

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

In the matter of an Appeal under Section  
753 of the Civil Procedure Code.

Disaanayake Mudiyansele Disanayake,  
Gamage Kade Road,  
Damanevaya.

**Petitioner**

**C.A. Case No: CA 570/97(F)**

**D.C. Polonnaruwa No. 41 T**

**Vs.**

Disaanayake Mudiyansele Dasanayake,  
Tag 04, Yaya 04,  
Bakamuna.

**Respondent**

**AND NOW BY AND BETWEEN**

Makalanda Malkanthi

Tag 04,

Yaya o4,

Bakamuna.

**Respondent – Appellant**

Disaanayake Mudiyansele Dasanayake,

Tag 04,

Yaya o4,

Bakamuna.

**Plaintiff – Respondent**

Disaanayake Mudiyansele Dammatissa

Disanayake,

Gamage Kade Road,

Damaneyaya.

**Substituted Plaintiff - Respondent**

**BEFORE** : P.W.D.C. JAYATHILAKE, J

**COUNSEL** : K. Suriyarachchi for the Appellant.

Buddika Gamage for the

Respondent.

**ARGUED ON** : 03.12.2014

**DECIDED ON** : 01.06.2015

**P.W.D.C. Jayathilake, J**

This is an appeal against the order dated 23.04.1997 made by the District Judge of Polonnaruwa pronouncing that the last will filed in the case had been made properly. The Petitioner Respondent has filed this Testamentary Action moving to issue probate to the Petitioner in accordance with the last will filed

with the petition. It appears that the property subjected to the last will is only two lands given to the testator on state grants. By the last will the testator has nominated the Petitioner as the successor to those two lands.

The Respondent Petitioner has filed objections raising the following matters. The last will is not an act of the testator as the testator was not in his proper sense during the period that includes the date of attestation of the last will. It has been raised in addition to the above, that the title of the property subjected to the conditions of the state grant cannot be transferred by way of a last will.

The learned District Judge has made the above mentioned order after the inquiry in which the evidence had been led for the Petitioner and the Respondent. Anyhow, the learned District Judge has not made any directive to issue probate in the said impugned order.

The evidence reveals that the Respondent Appellant was the nominated successor to the state grants and by the last will in question the testator has nominated the Petitioner as the successor to those properties.

On perusal of the relevant state grants, it is clear that the title given by the grant is subjected to the conditions stipulated in the grant itself. One of the

conditions is that the grantee cannot transfer the title without sanction of the District Secretary.

Therefore, a question crops up whether cancellation of the nomination of a successor of the state grant and/or a new nomination could be made by way of a last will. It seems that the learned District Judge has left the decision over the above question to the District Secretary by only pronouncing his decision that the last will had been made properly.

This court is of the view that the said question should have been addressed by the District Judge as it cannot be considered as an administrative decision, but a legal one which should have been adjudicated by court. Obviously, the District Judge has not bothered about framing issues of the inquiry nor has he answered issues.

It is not the duty of the Court of Appeal to answer issues of the case as Appellate Court Judges do not put themselves in shoes of original court judges in exercising the Appellate Jurisdiction.

This is an action filed in the year 1997 and the impugned order had been made in the same year. This appeal before this court had been pending for eighteen years. Therefore, it appears that sending back this case for a fresh hearing is something awkward. Nevertheless, when considering the facts and

circumstances of this case, I am of the opinion that there is no alternative other than sending the case back for a fresh inquiry. Therefore, I set aside the order of the District Judge dated 23 .04.1997 and order a fresh inquiry.

*Fresh inquiry ordered.*

**JUDGE OF THE COURT OF APPEAL**