IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

W.Don Somaratne
No.73, Kesbewa Road,
Boralesgamuwa.
Deceased 1st Defendant-Appellant

S.Srimathi Dias,
No.25, W.M.P.Jayawardena Mawatha,
Borelesgamuwa
Substituted-1st Defendant-Appellant

C.A.No.25/94 (F) **Vs.**
D.C.MT.LAVINIA CASE NO.399/SPL

N.Thilakaratna
No.4, Pragathi Mawatha,
Boralesgamuwa
Plaintiff-Respondent

2. W.Dona Ariyawathie
3A. K. Sompala Perera and others
All of No.1/16, Kesbewa Road,
Borelesgamuwa

Defendant-Respondents

BEFORE : **K.T.CHITRASIRI, J**

COUNSEL : Gamini Marapane P.C.with Keerthi Sri Gunawardane, Navin Marapana and Harshula Seneviratne for the substituted 1st Defendant-Appellant

Ms.J.R.Rajapakse for the Plaintiff-Respondent

ARGUED ON : 18.11.2013

WRITTEN SUBMISSIONS FILED ON : 04th November 2013 by the substituted 1st Defendant- Appellant
04th November 2013 by the Plaintiff-Respondent

DECIDED ON : **04.03.2014**

CHITRASIRI, J.

In this appeal, the 1st defendant-appellant (hereinafter referred to as the appellant) sought to set aside the judgment dated 9th February 1994, wherein the learned District Judge of Mt.Lavinia made order to recall the Probate issued in the Testamentary Case bearing No.520/T. In that testamentary case, said Probate had been issued in the name of the appellant and the effect of which is now been nullified pursuant to the judgment which has been appealed against by having lodged this appeal.

The aforesaid Testamentary Case 520/T had been filed by the appellant to prove a Last Will of the late G.Alice Perera who was the mother of the parties to this action. (P16 - vide at page 295 in the appeal brief) The said Last Will bears the No.24165 and it was executed by Charles Boteju on the 18th February 1970. The Plaintiff-Respondent (hereinafter referred to as the respondent) becoming aware of the

issuance of the said Probate, filed this action in the District Court to have the Probate issued to the appellant, recalled on the ground of fraud practiced upon Court, which relief was granted by the learned District Judge. Being aggrieved by the said decision, the appellant preferred this appeal.

Therefore, the issue in this appeal is to ascertain whether the learned District Judge is correct in recalling the Probate issued in favour of the appellant. In paragraph 8 of the plaint filed by the respondent, she has averred several reasons upon which she alleges that fraud has been committed by the appellant when obtaining probate. However, when the issues were framed at the trial stage, the respondent has basically raised the following matters (issue No.2) in order to establish fraud on the part of the appellant.

- ✓ Failure on the part of the 1st defendant-appellant to disclose the pendency of the testamentary action bearing No.478/T in the case 520/T filed by him though he was aware of filing Testamentary action 478/T prior to the filing of his action 520/T;
- ✓ Failure to serve summons on the plaintiff-respondent though she was in Sri Lanka at all material times; and
- ✓ Failure to make one of the daughters namely Siriyawathie of the deceased Alice Perera, a party to the testamentary action 520/T and thereby failing to give her the notice of filing of the said

testamentary action despite the fact that she is one of the daughters of the late Alice Perera.

Learned District Judge accepted those allegations as correct and has concluded that there had been fraud practiced upon the Court and made order recalling the Probate issued in case 520/T. Then the issue is to ascertain whether the learned trial judge is correct when he decided that those matters alleged by the 1st defendant-respondent would amount to practicing fraud upon the Court.

It is settled law that a Probate can be recalled by filing a separate action and also upon proving fraud practiced upon the Court. This position in law had been upheld in cases including that of:

- **Tissera v. Gunatillaka [13 NLR 261]**
- **Adoris v. Perera [17 NLR at 212]**
- **Gunasekara v. Gunasekera [41 NLR 351]**
- **Actalina Fonseka v. Dharshani Fonseka [1989 (2) SLR 95]**

In the case of Adoris V. Perera, (supra) it was held:

> *"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."*

In this instance, the appellant has filed a separate action to recall the Probate and therefore it is clear that the appellant has observed the law referred to in the decisions mentioned above when he filed this action separately to the testamentary case in order to have the judgment in that testamentary case 520/T vacated.

In the case of Actalina Fonseka V. Dharshani Fonseka (supra) Kulatunga J. quoting from Monir's "The Principles and Digest of the Law of Evidence", has stated thus:

> *"Whether the decree is void and may be set aside would depend on the totality of the evidence in the case and any such decision would have to take into account the entirety of the rules applicable in this sphere. The relevant principles have been fully stated in Monir (14th Edition) pages 634 – 641.*
>
> *The most salient principles are as follows:-*
>
> *(a) In order to get rid of a former judgment it is not sufficient for a person to prove constructive fraud, he must prove actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and the obtaining of that judgment by that contrivance.*
>
> *(b) Fraud must be extraneous to the decree, it must be fraud vitiating the proceedings in which the decree was passed. The*

decree should have been obtained by fraud practiced upon the Court.

(c) *It must be a fraud that is extrinsic or collateral to everything that has been adjudicated upon and not such as has been or must be deemed to have been dealt with by the Court.*

(d) *It is not possible to show that the Court in the former suit was mistaken, it may be shown that it was misled. In other words where the Court has been intentionally misled by the fraud of a party and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment.*

(e) *The decree cannot be set aside merely on the ground that it has been procured by perjured evidence. It is not sufficient to allege that the judgment was obtained by false evidence as the judgment sought to be vacated must be taken to have decided the question whether the testimony of any witness was true or false and whether the document produced in evidence was genuine or not.*

Accordingly, I will now consider whether the learned District Judge has evaluated the evidence in the manner as described by Kulatunga J in Actalina Fonseka V. Dharshani Fonseka (supra) when he concluded that the matters alleged by the plaintiff-respondent would amount to committing fraud upon the Court. Hence, I have no option than to consider the evidence in relation to those matters alleged by the plaintiff-

respondent to ascertain whether those would constitute fraud practiced upon the Court.

It was alleged that the appellant has failed to disclose the pendency of the testamentary case 478/T, filed by the plaintiff-respondent when he instituted the action 520/T. Admittedly, the testamentary case 478/T had been filed in the year 1980 and the case 520/T was filed in the year 1981. Case 520/T had been filed a few months after the institution of the action 478/T. However, the order to make the publication of notice in order to give notice to the public as to the filing of the action 478/T had been made only on the 29th November 1982. Therefore, it is clear that the date of publication of notice in 478/T by which the notice to the public was given as to the filing of 478/T had been made only on a date long after the institution of the action 520/T. Indeed, it is a date even after the conclusion of the case 520/T, which was in the month of February 1980.

Therefore, the appellant could not have known the fact of filing the action 478/T unless he was made a party to that action or by any other means acceptable to Court. Significantly, the appellant was not made a party in the case 478/T though he is a child of the late Alice Perera. (*Vide at page 272 in the original record).* In support of this fact, the very first petition filed in the said Case 478/T, had been marked in evidence as P12. Furthermore, the appellant in his evidence has stated that the filing

of the action 478/T was made known to him only after the respondent told him about the action. (*Vide proceedings at pages 163 & 164 in the original record*). Therefore, it is clear that there was no opportunity for the appellant to become aware of filing the action 478/T at the time he filed the testamentary case 520/T.

Those matters have not been looked at by the learned District Judge. Had he considered the matters referred to above, he would have realized that the appellant could not have become aware of a previous testamentary action for him to mention the pendency of that action in the testamentary case 520/T which he filed subsequently. Therefore, it is seen that the learned District Judge has misdirected himself when he decided that the appellant has purposely concealed the pendency of the case 478/T in the District Court when filing the testamentary case 520/T.

The next issue is the failure to serve summons on the respondent though she was in Sri Lanka at all material times and thereby failing to give notice to the respondent of filing the action 520/T. Clear evidence is available to show that she was not in Sri Lanka during the period that the summons was issued on her Power of Attorney holder. The officer from the Immigration & Emigration Department has clearly stated that the respondent was away from the country during the period commencing from 26th July1979 up to 25th July 1982. The passport of

the respondent also was produced in evidence. Having perused the entries made in the passport, the aforesaid witness from the Immigration & Emigration Department has clearly stated that she was not in the country during the said period. (vide proceedings at page 58 in the appeal brief) Hence, it is incorrect to state that the respondent was present in the country at all material times for the appellant to serve notice Defendant- Appellant on her.

However, the respondent been a party to the action, the appellant should have taken steps to give notice of filing the action 520/T to the respondent. According to the appellant, such notice was given to the respondent by having served the notice to her Power of Attorney holder. Serving summons to the power of attorney holder had been admitted if not accepted by the respondent herself in paragraph 8(C) found in her plaint. The aforesaid paragraph 8 (c) reads thus:

> "8.(ඉ) පැමිණිලිකාරිය මෙම රටේ ඉන්නා බව දැන දැනම ඕනෑ කමින්ම සහ ව්‍යාජ ලෙස ඇයගේ ඇටර්නි බලකරු හට නොතිසි භාරදී ඇති බවත්, කෙසේ වෙතත් එම භාරදීම නීත්‍යානුකූල නොවන බවත්, පෙන්වා දීම සම්බන්ධව ඉදිරිපත් කර ඇති දිවුරුම් ප්‍රකාශය නීතියෙන් පිළිගත හැකි එකක් නොවන බවත්, "

[vide at page 30 in the original record]

The respondent has not denied serving notices on her Power of Attorney holder. Furthermore, the original of the Power of Attorney given

to K.Premasiri which bears the No.548 and dated 21.05.10980 also had been marked P11 in evidence.

Accordingly, it is clear that the respondent has admitted that the notice of filing action 520/T was given to her Power of Attorney holder. Such delivery of notice to the Power of Attorney holder amounts to giving notice to the principal who is the respondent in this appeal. Therefore, it is incorrect to state that no proper notice was given to the respondent as to the institution of the testamentary case 520/T.

The next issue is the failure to give notice of filing the action 520/T, to one of the daughters namely Dona Siriyawathie of the deceased Alice Perera, she being a daughter of the maker of the Will. It is correct to state that the name Dona Siriyawathie is not found in the caption to the petition filed in 520/T in order to give notice of filing of the same. However, an address is found in that caption without a name been typed in front of the said address but in that same caption, there are six other persons named as respondents instead of Dona Siriyawathie. The reason as to why those names been cited in the caption is explained in paragraph 6 found in the petition filed in the case 520/T. In the said paragraph 6, it is stated that the whereabouts of Siriyawathie Alwis is not known and therefore her husband and the children have been named as the 3rd to 8th respondents. The said paragraph 6 of the petition filed in 520/T reads as follows:

"6. ඉහත කී සිරියාවතී අල්විස් දැනට සිටින තැනක් හෝ ආගිය තැනක් හෝ ජීවතුන් අතර සිටිනවාද නැද්ද යන වග හෝ නොදන්නා අතර, ඇය වෙනුවට ඇයගේ නීත්‍යානුකූල ස්වාමි පුරුෂයා වන නලින් අල්විස් සහ ඇයගේ බාලවයස්කාර දරුවන් වන (4) සිට (8) දක්වා වගඋත්තරකරුවන් නම් කර ඇත. මෙ බාලවයස්කරුවන්ගේ නඩු භාරකරු වශයෙන් ඔවුන්ගේ පියා වන එකී නලින් අල්විස් පත් කිරීමට සුදුසු තැනැත්තෙකි. "

[vide page 297 in the original record]

Similarly, even in the affidavit filed with the petition in 520/T, the name of Siriyawathie does not appear in the caption but her name has been disclosed in paragraph 7 thereto as a daughter of the late Alice Perera. Therefore, it is abundantly clear that there had been a valid reason for the appellant not to make Siriyawathie a party to the testamentary action 520/T.

Those material facts have not been looked at by the learned District Judge when he decided that Siriyawathie was not made a party in the testamentary action 520/T. Had he referred to those facts found in the petition and in the affidavit filed in 520/T, he would have realized the reason as to why her name is not appearing in the caption in 520/T.

The matters referred to above in this judgment show that the learned District Judge is incorrect to have decided that there had been fraud practiced upon the Court. As discussed in the case of Actalina Fonseka V Dharshani Fonseka, basically there shall have proof of actual and positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and the obtaining of that judgment by that contrivance, if one needs to establish practicing fraud upon Court, in order to have a judgment vacated. In this instance, the circumstances alleged by the respondent do not even indicate such a fraud committed by the appellant. Therefore, the plaint of the respondent should have been dismissed by the learned trial judge.

In the circumstances, it is clear that the matters advanced by the respondent to establish fraud, do not capable of establishing, committing fraud by the appellant. Therefore, it is my considered view that the learned District Judge has misdirected himself when he decided that there had been fraud practiced upon Court for the reasons set out in paragraph 8 in the plaint filed in this case.

For the aforesaid reasons, I set aside the judgment dated 9th February 1994 of the learned District Judge of Mt. Lavinia and allow the appeal of the appellant. The plaint of the plaintiff-respondent dated 3rd

July 1986 is to stand dismissed. Learned District Judge is directed to enter decree accordingly.

I make no order as to the costs of this appeal.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL