

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

In the matter of an application for leave
to appeal

Court of Appeal No: CALA 29/2006

District Court of Colombo No: 32400/T

G.R. Pathmaraj

Intervient Petitioner-Executor-
Petitioner

Vs.

K. Gunaratnam (Original Petitioner) &
Five Others

Respondents-Respondents

Before: **Eric Basnayake J**

Counsel: Faisz Mustahpha P.C. with N.R. Sivendran and K. Pirabakaran for the Intervient Petitioner-
Executor-Petitioner

Wijedasa Rajapakse P.C. with K. Nadarajah and V. Puvitharan for 1st, 2nd, 5th and 6th
Respondent-Respondents

Romesh De Silva P.C. with Geethaka Gunawardene for the 3rd Respondent-Respondent

Written submissions tendered on: For the Intervient Petitioner-Executor-Petitioner: 11.1.2008 &
11.1.2012

For the 1st, 2nd, 5th and 6th Respondent-Respondent: 14.1.2008

For the 3rd Respondent-Respondent: 11.1.2008 & 20.12.2011

Decided on: 27.1.2012

Eric Basnayake J

The intervenient-petitioner-executor-petitioner (probate holder) filed this leave to appeal application inter alia to have the order dated 6.1.2006 of the learned Additional District Judge of Colombo set aside. By this order the learned Judge had rejected the final account dated 18.10.2005 and the inventory dated 30.11.2005 tendered by the probate holder. The learned Judge had said in the order that an application was filed by the 1st and 2nd respondent-respondents (respondents) to recall probate and he will nominate the person who should file inventory and final accounts and the scheme of distribution after considering the application to recall probate. He said that the probate holder has been given time to file objections.

The averments in the petition of the probate holder dated 23.1.2006 (filed on 24.1.2006) and the written submissions of counsel filed on 11.1.2008 & 12.1.2012

The probate holder is the eldest son of the deceased K. Gunaratnam. The deceased died on 9.8.1989 leaving behind the widow (1st respondent), two sons (probate holder and 4th respondent) and four daughters (2nd, 3rd, 5th and 6th respondents). The deceased executed last will No. 839 of 6.5.1977 wherein the widow and the probate holder had been named as Executors of the will. The 1st respondent had made an application on 24.4.1991 for probate. The probate holder having objected, probate was issued to him on 25.1.2000.

The probate holder complained that the 1st respondent had not included certain properties belonging to the deceased situated in Sri Lanka and abroad and steps have been taken to bring properties out side Sri Lanka to the case. He stated that on 24.2.2004 the learned Additional District Judge refused an application for a citation on the ground that court has no jurisdiction in respect of properties outside Sri Lanka (pg 396). The probate holder complained that on an application filed by the 1st and 6th

respondents the court made order on 18.4.2005 (pg. 412) on the probate holder to file final account on or before 18.10.2005 and to file interim accounts every month till then. In compliance with this order the probate holder had filed two interim accounts and the final account on 18.10.2005 (pg. 1215).

The probate holder states that on 16.11.2005 a motion was filed objecting to the final accounts without an affidavit to support it. On 30.11.2005 the counsel for the 1st, 2nd and 3rd respondents orally objected to the final accounts. The probate holder complained that no written objections were filed supported by an affidavit. Therefore there is no valid objection to the inventory and the final account. Without a valid objection the learned Judge could not have rejected the inventory and the final account. The final account was objected to on the ground that it contained properties of the deceased situated abroad.

On 24.11.2005 the 1st and 2nd respondents filed an application to recall probate (pg 1235). The probate holder states that the 1st, 2nd, 4th and 6th respondents had filed written objections to the final accounts on 14.12.2005 without first seeking permission of court. After inviting written submissions on the objections to the final accounts, the learned Judge on 6.1.2006 delivered his order rejecting the inventory and the final accounts. It was submitted that the said order is wrong and cannot be maintained for the following reasons, namely, that:-

- The said order is contrary to law as the learned Judge had failed to understand the volume of property belonging to the estate left out of administration.
- The learned Judge had failed to appreciate that the Executor was bound to declare in the inventory and the final accounts, details of all the assets of the deceased.
- The learned Judge has erred in the interpretation of the law relating to testamentary.
- Final accounts and the inventory were rejected in whole when there were no objections other than objections to foreign assets.
- The learned judge had considered the petition filed to recall probate to reject the inventory and the final accounts.
- When properties in foreign countries are excluded the probate holder will not be able to pursue applications to recover those properties in foreign countries.

It was submitted that a large number of properties abroad are being held by the respondents and kept-away from being brought to the testamentary case. It was submitted that if it was wrong to include foreign assets in to the inventory and final accounts the court could have deleted the foreign assets

from the inventory and the final accounts without rejecting the final account and the inventory in its entirety. It was submitted that no prejudice would be caused to the respondents by having the assets abroad included in to the inventory and final accounts.

Judge's order

The learned Judge said that he made two orders previously, namely on 24.2.2004 and 18.4.2005, giving the background in detail. He said that a motion was filed objecting to the final accounts and the inventory on 16.11.2005. The counsel for the probate holder submitted that as objections had not been filed according to law, the final account and the inventory should be accepted by court. He submitted that the motion should not be considered valid. On 24.11.2005 the 1st and the 2nd respondents filed a petition and an affidavit to recall probate. The learned counsel for the probate holder submitted that the petition to recall probate cannot be considered as an objection to the final account and the inventory.

The main objection to the final account and the inventory is that it contains assets of the deceased person in foreign countries. The learned Judge held that this fact was brought to the attention of court either formally or informally. Whether a party moves to reject the inventory and final account, in terms of section 724A (2) of the Civil Procedure Code, the court may reject an account and/ inventory if the same is found to be bad. This inventory and final accounts contained a large number of foreign assets of the deceased. The learned Judge held that to include foreign assets into the inventory and the final accounts is in violation of the order dated 24.2.2004. Therefore the learned judge said that without any hesitation he decided to reject the final accounts and the inventory.

The learned Judge further stated that the orders dated 24.2.2004 and 18.4.2005 made it abundantly clear that the assets abroad belonging to the deceased should not form part of the testamentary case. A citation sought by the probate holder was refused by order dated 24.2.2004 as the court has no jurisdiction to give orders with regard to properties in foreign countries. The court held that action could

be filed in the respective countries where the assets lie. The learned counsel in the written submissions submitted that action has now been filed in India, the United Kingdom and Australia.

The final account submitted, dated 18.10.2005, states that it is an "interim account". In other words the probate holder considers it as not final. The learned Judge had also observed that the final account does not contain a scheme of distribution. Considering Form No. 118 A to the 1st schedule the scheme of distribution is part of the final account. As this final account does not contain a scheme of distribution, that becomes another reason to reject the final accounts.

The learned Judge held that probate was granted on 25.1.2000. In terms of section 539 of the CPC an inventory should be tendered within one month of the oath. In terms of section 551 the final account should be filed within 12 months of the issue of probate. However the probate holder had been purposely postponing the filing of the inventory and the final account and the distribution of assets for more than six years (that is up to the time of this order). The probate holder had been blatantly violating orders dated 24.2.2004 and 18.4.2005. By order dated 18.4.2005 the probate holder was ordered to file the final account on 18.10.2005 and to file interim accounts monthly till then. However the probate holder had filed only two interim accounts. Thus this order had not been complied with. With this background the learned Judge had refused to order the probate holder again to file final accounts as he found that the probate holder does not obey orders of the court. Therefore the learned Judge considered it more appropriate to hear the application to recall probate and to decide thereafter as to who should submit the accounts and the inventory. It is this order the probate holder is seeking to vacate.

Submission of the counsel for the respondents

The court made order on 25.1.2000 appointing the probate holder to administer the estate. The oath of office was administered on 8.2.2000. The probate holder failed to file the inventory within one month of taking the oath as required by section 539 of the CPC. The probate holder also failed to file a final account. On 22.4.2003 the 2nd and 6th respondents filed affidavit in terms of section 718 of the CPC and moved court to direct the probate holder to file an inventory. The court made order on 24.2.2004

directing the probate holder to file inventory and final accounts on or before 24.8.2004. On 24.8.2004 the court granted time till 7.12.2004. On 7.12.2004 time was granted till 16.2.2005. On 18.4.2005 the court granted time till 18.10.2005. Until 18.10.2005 the probate holder was ordered to file an interim account every month. The probate holder filed two such accounts on 18.5.2005 and 24.8.2005. Final account was filed on 18.10.2005. However, these two accounts do not take in to account the receipts and disbursements from the date of death to the date of the account and they are not in Form 118A as prescribed by section 724A.

The learned counsel submitted that the account titled "Final Account" admittedly is not a final account as it states that it must be treated as an interim statement of account. Permission of court was sought to amend the account. The learned counsel submitted that the last will bequeathed, and devised certain movable and immovable properties to specified persons. The income therefore accrues to the respective devisees. The final account does not include separate schedules in respect of such properties showing income/expenditure.

The learned counsel also complained that the accounts referring to foreign assets and income there from are contrary to the orders of court. The learned counsel complained that the probate holder has failed to collect the dividends and monies in the banks and other dues (as per the affidavit of 14.3.2003 of the 1st respondent). The probate holder has failed to account for the rent of No. 226, Bullers Road, Colombo. The probate holder has also failed to transfer to the devisees the shares and other assets as directed in the last will and to settle the liabilities of the estate.

Could properties situated outside Sri Lanka be brought in to a testamentary case for administration?

The purpose of filing a testamentary case is to obtain authority to administer the estate of a deceased person in Sri Lanka. Any person appointed as executor may apply to a District Court when any person shall die leaving a will under which **any property in Sri Lanka is affected** (S. 517 (1) of the CPC). **When a person dies leaving property in Sri Lanka, worth more than four million rupees**, such death shall be

reported to the relevant District Court (S. 525). The power of the grant or letters of administration may extend to all properties, movable and immovable within Sri Lanka (S. 542, 543). When persons die leaving property in Sri Lanka, the procedure as to who should apply for administration is laid down (526, 527, 528 (1) & (2)). Sri Lankan courts do not have authority to administer immovable property of deceased persons situated outside Sri Lanka. When a testator dies leaving immovable property situated outside Sri Lanka, it is the court where the property is situated that would have jurisdiction and not courts in Sri Lanka. However the executors are liable to account if the proceeds of sale or income derived from the property abroad is brought to Sri Lanka by the executors (Pathmanathan vs. Thuraisingham 74 N.L.R. 196).

Section 21 of the Judicature Act grant jurisdiction to courts in Sri Lanka to appoint administrators and executors with regard to properties left testate or intestate. The section is as follows:-

21. Every District Court shall have full power and authority subject to and in accordance with the law in force for the time being-

(1) to appoint according to the law in force for the time being administrators of the estates and effects of any persons dying either intestate, or who may not by any last will or testament have appointed any executor or trustee for the administration of such estates or effects, whether such estates or effects may be within such district or any other district or districts within Sri Lanka;

(2) to inquire into and determine upon the validity of any document or documents adduced before it as and for the last will of any person who may have died leaving property in Sri Lanka and to record the same, and to grant probate thereof.

Section 21 of the Judicature Act and sections 518 of the Civil Procedure Code gives the District Court no jurisdiction to grant probate of a last will which dealt exclusively with movable property abroad (Ratnasingham vs. Tikiribanda Dassanayake and others (1998) 1 Sri L.R. 8).

The learned Judge had rejected the inventory and the final account as it contained properties abroad. The court once refused to issue a citation on the basis that the court did not have jurisdiction with

regard to properties situated outside Sri Lanka. The learned Judge stated in the order that the probate holder has blatantly violated the orders of court by bringing assets of the deceased situated abroad. The petition of the probate holder filed in this court and also in the written submissions the probate holder insists that Sri Lankan courts have jurisdiction and the probate holder is duty bound to bring those assets in to the inventory and the final accounts. The averments in the petition and the written submissions reveal the grievance of the probate holder. That is that the respondents are enjoying considerable amount of wealth belonging to the deceased in foreign countries. The probate holder is adamant that those properties should be shown in the inventory and the final accounts in order to get the respondents to account for them. The law requires the probate holder to be accountable. Furthermore a court cannot give orders while having no power to do so. In the event of violation of such a court order, it will be powerless to enforce it.

Now I would like to examine some of the provisions of the Civil Procedure Code which deal with the accountability of executors. Once the court declares any person entitled to have probate it shall be the duty of that person to file within a period of one month from the date of taking oath an inventory with a valuation (539 (1)). Within twelve months of the grant of probate the probate holder shall file a true and final account of his executorship verified on oath or affirmation, with all receipts and vouchers attached (S. 551). A creditor or any person interested in the state may by an affidavit bring it to the notice of court that an executor has failed to file the inventory and account within the prescribed period (718 (1)). Thereupon or **of its own motion if the court is satisfied that the executor is in default, the court shall make order requiring the delinquent to file the inventory and accounts and in default thereof to show cause why he should not be attached. On his failure to file such, the court shall issue a warrant of attachment and shall deal with him for contempt of Court** (718 (2) & (3) & 724A (1), (2) & (3)).

Where one year has expired since grant of probate the court may upon the application of a party or of its own motion compel a judicial settlement of the account (S. 725). The court has power to issue a citation and in the event of disobeying, to issue a warrant of attachment and to revoke the probate (Sections 726 (1) & (2), 727 (1)). He is required to produce a voucher for every payment (S. 733 & 734). Court has very wide powers and at any time may require the probate holder to file his account and to attend and be examined touching his receipts and disbursements or any other matter relating to the

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- administration (S. 735). An affidavit should be annexed to the effect that it contains a full and true statement of all the receipts and disbursements. Considering the above provisions the court need not wait until someone inquires into an application, to recall probate.

It appears that the rejection of the inventory and the final account was due to the insubordination of the probate holder. The learned Judge has given many reasons for the rejection of the inventory and the final account and it is not necessary to upset it. Therefore I am of the view that this application is without merit. Hence leave to appeal is refused with costs.

Judge of the Court of Appeal