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

CASE NO: CA/512/2002/LA

DC COLOMBO CASE NO: 34200/T

1. M.L.C. Caderamenpulle (deceased)

1A. Joseph Romesh Sherhan Caderamenpulle,
No. 33, Booran Road,
Victoria 3162,
Australia.

2. D.G.M. Caderamenpulle (deceased)

2A. Mary Effegenia Caderamenpulle,
No. 34, Maligawa Road,
Etul Kotte.

2B. Dilly Michelle Eleanor Chandra,
No. 30, Wildoer Drive,
Aspendale Garden 3195,
Victoria, Melbourne,
Australia.

2C. Dinesh Delano Michael Caderamenpulle,
No. 3423, Spirea Terrace,
Missisauya,
ONL5N7N4,
Toronto,
Canada.

3. J.M.C. Caderamenpulle
No. 171, St. James Street,
Colombo 15.
Original Petitioners

A.J.M.V. Caderamenpulle,
No. 171, St. James Street,
Colombo 15.
And also of No. 25,
Copthorn Gardens,
Horn Church,
Essex, United Kingdom
Intervenient Petitioner

AND NOW

M.L.C. Caderamenpulle
1st Petitioner (deceased)
Joseph Romesh Sherhan Caderamenpulle,
No. 33, Booran Road,
Victoria 3162,
Australia.
1A Petitioner-Petitioner-Petitioner
D.G.M. Caderamenpulle
2nd Petitioner (deceased)
Mary Effegenia Caderamenpulle,
No. 34, Maligawa Road,
Etul Kotte.
2A Petitioner- Petitioner-Petitioner
Dilly Michelle Eleanor Chandra,
No. 30, Wildoer Drive,
Aspendale Garden 3195,
Victoria,
Melbourne,
Australia.
2B Petitioner-Petitioner-Petitioner

Dinesh Delano Michael Caderamenpulle,
No. 3423, Spirea Terrace,
Missisauya, ONL5N7N4,
Toronto, Canada.
2C Petitioner-Petitioner-Petitioner

V.

J.M.C. Caderamenpulle
No. 171, St. James Street,
Colombo 15.
3rd Petitioner-Respondent-Respondent

A.J.M.V. Caderamenpulle,
No. 171, St. James Street,
Colombo 15.
And also of No. 25,
Copthorn Gardens,
Horn Church,
Essex, United Kingdom
Intervenient Petitioner-Respondent-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: Nihal Fernando, P.C., with Rajindra Jayasinghe for the 1A, 2A-2C Petitioners-Petitioners-Petitioners.

3rd Original Petitioner-Respondent-Respondent and Intervenient Petitioner-Respondent-Respondent are absent and unrepresented.

Argued on: 01.06.2018

Decided on: 14.06.2018

Samayawardhena, J.

The Last Will was declared proved and admitted to probate. The Probate was issued jointly to the three original petitioners. Thereafter, the 3rd original petitioner and the intervenient petitioner made applications by way of petition and affidavit under section 537 of the Civil Procedure Code to recall the Probate already issued alleging various grounds and to issue the same in the name of both of them. The 1st and 2nd petitioners filed objections to this application but did not participate at the inquiry and the Court on 28.01.2000 allowed the said application of the 3rd petitioner and the intervenient petitioner *ex parte*. Thereupon the 1st and 2nd petitioners filed an application on 23.07.2001 seeking to set aside the said *ex parte* order dated 28.01.2000 and to recall the Probate issued jointly to the 3rd petitioner and the intervenient petitioner and to issue the same in the name of the 1st and 2nd petitioners. The 3rd petitioner and the intervenient petitioner filed objections to that application and after the inquiry concluded by way of written submissions, the District Court by order dated 20.11.2002 refused the application of the 1st and 2nd petitioners. It is against this order the 1st and 2nd petitioners filed this appeal with leave obtained.

The District Judge has basically refused the application of the 1st and 2nd petitioners on the premise that without first making an application to purge default, they cannot seek any substantive relief. That order, in my view, is flawless.

Whether the procedure is regular or summary, it is well settled law that a default judgment or order cannot be canvassed on merits before the District Court or before this Court on appeal (unless the defaulter first purges default). The only exception is a revision

application filed before this Court. (*Mrs. Sirimavo Bandaranayake v. Times of Ceylon Limited*[1], *Arumugam v. Kumaraswamy*[2]) Here the portion "unless the defaulter first purges default" was added within brackets for the purpose of better understanding the principle, but in fact, that part is redundant because if the defaulter is successful in purging default, the judgment or order will automatically be set aside regardless of its merits.

There cannot be any dispute that the 1st and 2nd petitioners in their application dated 23.07.2001 did not plead in the prayer to purge their default, but pleaded to set aside the *ex parte* order on merits.

It is the submission of the 1st and 2nd petitioners that the earlier order of the District Court dated 28.01.2000 is *per incuriam* because the summary procedure as stipulated in section 538 of Civil Procedure Code has not been followed when recalling the Probate and therefore the question of purging default does not arise as a *per incuriam* order is a nullity *ab initio*.

It is noteworthy that the 1st and 2nd petitioners did not take up such a position in their objections filed before the District Court prior to the said order dated 28.01.2000 was made. Their objections were based on the merits of the matter and not on the procedure. They took up such a position for the first time in their application dated 23.7.2001 made more than 1 ½ years after making the first order.

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[1] [1995] 1 Sri LR 22 at 34-35

[2] [2000] BLR 55

Unlike in a situation where there is patent or total want of jurisdiction, when the Court has plenary jurisdiction to deal with a matter and the question is invoking such jurisdiction in the right manner, a party cannot keep silent and take up such an objection as to procedure, if the final order is made against him. That is against the law and against common sense. Any objection as to latent or contingent want of jurisdiction shall be taken at the first available opportunity—vide section 39 of the Judicature Act, No. 32 of 1978, as amended. (*Navaratnasingham v. Arumugam*[3]) Long silence in that context amounts to waiver or acquiescence. (*Ranin Kumar, Proprietor, Messrs Pharma Chemie v. State Pharmaceutical Corporation*[4])

It is only if want of jurisdiction is patent, the matter can be raised at anytime, even for the first time in appeal, and in which event, the whole proceedings including the Judgment pronounced become a nullity *ab initio* due to *coram non judice*. Parties cannot confer jurisdiction to Court where none exists, and no amount of silence or acquiescence can cure that defect. (*Beatrice Perera v. The Commissioner of National Housing*[5]*, Colombo Apothecaries Ltd. v. Commissioner of Labour*[6]*, Ittepana v. Hemawathie*[7]*, State Timber Corporation v. Moiz Goh Pte Ltd*[8]*, Malegoda v. Joachim*[9]*)*

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[3] [1980] 2 Sri LR 1 at 5-6

[4] [2004] 1 Sri LR 276 at 281

[5] (1974) 77 NLR 361 at 366-370

[6] [1998] 3 Sri LR 320 at 325-327

[7] [1981] 1 Sri LR 476 at 483-484

[8] [2002] BLR 275 at 284-288

[9] [1997] 1 Sri LR 88 at 91

In *Dabare v. Appuhamy*[10] the defendant's objection to dismiss the plaintiff's action on *res judicata* was overruled. On appeal by the defendant, the plaintiff submitted that the dismissal of his former action was invalid as the judge in the former case followed the wrong procedure in that instead of summary procedure, regular procedure was followed. At that time, the plaintiff had not taken objection to the wrong procedure being followed. This Court rejecting that argument and allowing the appeal stated that notwithstanding the former judge had followed the wrong procedure, the order of dismissal made by him was valid since he had jurisdiction to hear and determine the action and the plaintiff did not take objection to the wrong procedure being followed at that time.

Hence the submission of the 1st and 2nd petitioners that the former order dated 28.01.2000 is a nullity as the proper procedure was not followed is not entitled to succeed.

In any event, the reason why the 1st and 2nd petitioners say that the summary procedure was not followed is that the 3rd petitioner and the intervenient petitioner "*did not obtain an order nisi in the first instance and have the same served on the 1st and 2nd petitioners*".

There is no compulsion to obtain order *nisi* under summary procedure as section 377 of the Civil Procedure Code provides for either obtaining (a) an order *nisi* or (b) an interlocutory order appointing a day for the determination of the matter. Here the Court has acted under (b) above even though it does not expressly state so.

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[10] [1980] 2 Sri LR 54

The next question is whether it is mandatory to serve the said order on the 1st and the 2nd petitioners as stated in section 379 of the Civil Procedure Code. After the application was supported in open Court, the Attorney at Law of the 1st and 2nd petitioners had moved for a date to file objections and did file the same on a subsequent date. Seeking for an adjournment to file written objections in that backdrop is not obnoxious to the summary procedure. (*Rajenda v. Parakramas Ltd*[11]) Under those circumstances, there is no compulsion to go through the prescribed formality and serve a copy of the order on the 1st and 2nd petitioners. (*Amarasinghe v. Weeratna*[12])

Another complaint of the 1st and 2nd petitioners is that no notice was served on them before the matter was fixed for the inquiry. This is absolutely not necessary. After the objections were filed they should know that the next step would be the inquiry, and it is incumbent on their part, being the original petitioners as well as the probate holders, to keep track of the case not only to oppose this application for recalling the Probate, but also to take mandatory steps including presentment of the Final Account in accordance with law.

If the respondent does not appear on the date of the inquiry, the Court can, in terms of section 383 of the Civil Procedure Code, make the final order. The respondent in that event can, in terms of section 389 of the Civil Procedure Code, make an application within a reasonable time after passing of such order to purge default. No such application has been made by the 1st and the 2nd petitioners.

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[11] (1962) 63 NLR 553

[12] (1943) 44 NLR 383

The application of the 1st and 2nd petitioners dated 23.07.2001 is misconceived in law. The impugned order of the District Judge dated 20.11.2002 is correct. The appeal is dismissed with costs.

Judge of the Court of Appeal