include in the last will "*any property which belong to him at the time of death*".

> *2(1). It shall be lawful for any person who has reached the age of eighteen years and residing within or outside Sri Lanka to execute a will bequeathing and disposing any movable and immovable property and all and every estate, right, share or interest in <u>any property which belong to him at the time of death</u> and which, if not so devised, bequeathed or disposed would devolve upon his heirs of such person not legally incapacitated from taking the same as he shall seem fit.*

The inclusion of properties in the last will or in the inventory filed in Court in testamentary proceedings, which the deceased did not own, does not confer any rights upon the purported beneficiaries.

In the case of *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 acquire title to such properties. In *Rosalin Nona's* case, the administratrix applied to the District Court for authority to sell certain immovable properties that were purportedly owned by the deceased. Two parties intervened, contending they had conclusive title to two lands through partition decrees and objected to the sale. The District Court dismissed these objections. On appeal, H.N.G. Fernando J. (later C.J.) with the agreement of T.S. Fernando J. whilst dismissing the appeal, had this to say:

> *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.*

In *Kalai Kumar v. Saraswathey and Others* [2005] 3 Sri LR 301, the respondent instituted testamentary action in respect of the estate of the deceased and the petitioner intervened to claim a certain land included in the inventory. This was application was refused by the District Court. Wimalachandra, J. in the Court of Appeal held at page 307:

> *In these circumstances when the accounting party (administrator or probate holder) has included a property in the inventory and prima facie if it appears to be a property not belonging to the deceased person, in my view, the District Court must hold an inquiry as to the genuineness of the claim of the petitioner. If the property does not form a part of the estate of the deceased person then it is not proper to administer the said property. Moreover, if the said property does not form a part of the estate of the deceased then the District Court has no jurisdiction to make any order with regard to that property.*

Conversely, the omission to include any property that actually belonged to the deceased in the inventory does not preclude the heirs from making a claim to that property on succession.

It was held in *Fernando v. Dabarera* (1971) 77 NLR 127:

> *When an action for declaration of title to a land belonging to a deceased person's estate is instituted by a person claiming to be a*

successor in title of the deceased, section 547 of the Civil Procedure Code does not expressly prohibit the maintenance of the action on the ground that the name of the land is not included in the Inventory filed in the testamentary action relating to the estate of the deceased owner.

The application of the law to the facts of this case

There cannot be a dispute that the plaintiff is one of the heirs of the deceased and the 1st defendant in connivance with the 2nd and 3rd defendants suppressed it in the testamentary proceedings filed to administer the estate of the deceased. She did not include in the petition the details of all the heirs of the deceased to the best of her knowledge as required by section 528. She made her husband a respondent and listed as an heir of the deceased. However, she did not make the plaintiff who is her husband's brother and the person in possession of the property a respondent and did not list him as an heir. There are several other heirs who were not made parties. The 1st defendant secured letters of administration on the false basis that the 1st defendant's husband and the 2nd and 3rd defendants are the only lawful heirs of the deceased Rupawathie and thereafter transferred the property in dispute to the said three parties by executive conveyance and registered the deed in the land registry. These are by all means fraudulent acts on the part of the 1st-3rd defendants. The defendants did not want to give evidence at the trial to rebut the allegation of fraud.

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 should constitute. Whilst section 528(1) 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.*"

While the provisions of section 528 are considered directory, not mandatory, as held in *Biyanwila v. Amarasekere* and *Pieris v. Wijeratne* [2000] 2 Sri LR 145, it is crucial to note that the Court will not countenance willful suppression of material particulars. It may be recalled that in *Biyanwila* case, Sirimane, J. at page 494 whilst stating that failure to strictly comply with section 524 (requisites of an application for probate) 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*".

Referring to the failure to name heirs as parties to the application for probate, in *Actalina Fonseka v. Dharshani Fonseka* at page 99, Kulatunga J. stated "*However, such failure is a relevant fact in determining whether probate had been obtained by fraud.*"

The argument of learned President's Counsel for the defendants that the High Court was wrong to have followed the dicta in *Adoris v. Perera* decided under the old procedure is devoid of merit. As I stated before,

when fraud is alleged, there is no difference between the old procedure and the new procedure.

In any event, the plaintiff did not file this action seeking to recall letters of administration. He filed the action seeking to cancel the executor conveyance on the ground of fraud and seeking a declaration that he is a co-owner of the property. As Lascelles C.J. stated in *Adoris v. Perera* at page 214 "*These provisions, of course, in no way effect the general jurisdiction of the Court to entertain actions to set aside judgments that are vitiated by fraud.*"

The argument of learned President's Counsel that the District Judge came to the firm finding that there was no fraud is also not correct. What the District Judge has stated in the judgment is that he who asserts fraud must prove it and not that the plaintiff has not proved fraud. The District Judge did not decide on the question of fraud on the erroneous basis that the Court had no jurisdiction to grant relief in a separate action.

Conclusion

I answer the question of law in the negative.

The judgment of the High Court of Civil Appeal is affirmed and the appeal is dismissed with costs.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., J.
I agree.

Judge of the Supreme Court

Shiran Gooneratne, J.
I agree.

Judge of the Supreme Court