MILTON
v.
BABY NONA AND OTHERS

SUPREME COURT.
WIMALARATNE, J., ABDUL CADER, J. AND TAMBIAH, J.
S.C. APPEAL No. 27/84 – C.A. / L.A. (S.C.) 6/84 – CA. 315/78 (F) – D.C. GAMPAHA 1123/T.
MARCH 11, 12 AND 28, 1985.

Adoption – Adoption of Children Ordinance – Sections 2 (2), 13, 6 – Adoption of Children Rules – Effect of adoption order – Can adoption order made on the joint application of two persons whose marriage is declared a nullity be subject to collateral attack ?

One Mudiyanse married Baby Nona in 1931 but deserted her after one year and was not thereafter heard of and thought by her to be dead. On 22.1.1954 Baby Nona married Peter Appuhamy and in the marriage certificate her civil status is described as "separated wife" of Mudiyanse. On a joint application by Peter Appuhamy and Baby Nona as husband and wife the Court of Requests of that time made an Adoption Order in respect of the child Milton then four years old as the qualifications in regard to age and residence were fulfilled and there was prima facie evidence of marriage. Peter Appuhamy and Baby Nona were named as the adopters in the Order. Peter Appuhamy died intestate on 2.2.1972 and Baby Nona instituted the present testamentary proceedings in respect of his estate claiming letters of administration as widow – the only other heir being the adopted child Milton. The 2nd to 4th respondents objected to letters being granted to Baby Nona and contended that Baby Nona was not lawfully married to Peter Appuhamy and that Milton was not their child. The District Judge however granted letters to Baby Nona. In appeal the Supreme Court set aside the order of the District Judge as Baby Nona had not obtained a divorce from Mudiyanse and the latter was still alive but left it open to Milton to apply for letters at the resumed inquiry. Milton then applied for letters as lawfully adopted son and heir of the deceased Peter Appuhamy. The 2nd to 4th respondents challenged the validity of the adoption order on the ground that Peter Appuhamy and Baby Nona were not lawfully married and their application for adoption was bad. The District Judge upheld the validity of the adoption order and directed the issue of letters of administration to Milton. In appeal before the Court of Appeal it was argued for Milton that a collateral attack on the adoption order was not permissible and the marriage between Peter Appuhamy and Baby Nona being a putative marriage the principle that the natural children of a putative marriage are legitimate should be extended to cover an adopted child. The Court of Appeal however held that as the marriage between Peter Appuhamy and Baby Nona was a nullity the adoption order was also a nullity as only spouses were entitled to make a joint application or adoption under s. 2 (2) of the Adoption Ordinance. The order of the District Judge was set aside and the application of Milton for letters was dismissed.

Held –

(1) The error here of entering an adoption order on the joint application of two persons whose marriage has been declared a nullity is one committed within jurisdiction and by a competent court. Such an order is voidable and not void and therefore collateral attack of the order in different proceedings by third parties is not permissible.

(2) The District Judge was right in issuing letters of administration to Milton.

Cases referred to :

(1) *Re Skinner (an Infant) [1948] 1 All ER 917, 918.*

(2) *Hriday Nath Roy v. Ram Chandra Barna Sarma* AIR 1921 Calcutta 34 (F.B.).

(3) *Re (Infants) Adoption Orders : (Validity)* [1977] 2 ALL ER 777.

(4) *F. v. F. [1970] 1* All ER 200.

(5) *P. v. P and J [1971] 1* All ER 616.

(6) *Christina and Three Others v. Cecilin Fernando* [1962] 65 NLR 274.

(7) *Permanent Trustee Company of New South Wales Ltd. v. Council of the Municipality of Campbelltown and Another* 105, Commonwealth Law Reports 401.

APPEAL from judgment of the Court of Appeal.

H. L. de Silva, P. C. with *A. L. M. de Silva* for 1st respondent-appellant.

J. W. Subasinghe, P. C. with *S. Gunasekera,* and *Miss. S. M. S. Edirisinghe,* for 2nd, 3rd and 4th respondent-respondents.

Cur. adv. vult.

May 8, 1985.

TAMBIAH, J.

This case depends on the interpretation of s. 2 (2) of the Adoption of Children Ordinance (Cap. 61), which reads as follows :

> "No Adoption Order shall be made authorising 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 authorising the two spouses jointly to adopt a child".

S. 13 (2) of the Ordinance provides for the making of rules by the Judges of the Supreme Court prescribing the manner in which applications to the Court are to be made and the procedure to be

followed in the hearing of such applications. The Court having jurisdiction to make an adoption order is the Court of Requests having jurisdiction in the place at which the applicant, or the child in respect of whom the application is made, resides (s. 13 (1)). For the purpose of any application, the court shall, subject to any rules made under this section, appoint some person or body of persons to act as guardian *ad litem* of the child upon the hearing of the application with the duty of safeguarding the interests of the child before the Court (s. 13 (4)).

The Adoption of Children Rules (Subsidiary Legislation 1956, Vol. 2, Ch. 61) provides :

When a guardian *ad litem* has been appointed, the duplicate of the application shall be served on him (Rule 5 (1)). The Court shall fix a time for the hearing of the application and shall notice, amongst others, the child in respect of whom the application is made and the guardian *ad litem*, of the day so appointed (Rule 5 (2)).

It shall be 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 (Rule 7).

The effect of the adoption order is stated in s. 6 (1) :

"Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians of the adopted child in relation to the future custody, maintenance and education of the adopted child including all rights to appoint a guardian or to consent to the marriage of the child, or to give notice forbidding the issue of a certificate for the solemnisation of such marriage shall be extinguished ; and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock. . . . . "

In England, there are identical provisions (Adoption of Children Act, 1926, and the rules made by the Lord Chancellor under the Act) and Lord Greene, M. R. in *Re Skinner (an Infant)*(1) commenting on those provisions observed (p. 918) :

"It is to be observed that the effect of the adoption order is serious and fundamental. It divests the infant of its legal rights against its natural parents. It deprives the natural parents of their legal rights in respect of the infant and confers on the infant legal rights against the adopting parties as though they were the natural parents. It is obvious that the legislature, in view of the serious effect on a child of an adoption order, has taken the appropriate method of ensuring that the interests of the child shall be protected. The child is to be a party to the application on which the order is to be made and a guardian *ad litem* is to be appointed, charged with the duty of making all investigations relevant to the welfare of the child in connection with the proposed adoption. The adoption order, therefore, when made, is not a mere order operating inter partes and affecting only the status of the new adopters. It is essentially a thing which alters the status of the infant who is the person primarily affected and interested. The adopting parents, of course, get various advantages. They get what is no doubt, the valuable sentimental advantage of being able to bring up a child. They get the advantage that the child, by the adoption order, incurs certain obligations towards them as though they were the natural parents. Nevertheless, the person primarily affected by the order is undoubtedly the child. The order does not affect the status of the two parties, except in the sense that they acquire the liabilities of a natural parent and the rights of a natural parent".

Bearing in mind that an adoption order is essentially a thing which alters the status of the infant who is the person primarily affected, I approach the problem that has arisen in this case. The facts are these :

Baby Nona, the petitioner-respondent-respondent, had married one Mudiyanse in 1931. Mudiyanse had deserted Baby Nona one year after marriage and since then she had not heard of him and thought he was dead. On 22.01.1954 she married one Peter Appuhamy and the marriage was registered. In the marriage certificate, her civil status has been described as "separated wife" of Mudiyanse. The 2nd

respondent, a brother of Mudiyanse, has stated in evidence that everybody in the village accepted them as husband and wife. They made a joint application, as husband and wife, to the Court of Requests, Colombo, to adopt Milton, the 1st respondent-respondent-appellant in this case, and the Court made the Adoption Order on 03.07.1954. Milton was Peter Appuhamy's sister's son and on the date of the adoption order, he was about four years old. The Court directed the adoption to be entered in the Adoption Register which has to be kept under the Ordinance and this was done. The Certificate of Adoption issued by the Registrar-General sets out the name of Milton as the adopted child and the names of the adopters as Peter Appuhamy and his "wife" Baby Nona.

Peter Appuhamy died intestate on 02.02.1972 and Baby Nona instituted testamentary proceedings on 27.03.1972 in respect of the estate of Peter Appuhamy. She claimed letters on administration on the basis that she was the widow of the deceased and also disclosed the appellant as being the only child.

The 2nd to the 4th respondents-appellants-respondents objected to the issue of letters on the ground that Baby Nona was not lawfully married to the deceased and further, that the appellant was not a child of the union between her and the deceased, and counterclaimed letters as brothers of the deceased. After inquiry, the learned District Judge held that Baby Nona was entitled to letters as widow of the deceased. The 2nd to the 4th respondents appealed to the Supreme Court and the Supreme Court by its judgment of 31.08.1976 set aside the order of the District Judge, holding that as Baby Nona had married 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, although living in separation from Mudiyanse, was divorced from him, she was not the widow of the deceased and as such, not entitled to letters of administration. The Supreme Court thereafter remitted the case to the District Court to ascertain who was entitled to letters and the Court also observed that "it will be open to the 1st respondent (the present appellant) the adopted child, if he so desires, to make an application for letters of administration at the resumed inquiry."

On 27.09.1977, the appellant applied for letters of administration on the basis that he was the lawfully adopted son of the deceased and the sole heir to the estate. The 2nd to the 4th respondents objected

and denied that the appellant was the lawfully adopted son of the deceased and further stated that as the marriage between Baby Nona and the deceased was invalid in law, they were not entitled to make a joint application for adoption, and counterclaimed letters for themselves as brothers of the deceased. The main issue at the resumed inquiry was whether the adoption order was valid in view of the fact that the marriage between the deceased and Baby Nona (both of whom are joint adopters) was held to be invalid. The learned District Judge upheld the adoption order and directed that letters of administration be issued to the appellant as the adopted son of the deceased.

The 2nd to the 4th respondents appealed to the Court of Appeal. It was argued for the present appellant, (1) that it was not open to the 2nd to the 4th respondents to attack the validity of the adoption collaterally in these proceedings, (2) that the marriage was registered and the parties had contracted the marriage in the honest belief that there was no legal impediment to their getting married ; it was a putative marriage. The principle that the natural children of a putative marriage are considered to be legitimate should be extended to cover the case of an adopted child.

The Court of Appeal by its judgment dated 09.02.1984 held that under s. 2 (2), a Court has no power to entertain a joint application to adopt a child unless it be by the husband and wife, and that a court is not competent to make a joint adoption order except in favour of a husband and wife. The parties never stood to each other in the relationship of husband and wife. S. 2 (2) is a mandatory provision and the adoption order has been made in violation of s. 2 (2) and therefore a nullity ; it is open to the 2nd to the 4th respondents to show that the order is a nullity in the instant proceedings. The Court of Appeal further held that as the adoption order is 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, and that the extension of the principle to cover the case of an adopted child did not arise for consideration. The Court of Appeal set aside the order of the learned District Judge, dismissed the application for letters of administration and remitted the case to the District Court for a consideration of the application of the 2nd to the 4th respondents for letters of administration.

Though the Court of Appeal granted leave to the appellant to appeal to this Court from its decisions on both matters, learned President's Counsel for the appellant did not seek to canvass the finding of the Court of Appeal on the 2nd matter.

While learned President's Counsel for the appellant contends that *ex facie*, the adoption order is a valid order and cannot be attacked collaterally in these testamentary proceedings, learned President's Counsel for the 2nd to the 4th respondents contends that s. 2 (2) is a mandatory provision, and that a contravention of the section renders the adoption order a nullity and therefore can be attacked collaterally.

In *Hriday Nath Roy v. Ram Chandra Barna Sarma* (2) Mookerjee, A. C. J. observed (pp. 36, 37) :

> "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. . . . . 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 . . . . . There is a clear distinction between the jurisdiction to try and determine the 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. So far as the jurisdiction itself is concerned, it is wholly immaterial whether the decision upon the particular question be correct or incorrect. Were it held that the Court had jurisdiction to render only correct decisions, then each time it made an erroneous ruling or decision, the Court would be without jurisdiction and the ruling itself void. Such is not the law, and it matters not what may be the particular question presented for adjudication, whether it relates to the jurisdiction of the Court itself

or affects the substantive rights of parties litigating, it cannot be held that the ruling or decision itself is without jurisdiction or is beyond the jurisdiction of the Court. The decision may be erroneous, but it cannot be held to be void for want of jurisdiction. A Court may have the right and power to determine the status of a thing and yet may exercise its authority erroneously ; after jurisdiction attaches in any case, all that follows is exercise of jurisdiction, and continuance of jurisdiction is not dependant upon the correctness of the determination . . . . . It is plain that however erroneous the order may be, it is not an order made by a Court without jurisdiction ; it is, on the other hand, an order made by a Court of competent jurisdiction acting with material irregularity in the exercise of its jurisdiction. The order cannot consequently be deemed null and void. The party aggrieved may directly impugn the order, and may, in an appropriation proceeding, invoke the aid of a superior tribunal to set aside the order. . . . . but till it has been so vacated, it is operative between the parties and cannot be ignored or challenged collaterally in a different proceeding."

In *Re Skinner (an Infant) (supra)*,on 19.07.1937, S gave birth to a child. On 12.11.1941, she went through a ceremony of marriage with C. On 06.06.1942, S and C presented a petition in the County Court for an adoption order in respect of the infant under s. 51 (3) of the Adoption of Children Act, 1926, which reads–

"Where an application for an adoption order is made by two spouses jointly, the Court may make the order authorising the two spouses jointly to adopt, but save as aforesaid no adoption order shall be made authorising more than one person to adopt an infant."

The adoption order was made on 16.07.1942. On 09.09.1947, C was convicted of bigamously marrying S and sent to prison. On discharge, he left S and refused to support the child. On 13.11.1947, S complained to Edmonton Petty Sessions that she was the mother of the infant and that C was the guardian and she was desirous of having the legal custody of the infant. The Justices gave the legal custody of the child to S and adjudged C to be the guardian of the child and ordered C to pay 10s. a week for the child's maintenance. C appealed and Vaisey, J. discharged the maintenance order on the ground that the adoption order was invalid. He took the view that as S had stated before the Justices that C had bigamously married her, she could not

be heard to assert the validity of the adoption order, because by that statement she was asserting a state of facts, which, if it existed, would have deprived the County Court, under S. 1 (3) of the Adoption of Children Act, 1926, of the jurisdiction to make the adoption order. The Court of Appeal, on an appeal from the order of Vaisey J., held that the justices had jurisdiction to make the maintenance order on the basis that the adoption order was valid.

Lord Greene, M. R. said (pp. 918, 919, 920) :

"The adoption order was made on July 16, 1942. It was made on reading the petition which contains allegations that the parties are spouses and on reading the affidavits. The Court heard the solicitor for the petitioners, and it heard Mr. Brace as guardian ad litem. The order recites that the judge was satisfied that the allegations in the petition were true. He was satisfied with the undertaking of William James Carter and Margaret Rose Carter, described as his wife, as to the provision to be made for the infant that it should be adopted. It was further stated that all the requirements of the Adoption of Children Act, 1926, had been complied with. He, therefore, made the order authorising the adoption and directing the adoption to be entered in the register which has to be kept under the Act. . . . . That solemn and important order was made in accordance with the directions of the Act and rules, after careful and responsible investigation into the question of the benefit to the infant by an officer of the local authority as the guardian ad litem, and on evidence which, on the face of it, was adequate and sufficient to found jurisdiction. . . . . The adoption order had never been set aside or pronounced to be void by any competent Court. . . . . think myself the more probable view is that the justices took what, in my opinion, is the correct view, viz., that they had no jurisdiction to disregard the order of the county court judge so long as that order stood. . . . . It is not for us to consider here by what procedure, if any, the adoption order could be got rid of on the ground that it was made without jurisdiction. It may be that the only remedy is certiorari. It may be that either of the petitioners or the infant could get leave to appeal to this court out of time, if they were out of time. . . . . Assuming that the order can be challenged by appropriate process, it was not competant, in my opinion, for the justices to challenge it."

Sommerville, L. J. said (p.921) :

"I agree that the justices had jurisdiction to make the order which they did, viz., an order on the basis that the adoption order was valid. The foundation of the submission of Counsel for the defendant is that under the terms of s. 1 (3) of the Adoption of Children Act, 1926, where an order is made on the basis that the two persons asking for it are spouses and it subsequently turns out that they are not spouses, the order is invalid without any further declaration by any competant court and can, or must be, disregarded by any court in which these facts are proved. I think, if one considers this Act as a whole, there is an argument on which I do not desire to express an opinion as I have not formed one, that, notwithstanding those circumstances, the order originally made on the basis that the two were spouses will remain an effective order of which the adopted infant can take advantage and under which he or she can maintain his or her rights. Putting it in another way, a man who has induced the court by false representation to give him the right and impose on him the obligations which he has under the Statute cannot thereafter, possibly to the detriment of the infant adopted, say : "I told you what was untrue and, therefore, this order is invalid." I take the view that an order of this kind is one which courts must treat as valid unless it is set aside by appropriate procedure. . . . . This, in my view, is a valid order and must be regarded as such until proceedings are taken, if they can be taken, and succeed, expressly directed to set it aside or getting some declaration as to its invalidity."

In *Re (Infants) (Adoption Orders : Validity)*(3) Mrs. S first married Mr. F and two children were born respectively on 18.8.1967 and 24.02.1969. The marriage was dissolved by decree absolute on 06.12.1972. On 13.10.1973, Mr. and Mrs. S got married at the Registrar's Office, the husband describing himself as a bachelor. On 30.4.1974, Mr. and Mrs. S got two adoption orders to adopt the two children, their father F giving his consent to the proposed adoption. At the time Mr. S married Mrs. S, he was married to another woman but he believed he had been divorced ; in fact his first marriage was not dissolved until a decree absolute was made on 14.6.1974, so that the second marriage was bigamous and therefore void. Consequently, on the date when the adoption orders were made, the adopters were not 'spouses' within the meaning of the Adoption Act, 1958. S. 1 (2) which reads : "An adoption order may be made on the application of

two spouses authorising them jointly to adopt an infant ; but an adoption order shall not in any other case be made authorising more than one person to adopt an infant."

In August 1974, the adopters discovered that their marriage was bigamous and in July 1975, Mrs. S petitioned for a decree of nullity of her marriage to Mr. S and the purported marriage was annulled by a decree absolute dated 25.02.1976 and three days later Mr. and Mrs. S went through another, and a valid, ceremony of marriage.

Wishing to regularise the status of their children, Mr. and Mrs. S applied to the County Court for directions as to the status and effect of the adoption orders of 30.4.1974. The Court took the view that it had no power to grant a declaration or to determine the validity of those orders and that it was a matter for the higher Court. Mr and Mrs. S then applied to the Court of Appeal for leave to appeal out of time to set aside the adoption orders. Mr. and Mrs. S intended to apply for new adoption orders in respect of Mrs. S's children. The Court of Appeal held that the adoption orders of 30.4.1974 are good on their face and, therefore, valid until set aside by a competent Court ; that the proposed appeal is misconceived and dismissed the application for leave to appeal out of time.

The judgment of the Court considered the decision in *Re Skinner (an Infant) (supra)* and stated (pp. 780, 781, 782, 783, 784) –

"The result of that decision is that an adoption order made by a competent Court in favour of two persons in the erroneous belief that they were lawfully married, that is that they were 'spouses', is not a nullity and must be acted on as if it were valid until set aside by a competent Court . . . . . The decision of this Court in *Re Skinner (an Infant)* that the adoption order was not a nullity and that the Magistrate's Court was obliged to treat it as valid until it was set aside is in accordance with the view expressed by Diplock, J. in *O'Connor v. Isaacs* where he said : 'The order in itself shows that there was no jurisdiction. It is an order that is bad on its face, and where an order is bad on the face of it, it ceases to have the advantage which orders, although made without jurisdiction but good on their face, have, namely, that they are valid and are to be treated as valid until they have been set aside. Authority for that proposition is to be found in a number of cases . . . . . ' On this analysis, the adoption orders in *Re Skinner (an Infant)* and in the

present case, all of which were good on their faces, were valid orders, unless and until they were set aside by a competent Court. . . . . A decree of divorce purporting to have been made by a Magistrate's Court, or any order purporting to have been made by a court without any jurisdiction over the subject matter, would be bad on its face and therefore a nullity. . . . The fact of the matter is that in such situations the Court, in exercising its powers to make adoption orders, has found, expressly or by implication, as a fact on the evidence before it, that the adopters were spouses. Such an error of fact would be a ground of appeal against the adoption order at the suit of an aggrieved party. . . . . The result, therefore, is that the adoption orders of 30.04.74 are good on their face and, therefore, valid until set aside by a competent Court. If they (adopters) or any other relevant party wishes to have the orders set aside, an appeal out of time would be one way of achieving, or trying to achieve, that objective. It seems, although we are not deciding the point, that proceedings in the High Court for a declaration that orders are valid might be a possible alternative. . . . . "

The above two English cases support the proposition that an adoption order made in favour of persons bigamously married is valid unless and until it is set aside by a competent Court.

Words similar to those used in s. 1 (2) of the Adoption Act, 1958, are to be found in s. 33 (1) (*a*) of the Matrimonial Causes Act, 1958, which reads : "The Court shall not make absolute a decree for divorce unless it is satisfied as respects every child who is under 16 that arrangements for his care and upbringing have been made and are satisfactory or are the best that can be devised in the circumstances."

In *F. v. F.* (4) the wife, in 1967, filed a petition for divorce on the ground of the husband's adultery. The petition set out that there were three children of the family and the wife prayed for their custody and for maintenance for herself and for them. After the petition had been filed, the wife gave birth to a child S, but the petition was not amended to deal with her. The suit was undefended and in July 1967, a decree nisi for divorce was pronounced in the wife's favour. The trial Judge heard evidence relating only to the three children named in the petition and was satisfied as to the arrangements made for their welfare. In October 1967, the decree absolute was made, the Court still having no information about the birth of S. In March 1969, the respondent

husband went through a ceremony of marriage with the woman named in the petition. They had two children born before the ceremony. In April 1969, the petitioner filed an affidavit asking for maintenance for all four children. On a summons by the petitioner to amend her petition to deal with S and asking the Court to examine the arrangements made for S's welfare so that the decree might validly be made absolute in compliance with s. 33, the summons was dismissed by Court. The Court held that though clearly there has been a failure to comply with the requirements of s. 33, such failure rendered the decree absolute 'voidable' and not 'void'. Some of the considerations that weighed with Sir Jocelyn Simon P were that if Parliament intended that a failure to comply with the provisions of the section rendered a decree absolute void, nothing would have been simpler than so to have stipulated, and also that to hold that non-compliance with s. 33 renders the decree absolute void, would sometimes cause hardship to innocent 3rd parties ; e.g., a husband petitioner might without any fault be ignorant of the relevant child's birth ; and, if he had re-married on the faith of an apparently valid decree absolute, his after-taken wife and their children might suffer.

The view expressed by Sir Jocelyn Simon P was adopted by the Court of Appeal in *P. v. P.* and *J.*(5).

In *Christina and Three Others v. Cecilin Fernando* (6), the respondent applied for letters of administration to the estate of her deceased husband. The appellants, claiming to be the lawful heirs of the deceased, opposed the application of the respondent on the ground that she was not legally married to the deceased. The basis of their claim was that the respondent was previously married to one M and that in the action for divorce instituted by her against M, the decree nisi by default after due service of summons was made absolute without service of notice of the decree nisi on M. The respondent married the deceased after she obtained the decree absolute for divorce and the marriage was duly registered.

The appellants contended that the decree absolute for divorce was ab initio null and void and of no legal effect whatsoever on account of non-compliance with the imperative provisions of s. 85 of the Civil Procedure Code. The respondent contended that the decree absolute was only voidable at the instance of the defendant in direct proceedings and it is not open to collateral attack in other proceedings at the instance of 3rd parties.

The Supreme Court held that the decree for divorce had been entered by a Court of competent jurisdiction and, however erroneous or irregular it may have been as between the parties to the action for divorce, was not open to collateral attack by third parties in other proceedings.

L. B. de Silva, J. said (p. 277) :

"It must be noted that in the cases cited so far, the finding that the Decree was a nullity, was made in the same case, on the application of a party affected. Such an order may be made by the Court that entered the decree, by an Appellate Court, in Revision, by a writ of certiorari or by separate action between the parties concerned for that purpose. But we are required to consider if such an order or decree is open to collateral attack in other proceedings at the instance of third parties. If such an order or decree was void *ab initio* and had no legal consequences it could undoubtedly be challenged collaterally in other proceedings even by third parties, as no one can possibly claim any rights from such an order or decree."

In *Permanent Trustee Company of New South Wales Ltd. v. Council of the Municipality of Campbelltown and Another* (7) the Municipality served a notice on the Company under s. 224 (3) of the Local Government Act (N.S.W.) of its intention to take over a strip of land on the ground that it was a road left in subdivision of private lands and it was doubtful whether it was a public road or not. S. 224 (3) stated that where any road has been left in subdivision of private lands before commencement of the Local Government Act, 1906, and there exists any doubt as to whether or not it is a public road, the Council may serve on the owner of the land comprising the road, notice of intention to take over the land. If the owner has any objection, he could appeal to the District Court Judge. If no appeal is preferred or if on appeal the judge so orders, the Council may notify in the Gazette that such road is a public road, and thereupon the road shall be a public road and shall vest in the Council. The Company appealed and the appeal was dismissed. It then obtained from the Supreme Court of New South Wales an order nisi directed to the Municipality to show cause why a writ of prohibition should not issue restraining the District Court Judge and the Municipality from proceeding further and why a writ of certiorari should not issue to quash the proceedings on the ground that the land was not a road within the meaning of s. 224 (3), that the

said land was not a road left in a subdivision of private lands before the commencement of the 1906 Act, and that the Council's notice was given for a purpose not sanctioned by s. 224 (3). The order nisi was discharged.

Fullagar, J. said (pp. 407, 408) :

"The substantive power given to the Council . . . . is a power to notify in the Gazette that any particular land is a public road . . . . The power is given subject to three conditions. The first is that the land is a road which has been left in subdivision of private lands before the commencement of the Local Government Act, 1906. The second is that there exists a doubt as to whether or not it is a public road. The third is that notice shall have been served on the owner of the land of the Council's intention to take over the land . . . . What then has the Judge to decide ? Surely the very thing he has to decide is whether the three conditions of the exercise of the Council's powers are fulfilled . . . . The three conditions are conditions of the Council's power ; they are not conditions of the judge's jurisdiction. Their existence is not a collateral matter which a judge cannot finally determine ; it is the very matter which he is given jurisdiction finally to dertermine."

Menzies, J. said (p. 414) :

"The grounds upon which it was contended that the District Court judge had no jurisdiction were in short that St. George's Parade was not a road ; that it was not a road left in the subdivisions of private lands ; and in any event that it was so clear that it is not a public road that no doubt existed as to whether it is so or not. The argument was that correct findings as to these matters by the District Court Judge was essential to his jurisdiction so that in the event of error he was subject to control by the Supreme Court by means of one or other of the prerogative writs. I am not prepared to accept the basis of this argument because it seems to me that the jurisdiction of the District Court Judge cannot be made to depend upon his correctly deciding the matters which the section commits to his decision."

In the present case, the application to adopt the appellant was made by the deceased Peter Appuhamy "and his wife", Baby Nona. Their marriage was registered. It was not an application made, say, by Peter Appuhamy and his brother or sister. The Court which had the

power to hear and determine the application and to make an adoption order under the Ordinance was the Court of Requests. The application was presented to the Court of Requests, Colombo. If the subject matter of the adoption order is regarded as the application for an adoption order, then, the subject matter was within the jurisdiction of the Court of Requests, Colombo. It is not as if the application was made to a Magistrate's Court which had no jurisdiction in the matter, and the adoption order was made by it. The adoption order dated 03.07.1954 was made by the Court of Requests, Colombo, and on its direction, the adoption was entered in the Adoption Register. On the face of it, the adoption order is good, and, therefore, valid until set aside by a competent Court and this has not been done. The learned District Judge was therefore right in granting the letters of administration to the appellant on the basis that the adoption order was valid.

Learned President's Counsel for the respondents contends that at the time the adoption order was made, Peter Appuhamy and Baby Nona were not "spouses" within the meaning of s. 2 (2) of the Ordinance, as they were bigamously married ; that a husband and wife relationship is a necessary antecedent to the ability of the Court to make an adoption order, a condition precedent to the exercise of its jurisdiction to make an adoption order ; and that a joint adoption order in favour of two persons, who are not "spouses", is a violation of s. 2 (2), which is an imperative provision, and renders the adoption order a nullity.

I cannot agree. S. 2 (1) empowers the Court to make adoption orders and thereafter proceeds to give statutory directions to be adhered to by the Court, in the exercise of its powers to make adoption orders. Thus, no adoption order is to be made in favour of two persons unless they are spouses (s. 2 (2)). An adoption order shall not be made, where the applicant is under 25 years of age or is less than 21 years older than the child (s. 3), or in respect of a child over 10 years except with his or her consent (s. 3 (5)) or where the applicant is not resident or domiciled in Ceylon or in respect of a child who is not a British subject and so resident (s. 3 (6)) and so on. In other words, the Court is required, before making an adoption order, to be satisfied on the evidence before it that the adopters are spouses and that both the adopter and the child to be adopted have the requisite age and residence. These are matters which the Ordinance has committed to the decision of the Court. The Court may

erroneously decide that the adopters are "spouses" or that the adopter or the child has the required age and residence and make the adoption order. In the result, the adoption order itself may be an erroneous order, but, it cannot be said that it is an order made without jurisdiction. It is an order made by a Court of competent jurisdiction acting wrongly in the exercise of its jurisdiction. The order becomes voidable and not void. As was correctly pointed out by learned President's Counsel for the appellant, the Court has to be satisfied not only that the adopters are spouses but also that the adopter is over 25 years, is more than 21 years older than the child, and resident in this country. Suppose the Court made the adoption order in an erroneous belief as to the age and residence – it turns out later that when the adoption order was made, the adopter was 24 years, was less than 21 years older than the child and was resident abroad – does it mean that non-compliance with the age and residence requirements results in the adoption order being a nullity? It is inconceivable that the legislature could have intended such a consequence.

The adoption order being voidable and not void, it could only be set aside in direct proceedings and is not open to collateral attack in other proceedings. The appellant was about 4 years old at the time of the adoption and was an innocent party to the adoption proceedings. What the 2nd to the 4th respondents, who are 3rd parties to the adoption proceedings, are seeking to do, is to impugn the adoption order almost 23 years later and in these testamentary proceedings, which are collateral proceedings. This, they cannot do.

The appeal is allowed with costs. I set aside the judgment of the Court of Appeal dated 09th February, 1984, and affirm the order of the learned District Judge issuing letters of administration to the appellant.

WIMALARATNE, J.

I am in entire agreement with the conclusion reached by my brother Tambiah, J., as well as with the reasons for his conclusion.

Section 4 of the Adoption of Children Ordinance imposes a duty on the Court, before making an adoption order to be satisfied, inter alia, that the order will be for the welfare of the child. Before the Court makes an order it considers, in practice, a report from a Probation Officer, which report is submitted after a careful investigation. It must be presumed that that has been so in this case as well.

Section 6 of the Ordinance deals with the effect of an adoption order. An adoption order has the effect of changing the status of a child. This child has been accepted as the adopted son of Peter Appuhamy and Baby Nona ever since 1954. Even if an adoption order could be attacked in collateral proceedings, which I do not for a moment concede, a Court would be extremely slow to disturb a beneficial status which a person has enjoyed for so long a period.

I would allow this appeal with costs.

ABDUL CADER, J.– I agree.

Appeal allowed.