1941 *Present* : **Howard C.J. and Soertsz J.**

CANDAPPA *v.* SUBRAMANIAM *et al.*

12—D. C. Jaffna, 124.

Collation—Liability—Gift from parents to children above the others—Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), s. 33.

The liability to collation under section 33 of the Jaffna Matrimonial Rights and Inheritance Ordinance depends upon whether the gifts received by children either on the occasion of marriage or to advance them in life amounted to more than what the other children have received from their deceased parents.

APPEAL from a judgment of the District Judge of Jaffna.

N. Nadarajah, for third to sixth respondents, appellants.

A. C. Nadarajah, for petitioner, respondent.

Cur. adv. vult.

July 11, 1941. SOERTSZ J.—

The facts from which the questions involved in this appeal arise, may be stated briefly as follows:—The deceased intestate died on December 4, 1934; leaving six children, four sons, namely, the present petitioner and the first, second, and seventh respondents, and two daughters, the fourth and sixth respondents.

The petitioner obtained letters of administration, and having administered the estate, filed the present petition in order to have his account judicially settled in terms of section 725 of the Civil Procedure Code. In paragraphs 3 and 4 of his petition he averred that "the persons

interested in the estate" were, himself, and his brothers, the first and second respondents, and that "the other respondents are not interested in the estate and are not entitled to any share thereof in view of the fact that the deceased during his lifetime did settle on each of them property . . . . with a view to advancement in life".

The respondents denied that the donations they had received prevented them from sharing the estate left by the deceased. They stated that those donations were simple donations, implying thereby that they were not liable to collation under section 33 of the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48).

At the inquiry there were three issues framed in regard to this controversy, namely:—

(1) Was the gift in 1912 in favour of the fourth respondent, her dowry ?
(2) Was the gift in favour of the sixth respondent in 1926 (an error for 1929) a donation of the kind contemplated in section 35 (an error for 33) of Ordinance No. 1 of 1911 ?
(4) Were the gifts in favour of the seventh respondent in 1928, 1929, and 1933, made for the purpose of advancing him in life . . . . ?

But an additional issue (3) was framed—it is not clear why—calling in question the heirship of the second respondent too, although in the petition for judicial settlement his right to succeed had been admitted.

From the trend of the inquiry and from the judgment it seems clear that the administrator did not mean to contend that the two daughters had, by operation of section 3 of the *Thesawalamai*, forfeited their right to share in the estate left by the deceased, but only that their right to share was similar to the right of the second and seventh respondents and was conditional upon their bringing the gifts referred to into collation.

After inquiry, the trial Judge found (*a*) "that the first donation to each of the daughters . . . . was dowry set apart as such from the time of the marriage and transferred by deed of donation and that the second donation to each of them was additional dowry"; (*b*) that the gifts made to the second and seventh respondents "come within property contemplated by section 33 of Chapter 48, that is to say, gifts made for the purpose of advancing the donees in life"; (*c*) that "the result of the findings is that the second, fourth, sixth and seventh respondents are such heirs only if they bring into collation the properties they have received by way of gift".

The learned Judge concluded his order as follows:—"I value all the donations at half the face value on the deeds . . . . and hold second, fourth, sixth, and seventh respondents to be entitled to the balance, if any, to make up their shares of the estate . . . . Those respondents are to state in writing within three weeks of the delivery of this order whether they will be satisfied with what they have already received or claim a share of the estate on the terms I lay down".

The fourth and sixth defendants appeal against these findings and order. It is obvious that the finding of the learned Judge in regard to the deeds of donation in favour of the fourth and sixth respondents in the year 1933, and his order based upon that finding cannot stand. Those donations

were not challenged and there was no issue in regard to them. Moreover, on the evidence, the trial Judge's finding that the gifts made in the year 1933 were additional dowry cannot be supported.

The only question then is—that is to say, so far as the fourth and sixth respondents are concerned—whether the gifts in favour of the fourth and sixth respondents in the year 1912 and 1929, respectively were, "gifts made by way of dowry or otherwise on the occasion of their marriage". The trial Judge has expressly found that although the deeds themselves were executed several years after the marriage of each of the donees, the properties involved in them were set apart for the donees as from the time of their marriage. There is evidence to support this finding, and the fact that other relations of the donees joined the donees' parents in these gifts, strongly supports the view that they were meant by way of dowry as is shown by section 3 of the *Thesawalamai*. That finding of the trial Judge must therefore be accepted, but his order based thereon cannot be sustained for the reason that that order involves all the property conveyed by those deeds, whereas the liability created by section 33, Chapter 48, affects only the lands that were given by the deceased parent, namely, the first-named donor. The result is that the fourth and sixth respondents would, if at all, be liable to bring into collation only the properties or rather the shares of the properties conveyed to them by the deceased on deeds P 1 and P 2 and for this purpose, the value to be put upon them is their value at the date of the donation. The properties in deeds P 3 and P 4 are not liable to collation.

The question remains whether the father's contribution to these two deeds constitutes a donation to the fourth and sixth respondents "above" what the other children have received from him. On the evidence in the case it is impossible to say that it does. For that reason at least, section 33 of Chapter 48 does not apply to P 1 and P 2.

This finding disposes of the appeal itself, but leaves the case in an unsatisfactory state inasmuch as it does not affect the finding of the trial Judge that the second and the seventh respondents are liable to bring their gifts into collation. In my opinion these donations cannot, on any sound principle, be differentiated from those to the first respondent, and yet the first respondent has been exempted from collation. Moreover, there is the fact that in his petition the petitioner did not challenge the gifts to the second respondent. I, therefore, think that this is eminently a case in which we should exercise the powers vested in us by section 753 of the Civil Procedure Code, and consider whether there is occasion for revision of the orders made in regard to the second and seventh respondents.

In regard to the donation to the second respondent, the only evidence is that of the administrator-petitioner that "the second respondent was a Police Vidane. One property was donated to him with a face value of Rs. 800 but of actual value of Rs. 1,500 to enable him to give security for his office of Sanitary Rate Collector". From this we are asked to infer that the gift was made to him in order to advance or establish him in life. I do not think we shall be justified in drawing the inference. The deed

itself recites that it is made for love and affection and is not one by the parents alone, but by an aunt as well.

Similarly in regard to the donations to the seventh respondent on the evidence one cannot say with confidence that the purpose of the donations was to advance or establish him in life, although no doubt, they must have helped to that end. Moreover, it can hardly be said that these gifts were above what the other children received. It seems to me that the money which the deceased appears to have spent on the education and professional training of the petitioner can be, more appropriately, described as advances to establish him in life. But in his case too it is not possible to say that he was unduly preferred.

For these reasons, I am of opinion that the order of the learned trial Judge is erroneous. I therefore allow the appeal of the fourth and sixth respondents and declare that there is no liability on their part to collate. Acting under section 753 of the Civil Procedure Code, I set aside the order made in regard to the second and seventh respondents.

In this view of the matter, there is no occasion to consider the cross appeal or the preliminary objection taken to it.

In all the circumstances of this case, I am of opinion that the costs including the costs of appeal should come out of the estate.

The case will go back for the consideration by the trial Judge of the remaining issues and for the ultimate distribution of the estate on the basis that there was no liability for collation on the part of any of the heirs.

HOWARD C.J.—I agree.

Appeal allowed.