

**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 398/2004  
District Court of Colombo No: 35481/T

Subash S.K.H. Ibulmure

Intervient-Respondent-Petitioner

Vs.

The Public Trustee

Executor-Petitioner-Respondent

Before: **Eric Basnayake J**

Counsel: Kushan De Alwis for the Intervient-Respondent-  
Petitioner

M.U.M. Ali Sabry with Ruwantha Cooray for the Petitioner-Respondent

Argued on: 30.3.2012

Written Submissions Tendered On: 6.9.2007

Decided on: 2.05.2012

Eric Basnayake J

1. The intervenient-respondent-petitioner (petitioner) filed this leave to appeal application to have the order dated 8.10.2004 of the learned Additional District Judge of Colombo set aside. By this order the learned Judge had dismissed the petitioner's application. Leave to appeal was granted by this court on 30.11.2010.
  
2. The executor-petitioner-respondent is the Public Trustee (respondent). The respondent filed action on 15.12.2000 in the District Court of Colombo seeking probate in respect of the last will of the estate of the deceased, Jayasena Weerasekera. The respondent claimed

that the deceased had left a sum of Rs.500912.34 by way of fixed deposits at The Finance Company Ltd., and a sum of Rs.3655.21 in an account at Peoples' Bank. The respondent did not make any party a respondent for the reason that the deceased did not have any relations and did not expect any objections.

3. The last will is marked "E 2". The last will was attested by A.H.T. Dayananda J.P.U.M., Attorney-at-Law and Notary Public on 9.11.1998. In this last will the deceased had devised and bequeathed all his money in fixed deposits in The Finance Company Limited, bearing numbers TEM 3594-3596 of 26.11.1997 and all monies in the current account No. 1070049233 in the Peoples' Bank, Duke Street, Colombo.
4. The certificates are as follows:-
  - a. No. 3594 for a sum of Rs. 200,000.00
  - b. No. 3595 for a sum of Rs. 200,000.00
  - c. No. 3596 for a sum of Rs. 200,000.00

Total Rs. 600,000.00

5. The respondent claimed that the deceased had left his properties in the last will to the following beneficiaries, namely:

- Buddhist Welfare Fund of the Sri Dalada Maligawa, Kandy.
- Sri Lanka Council for Blind at Church Terrace, No. 74, Colombo 2.
- Institute of Helpage, C/o People's Bank Headquarters, Colombo 2.
- Sri Ginananda Children's Home, No.1, Sri Sugatha Viharaya, Dharmarama Road, Colombo
- Saleema Wijegunawardene Home for the Elders, Riverside Road, Piliyandala.

6. On 23.5.2001 the petitioner sought an order from court under Section 544 of the Civil Procedure Code to have him declared entitled to a sum of Rs.1500000 (1.5 million) deposited by the deceased at The Finance Company Ltd. The deposit of 1.5 million

contained eight certificates including the three certificates referred to in the last will and the details of the certificates are described in the schedule to the petition dated 23.5.2001 of the petitioner. The learned Judge after an inquiry dismissed the application of the petitioner with costs. The learned Judge held that if the petitioner has a claim, he must resolve it in a separate action.

7. The case of the petitioner

The deceased died on 30.6.1999. On 26.11.1997 the deceased had deposited a sum of Rs.1500000 (1.5 million) with The Finance Company Ltd. This sum was deposited in seven fixed deposits of Rs.200000 and one Rs.100000. The petitioner claimed that he was the nominee of all the deposits. The deceased on 4.1.1998 had confirmed the nomination by a separate letter to the Manager, The Finance. The petitioner has attached copies of eight nominations dated 26.11.1997 and a copy of the letter dated 4.1.1998 marked A-1 and A-1 (a). The petitioner states that upon the death of the deceased the petitioner duly informed The Finance and requested that the monies be released to the petitioner. However these monies were not released to the petitioner as the respondent had objected. Hence the petitioner intervened in the testamentary action to get the monies in the fixed deposits excluded from the inventory.

8. The petitioner states that the Public Trustee solely objected to the monies being released to the petitioner on the ground that the signatures of the deceased have been forged. Hence on the application of the Public Trustee, to which the petitioner did not object, a commission was issued to the Examiner of Questioned Documents to examine and report the authenticity of the signatures appearing on the fixed deposits. The E.Q.D. after examining the relevant signatures with specimens confirmed that the signatures were genuine (A8).
9. Learned counsel appearing for the respondent agreed to confine his case to the three fixed deposits mentioned above amounting to Rs.600,000. Thus an order was made to The Finance Co. to release the monies together with interest on five certificates. Now the only

dispute is with regard to the three fixed deposits amounting to Rs. 600000. The respondent is claiming these fixed deposits on the basis that the monies involved in these fixed deposits have been bequeathed in the last will dated 9.11.1998.

10. The petitioner claims that a nomination had been made in his favour in respect of all the fixed deposits.
11. Section 544 of the CPC permits anyone over sixteen years of age to nominate persons in respect of monies in accounts, shares, life insurance, fixed deposits in finance companies and movable properties in bank vaults and **such monies, shares or movable property shall be delivered to the nominees on the death of the nominator. Such transfer or handing over shall be a complete discharge of the obligation of the Bank or the Institution. A nomination shall have effect upon the death of the nominator notwithstanding anything to the contrary in his last will.**

Section 544 is as follows:-

**12. Any person over sixteen years of age who has-**

- i. ((a),( b), ( c ) not reproduced)
- ii. **(d) any money in deposit in any finance company registered under the Finance Companies Act, No. 78 of 1988 may nominate a person (nominee) to whom such monies....lying to the credit of....(nominator) shall be paid or transferred upon his death.**
- iii. (e) (f) not reproduced
- iv. **(2) A nomination made under subsection (1) shall have effect upon the death of the nominator notwithstanding anything in his last will to the contrary.**
- v. (3), (4) not reproduced
- vi. **(5) The handing over, or transferring of, any money, share certificate or deposit certificate or other movable property to any nominee of a nominator who has died, shall be a complete discharge of the obligations of the Bank or institution, in respect of the money, or other movable property, lying to the credit of, or in the name of, such nominator, or under such insurance policy (emphasis added).**

13. In the event of a nomination being made such deposit certificates should not be included in to the “estate” of the deceased. The respondent had included a sum of Rs.500912.34 as the value of fixed deposits with The Finance Company. Thus the respondent had clearly violated the provisions of Section 544 (2) which is as follows:-

a. 554 A (1) Not reproduced.

(2). For the purpose of proceedings under this Chapter “estate” and “property” of any deceased person shall be deemed not to include-

(a) Not reproduced.

(b) the monies represented by any share certificates and **deposit certificates** issued by any institution and remaining in the name of such deceased at the time of his death; if he had made a nomination in respect thereof under subsection (1) of section 544;

14. The learned Judge has held that the claim of the petitioner cannot be considered at this inquiry. Allowing the petitioner’s claim would open flood gates for action within an action. The learned Judge has relied on several judgments, namely, De Silva vs. Gomes 30 N.L.R. 249, Pathmanathan vs. Thurasingham 74 N.L.R. 196 and Rosalin vs. Heart 65 C.L.W. 55. In De Silva vs. Gomes the respondent was a creditor of the estate. He applied to the administrator for the payment of the debt which he alleged was due to him, but the administrator was not prepared to pay without a court order. The respondent applied to court for an order of payment. The court held that since the administrator was not prepared to pay, the creditor should file a separate action.

15. In Pathmanathan’s case the Supreme Court held that the disputed claim should not be adjudicated upon in an inquiry relating to a judicial settlement and should establish the claim in a separate action. The court held that it is practically impossible for a Judge to hear disputed claims by creditors in proceedings for a judicial settlement of accounts. Even a single disputed claim may involve a complicated trial. 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 property in order to recover testamentary expenses

incurred by her. Rosalin Nona intervened and objected. However the objections were dismissed. H.N.G. Fernanado J (later Chief Justice) held that if an administrator claims any property as being the property of the estate, the court does not in testamentary proceedings have jurisdiction to determine disputes as to title between the administrator and third parties. The appellant had no right to call upon the court to adjudicate upon their claims of unencumbered title to the lands in question.

16. In the cases mentioned above the properties were in the custody of the administrator and if any claim preferred was disputed by the administrator the creditors had to file separate action to recover.
17. However section 544 of the CPC refers to monies etc., lying with persons other than the administrator. Section 544 specifically refers to deposits in finance companies where the testator could propose a nominee. The Act makes provision for those companies to deliver property to the nominee on the death of the nominator and get themselves discharged from the obligation. If that is the case why should a nominee file an action to recover the money? Action could be filed if the nominee is refused payment. In this case payment was withheld at the instance of the Public Trustee. If the Public Trustee is disputing the claim of the nominee, the Public Trustee could bring an action against the nominee and the finance company. There is no necessity for the nominee to file action against the Public Trustee.
18. The law makes it easier for the nominee to recover money after the death of the nominator. Provision is made for the custodian to respect the wishes of the nominator and pay after the death of the nominator. The nominee has to make a claim from the person in whose custody the property lies. The nominee has to prove his identity to the custodian. He has to satisfy that he is the one in whose favour the nomination was made. The custodian may refuse payment if the custodian is not satisfied with the bona fide of the claim.
19. In this case the custodian, namely, The Finance Company had written to the District Court confirming the nomination (A2 (a)). The petitioner filed eight photocopies of

documents claiming them to be the nominations. These documents are dated 26.11.1997. It appears that the learned Judge had made his order ignoring the unambiguous provisions of law according to which certificates of deposit with a nominee cannot be part of the estate of the deceased. Therefore I set aside the order dated 8.10.2004 and allow this appeal. Under the circumstances of this case I do not award costs. However the petitioner is entitled to withdraw all eight certificates together with interests. The appeal is allowed.

Judge of the Court of Appeal