BABY NONA

v.

MILTON AND 3 OTHERS

COURT OF APPEAL
ATUKORALE, J. (PRESIDENT) AND T. D. G. DE ALWIS, J.
C.A. 315/78 (F) ; D.C. GAMPAHA -1123/T.
NOVEMBER 7, 1983.

Testamentary action – Issue of letters of administration – Adoption Ordinance, section 2 (2) – Definition of term 'spouse' – Requirement that joint application should be by 'spouses', whether mandatory – Whether adoption order can be challenged in collateral proceedings.

On the death of one Peter Appuhamy, the petitioner-respondent applied for letters of administration on the basis that she was the widow of the deceased. The 2nd to 4th respondents objected to the issue of letters on the ground that the petitioner was not lawfully married to the deceased. After inquiry the District Court held that the petitioner was entitled to letters as the widow of the deceased. In appeal, the Supreme Court set aside the order of the learned District Judge and held that the petitioner was not the widow of the deceased and as such was not entitled to letters of administration. The case was remitted to the District Court to ascertain who was entitled to letters. The 1st respondent then applied for letters on the basis that he was the adopted son of the deceased. The 2nd to 4th respondents objected once again and challenged the adoption order. The learned District Judge upheld the adoption order and directed that letters be issued to the 1st respondent as the adopted son of the deceased. The contesting respondents appealed from this order.

Held

(1) The word 'spouses' in the proviso to section 2 (2) of the Adoption Ordinance read with section 17 means husband and wife.

(2) Section 2 (2) is a mandatory provision of law. A court has no power to entertain a joint application to adopt a child unless it be by husband and wife. Similarly, a court is not competent to make a joint adoption order except in favour of a husband and wife.

(3) The petitioner and the deceased never stood to each other in the relationship of husband and wife, and therefore the adoption order was in contravention of section 2 (2) of the Adoption Ordinance and is of no legal effect.

(4) It is not necessary that an adoption order be set aside in the very proceedings in which it was made.

Cases referred to

(1) *Fernando v. Fernando (1968) (70 N.L.R. 534).*
(2) *Macfoy v. United Africa Co. Ltd. (1961) 1 All E.R. 1169.*

APPEAL from an order of the District Court of Gampaha.

J. W. Subasinghe, S. A., with *Miss. E. M. S. Edirisinghe* for the 2nd, 3rd and 4th respondent-appellants.

P. A. D. Samarasekera with *A. L. N. de Silva* for the 1st respondent-respondent.

Petitioner-respondent absent and unrepresented.

Cur. adv. vult.

February 9, 1984.

ATUKORALE, J. (President)

This is a testamentary action in respect of the estate of one Peter Appuhamy who died intestate on 2.2.1972. It was originally instituted by one Baby Nona (the petitioner) who claimed letters of administration on the basis that she was the widow of the deceased. The 1st respondent is one Milton who, the petitioner alleged in her petition, was the only child of the union. The 2nd, 3rd and 4th respondents (hereinafter referred to as the contesting respondents) objected to the issue of letters on the ground that the petitioner was not lawfully married to the deceased. They also denied that the 1st respondent was a child of the deceased and themselves claimed letters as brothers of the deceased. After inquiry the learned District Judge held that the petitioner was entitled to letters as widow of the deceased. The contesting respondents appealed from this order and the Supreme Court by its judgment of 31.8.1976 set aside the order of the learned District Judge. The court held that as the petitioner had married one Mudiyanse in 1931 and that at the time she purported to marry the deceased in 1954 Mudiyanse was alive and as there was no evidence that she (though living in separation from Mudiyanse) was divorced from him, the petitioner was not the widow of the deceased and as such she was not entitled to letters of administration. The court therefore remitted the case to the District Court to ascertain who was entitled to letters. The court also observed that "it will be open to the 1st respondent, the adopted child, if he so desires, to make an application for letters at the resumed inquiry".

On 27.9.1977 the 1st respondent applied for letters on the basis that he was the lawfully adopted son of the deceased and the sole heir to the estate. The contesting respondents objected again and

denied that he was the lawfully adopted son. They further averred that as the marriage of the petitioner and the deceased was not valid in law, they were not entitled to make a joint application for adoption. They claimed letters for themselves as brothers of the deceased.

At the resumed inquiry no oral evidence appears to have been led. Written submissions were tendered on behalf of the parties. The main issue that arose for determination was whether the adoption order, P2, was valid in view of the fact that the marriage between the deceased and the petitioner (both of whom were joint adopters) was held to be invalid. The learned District Judge upheld the adoption order and directed that letters be issued to the 1st respondent as the adopted son of the deceased. The present appeal of the contesting respondents is from this order.

P2 is the impugned adoption order. It has been made by the appropriate court on 3.7.1954. The 1st respondent is the adopted child. The adopters are the deceased and the petitioner whose marriage was registered on 22.1.1954–vide P1. It is not in dispute that this adoption order has been made in pursuance of the provisions of the Adoption of Children Ordinance (Chap. 61, Vol. 3, L.E.). It is the contention of learned Senior Attorney for the contesting respondents that this adoption order is void and of no legal force for the reason that it has been made by court in violation of the mandatory provisions of S. 2 (2) of the aforesaid Ordinance, which reads as follows :

"(2) No adoption order shall be made authorizing two or more persons to adopt a child :

Provided, however, that the court may, on application made in that behalf by two spouses jointly, make an adoption order authorizing the two spouses jointly to adopt a child."

Learned Senior Attorney submitted that the finding of the Supreme Court in this case is that the marriage between the deceased and the petitioner is a nullity. They therefore did not at any time stand in the relationship of spouses and were thus not entitled to make a joint application for adoption nor was the court competent to make the adoption order, P2. Learned counsel for the 1st respondent maintained, firstly that it was not open to the

contesting respondents to attack the validity of the adoption order collaterally in these proceedings. Secondly, he contended that the oral evidence led at the earlier inquiry established quite clearly that the marriage between the deceased and the petitioner had been registered in accordance with the prescribed formalities and was one that the parties had contracted in the honest belief that there was no legal impediment to their getting married. He thus urged that it was a putative marriage, that the children born of such a marriage are considered to be legitimate and that this principle should be extended to the facts and circumstances of the instant case and the 1st respondent's adoption be considered to be valid. In support of this contention he cited Hahlo on 'The South African Law of Husband and Wife' (1953 Ed., p. 275) and the case of *Fernando v. Fernando* (1). Finally learned counsel submitted that it was not open to the contesting respondents to challenge the adoption order as it was not challenged in the Supreme Court at the earlier hearing.

The main question that arises for our determination is whether, as maintained by learned Senior Attorney, the adoption order P2 is void or not. The word 'spouses' appearing in the proviso to S. 2 (2) of the aforesaid Ordinance is not defined, but the definition of the word 'adopter' in S. 17 throws much light on its meaning. 'Adopter' is defined to mean, *inter alia,* both husband and wife where an adoption order is made in favour of a husband and wife on their joint application. The only provision in the Ordinance which empowers a joint application to be made for an adoption order is the proviso to s. 2 (2). But for the proviso, s. 2 (2) imposes a prohibition on the making of an adoption order authorizing two or more persons to adopt a child. Thus the word 'spouses' in the proviso when read with the definition of the word 'adopter' in s. 17 must necessarily mean husband and wife. This also seems to be the popular meaning of the word. Jowitt's Dictionary of English Law defines 'spouse' as one's wife or husband. Hence it appears to me that s. 2 (2) of the Ordinance imposes a prohibition which precludes a court from making an adoption order in favour of two persons except upon the joint application of a husband and wife. The application should be by the husband and wife and the adoption order must be one authorizing the husband and wife to adopt the child. S. 2 (2) seems to me to be a mandatory provision of law. A court has no power to entertain a joint application to

adopt a child unless it be by the husband and wife. Similarly a court is not competent to make a joint adoption order except in favour of a husband and wife. In the instant case as the petitioner and the deceased never stood to each other in the relationship of husband and wife, I am of the opinion that the adoption order, P2, has been made in contravention of the provisions of s. 2 (2) of the Ordinance and is thus of no legal effect. It is a nullity. It is not necessary that such an order should be set aside in the very proceedings in which it was made. It is open to the contesting respondents in the instant proceedings to show that the order is a nullity – vide *Macfoy v. United Africa Co. Ltd.* (2). I am also of the opinion that P2 being void and of no legal effect the principle that the natural children of a putative marriage are considered to be legitimate would have no application to the circumstances of this case. The extension of this principle to cover the case of an adopted child would thus not arise for consideration by us.

The final submission of learned counsel for the 1st respondent has now to be considered. It is clear from the judgment of the Supreme Court that the question of the validity of the adoption order P2 was not canvassed at the hearing of the appeal. In fact the validity or otherwise of the order was never considered by the Supreme Court. Nor was its validity put in issue at the inquiry in the lower court. As pointed out by me earlier it was only on 27.9.1977, i.e. after the judgment of the Supreme Court, that the 1st respondent for the first time set up a claim for letters of administration on the basis of an adoption. The contesting respondents in their objections to this claim of the 1st respondent challenged the validity of the order, P2. There is nothing in the judgment of the Supreme Court which precludes the contesting respondents from doing so. This submission too fails.

For the above reasons the appeal is allowed. The order of the learned District Judge is set aside. The 1st respondent's application for letters of administration is dismissed and the case is remitted to the District Court for a consideration of the application of the contesting respondents for letters. In the circumstances of this case there will be no order as to costs.

T. D. G. DE ALWIS, J.–I agree.

Appeal allowed.