

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

In the matter of an application Under
and in terms of Section 5C of the
High Court of the Provinces (Special
Provisions) Amendment Act No. 54
of 2006.

Saputhantrige Nandawathie of
No. 21, Dickman's Lane,
Colombo 05

**Original Petitioner
(now deceased)**

Case No. SC/Appeal 56/2010
WP/HCCA/Col/162/2008/LA
D.C. Colombo 29793/T

Meemanage Harold Fernando
No. 23, Dickman's Lane,
Colombo 5

Substituted Petitioner

Vs.

1. Freeda Fonseka
"Sweet Content"
Kanakarathnam Road,
Nuwara Eliya.
(Deceased)
- 1(a) Jayani Wimalarathna nee
Fonseka
- 1(b) Manoja Waliwitigoda nee
Fonseka

Both: "Sweet Content"
Kanakaratnam Road,
Nuwara Eliya.

- 2) Meemanage Herbert Fernando
No. 611, Galle Road,
Horethuduwa
Moratuwa

Respondents

And Between

Meemanage Harold Fernando
No. 23, Dickman's Lane,
Colombo 5

Substituted-Petitioner-Petitioner

Vs.

2. Freeda Fonseka
"Sweet Content"
Kanakarathnam Road,
Nuwara Eliya.
(Deceased)
- 1(a) Jayani Wimalarathna nee
Fonseka
- 1(b) Manoja Waliwitigoda nee
Fonseka
- 2) Meemanage Herbert Fernando
No. 611, Galle Road,
Horethuduwa
Moratuwa

**Substituted –Respondent-
Respondents**

And Now Between

1(a) Jayani Wimalarathna nee
Fonseka

1(b) Manoja Waliwitigoda nee
Fonseka
Both: “Sweet Content”
Kanakaratnam Road,
Nuwara Eliya.

**Substituted –Respondent-
Respondent-Petitioners**

Vs.

Meemanage Harold Fernando
No. 23, Dickman’s Lane,
Colombo 5

**Substituted –Petitioner-
Petitioner –Respondent**

Meemanage Herbert Fernando
No. 611, Galle Road,
Horethuduwa,
Moratuwa

**Respondent-Respondent
Respondent**

BEFORE

:

HON. TILAKAWARDANE, J
HON. IMAM, J
HON. PRIYASATH DEP, PC. J

COUNSEL : Mr. U.M. Ali Sabry with Lakshan Livera and Kasun Premarathne for the Appellant instructed by Ms. Anoma Somathilake.

Shibly Aziz, PC with Anita Perera and Hiran Seneviratne for the Substituted Petitioner-Petitioner-Respondent.

ARGUED AND : 04-08-2011

DECIDED ON : 29-03 2012

Justice Priyasath Dep

This appeal is from the order of the Western Province High Court exercising Civil Appellate jurisdiction setting aside the order of the District Court of Colombo in a Testamentary case bearing No. DC Colombo 29793/T.

The Appeal was taken up for hearing on 4-8-2011 and oral submissions were concluded. At the hearing the counsel agreed that the only question of law that is relevant for the judgment is as follows:

“Whether their Lordship, the Judges of the High Court have erred in law when granting relief not sought by the Petitioner –Petitioner-Respondent in the High Court, in so much as approving a purported Scheme of Distribution which was not even considered by District Judge.”

In this case the deceased Meemanage Wilfred Fernando died on 19th March 1984 without leaving a will. The Petitioner Saputantrige Nandawathi who is the wife of the deceased Meemanage Wilfred Fernando instituted proceedings in the District Court of Colombo seeking letters of administration to administer the intestate estate of her late husband. The said Meemanage Wilfred Fernando died issueless leaving following heirs.

- (1) Saputhanthrige Nandawathi- Wife (Original Petitioner)
- (2) Freeda Fonseka nee Fernando- Sister (1st Respondent)
- (3) Meemanage Herbert Fernando- Brother (2nd Respondent)
- (4) Meemanage Harold Fernando- Brother (3rd Respondent)

The letters of administration was granted to the Petitioner Saputhantrige Nandawathi who is referred to as the original Petitioner. While the Original Petitioner was away in Australia for a short period, the Public Trustee was appointed as the administrator of the estate. After her return Original Petitioner again applied for letters of administration and after a protracted inquiry she was able to obtain letters of administration. She filed the Inventory and Final Accounts on 20th October 1993.

In the course of the proceedings at different stages several parties applied to intervene in the action thus prolonging the final determination of the case. The Original Petitioner died on 09-06 1994. The 3rd Respondent Meemanage Harold Fernando, a brother of the deceased was substituted in the place of the deceased Original Petitioner. (Hereinafter he is referred to as the Substituted Petitioner)

While the proceedings were pending 1st respondent Freeda Fonseka died and her daughters Jayani Wimalarathne nee Fonseka and Manoja Waliwitigoda were substituted in the room of the 1st Respondent as 1A and 1B Substituted Respondents on 29th May 2007.

It was alleged by the 1A and 1B Substituted Respondents that after the death of their mother, the Substituted Petitioner as administrator had taken various steps in the case without taking steps to substitute the deceased 1st Respondent. It appears that the substitution has taken place on 29th May 2007, more than five years after the death of the 1st Respondent.

The substituted Petitioner as administrator filed the Final Accounts and Inventory on 12-12- 2006 and moved the court to terminate the proceedings. 1A and 1B Substituted Respondents objected to the Inventory and Final Accounts on the basis that it is contrary to the provisions of the Civil Procedure Court and it does not reflect the current market values of the properties. The learned Additional District Judge on the date fixed for inquiry directed parties to file written submissions. After considering the

written submissions filed by the parties the Learned Additional District Judge directed the Substituted Petitioner to file an amended Inventory and Final Accounts giving the market value of the properties as at the date of filing the Inventory and Final Accounts. The substituted Petitioner filed a Leave to Appeal Application in Western Province High Court of Colombo exercising Civil Appellate jurisdiction and obtained leave. The High Court after considering the written submission filed by the parties set aside the order of the Learned Additional District Judge and made further order to accept the Scheme of Distribution filed by the Substituted Petitioner and terminate proceedings.

The 1A and 1B Substituted Respondents filed a Leave to Appeal Application in the Supreme Court to set aside the order of the Western Province High Court and obtained leave. At the hearing the counsel agreed that the only question of law that is relevant for the judgment is as follows:

“Whether their Lordship, the Judges of the High Court have erred in law when granting relief not sought by the Petitioner –Petitioner-Respondent in the High Court, in so much as approving a purported Scheme of Distribution which was not even considered by District Judge.”

1A and 2B Substituted Respondents submitted that at the time the learned Additional District Judge fixed a date for inquiry pertaining to the objections to the acceptance of the Inventory, Final Accounts and Scheme of Distribution, the Scheme of Distribution was not filed of record. Therefore the Appellants did not have an opportunity to object to the Scheme of Distribution and the Court could not consider the Scheme of Distribution. The Substituted Petitioner(Administrator) disputed this fact and submitted that the Scheme of Distribution was filed of record and only the 2nd Respondent in the District Court Meemanage Hubert Fernando objected to Inventory, Final Accounts and the Scheme of Distribution. Subsequently said Meemanage Hubert Fernando withdrew his objections. The Substituted Petitioner submits that the Appellant who are the 1A and 1B Substituted Respondents in the District Court due to default, remiss or negligence failed to object to the Scheme of Distribution. In the absence of objections the court could accept the Scheme of Distribution and terminate the proceedings.

The tenor of the submissions of the 1A and 1B Substituted Respondents (Appellant) is that the Substituted Petitioner surreptitiously introduced the Scheme of distribution to the proceedings. This was denied by the Substituted Petitioner. He states that the Scheme of distribution was filed of record and 1A and 1B Respondent failed and neglected to object to the Scheme of distribution.

It is pertinent to examine the journal entries and proceedings related to years 2006 and 2007. It should be observed that this action was instituted in 1984 and there was an inordinate delay in concluding this case. It appears from the record at various stages attempts were made by parties to intervene in these proceedings and it led to the protracted litigation. According to the proceedings dated 23.05.2006 a motion was filed on behalf of the 2nd Respondent on 27-4-2006 seeking to withdraw his objections to the Inventory and Final Accounts filed by the Original Petitioner. Accordingly, Substituted Petitioner and the 2nd Respondent moved the court to accept the Inventory and Final accounts submitted by the Original Petitioner. At this stage the Learned Additional District had remarked that the Court is not aware of as to how many (number of) Inventories and Final Accounts tendered to Court. He ordered the counsel to indicate on the next date the exact date of the Inventory and Final Accounts which is to be accepted by the court. He had further remarked that If the exact date is not given it will lead to a confusion when calling for a report from the Registrar. The Counsel for the Substituted Petitioner moved for a date to submit the Scheme of Distribution. When the case was called on 25.07.2006 Counsel who appeared for the Substituted Petitioner could not give the exact date of the Inventory and Final Accounts. However the Counsel had submitted to Court that the item No 1 of the list of immovable properties should be excluded.

The Court had observed that this case is a very old case and at present in a confused state. The Court directed the Substituted Petitioner (Administrator) to file an amended Inventory, Final Accounts and a Scheme of Distribution and the copies to be handed over to the other parties and if the other parties are objecting an inquiry to be held. On the other hand if the other parties are not objecting to the said document they should file an affidavit indicating their consent. The Court had granted a final date to the Substituted Petitioner to file the Inventory, Final Accounts and the Scheme of Distribution.

On 05.01.2007 the counsel for the Substituted Petitioner filed the amended Inventory and Final Accounts and moved for time to file the Scheme of Distribution. The Scheme of Distribution was filed only on 06.03.2007. 1A and 1B Respondents had objected to the Inventory and the Final accounts. Inquiry was held in respect of this matter and after inquiry the Learned Additional District Judge upheld the objections and directed the Substituted Petitioner to file an amended Inventory and Final Accounts based on the market value as at the date of filing the amended Inventory. The substituted Petitioner appealed against the said order to the High Court. The High Court set aside the order of the Learned Additional District Judge and directed the Additional District Judge to accept the amended Inventory, Final Accounts and the Scheme of Distribution. 1A and 1B Respondents - Petitioner appealed against the said Order to the Supreme Court after obtaining leave at the first instance.

It is abundantly clear that at no stage of the proceedings 1A and 1B Substituted Respondents consented to the Scheme of Distribution. There was no affidavit filed by them indicating their consent as required by court. The fact that they did not object does not amount to consent or assent. What is required is the express consent of the parties. Further the trial judge did not have the occasion to consider the Scheme of Distribution.

It is pertinent at this stage to consider the duties and responsibilities of the administrator and the Court in testamentary proceedings. Administrator holds a fiduciary position similar to a Trustee and he is responsible for the due administration of the estate and has taken a solemn oath for this purpose. His task is to wind up the estate considering the interest of the estate of the deceased as a whole. He should pay due consideration to the rights of creditors, heirs, legatees and others having legal rights in relation to the estate.

The Court plays a very important role in regard to the administration of the estates. Chapter LIV of Part V11 of the Civil Procedure Code deals with Aiding, Supervising and Controlling Executors and Administrators and Chapter LV deals with Accounting and Settlement of the Estate. Therefore, it is the duty of the court to see that the estate is properly administered and also for that purpose had the power to control and supervise the administrators and executors either at the instance of the parties or ex mere motto. Therefore the Court is not a mere spectator in the testamentary

proceedings nor a rubber stamp. It has controlling and supervisory powers in relation to testamentary proceedings.

I have examined the Scheme of Distribution submitted by the Substituted Petitioner (Administrator) who is also an heir to the intestate estate. This Testamentary case is based on intestate succession and the assets to be distributed among the heirs. The Scheme of Distribution submitted by the Substituted Petitioner (Administrator) exclude the main asset of the estate namely the premises at No.21 Dickmans Lane, Colombo which formed part of the main property bearing assessment no 19 of Dickmans Lane. It is to be observed that the other movable assets are not of significant value. According to this Scheme of Distribution the premises bearing assessment No 21, Dickman Lane, Colombo will be distributed on the basis of the Last will of Meemanage John Fernando which was proved in the District Court of Colombo Case No 17719/ T. The said John Fernando is the father of Meemanage Wilfred Fernando, (who died intestate), Meemanage Harold Fernando (Substituted Petitioner) and Meemanage Hubert Fernando (2nd Respondent) and the grandfather of 1A and 1B Substituted Respondents.

Relevant portion of the Scheme of Distribution is given below:

“ I do hereby devise and bequeath unto my sons Meemanage Wilfred Fernando, Meemanage Herbert Fernando and Meemanage Harold Fernando an undivided one third share each in premises No. 19 Dickmans Lane Havelock Town aforesaid with a life interest in favour of my wife Meemanage John Fernando (Nawatuduwege Ceclia Silva) in premises No. 19, Dickman’s Lane aforesaid.....If any one or more of my three children entitled to premises No. 19, Dickmans Lane aforesaid shall die issueless such sons share shall devolve on the surviving issue or issues of my son or sons, entitled to premises No. 19 Dickmans Lane. If all three sons shall die issueless their share shall devolve according to the law of intestate succession”.

If this scheme is accepted the heirs who are parties to this Testamentary case will be deprived of their shares in the premises bearing No 21 Dickman’s Lane and persons who are not parties to the case will benefit from the Scheme. Although Substituted Petitioner (Administrator) and the 2nd Respondent will also be deprived of their shares in the premises their children will benefit from the scheme. The entirety of shares of the premises will be distributed among them at the expense of 1A and 1B Substituted Respondents. That is the very reason for the 2nd Respondent to accept the Scheme of Distribution introduced by the Substituted Petitioner.

I am of the view that the Scheme of Distribution introduced by the Substituted Petitioner will change the scope of the Testamentary Case and raises complex questions of law and facts.

I find that that a copy of the Last will Meemanage John Fernando was not produced in court and only an extract of the Last Will was incorporated in the Scheme of Distribution. The court is thus prevented from examining the Last Will to ascertain whether it contained a fideicommissum and if so the Abolition of Fideicommissa and Entails Act No. 20 of 1972 apply to the said will or not. The Additional District Judge is required to examine and consider these legal issues carefully before accepting the Scheme of Distribution submitted by the Substituted Petitioner.

I find that the High Court erred in law when it directed the District judge to accept the Scheme of Distribution. Therefore I set aside that part of the judgment of the Western Province High Court dated 03-02-2010 directing the District Judge to accept the Scheme of Distribution. I direct the District Judge to grant an opportunity to 1A and 1B Substituted Respondents who did not consent to the Scheme of Distribution to object to the Scheme of Distribution. If objections are submitted the District Judge is further directed to inquire into the matter and to consider objections and make an appropriate order according to the provisions of the Civil Procedure Code. This court accordingly makes order sending the case back to the District Court for further trial, to be concluded expeditiously.

Appeal allowed. No Costs.

Judge of the Supreme Court

Justice Shiranee Tilakawardene - I agree

Judge of the Supreme Court

Justice S.I. Imam- I agree

Judge of the Supreme Court

