

IN THE ESTATE OF NAYAN SINGH; IN THE MATTER OF AN APPLICATION BY HEMANT JUMAR SINGH aka HERMANT KUMAR SINGH (HPP0043 of 2011S)

5 HIGH COURT — PROBATE JURISDICTION

AMARATUNGA M

17 November 2011, 31 May 2012

10 **Practice and procedure — applications — institution of action — ex-parte notice of motion — leave to insert date to purported ‘will’ — whether mode of institution of action is correct — power to grant relief sought — High Court Rules O 5 r 5, O 85 r 2(c).**

15 The applicant sought leave to properly date and register a purported will. He filed an affidavit and an ‘ex-parte notice of motion’ purportedly in the terms of O 85 r 2(c) of the High Court Rules.

Held –

20 (1) There is no provision in the High Court Rules that allows the institution of an action through an ‘ex parte notice of motion’. On this ground alone, the application should be struck off.

(2) Even if the ‘ex parte notice of motion’ were considered as an originating motion, the applicant has not referred the Court to any provision of law that allows the relief sought, namely the insertion of a date into a will. The application should be dismissed on merits as well as wrong procedure.

25 ‘Ex-parte notice of motion’ dismissed and struck off.

Muaror for the Plaintiff.

Amaratunga M.

30 **A. INTRODUCTION**

[1] The action is purportedly instituted in terms of O 85 r 2(c) of the High Court Rules and inherent powers of the court. The mode of institution of action is stated in O 5 of the High Court rules and inherent power of the court cannot be resorted to institute an action in any other manner in contravention of this express provision. The action is instituted by an ‘*ex parte notice of motion*’ and an affidavit in support. The ‘*ex parte motion*’ is vague, but the relief sought in that is, the leave of the court, to insert the date to a purported ‘will’. Order 85 r 2(c) does not grant the court to allow such an application to insert date to a document that is undated and alleged to be a will. The mode of institution of this action is incorrect as there is no mode to institute an action by way of ‘*ex –parte notice of motion*’ in the High Court Rules and the relief sought in terms of O 85 r 2(c) is not a relief that can be granted in terms of the said provision.

45 **B. ANALYSIS**

[2] The ‘*Applicant*’ has filed an affidavit and an Ex-parte notice purportedly in terms of O 85 r 2(c) of the High Court Rules seeking following order

50 ‘1. That the applicant, as the appointed Executor and Trustee of the Estate of his late father Mr Nayan Singh, Testate, is granted leave to properly date and register the last known Will and Testament of his late father as the last and true record of the Will and Testament of Nayan Singh.’

[3] The said motion is vague and misleading as it has mentioned the applicant as the appointed executor and trustee of the estate of Mr Nayan Singh and the purported undated document is described as the will.

5 [4] The Applicant would become Trustee and Executor only upon the acceptance by the court as the true record of the Will and Testament of Narayan Singh, which is not even the ultimate relief in this motion. The applicant need not come to court seeking an order of the court to accept the 'Will' if he is already the executor, and the said document is accepted as the 'Will'.

10 [5] The purported 'will' is undated and the applicant is seeking to insert a date which according to the applicant was the date of the making of said purported 'will'.

[6] In any event, the whole proceeding is wrongly instituted as O 5 of the High Court specifically mentions the methods of beginning of civil proceedings as writ, originating summon, originating motion or petition and the 'Applicant' has not instituted this action accordingly.

[7] Order 5 of the High Court Rules 1988 states as follows

20 '1. Subject to the provisions of any Act and of these Rules, civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition.

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Proceedings to be begun by motion or petition

25 5. Proceedings may be begun by originating motion or petition if, but only if, by these rules or by or under any Act the proceedings in question are required or authorized to be so begun.'

[8] The 'Applicant' has filed an 'Ex- parte notice of Motion' in this action. There is no provision in High Court Rules that allows an institution of action through 'Ex-parte Notice of Motion'. On this ground alone this application should be struck off.

[9] Without prejudice to what is stated above even if the ex parte notice of motion is considered as an originating motion it is clear that such institution is allowed only if such mode of institution is authorized by the High Court Rules or by any Act.

[10] The 'applicant' has not referred to any legislation in its motion and or at the hearing, but solely relied on O 85 r 2(c) and inherent jurisdiction of the court. It is clear that the when there is express prohibition inherent jurisdiction cannot be invoked. Order 5 r 5 is explicit and institution by way of originating motion and petition is only when it is allowed by law. Nothing is O 85 allows institution of the action in terms of the said Order, by a special mode as required in O 5 r 5.

[11] The 'Ex- parte notice of motion' also seeks an order of the court to 'properly date the will'. Obviously the document is not dated and has not been admitted as a will. The O 85 r 2(c) reads as follows

(2) Without prejudice to the generality of paragraph (1), an action may be brought for the determination of any of the following questions-

.....

50 '(c) any question as to the rights or interests of a person claiming to be a creditor of the estate or a deceased person or to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust.'

[12] The said provision does not allow the court to grant leave to insert a date to the purported will, which remains undated, by the 'applicant'. I have not been referred to such an instance through Case law of any deletion and or addition to a Will where the court has granted its consent to do so in terms of the provisions stated in this 'ex-parte motion'. Again the 'Applicant' has failed to satisfy the court the applicability of the O 85(2)(c) to this application and without prejudice to what was stated as regards to the mode of institution of this action, in this ruling, the 'ex-parte notice of motion' should be dismissed, even on merits as O 85 r 2(c) does not empower the court to grant the relief sought by the applicant.

10 **C. CONCLUSION**

[13] The 'applicant' has filed '*ex-parte notice of motion*' and an affidavit in this action. The said motion indicate O 85 r (2)(c) and inherent jurisdiction as the basis for this application. The O 85 r 2 specifically indicate that invoking jurisdiction under the said provision is by way of *an action*. The mode of institution of *action* is clearly laid down in O 5. There is no method sanctioned by said provision that allows institution of action by 'Ex-parte motion supported by an affidavit, the 'Ex-parte notice of Motion 'should be dismissed. Apart from this irregularity, error and or mistake the motion itself is vague and not easily comprehensible and contains factually incorrect position as regard to purported 'will' and the status of the 'applicant' who has been described as appointed executor without even before admitting the document as the will of the deceased. The final relief is the leave of the court to allow the applicant to insert the date to the will. I have not been referred any provision of law that allows such insertions to a 'will'. The 'ex-parte notice of motion dated 24th October 2011 should be dismissed on merits as well as on wrong procedure followed in the institution of this action. I order no cost.

D. FINAL ORDERS

- 30 a. The 'ex-parte notice of motion' is dismissed and struck off.
b. No cost.

'Ex-parte notice of motion' dismissed and struck off.

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