1978 *Present* : **Udalagama, J., Ismail, J. and Tittawella, J.**

HAPUGANORALAGE MENIKHAMY and OTHERS, Appellants

and

J. M. PODI MENIKA and OTHERS, Respondents

S. C. 108—109/71 (F)—D. C. Kurunegala 6259/T

Adoption of Children Ordinance (Cap. 61), section 3—Child brought up by parties subject to Kandyan Law—Application made in respect of such child under the Adoption of Children Ordinance —Requirement in section 3 (5) that no order except with child's consent where the child is over 10 years old—Whether such requirement mandatory—Duty of Judge to obtain such consent— Effect of lack of consent—Jurisdiction of Court—Whether order void.

Evidence Ordinance, sections 41, 114(d)—Can such Adoption Order be attacked collaterally—Application of presumption to be drawn under section 114(d)—In what circumstances can such presumption be drawn.

One P died on 9th March, 1969 without leaving a Last Will and leaving an estate valued at over Rs. 200 000. He left no children of his own, but the petitioner sought letters of administration to his estate claiming to be an adopted child of the deceased and therefore the sole intestate heir. This claim was contested by the children of the deceased's brothers and sisters who also claimed as intestate heirs. The parties were subject to the Kandyan Law. It was common ground that if the petitioner was the legally adopted child of *P* she would be the sole heir to his estate. It would appear that the mother of the petitioner having died when she was only 10 years old she was thereafter brought up by the said *P* and his wife, who on 23rd January, 1952, made an application under the Adoption Ordinance, No. 24 of 1941. to the Court of Requests, Kurunegala, which by virtue of section 13 of the Ordinance was the Court having jurisdiction. On 29th January, 1952, the learned Commissioner of Requests held an inquiry and order was made allowing the said *P* and his wife to adopt the petitioner. Giving evidence at this inquiry the said *P* stated, inter alia that he wished the petitioner to be given his *ge* name "for the purpose of inheriting his property". The father of the petitioner also consented to this adoption. The petitioner was at the time of the inquiry 10 years and 4 months old. In the District Court it was submitted on behalf of the appellants who were contesting the petitioner's claim that the said adoption order was void and of no effect or avail in law and that therefore they were the intestate heirs of that deceased. The learned District Judge held that the petitioner was the legally adopted heir and that accordingly she was the sole heir of the said *P*.

The appellants appealed against this order.

Section 3 (5) of the Adoption Ordinance, No. 24 of 1941, is as follows :—

"An adoption order shall not be made in respect of a child over the age of 10 years except with the consent of such child".

There was no record in the proceedings at the adoption inquiry or in the formal order made by the learned Commissioner of Requests of having obtained the consent of the petitioner before making the adoption order. The petitioner, however, at the inquiry into her application for letters of administration to the estate of the said *P* stated that the Judge questioned her and that she

consented to the adoption. It was submitted on behalf of the appellants that jurisdiction can be of two kinds, namely, one to hear a matter and the other to make an order and that failure of either jurisdiction resulted in the order made being *ab initio* void and of no effect or avail in law.

Held (Tittawella, J. *dissenting*) :

(1) That the requirement in section 3 (5) of the Adoption Ordinance that an adoption order shall not be made in respect of a child over the age of 10 years except with the consent of such child was mandatory. The Judge is under a duty to get the consent of the child and at the inquiry in the testamentary proceedings the only way the Court could know that such consent was obtained was the fact that it had been recorded in the adoption case. The order in question was made without jurisdiction and therefore void.

(2) That this adoption order could be attacked collaterally as it was not an order *in rem* and did not come under the category of orders set out in section 41 of the Evidence Ordinance.

(3) That section 114 (*d*) of the Evidence Ordinance on which counsel for the petitioner relied has no application to the present case. It does not raise any presumption that an act was done of which there is no evidence or proof which is essential to a case and there can be no presumption that an act such as that of obtaining the consent of the child in an adoption case was done.

Cases referred to :

Perera v. Commissioner of National Housing, 77 N.L.R. 361.

Dheerananda Thero v. Ratnasara Thero, 60 N.L.R. 7.

Societe Genarale De Paris v. Walker, 54 L.T. 389 ; (1885) 11 App. Cas. 20 ; 55 L.J. Q.B. 169.

Gunawardena v. Kelaart, 48 N.L.R. 522.

Dharmatillaka v. Brampy Singho, 40 N.L.R. 497.

Weerasooria v. Controller of Establishments, 51 N.L.R. 189.

Re G (T. J.) (an infant), (1963) 1 All E.R. 20 ; (1963) 2 W.L.R. 29 ; (1963) 2 Q.B. 73.

Re F (an infant), (1957) 1 All E.R. 819.

Narendra Lal Khan v. Joge Hari ; 32 c. 1107.

Hriday Nath Roy v. Ram Chandra Barna Sarma, A.I.R. 1921 (Cal.) 34.

Ahamado Muheyadin v. Thambi Appu, 46 N.L.R. 370 ; 30 C.L.W. 106.

The Queen v. The Commissioner for Special Purpose of the Income Tax (1888) 21 Q.B.D. 313.

APPEAL from a judgment of the District Court, Kurunegala.

C. Ranganathan, Q.C., with *M. L. A. Refai* and *I. Hassen*, for the 1st, 2nd, and 7th respondent-appellants in S.C. 108/71 and for the 3rd to 6th respondent-appellants in S.C. 109/71.

H. W. Jayewardene, Q.C., with *J. W. Subasinghe* and *Miss S. Fernando*, for the petitioner-respondent.

Cur. adv. vult.

May 29, 1978. UDALAGAMA, J.

This appeal concerns the estate of one Jayasundera Mudiyanselage Punchiappuhamy, who died on the 9th of March, 1969, without a will and leaving an estate valued at over two lakhs of

rupees. He left no children of his own. As the parties are subject to the Kandyan law, the intestate heirs, in the event of their being no children by the deceased would be his deceased brothers' and sisters' children who are the 2nd and 7th respondent-appellants respectively. The petitioner, however, claiming to be an adopted child of the deceased, has asked for letters of administration, on the basis, she is the sole intestate heir of the deceased.

It was common ground that if the petitioner-respondent was the legally adopted child of the deceased, she would be the sole heir to the estate of the said Punchi Appuhamy. It appears the petitioner-respondent was the child of Ramanayaka Mudiyanselage Ukku Banda and Jayasinghe Mudiyanselage Punchi Menike. The mother of the petitioner died in 1941 when she was 10 days old. She was thereafter brought up by the deceased Punchi Appuhamy and his wife Podihamine. On the 23rd of January, 1952, the deceased and his wife made an application under the Adoption Ordinance to the Court of Requests, Kurunegala, in terms of Ordinance 24 of 1941. On the 29th of January, 1952, the learned Commissioner of Requests, held an inquiry and purported to make an order allowing the deceased Punchi Appuhamy and his wife to adopt the petitioner-respondent. The 2nd and 7th respondents-appellants had submitted in the District Court that the adoption order in respect of the petitioner-respondent was void and of no force or avail in law and therefore they were the intestate heirs of the deceased. The learned District Judge at the conclusion of the evidence of the petitioner on 7.5.71 and after hearing counsel on either side, made a short order holding that " the petitioner is the legally adopted heir of the deceased and that she is the sole heir of the deceased ". The 2nd and 7th respondents-appellants, now appeal against this order of the learned District Judge.

The Adoption Ordinance 24 of 1941 conferred jurisdiction on the Court of Requests by section 2 and 13 (1) to make an order of adoption, authorizing a person making an application, to adopt a child. This jurisdiction to make adoption orders is limited by section 3 of Part 1.

Section 3 spells out the limitations imposed upon the Court of Requests to make adoption orders. Section 3 states :

" (1) An adoption order shall not be made in any case where—

(*a*) the applicant is under the age of twenty-five years, or

(*b*) the applicant is less than twenty-one years older than the child in respect of whom the application is made :

Provided, however, that where the child in respect of whom an application is made is—

(1) a direct descendant of the applicant ; or

(2) a brother or sister of the applicant by the full or the half-blood or a decendant of any such brother or sister ; or

(3) the child of the wife or husband, as the case may, be of the applicant by another father or mother,

the court may, if it thinks fit make an adoption order notwithstanding that the applicant is less than twenty-one years older than the child.

(2) An adoption order shall not be made in any case where the sole applicant is a male and the child in respect of whom the application is made is a female, unless the court is satisfied that there are special circumstances which justify the making of an adoption order.

(3) An adoption order shall not be made except with the consent of every person or body who is a parent or guardian of the child in respect of whom the application is made, or who has the actual custody of the child, or who is liable to contribute to the support of the child.

Provided that the court may dispense with any consent required by the preceding provisions of this subsection if satisfied that the person whose consent is to be dispensed with has abandoned or deserted the child or cannot be found or has been adjudged by a competent court to be of unsound mind, or, being a person liable to contribute to the support of the child, either has persistently neglected or refused to contribute to such support or is a person whose consent ought in opinion of the court and in all the circumstances of the case to be dispensed with.

A man who marries a woman having a child (whether legitimate or illegitimate) at the time of the marriage shall be deemed for the purposes of this subsection to be a person liable to contribute to the support of the child.

(4) An adoption order shall not be made upon the application of one of two spouses without the consent of the other of them :

Provided that the court may dispense with any consent required by the preceding provisions of this subsection if satisfied that the person whose consent is to be dispensed with

cannot be found or has been adjudged by a competent court to be of unsound mind, or that the spouses have been judicially separated by a decree of a competent court.

(5) An adoption order shall not be made in respect of a child over the age of ten years except with the consent of such child.

(6) An adoption order shall not be made in favour of any applicant who is not resident and domiciled in Ceylon or in respect of any child who is not a British subject and so resident."

It will be noted that section 3(5) states, "an adoption order shall not be made in favour of a child over the age of 10 years except with the consent of such child". Section 4 deals with the matters which the court must be satisfied, before making an order for adoption, and section 6 deals with the effects of an adoption order.

Counsel for the 2nd and 7th respondents-appellants contended that jurisdiction can be of two kinds, namely one to hear a matter and the other to make an order. Failure of either jurisdiction it was contended resulted in the order being *ab initio* void and of no effect or avail in law. In *Perera v. the Commissioner of National Housing*, 77 N.L.R. 361 at 336, Tennekoon, C.J. put the matter thus :

"Lack of competency in a court is a circumstance that results in a judgment or order that is void. Lack of competency may arise in one of two ways. A court may lack jurisdiction over the cause or matter or over the parties ; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the court. Both are jurisdictional defects. The first mentioned of those is commonly known in the law as a "patent" or "total" want of jurisdiction or a *defectus jurisdictionis* and the second a "latent" or "contingent" want of jurisdiction or a *defectus triationis*. Both classes of jurisdictional defect result in judgments or orders which are void."

Craies on Statute Law (5th Edition) at page 243 states :

"If the requirements of a statute which prescribes the manner in which something is to be done are expressed in negative language that is to say if the statute enacts that it shall be done in such a manner and in no other manner, it

has been laid down that those requirements are in all cases absolute, and that neglect to attend to them will invalidate the whole proceeding."

In *Dheerananda Thero v. Ratnasara Thero*, 60 N.L.R. 7 at 14, T. S. Fernando, J. stated :—

"Where it is shown that the proceedings are illegal in the sense that the Court had no jurisdiction to proceed to make an order, there is, in my opinion, no room for the argument that it is too late at the stage of appeal to object to the proceedings taken and the order of court consequent upon these proceedings."

Counsel for the 2nd and 7th respondents-appellants submitted that the adoption order P2(*a*) in respect of the adoption of the petitioner-respondent was void and of no effect in law as the said order was made by the learned Commissioner of Requests, without jurisdiction, in as much as he failed to follow a mandatory requirement of the Ordinance before such an order is made. Under section 3 (5) it is an absolute requirement that an adoption order shall not be made in respect of a child over the age of 10 years except with the consent of such child. At the time the adoption order P2(*a*) was made it was common ground that the petitioner-respondent was over 10 years. The adoption proceedings P2 does not, anywhere state that the consent of the petitioner-respondent was obtained before the order was made. The order of the learned Commissioner does not refer to his having obtained the consent of the petitioner-respondent although he states the father has no objection to the adoption. The formal order P2 (*a*) while stating that the consent of the father was obtained, is silent in regard to the consent of the child. At the argument of this appeal, it was conceded by counsel for the petitioner-respondent, that there is no record in the adoption inquiry proceedings or of the formal order, of the learned Commissioner having obtained the consent of the petitioner-respondent before making the adoption order.

The petitioner-respondent tried to get over this difficulty at the inquiry into her application for letters of administration by stating "I gave evidence in Court. The judge asked whether I consented and he wrote that out. I remember being questioned". An examination of the adoption inquiry proceedings clearly shows, that this evidence of the petitioner-respondent is untrue. Counsel for the petitioner-respondent however submitted that there was no legal requirement that the consent of the child should be recorded. He submitted that under section 10 (6) (*b*) where a certified copy of any entry in the adoption register is

produced it is prima facie evidence of the adoption. In *Societe Genarale De Paris v. Walker,* 54 Law Times 389 at 395, Lord Fitzgerald stated: "'Prima facie title' means that the certificates shall be evidence that the title of the holder is correct until the contrary shall be made to appear". The 2nd and 7th respondents-appellants' contention is that although P1 may be prima facie evidence of the adoption, the proceedings P2 and the formal order P2(*a*) show that consent of the petitioner was not obtained. Under section 3 (5) the consent of the child, where the child is over 10 years, is mandatory. It is not permissible to conjecture on a mandatory requirement of this nature that the consent may or may not have been obtained. This would not be a correct approach to such a problem and would only make the section useless. In the cases set out in 3(1), 3(2), 3(3) and 3(4) there is provision under certain circumstances for the court to use its discretion and make an adoption order, but not so under section 3(5). It is a statutory requirement and the Judge is under a duty to get the consent of the child and this Court could only know that such consent was obtained by the fact that it has been so recorded in the case. Under section 92 of the Civil Procedure Code "with the institution of the action the court shall commence a journal entitled as of the action, in which shall be minuted as they occur, all the events in the course of the action, i.e., the original application and every subsequent step, proceeding and order; each minute shall be signed and dated by the judge and the journal so kept shall be the principal record of the action". In *Gunawardene v. Kelaart,* 48 N.L.R. 522, it was held the Supreme Court will not admit affidavits which seek to contradict the record kept by the Magistrate. In *Dharmatilaka v. Brampy Singho,* 40 N.L.R. 497, the learned District Judge in a claim inquiry under section 243 of the Civil Procedure Code made the following order "Claimant in person present. Notice served on plaintiff personally—absent—claim upheld". It was argued on behalf of the petitioner that as section 243 of the Civil Procedure Code required the claimant to adduce evidence the order was bad. It was argued on behalf of the respondent that the order allowing the claim was an order which the District Judge had jurisdiction to make and that one must not look behind that order. Keuneman, J. stated "I think that the terms of section 243 make it necessary for the claimant to adduce evidence, whether the judgement-creditor is present or not at the inquiry and where the requirements of section 243 have not been observed I do not think that any allowance of the claim can be regarded as an order under section 244". In other words what the Supreme Court said was that the learned Judge did not have the jurisdiction to make the order he did.

Counsel for the petitioner-respondent cited the case of *Weerasooriya v. The Controller of Establishments,* 51 N.L.R. 189, in support of his contention that non-observance of a mandatory requirement does not make the order void but only voidable if he has jurisdiction over the subject-matter. The Commissioner for Workmen's Compensation dismissed an application for compensation made by the appellants against the respondent on November 10, 1947, and entered *order nisi* as the applicant was absent on that date which was the date fixed for hearing. Subsequently at an inquiry held on December 23, 1947, with notice to the respondent, the applicant satisfied the Commissioner that there were reasonable grounds for his default and the Commissioner made order setting aside the *order nisi* and fixing the application for inquiry. At a subsequent inquiry respondent's counsel contended that the *order nisi* (which fixed a period of fourteen days for showing cause) had already become absolute before the order of December 23, 1947, was made and even before the appellant made his application to have the *order nisi* set aside, which appeared to have been made on December 3, 1947. This contention was accepted by the Commissioner and he made an order holding that the *order nisi* had become absolute and therefore there was "no ground for proceeding with the inquiry". In appeal the applicant contended that the Commissioner was not entitled to set aside his own order of December 23, 1947. It appeared under regulation 30 of the Workmen's Compensation Regulations 1935 the provisions of Chapter XII of the Civil Procedure Code and certain other chapters of that Code applied to proceedings before the Commissioner in so far as they were applicable thereto. However one of the provisos to regulation 30 was "the Commissioner may, for sufficient reason ; proceed otherwise than in accordance with the said provisions if he is satisfied that the interests of the parties will not thereby be prejudiced". It was contended for the respondent that when the Commissioner made an *order nisi* dismissing the application, he had no jurisdiction to set it aside after the expiration of the period within which cause must be shown, and that consequently every step taken by the Commissioner after November 10, 1947, was a nullity.

Gunasekera, J. disagreeing with this contention stated : "Not only is the Commissioner empowered to set aside in appropriate circumstances an *order nisi* made by him, but he is vested with a wide discretion as to whether he should proceed otherwise than in accordance with the relevant provisions of the Civil Procedure Code". It will be seen that besides section 84 of the Civil Procedure Code the Commissioner was vested with a special

discretion by one of the provisos to regulation 30. Thus this case would not be an authority for the proposition that an order made without jurisdiction is not null and void but only voidable.

Counsel for the petitioner-respondent further submitted, that a judgment or order which declared a status, cannot be attacked collaterally, as it is an order *in rem*. The answer to this submission is contained in section 41 of the Evidence Ordinance. It is only in the case of judgments, orders or decrees in testamentary, matrimonial, admiralty or insolvency cases, which have the effect of judgments, orders or decrees *in rem*, and cannot be attacked collaterally. Adoption orders do not fall into this category.

The learned District Judge sought to justify the adoption order under section 114 (*d*) of the Evidence Ordinance, which states that the court may presume that judicial and official acts have been regularly performed. What this section states is that where an act has been proved to have been done, it was regularly done. In *Dharmatilake v. Brampy Singho* (*supra*), it was held that section 114 (*d*) of the Evidence Ordinance means that if an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done of which there is no evidence and the proof of which is essential to a case. It will therefore be apparent that there is no presumption that an act like the act of the obtaining of consent of the child in an adoption case was done.

The learned District Judge also stated that he had no power to vacate the adoption order made in the Court of Requests. The respondents' contention was that the adoption order, made without the petitioner's consent was void. He was not called upon to vacate the order of adoption. All that he was called upon to do was to adjudicate on the validity of the order. The learned District Judge here, was clearly in error.

Learned counsel for the petitioner-respondent also submitted that the fact that the petitioner-respondent was present at the adoption inquiry together with her *guardian-ad-litem*, who was no other than her own father, shows that the petitioner-respondent's consent must have been obtained. If one examines the Adoption Ordinance and the rules made under the said Ordinance, it will be seen, it is the duty of the *guardian-ad-litem* to investigate as fully as possible all the circumstances of the child and the applicant, and all other matters relevant to the proposed adoption, with a view to safeguard the interests of the child before the court and in particular whether the written statement required by rule 2 is true and complete, particularly as regards the date of birth and the identity of the infant and whether any

payment or other reward in consideration of the adoption has been received or agreed upon and whether it is consistent with the welfare of the child. Rule 2 states :—

"Every application for an order authorizing the adoption of a child—

(*a*) shall be made to the court by written statement in duplicate and shall be substantially in Form 1 in the Schedule ; and

(*b*) shall, except in a case where the applicant desires the court to dispense with the consent of persons whose consent is required under section 3 (3) of the Ordinance, be accompanied by written statements of consent substantially in Form 2 in the Schedule."

It will be seen the above rule does not refer to the consent required to be obtained under section 3 (5) of the Ordinance in respect of a child over 10 years of age. As submitted by counsel for the appellants, that is because the obtaining of the consent referred to under section 3 (5) is a judicial function which cannot be delegated to a third party. It is mandatory and must be done by the Judge. The record does not show that the learned Judge has performed this function. Counsel for the petitioner-respondent cited the case of *Re G (T.J.) (an infant)*, (1963) 1 A.E.R. 20. That was an application by a step-mother of a boy of nearly twelve years of age who had looked after him since he was four. The mother of the boy objected to the adoption and the court held that her objection was not being withheld unreasonably. In appeal it was contended both by the counsel on behalf of the applicant and by counsel on behalf of the *guardian-ad-litem* who was supporting the applicant's appeal, that the learned judge did not give proper weight to the views of the infant as expressed in the welfare officer's report. It was contended that nowhere in the learned Judge's judgment was any mention made of these views. It was further contended that in his judgment the learned Judge should have said in terms, that he had complied with the provisions of section 7 (2). Lord Justice Donovan stated :—

"With regard to s. 7 (2) of the Act, the judge did not ascertain the child's wishes by direct questioning of child. The subsection provides that the judge shall give due consideration to the child's wishes, having regard to its age and understanding. The child was aged twelve at the time ; and in such a case I think that, subject to what follows, the judge should satisfy himself about the child's understanding by speaking to the child himself. No doubt in most cases this would be best done in private. But where, as here, the judge has a very recent report by the child welfare officer of the

local authority which tells him *inter alia,* what the child's wishes are, I see no reason why the judge should not accept that report if he thinks it right to do so. If the report were some months old as I gather it could be in some cases—the judge should, and I have no doubt would verify for himself that the child's wishes remained the same since the subsection does require, in my opinion, the ascertainment of these wishes as at the time of the hearing or near enough to that time to make no difference"

The difference in this case and the present case is that there was a report of the guardian made just before the hearing where it was stated that the boy had said he would like to be adopted. There is nothing like that in the present case. Moreover as pointed out earlier, the rules framed under our Adoption Act do not provide for the guardian to obtain the consent of the child. That duty is expressly entrusted to the judge.

In *Re F (an infant)*, (1957) 1 A.E.R. 819, cited by counsel for the appellant, the applicants sought to adopt M, a female child. Earlier the parties had entered into a deed of agreement where the parents of M, had stated that they "fully understand the nature of such adoption order and that the effect thereof will be permanently to deprive them of their parental rights in respect of the infant". Section 2(4) (*a*) of the Adoption Act, 1950 forbids an adoption order being made without the consent of the child's parents, although the court can dispense with the consent (section 3 (1)), if it is unreasonably withheld. The parents of M. refused to give their consent at the adoption inquiry. It was held an order for M's adoption would not be made because the father and mother refused their consent, their refusal was not unreasonable and the consent which they had given by the adoption agreement was revocable until an adoption order was made. In this case it will be seen, the court declined to exercise its jurisdiction and make an adoption order, because a mandatory requirement to wit the obtaining of the consent of the parents, was not forthcoming at the inquiry.

Finally it was submitted on behalf of the petitioner-respondent, that after such a long lapse of time, it would be unjust on the petitioner-respondent, to hold that the adoption order was a nullity and thus deprives her from inheriting the estate of the deceased J. M. Punchi Appuhamy. While no doubt it is a long time since the adoption order was made, at the same time it appears that the petitioner was not that close to the deceased as one would have expected of an only child. The petitioner at the inquiry admitted that she eloped with the deceased's driver and thereafter she had nothing to do with the deceased. The 2nd respondent-appellant, in his affidavit filed in the District Court

has affirmed to, that the petitioner eloped with the deceased's driver in 1962 taking away with her a large sum of money and jewellery belonging to the deceased and the deceased had nothing to do with her, cut her off and disowned her. That a few days prior to his death, the deceased expressed in the presence of several persons that it was his earnest desire that all his property should be bequeathed to him (the 2nd respondent-appellant) as recompense for the faithful services rendered to him and accordingly he sent for a Notary and instructed him to draw up a will in favour of him, bequeathing all his movable and immovable properties. He has further affirmed that a will was drawn up, according to the wishes of the deceased, but when the Notary came ready with the will, the deceased's condition had taken a turn for the worse and in the circumstances the signing of the will had to be put off but the deceased died and the will could not be signed.

I allow the appeals and set aside the order of the learned District Judge dated 7.5.71 and hold that the petitioner-respondent is not a legal heir of the deceased, J. M. Punchi Appuhamy and dismiss her application for Letters of Administration to the estate of the said J. M. Punchi Appuhamy. The petitioner-respondent will pay the 1st, 2nd and 7th respondents costs of the inquiry in the District Court and the costs of this appeal.

ISMAIL, J.

I have the benefit of having before me the judgments prepared in this case by Udalagama, J. and Tittawella, J. For the purpose of the order I propose to make in this case I will deal only very briefly with facts which are material for the purpose of my order.

It would appear that the application for adoption in Case No. 23 of the Court of Requests, Kurunegala, had been made on 23rd January, 1972, in respect of the minor, R. M. Podimenika, who according to the birth certificate R1 was born on 7th September, 1941. This indicates that this child at that time was just over ten years of age. Section 13 (1) of the Adoption Ordinance Chapter 61 confers jurisdiction on the Court of Requests having jurisdiction at the place at which the applicant or the child in respect of whom the application is made resides. Section 3 of the Adoption of Children Ordinance indicates certain restrictions and limitations which have to be observed in making an adoption order. For the purpose of matters in issue we need be concerned only with section 3(5) which reads,

> "An adoption order shall not be made in respect of a child over the age of ten years except with the consent of such child."

It therefore follow that the Commissioner of Requests has jurisdiction to make an order in respect of a child who is over the age of ten years only with the consent of such child. It would therefore follow necessarily that if the Commissioner does not obtain the consent of a child, if it is over ten years of age, the Commissioner has no jurisdiction to make an order for adoption and such order is made would therefore be void.

The case record in the adoption proceedings No. 26 C. R. Kurunegala has been produced marked P1 and P2 which contains the petition, affidavit, journal entries, proceedings of 29.1.72 and the order made on that date. On a perusal of these documents it is clear there is nothing in the journal entries, proceedings or in the adoption order itself to indicate that the consent of the child, who was admittedly over ten years of age, had been obtained by the Commissioner of Requests in this case.

Counsel appearing for the respondents rely on section 114 of the Evidence Ordinance and referred us to illustration (*d*) of that section. Section 114 of the Evidence Act reads,

> "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case."

This section gives eight illustrations marked 'a' to 'h'. For the purpose of matters that arise for determination in these proceedings it is illustration (*d*), which is the equivalent to the illustration (*e*) in the Indian Evidence Act, which is material for the purpose of this case. This illustration reads,

> "The court may presume that judicial and official acts have been regularly performed".

It is to be noted that section 114 deals with presumptions which are rebuttable. Section 114 does not lay down any proposition of law as such.

Keuneman, J. at page 501 in the case reported in 40 N.L.R. 497 stated, "in considering the facts of that particular case the journal entry of June 30, 1934 reads, 'claimant in person—present. Notice served on plaintiff personally—absent. Claim upheld.'" The only presumption is that the claim was upheld because of the absence of the plaintiff. But it is argued that by virtue of section 114 illustration (*d*), we must presume that the necessary evidence had been adduced by the claimant under section 243. But that illustration only raises a presumption as to the regularity of official acts. I think it is not possible to state it to

a presumption that all the necessary evidence has been taken before an order is made, of the dictum of Woodroffe, J. in Narendra Lal Khan *v.* Joge Hari.

> "The meaning of section 114(*e*) of the Evidence Act is that if an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence and the proof of which is essential to the plaintiff's case".

Monir in his Principles and Digest of the Law of Evidence, 4th Edition, Vol. 2, page 676 states,

> "A presumption that an act was regularly done arises only on proof that the act was in fact done, as the presumption is limited to the regularity of the act done and does not extend to the doing of the Act itself"

He has at footnote 24 on the same page referred to several Indian authorities in support of this. He proceeds to say,

> "In other words, the presumption that may be raised is that the act if proved to have been done was done in a regular manner. There is no presumption that an act was done, of which there is no evidence and the proof of which is essential to the case raised."

Ratanalal and Thakore in Law of Evidence 13th Edition at page 250 referring to illustration (*e*) states,

> "The rule embodied in this illustration flows from the maxim '*omnia praesumuntur rite et solemniter esse acta*', i.e., all acts presumed to have been rightly and regularly done. The true principle intended to be conveyed by the rule, '*omnia praesumuntur rite et solemniter esse acta*,'.... seems to be, that there is a general disposition in courts of justice to uphold official, judicial, and other acts, rather than to render them inoperative; and with this in view where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption rests solely on grounds of public policy. The Court can make a presumption that official acts have been regularly performed. Whether a presumption should or should not be made must depend upon the particular circumstances of each case.

> Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation it is for the person who alleges that the liability has been incurred to prove that the things prescribed in the Act have been actually done. No presumption can be made in favour of the things prescribed by the Act having been done. If, for example, publication of a notice was essential under an Act in order to bind a person, such publication must be distinctly proved."

Similarly Woodroffe and Ameer Ali in Law of Evidence 13th Edition Vol. 3 at page 2597 after making references to the authorities state,

> "There is a presumption of regularity in respect of official and judicial acts, and it is for the party who challenges such regularity to plead and prove his case. The meaning of this illustration is that if an official act is not proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence and the proof of which is essential to the plaintiff's cases. If a judicial or official act is proved to have been done, it will be presumed to have been regularly done..... The illustration does not say that it may be presumed that any particular judicial or official act has been performed. No doubt when the only evidence is that a particular judicial or official act has been performed and there is no other evidence on record, it may be presumed that any particular judicial or official act was regularly performed. But when the dispute is whether a particular judicial act was performed or not, there is nothing in law which enables a Court to presume that that act was, as a matter of fact, performed."

Again at page 2602 it is stated,

> "Although there is a presumption that official acts have been regularly peformed, and that they have been performed in accordance with rules and regulations bearing on the subject, yet this is a rebuttable presumption. In fact, it is left to the Court to raise that presumption or not, having regard to the peculiar facts and circumstances of each case."

The question that arises for consideration in these proceedings is whether by reason of the presumption arising from application of illustration (d) to section 114 of the Evidence Act when there is no indication whatsoever in the record itself of the consent of the minor having been obtained as required by section 3 (5), whether it can be presumed that the consent of the minor had

in point of fact been obtained by the Commissioner of Requests. If, for instance, it is recorded that the consent of the minor was in fact obtained then the presumption would only arise that the consent of the minor had been duly obtained in the course of the proceedings had before the Commissioner of Requests. Then the burden shifts to the party who avers that such consent had not been obtained to rebut the presumption arising under the section and indicate to Court that such consent was in fact not obtained by the evidence or other circumstances. In the present instance however there is no indication whatsoever that an express requirement of the law as required by section 3(5) had been complied with.

In my opinion therefore the presumption that arises under illustration 114 (*d*) of the Evidence Act cannot be invoked to prove the act which is not proved to have been done in a regular manner, had in fact been done. There is no presumption that the consent had been obtained when there is no evidence whatsoever of such consent having been obtained and proof of the obtaining of the consent is necessary for the respondent's case. The obtaining of the consent of the minor in question was a judicial act which had to be done. In this instance there is no indication of this consent having been obtained. I do not think therefore that the presumption arising under section 114(*d*) can be extended to a situation as in this instance. In the absence of evidence to indicate the obtaining of such consent, if there was an indication in the record itself that the consent had been obtained then one can draw the presumption or inference that such consent had been obtained regularly. It is therefore my view that the presumption arising under section 114(*d*) would not be applicable to the facts of this case.

Since it is an imperative requirement under section 3 (5) that the consent of the minor had to be obtained it cannot be left in the realms of surmise of speculation as to whether such consent had been obtained or not. It is therefore my view that since the order for adoption was made without such consent the Commissioner of Requests had no jurisdiction to make the order for adoption. Therefore, I am of the view that the adption order in question is void *ab initio*.

I am in agreement with the view of Udalagama, J. that a void order as in this instance can be collaterally attacked. Udalagama, J. has referred to the authorities on this aspect of the matter and I am in agreement with this view.

I would therefore allow the appeal in this case setting aside the order of 7.5.71 made by the District Judge and dismiss the application of petitioner-respondent for letters of administration

to the estate of the late J. M. Punchiappuhamy on the footing that the petitioner-respondent is not a legal heir of the deceased J. M. Punchiappuhamy. The 1st, 2nd and 7th respondents will be entitled to costs of appeal and costs in the lower Court.

TITTAWELLA, J.

I have had the advantage of reading the judgement of Justice Udalagama with which Justice Ismail has agreed. I find myself unable to agree with the reasons and conclusions reached by them. I have therefore set down my views for dismissing the appeal with costs.

One Jayasundera Mudiyanselage Punchappuhamy (hereinafter referred to as Punchappuhamy) died intestate leaving a large estate. Podi Menike the respondent to this appeal claiming to be an adopted child and the sole heir of Punchappuhamy made application for letters of administration. The appellants who are the mother of the deceased and children of the deceased's uncle objected on a number of grounds the main one being that the adoption order was invalid. After inquiry the learned District Judge dismissed the objections holding that the adoption order was valid. Against this the appellants have now appealed and the validity of the adoption order was the only matter argued before us.

The surrounding facts pertaining to this matter are relevant and they are set down briefly. Punchappuhamy was married to one Podihamine and they did not have any children. Podimenike the respondent to this appeal was born on the 7th September, 1941. Her mother one Punchi Menika died about ten days later leaving the father one Ukku Banda with three other children besides her. A few days later Podimenike was handed over to Punchappuhamy and his wife to be adopted as their child. About ten years later, on the 23rd January, 1952, Punchappuhamy and his wife made an application to the Commissioner of Requests, Kurunegala, for the issue of an adoption order under the provisions of the Adoption of Children Ordinance. Podimenike was then about 10 years and 4 months old and she had been living throughout with Punchappuhamy and his wife.

An inquiry into the matter of adoption was held on the 29th January, 1952. Punchappuhamy, his wife and Ukku Banda, the father of Podimenike testified at this inquiry. In his evidence Punchappuhamy stated that the child Podimenike had been brought up by them from the time when she was about 15 days old. At the time of the inquiry Podimenike was 10 years and 4 months old. Punchappuhamy stated that he was possessed of

considerable property and that he wished the child to be given his ge name " for the purpose of inheriting his property ". Podimenike's father consented to this adoption. The Commissioner in an order made on the same day allowed the application for adoption, and also the application for Podimenike the adopted child to use the ge name of the adopter Punchappuhamy. At the end of his order there is a direction that the Registrar-General should make the appropriate entry in the Adoption Register. It would appear that the Registrar-General has complied with the direction.

After Punchappuhamy's death the application for letters of administration came up for inquiry before the District Judge of Kurunegala on the 7th May, 1971. Podimenike the petitioner was then 30 years old and married. The following issues were raised at the inquiry and both were answered in the affirmative :

(*a*) Whether the petitioner is the legally adopted child of the deceased Punchappuhamy ;

(*b*) If so is she the sole heir of the deceased.

Podimenike the sole witness at this inquiry stated in evidence that at the time of her adoption she was over ten years of age. She also said that the Judge asked her whether she consented to the adoption and that she had answered in the affirmative. It was argued in the District Court that the child at the time of adoption being over ten years old it was imperative under section 3 (5) of the Adoption Ordinance that the consent should be obtained. It was urged that this had not been done and it was contended therefore that the adoption order was bad in law.

It is this same matter that has been advanced in appeal. Learned Counsel for the appellant has referred us to the proceedings in the adoption inquiry and in particular to the formal order of the learned Commissioner and his reasons for making it. Nowhere in the proceedings is it recorded he submits that the consent of the child who was ten years at that time has been obtained. He draws our attention to section 3 (5) of the Adoption Ordinance which stated :—

> An adoption order shall not be made in respect of a child over the age of ten years except with the consent of such child.

He also draws our attention to section 4 (*a*) of the Ordinance which is to the effect that the court before making an adoption order shall be satisfied that every person whose consent is necessary has consented to and understands the nature and effect of the adoption order for which application is made. It is submitted that the Commissioner who made the adoption order

failed to appreciate the necessity of these requirements. It is also submitted that the consent of a child over ten years is mandatory and therefore that the order made without such consent in null and void *ab initio*. It is further submitted that a court making an order without such consent being obtained acts without jurisdiction resulting in the consequent orders being void and of no legal effect.

From all the material in these proceedings one incontrovertible fact emerges. Nowhere in the adoption proceedings has it been expressly recorded that the consent of the child has been obtained. It does not however necessarily follow from this that such consent *had not in fact been obtained.*

At the inquiry into the application for letters of administration the respondent has been questioned regarding the adoption proceedings in following manner. In examination-in-chief she said as follows :—

Q. Were you present in Court when evidence was led in this case ?

A. Yes.

Q. Did the Judge question you ?

A. Yes.

Q. Did you answer the questions put to you by the Judge ?

A. Yes. I did not object to the adoption. I consented to the adoption.

Under cross-examination she said :

I do not remember the Judge who made this order but I remember having come to this Court. I came along with my father named Ukku Banda. My mother was not alive. My father was Ukku Banda. He gave evidence. I gave evidence in the Court. The Judge asked me whether I consented and he wrote that out. I remember being questioned ..... I admitted that I was ten years of age.

Q. Did you consent to this adoption ?

A. Yes, I did.

The circumstances under which the adoption order came to be made, the relationship between the parties and the recorded material in the adoption proceedings coupled with the evidence of the adopted child (i.e., the respondent to this appeal) at the inquiry in the District Court leave no doubt on the question that the consent of the adopted child had been obtained before

the adoption order was mode. The fact that the adopted child had consented has not been so recorded in the adoption proceedings is in my view not, in this case fatal. I hold that the adoption order is valid and therefore the appeal must be dismissed.

Much argument was addressed to us on the validity of the adoption order, if in fact, the adopted child had not consented to the adoption. As indicated earlier, learned counsel for the appellants has submitted that the Court in making the adoption order then acted without jurisdiction and therefore the adoption order is void ab initio, that it is a nullity and is of no legal consequence. He submits that this adoption order made without the consent of the adopted child is such, as if it had never been made. This submission has now to be examined in order to determine whether the Court acted without jurisdiction as submitted by learned counsel for the appellants.

Section 13 of the Adoption of Children Ordinance is in the following terms :—

> The Court having jurisdiction to make an adoption order under this part shall be the Court of Request having jurisdiction in the place at which the applicant, or the child in respect of whom the application is made, resides.

Section 3 of the Ordinance enumerates the restrictions on the making of adoption orders as follows :—

> 3(1) An adoption order shall not be made in any case where—
>
> (*a*) the applicant is under the age of twenty-five years, or
>
> (*b*) the applicant is less than twenty-one years older than the child in respect of whom the application is made :
>
> (2) An adoption order shall not be made in any case where the sole applicant is a male and the child in respect of whom the application is made is a female, unless the court is satisfied that there are special circumstances which justify the making of an adoption order.
>
> (3) An adoption order shall not be made except with the consent of every person or body who is a parent or guardian of the child in respect of whom the application is made, or who has the actual custody of the child, or who is liable to contribute to the support of the child :
>
> (4) An adoption order shall not be made upon the application of one of two spouses without the consent of the other of them :

(5) An adoption order shall not be made in respect of a child over the age of ten years except with the consent of such child :

(6) An adoption order shall not be made in favour of any applicant who is not resident and domiciled in Ceylon or in respect of any child who is not a British subject and so resident.

There are however provisos to subsections (1), (3) and (4) of this section indicating the circumstances in which the Court could notwithstanding the restrictions contained in these subsections.

As mentioned earlier the main argument of the learned counsel for the appellants is that if the consent of a child over the age of ten years has not been obtained then the adoption order made in such a case is a nullity for the reason that the Court has acted without jurisdiction. Such an order is non-existent in the eyes of the law and can be subjected to collateral attack as has been done here.

I find myself unable to accept this submission. Jurisdiction to make adoption orders has been clearly vested in the Court of Requests of the respective areas under section 13 of the Ordinance. The existence of the jurisdiction is clearly in the appropriate Court of Requests but it is in the *exercise* of this jurisdiction when adoption orders are being made that certain restrictions have been imposed. Failure to give effect to these restrictions may result in an adoption order being made, which order may be set aside in appeal, revision or such proceedings. The order may be voidable but that is very different from saying that it is for this reason void ab initio. Such a voidable order must be set aside in direct proceedings and cannot be the subject of collateral attack. Gunasekera, J. in the case of *Weerasooriya v. Controller of Establishments,* 51 N.L.R. 189 at 191, has drawn this distinction between the existence of jurisdiction and the exercise of purisdiction. He refers to a passage in the judgment in the case of *Hriday Nath Roy v. Ram Chandra Barna Sarma* A.I.R. 1921 (Calcutta) 34, which brings out this distinction clearly :

> The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction ; and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction. The extent to which the conditions essential for creating and raising the jurisdiction of

a Court or the restraints attaching to the mode of exercise of that jurisdiction, should be included in the conception of jurisdiction itself, is sometimes a question of great nicety....

.....

But the distinction between existence of jurisdiction and exercise of jurisdiction has not always been borne in mind and this has sometimes led to confusion. .....

Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. As an authority for this proposition reference may be made to the celebrated dictum of Lord Hobhouse in *Malkarjun v. Narhari* (1900) 25 Bom. 337=27. I.A. 216=5 C. W.N. 10=2 Bom. L.R. 927=10 M.L.J. 368=7 Sar. 739 (P.C.) —" A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right ; and if that course is not taken, the decision however, wrong, cannot be disturbed." Lord Hobhouse then added that though it was true that the Court made a sad mistake in following the procedure adopted, still in so doing the Court was exercising its jurisdiction ; and to treat such an error as destroying the jurisdiction of the Court was calculated to introduce great confusion into the administration of the law. The view that jurisdiction is entirely independent of the manner of its exercise, and involves the power to decide either way upon the facts presented to the Court, is manifestly well-founded on principle, and has been recognised and applied elsewhere .....There is a clear distinction between the jurisdiction of the Court to try and determine a matter, and the erroneous action of such Court in the exercise of that jurisdiction. The former involves the power to act at all, while the latter involves the authority to act in the particular way in which the Court does act. The boundary between an error of judgment and the usurpation of power is this ; the former is reversible by an Appellate Court within a certain fixed time and is therefore only voidable, the latter is an absolute nullity. When parties are before the Court and present to it a controversy which the Court has authority to decide, a decision not necessarily correct but appropriate to that question is an exercise of judicial power or jurisdiction.

This same distinction has been brought out by Cannon J. in the case of *Ahamado Muheyadin v. Thambiappah*, 46 N.L.R. 370 at 371. He cites two passages from the case of *The Queen v. The Commissioner for Special Purposes of the Income Tax* (1888) 21 Q.B.D. 313, and they are reproduced below :

> When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends.

I am therefore of the view that if in this case no consent had been obtained then the adoption order is only voidable. It cannot be said that the order was void ab initio. The parties concerned in the order have taken no steps to have it set aside in appropriate proceedings for a period of over ten years. It is now not open to a third party to challenge its validity in collateral proceedings.

The appeals must therefore be dismissed with costs.

Appeals allowed.