

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

In the matter of an Application for Leave to Appeal  
under Section 754(2) of the Civil Procedure Code.

In the matter of the Last Will and Testament of  
Ruwanpura Deepal Chulanie De Silva

No. 21/1, Buller's Lane,  
Colombo 07.

Deceased

**Shivanthimala De Silva**

In the Will referred to as "Shivanthimala"

No. 21/1, Buller's lane,  
Colombo 07.

PETITIONER

In the matter of an Application for Intervention  
to file objections to the final accounts and the  
inventory of the testamentary case.

1. Mawathage Sita De Silva
2. Ruwanpura Suranganal Manourie De Zoysa *nee*  
De Silva

Both of No. 34, Dickman's Road,  
Bambalapitiya,  
Colombo 05.

INTERVENIENT-PETITIONERS

-Vs-

C.A. L.A. Application No.  
219/2005

D.C. Colombo Case No.  
36154/T

**Shivanthimala De Silva**

In the Will referred to as "Shivanthimala"

No. 21/1, Buller's lane,

Colombo 07.

**PETITIONER-RESPONDENT**

**AND NOW**

1. **Mawathage Sita De Silva**

2. **Ruwanpura Suranganal Manourie De Zoysa *nec*  
De Silva**

Both of No. 34, Dickman's Road,

Bambalapitiya,

Colombo 05.

**PETITIONER-PETITIONERS**

**-Vs-**

**Shivanthimala De Silva**

In the Will referred to as "Shivanthimala"

No. 21/1, Buller's lane,

Colombo 07.

**PETITIONER-RESPONDENT-RESPONDENT**

**BEFORE**

**A.H.M.D. Nawaz, J.**

**COUNSEL**

Jacob Joseph with Sandamali Madurawala for the  
2<sup>nd</sup> Petitioner-Petitioner

Navin Marapana for the Respondent



Decided on

08.01.2019

A.H.M.D. Nawaz, J.

The 1<sup>st</sup> and 2<sup>nd</sup> Petitioner-Petitioners (hereinafter referred to as the "Petitioners") preferred an application for leave to appeal against the order of the learned District Judge of Colombo dated 27.05.2005 by which the court did not allow the Petitioners to intervene in the action. This Court granted leave to the Petitioners against the said order which rejected their application to intervene in the testamentary action.

The probate had already been issued to the Petitioner-Respondent-Respondent (hereinafter referred to as the "Respondent") as far back as 19.11.2003 when the Petitioners sought to intervene by way of their application dated 10.03.2004. In the prayer to the petition for intervention these Petitioners had prayed for the following reliefs:-

- a. they should be added as Respondents to the testamentary action;
- b. an amendment must be made to the inventory filed in the case, limiting the share of the deceased in the properties itemized at 4, 5, 6, 7, 8, 9, 10, 11 and 12 to only 9/80 shares;
- c. the balance shares in the properties belong to them and therefore should be excluded from the inventory;
- d. both Petitioners must be paid sums of Rs. 4,329,375/- and Rs. 5,000,000/- respectively;
- e. vehicle bearing No. EL 9170 must be excluded from the inventory and an order be made that the said vehicle be handed over to 1<sup>st</sup> Petitioner.

The Respondent filed objections to the application for intervention and raised *inter alia* a preliminary objection that an application of this nature and orders sought from the District Court by the Petitioners would not come within the purview of a testamentary action and as such the application for intervention must be rejected ought to be rejected *in limine*. The gist of the objection for intervention was that a claim with regard to title to

property included or not included in an inventory in the testamentary action, cannot be made a subject of adjudication in a testamentary action. After inquiry the learned Additional District Judge upheld the objection raised by the Respondent and directed the Respondent to file the final accounts and scheme of distribution to court.

The order dated 27.01.2005 states that the court would accept the inventory subject to the judgment in *Balapitiya* Case No. 2003/L. In other words the Petitioners have admittedly filed a *rei vindicatio* action in respect of the same dispute in District Court of *Balapitiya*. It would be pertinent to observe that in the application to intervene made by the Petitioners, they were seeking to challenge the title of the deceased testator in respect of nine lands included in the schedule to their petition dated 11.03.2004. If the Petitioners have admittedly filed a *rei vindicatio* action in respect of the same dispute in *Balapitiya*, a successful application to intervene in the District Court of Colombo would be tantamount to the District Court of Colombo being called upon to adjudicate the question of disputed title to the said nine lands. It would then lead to multiplicity of suits with regard to the same subject-matter. It is in this light that the judgment of Sirimanne, J. (with Weeramantry, J. agreeing) in *Pathmanathan v. Thraisingham* 74 N.L.R 199 becomes relevant:

*“Learned Counsel for the Appellants submitted that in such a case the Testamentary Judge would have a discretion to refer the alleged creditor to a separate action. But, on a reading of that Chapter (Cap.55) as a whole, I am inclined to agree with the submission made by Mr. Jaywardena for the executor that a ‘creditor’ (Section 731) whose ‘claim has been established’ (section 740) means, one who has already established his claim. It does not mean that a creditor whose claim is disputed can seek to establish that claim in the proceedings for a judicial settlement.”*

His Lordships Sirimanne, J. went on to articulate at page 200 as follows:-

*“Having regard to the practice and procedure adopted by our Courts, I am of the view that disputed claims should not be adjudicated upon in an inquiry relating to a Judicial Settlement and I think*



that the learned District Judge was right when he held that the 2<sup>nd</sup> citee should establish her claim in a separate action.”

In opposition the learned Counsel for the Petitioners have cited the case of *Harold Fernando v. Fonseka and others* (1998) 3 Sri LR 301 where the Court of Appeal no doubt stated the following, namely:-

- “1. that grant of probate or letters of administration, as the case may be, is a distinct preliminary step in testamentary proceedings, independent of claims to the estate by the heirs; and
2. the question of entertaining claims to the estate on the ground that the claimant is an heir could form the basis of an inquiry at a subsequent stage of the proceedings.”

But I take the view that since the claim of the heirs forms the basis of a trial in a different District Court, and in light of the fact until that District Court in *Balapitiya* Case No. 2003/L. has pronounced his decision on the disputed claims, the inventory that the testamentary court has accepted would not take effect, it would be contrary to logic and commonsense to allow intervention in District Court of Colombo when the Petitioners are in the process of agitating the same dispute in District Court of *Balapitiya*. In any event the Additional District Judge of Colombo has subjected the entering of decree absolute in the testamentary case to the prospective judgment to be given in the District Court of *Balapitiya* and in the circumstances I hold the view that the Petitioners in this case would not be imperiled or are not in danger of being prejudiced by this Court allowing the decision of District Court of Colombo to stand.

In the circumstances I would prefer to adopt the views of the Supreme Court in *Pathmanathan v. Thraisingham* (*supra*) in preference to the Court of Appeal decision in *Harold Fernando v. Fonseka and others* (*supra*) and proceed to dismiss this appeal.

JUDGE OF THE COURT OF APPEAL