

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

In the matter of an Application for Letters of Administration with the will annexed in respect of the last will and testament of the late Dr. Alagaratnam Velupillai, lately of 37, Trincomalee Road, Koddaimunai, Batticaloa.

Parameshwary Upali De Silva (nee Parameshwary Velupillai) of
No.6, Pansala Road,
Koddaimunai,
Batticaloa, presently of
No.6, Ediriweera Avenue,
Dehiwala.

Petitioner

-Vs-

C.A. No: 203/98 (F)
D.C. Batticaloa
Case No: 983/T

1. Savithiri Lokitharajah (nee Savithri Velupillai)

Presently of 9A, Hydean Way,
Stebanage, Case No: 983/T
Harts, S.G.2, 9XH,
United Kingdom.

2. Selvadurai Sivam Ganeshanandham

Presently of No. Bryn Ogwer, Pearhes
Garned, Banger Gurnedd, LL-ST-2DX,
United Kingdom; &

3. Dr. Kandapper Murugupillai of
No.4, Pansala Road, Batticaloa.

Respondents

And

In the matter of an appeal under Section 754 (i) of the Civil Procedure Code as amended in particular by section 50 of Act No. 79 of 1988

Between

Parameshwary Upali De Silva (nee Parameshwary Velupillai) of
No.6, Pansala Road,
Koddaimunai,
Batticaloa, presently of
No.6, Ediriweera Avenue,
Dehiwala.

Petitioner-Appellant

-Vs-

1. Savithiri Lokitharajah (nee Savithri Velupillai)
Presently of 9A,
Hydean Way,
Stebanage,
Harts, S.G.2, 9XH,
United Kingdom.

Deceased

Kandappan Lokitharajah
No.33, Cheyney Avenue,
Cannors Park,
Edgware,
Middlesex HA8 6SA,
UK.

Substituted 1st Respondent-Respondent

2. Selvadurai Sivam Ganeshanandham
Presently of No. Bryn Ogwer, Pearhes
Garned,
Banger Gurnedd, LL-ST-2DX,
United Kingdom ; &

3. Dr. Kandapper Murugupillai of
No.4, Pansala Road,
Batticaloa.

Respondents- Respondents

Counsel: Upul Jayasuriya with P. Radakrishnan for the
Petitioner/Appellant.

S.Mandaleswaran with Tharani Ganeshanathan for the
1st Respondent/Respondent.

Arguments: 23-3-2011.

Written Submissions: 1-2-2010(Petitioner/Appellant)
23-2-2010 (1st Respondent/Respondent)

Before: Rohini Marasinghe J.

Judgment: 26-5-2011.

One Dr. Alagaratnam Vellupillai died on 30th June 1983. At the time of his death his heirs were his 4 children namely;

1. Sarathadevi wife of Ganeshanadan (2nd Respondent)
2. Kanageswari wife of Murugupillai
3. Sakunthaladevi wife of Balasubramaniam
4. Parameswari wife of Upali de Silva (Petitioner)

According to the petitioner their father had left a Last Will dated 27-4-1976. The petitioner filed action under section 524 of the CPC in the District Court seeking probate. Consequently, she filed a petition, an affidavit along with the Last Will marked as "A". The said application was filed on 1-10-1986. The District Court under section 529 directed the publication of the Last Will and ordered that the decree nisi be served on the respondents. The respondents filed their objection in terms of section 532. The respondent appeared in court under section 533 and satisfied that there were grounds of objection to the application of probate which ought to be tried by viva voce evidence. The respondent contended that most of the properties mentioned in the impugned will had been gifted by the deceased and the petitioner was well aware of this fact.(Vide proceedings dated 2-12-1997) The respondents objections were heard by court under the provisions contained in section 533.

The section 533 provides;

“If on the day appointed under section 532(1) for final hearing, or on the day to which it may have been duly adjourned the persons filing objections satisfies the court that there are grounds for objecting to the application, such as ought to be tried by viva voce, evidence, then the court shall frame the issues which appear to arise between the parties; and shall direct them to be tried on a day to be appointed for the purpose under section 386”.

The 2nd respondent had given evidence and marked several deeds purported to have been executed by the said Dr. Velupillai during his life time. They were marked as 2 R1 -2R8. The deed bearing No 419 dated 28-6-1980 is very significant to be mentioned here which explains the mala fides of the petitioner. By virtue of that deed the petitioner had been gifted with the property which was listed by the petitioner as part of the estate still remaining as a property of the deceased to be disposed through the impugned will 1058. The said gift had been accepted by the petitioner which shows that the petitioner had knowledge that the deceased had already gifted the said property. Therefore, the learned trial judge found sufficient material in the evidence of the 2nd respondent. The court was then required to follow the procedure mentioned in section 386.

The section 386 reads as follows;

“When the respondent’s evidence has been taken, it shall be competent to the court, on the request of the petitioner, to adjourn the matter to enable the petitioner to adduce additional evidence ; or if it thinks necessary it may frame issues of fact between the petitioner and respondent and adjourn the matter for the trial of these issues...” This means that after the evidence of the respondent

has been taken the court is required to go to section 386 to frame issues and to adduce additional evidence only if there was a request to that effect from the petitioner. In this case there was no such request from the petitioner. The counsel of the petitioner merely informed the court that he has no instructions. The court had proceeded to enter its' order under section 388. The court had correctly dismissed the application of the petitioner. I must also add that after the objections of the respondents under section 533 have been heard and if the court was satisfied with the objections of the respondent the onus of the respondent ends at that point. The burden then rests on the petitioner to call for additional evidence to prove her case. The burden was on the petitioner to begin the case and take it forward along the terms mentioned in section 386. The petitioner had failed to discharge this burden.

The petition of appeal is dismissed.

Rohini Marasinghe J

Judge of the Court of Appeal.