BABBUWA AND OTHERS
v
PREMADASA AND OTHERS

SUPREME COURT.
DR. SHIRANI BANDARANAYAKE, J.
ANDREW SOMAWANSA, J.
SC (APPEAL) NO. 57A/2006
SC (SPL) L.A. NO. 343/2003
C.A. NO. 139/90(F)
D.C. RATNAPURA NO. 1172/P
SEPTEMBER 4, 2008

Kandyan Law Declaration and Amendment Ordinance of No. 39 of 1938 Section 10(1), Section 27 – Its applicability in respect of persons dying after the commencement of the Ordinance in deciding question of heirship – Section 10(1) applicability of the provisions of the Ordinance to determine character of property – No retrospective application under the Ordinance unless expressly provided.

This is an appeal from the judgment of the Court of Appeal dealing with questions arising under the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938. The appellants and the respondents agreed at the hearing that this appeal could be argued on the following questions:

(1) Have their Lordships of the Court of Appeal erred in holding that the provisions of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938, applied in respect of persons dying after the commencement of the said Ordinance in deciding questions of heirship, but did not apply in determining the nature and character of the inheritance?

(2) Have their Lordships of the Court of Appeal erred in holding that the definition of *paraveni* in section 10(1) of the said Ordinance did not apply to the property in question at the time of the death of Podimenike referred therein?

Held:

(1) Section 10 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 clearly indicates that the proviso or the provisions of Section 10(1) do not have retrospective application regarding *paraveni* property. Section 27 of the Ordinance clearly states that the Ordinance shall not have retrospective effect unless expressly so provided in the Ordinance.

(2) For the property in dispute to be categorized as *paraveni* property it has to be identified under one of the three categories specified in Section 10(1) a, b, and c, subject to the conditions stipulated in the proviso to Section 10 of the Ordinance.

Held further:

(3) Acquired property consists of property obtained in other ways such as by accession, dowry, gift, prescription, purchase, occupation by operation of law or by royal favour.

(4) The Kandyan Law Declaration and Amendment Ordinance came into effect in January 1939 and if any person dies after the said Ordinance had come into effect, the provisions of said Ordinance would be applicable in deciding the succession of that person's acquired property.

Cases referred to:

(1) *Ausadahamy* v *Tikiri Banda* (1950) 52 NLR 314.

(2) *Dingiri Banda* v *Madduma Banda* (1914) 17 NLR 201.

(3) *Ukkuwa* v *Banduwa* (1916) 19 NLR 63.

APPEAL from the Judgment of the Court of Appeal.

Navin Marapona for respondents-appellants-Appellants.

D.S. Wijesinghe, PC with *Kaushalya Molligoda* for 1st and 2nd plaintiffs-respondents-respondents.

L.C. Seneviratne, PC with *U.H.K. Amunugama* and *S. Gunasekera* for 7th to 10th defendants-respondents-respondents.

Cur.adv.vult

February 2, 2008

DR. SHIRANI BANDARANAYAKE, J.

This is an appeal from the judgment of the Court of Appeal dated 05.11.2003. By that judgment the Court of Appeal dismissed the appeal of the 11th, 12th and 14th defendants-appellants-appellants (hereinafter referred to as appellants) and affirmed the order of the learned District Judge, who had held, by his order dated 05.03.1990, that Ukkinda, Suratha and Malmada were the original owners of the land and therefore 1st and 2nd plaintiff-respondents-respondents (hereafter referred to as respondents) were entitled to 1/3 share in the land sought to be partitioned, which was owned by one of the original owners, viz., Ukkinda. The appellants appealed

to this Court for the appellants and the learned President's Counsel for the respondents agreed at the hearing that this appeal could be argued on the basis of the following questions:

(1) Have their Lordships of the Court of Appeal erred in holding that the provisions of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, applied in respect of persons dying after the commencement of the said Ordinance in deciding questions of heirship, but did not apply in determining the nature and character of the inheritance?

(2) Have their Lordships of the Court of Appeal erred in holding that the definition of paraveni property in section 10(1) of the Ordinance did not apply to the property in question at the time of the death of Podimenike referred to therein?

The facts of this appeal as submitted by the learned Counsel for the appellants and the respondents, *albeit* brief, are as follows:

The respondents had instituted this partition action in the District Court of Ratnapura and sought to partition the land known as "Indikade Kumbura" described morefully in the schedule to the plaint filed by them. The appellants and the 1st to 10th defendants-respondents (hereinafter referred to as the defendants) had filed their statements of claim and admittedly there had been several different pedigrees and diverse claims to shares by the parties to be considered by the learned District Judge.

After trial, learned District Judge had held that, three (3) persons, viz., Ukkinda, Malmada and Suratha, named in the plaint were the original owners of the land that was sought to be partitioned and that they owned the corpus in equal (1/3) shares. The respondents were therefore declared entitled to 1/3 share of Ukkinda.

The appellants, aggrieved by the said judgment of the learned District Judge of Ratnapura in the said partition action, preferred an appeal to the Court of Appeal challenging the decision of the 1/3 share of Ukkinda. All parties had accepted the finding of the learned District Judge on the three (3) original owners and the shares credited to them and the only matter, which came up for

consideration in the Court of Appeal was whether the 1/3 share of Ukkinda had devolved on the appellants or the respondents. Since the shares allocated to the other defendants were not in issue, learned President's Counsel for the 7th defendant, Mr. L.C. Seneviratne, was requested to assist the Court of Appeal as *amicus*. The learned President's Counsel for the 7th defendant, had clearly taken up the position that the said 1/3 share of Ukkinda devolved on the respondents.

It was common ground that the following facts were not in dispute between the parties:

(1) 1/3 share of Ukkinda was conveyed to Gamasagam Gamaethige Malhamy on Deed No. 619 dated 02.11.1882 (P1);
(2) the said Gamasagam Gamaethige Malhamy conveyed his rights to his daughter Gamasam Gamaethige Ranmenike on Deed No. 27497 dated 18.01.1897 (P2);
(3) the said Ranmenike was married to one Imihamilage Haramanis Appuhamy;
(4) the said Ranmenike died leaving Podimenike;
(5) that on Ranmenike's death, the said property devolved on her daughter Imihamilage Podimenike, and
(6) the said Podimenike died intestate and issueless on 01.01.1944.

Accordingly it was not disputed that the main issue that has to be considered was whether upon the death of Podimenike, her title devolved on her father,viz., Imihamilage Haramanis Appuhamy, as claimed by the respondents or her maternal uncle, viz., Gamasam Gamaethige Appuhamy, as claimed by the appellants. In order to examine the said question, it was necessary to ascertain whether the property was *paraveni* property or *acquired* property of Podimenike at the time of her death. This issue is of importance as if the property in question was *paraveni,* after her death the property would have vested in her maternal uncle and if it was *acquired* property it would have vested in her father.

Learned Counsel for the appellants contended that the property in question was the maternal *paraveni* property of the said Podimenike and therefore the appellants were entitled to succeed in this appeal.

Learned Counsel for the appellants further contented that the learned trial Judge, although was correct in applying the proviso to section 10 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 (hereinafter referred to as the Ordinance), had erred in applying a wrong definition, in describing *paraveni* property.

The contention of the learned Counsel for the appellant was that the said Podimenike had died in 1941 after the Ordinance came into force and therefore the provisions of the said Ordinance must be applied in its totality. According to the learned Counsel, the nature of the property in question must be determined solely by applying the definition in section 10(b) of the said Ordinance, which would clearly show that the property in dispute must be regarded as Podimenike's maternal *paraveni* property.

On a consideration of the submissions of the learned Counsel for the appellants and the learned President's Counsel for the respondents, it is evident that the only question that has to be examined was that whether the property in dispute could be described and recognised as *paraveni* property as contended by the learned Counsel for the appellants or whether it belongs to the category of *acquired* property as contended by the learned President's Counsel for the respondents.

It is common ground that Podimenike died on 01.11.1944 (11V7) intestate and left no surviving spouse or issue and that the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 came into force on 01.01.1939. The said Ordinance was enacted to declare and amend the Kandyan Law in certain respects, deals with the inheritance of immovable and movable property. Section 10 of the said Ordinance which is contained under the inheritance of immovable property, specifically deals with the question of *paraveni* property and states as follows:

> "10(1) The expressions "*paraveni* property" or "ancestral property" or "inherited property" and equivalent expressions shall mean immovable property to which a deceased person was entitled -
>
> (a) by succession to any other person who has died intestate, or

(b) under a deed of gift executed by a donor to whose estate or a share thereof the deceased would have been entitled to succeed if the donor had died intestate immediately prior to the execution of the deed; or

(c) under the last will of a testator to whose estate or a share thereof the deceased would have been entitled to succeed had the testator died intestate;

Provided, however, that if the deceased shall not have left him surviving any child or descendant, property which had been the acquired property of the person from whom it passed to the deceased shall be deemed acquired property of the deceased.

Section 10(3) of the said Ordinance, which refers to the *acquired* property clearly states that,

> *"Except as in this section provided, all property of a deceased person shall be deemed to be acquired property."*

It is therefore apparent that for the property in dispute to be categorized as paraveni property, it has to be identified under one of the three (3) categories specified in Section 10(1) a,b, and c, subject to the conditions stipulated in the proviso to Section10 of the Ordinance.

As stated earlier, it is important to note that, Podimenike died leaving no surviving spouse and issueless, which is a fact admitted by the appellants as well as the respondents. Consequently, the proviso to section 10 of the Ordinance comes into effect and thus it becomes relevant and necessary to ascertain whether the property in question was acquired property or not in the hands of **Ranmenike** from whom it was passed to the deceased Podimenike.

The aforementioned position that the proviso to Section 10 of the said Ordinance is applicable to the property in dispute is also admitted by both parties. Accordingly it is common ground that it is

necessary to examine whether the property in dispute was the *acquired* property of Ranmenike or whether it was her *paraveni* property.

The contention of the learned Counsel for the appellants was that Ranmenike had got the property in question by way of a deed of gift (P2) from her father namely, Malhamy Muhandiram. Since it was given under a deed or gift, learned Counsel for the appellants, strenuously contented that, the provisions of section 10(1) (b) of the said Ordinance shall be applicable and accordingly the said property must be considered as *paraveni* property of Ranmenike. The position taken by the learned Counsel for the appellants is that, although, Podimenike's mother, Ranmenike had deceased prior to the introduction of the Ordinance, the provisions laid under the said Ordinance should be applicable to ascertain the category of property that is in dispute.

The contention of the learned President's Counsel for the respondents was that the law as it stood on the date the property in dispute became vested in Ranmenike should apply, and therefore the law, which was in force prior to the Ordinance came into being should be applicable when dealing with the aforementioned question.

In fact the case law dealing with *paraveni* property supports the contention of the learned President's Counsel for the respondents and *Ausadahamy* v *Tikiri Banda*[1] is a decision in point. The learned Counsel for the appellants however, submitted that the case of *Ausadahamy (supra)* has been wrongly decided and that the line of reasoning in that case did not accurately take into account the fact that the definitions in the 1938 Ordinance had to be applied uniformly to all questions, which arose for decision after its enactment. The contention of the learned Counsel for the appellants was that in all disputed questions arising after the 1938 Ordinance, the only definition of *paraveni* property that could be applied was the definition in the Kandyan Law Declaration and Amendment Ordinance.

The said Ordinance as stated earlier, defines the expression, *paraveni* property in section 10 and a careful examination of the

said provision, clearly indicates that the proviso or the provisions of section 10(1) do not have retrospective application regarding *paraveni* property. In fact section 27 of the said Ordinance clearly stated that the Ordinance shall not have retrospective effect unless expressly so provided in the Ordinance. Section 27, thus reads that,

> *"The provisions of this Ordinance shall not have, and shall not be deemed or construed to have, any retrospective effect except in such cases where express provision is made to the contrary."*

Section 10(1) of the Ordinance, as could be clearly seen, has not made any express provision to have retrospective application of its provisions. It was this position that was highlighted in the decision of *Ausadahamy* v *Tikiri Banda (supra),* where Nagalingam, J. referred to section 27 of the Ordinance and had clearly stated that,

> "The words used are very emphatic and admit of no ambiguity. No retrospective effect should be given to the provisions of the Ordinance unless it could be shown that express provision is made that retrospective effect should be given. And to put the matter beyond any argument, the Legislature has taken pains to say that not only are the provisions not to have, but that they shall *not be deemed to or construed to have retrospective effect."*

Having said that Nagalingam, J. had observed that neither in section 10 nor in any other part of the Ordinance are there words from which it could be said that express provision has been made for retrospective effect, being given to the provisions of section 10 of the Ordinance.

Moreover Nagalingam, J. had also considered the aspect of the Ordinance, being a declaratory one,. Considering the said aspect it was stated that,

> "It is however, said that the Ordinance being a declaratory one, retrospective effect should be given to its provisions – *Attorney-General* v *Theobold.* The rule too is subject to qualification. In the words of Lord Watson in *Young* v *Adams,*

> *It may be true that the enactments are declaratory in form; but it does not necessarily follow that they are therefore retrospective and were meant to apply to acts which had been completed or to interests which had vested before they became law."*

The Kandyan Law Declaration and Amendment Ordnance cannot be regarded entirely as an enactment, which is declaratory as it deals with amendments as well. The cumulative effect of all the aforementioned aspects is that the provisions of the said Ordinance cannot be applied retrospectively unless there is express provision to that effect.

It is therefore quite evident that their Lordships of the then Supreme Court in *Ausadahamy* v *Tikiri Banda (supra)* had not erred when it stated that,

> *"Now, neither in section 10 nor in any other part of the Ordinance are there words from which it could be said that express provision has been made for retrospective effect being given to the provisions of section 10; therefore, even a construction of the section so on to give it retrospective effect is completely barred."*

Accordingly, since there is no possibility for the application of the provisions of the Kandyan Law Declaration and Amendment Ordinance to determine the character of the property of Ranmenike, it is evident that it would be necessary to apply the Kandyan Law to decide the nature of her property.

Under Kandyan Law, the property could be classified into different groups, but the classifications of chief importance are those which divide things into movables and immovables, inherited and acquired. The distinction between inherited and acquired property is of considerable importance. Inherited property or as it was known in the Kandyan regions – *paraveni* property – belongs to several kinds. Referring to these different kinds of property, H.W. Thambiah, (Principles of Ceylon Law, H.W. Cave and Company, 1972, pg. 160) states that,

> "Inherited property by virtue of paternity is of two kinds. It may consist of property inherited from the father or from the estate of any other relation (*piya uruma*); or it may consist of the right of a father to succeed to the estate of the deceased child (*jataka uruma*).
>
> Property obtained by virtue of maternity is of two kinds; a person may inherit the property from his mother's estate or from the estate of any relation from the mother's estate or from the estate of any relation from the mother's side (*mau uruma*); or the mother may sometimes in certain instances succeed to the estate of a deceased child (*daru Uruma*)."

Acquired property on the other hand consists of property obtained in other ways such as by accession, dowry, gift, prescription, purchase, occupation, operation of law or by royal favour. Accordingly, as H.W. Thambiah (*supra*) has clearly pointed out, under Kandyan Law, property falls into three (3) general categories, viz., paternal *paraveni*, maternal *paraveni* and acquired property. The intestate succession therefore could vary depending on the nature of the property that had been inherited.

As referred to earlier, the question in this matter had arisen when the respondents instituted a partition action (No, 1172/P) in the District Court of Ratnapura and sought to partition the land called and known as "Indikade Kumbura", described morefully in the schedule to the plaint. It was common ground that Ukkinda, Malmada and Suratha were the original owners of the disputed land and that Ukkinda, being one of the original owners, was entitled to 1/3 share of the said land in dispute.

The 1/3 share of Ukkinda was conveyed to Gamasam Gamaethige Malhamy on Deed No. 619 dated 02.11.1882 (P1). The said Gamasam Gamaethige Malhamy conveyed his rights to his daughter Gamasam Gamaethige Ranmenike on Deed No. 27497 dated 18.01.1897 (P2). It is therefore to be noted that the said Malhamy did not inherit the said 1/3 share, but had purchased it at a Fiscal's Sale on a Fiscal's Conveyance No. 619 dated

02.11.1882. Accordingly it was the said acquired property that Malhamy had gifted to his daughter Ranmenike in 1897.

The question as to whether the property that has been gifted could be considered as acquired property was examined in *Dingiri Banda* v *Madduma Banda*(2) by Lascelles, C.J., and De Sampayo, A.J. In this matter, Ukkurala and Mutumenika had a daughter, Kirimenika (died in 1868), who was married in *binna* to plaintiff. Ukkurala gifted in 1888 along with Mutumenika his land to his grandson, Tikiri Banda, subject to the condition that he should render assistance, etc., to Ukkurala and Mutumenika. Tikiri Banda died leaving a son, Ran Banda, who died issueless in 1906. Mutumenika in 1907 (her husband being then dead) purported to gift the land to her brothers. De Sampayo, A.J. held that,

(a) Mutumenike's deed in favour of her brothers did not convey any title to them, as the land belonged to Ukkurala and not to Mutumenike;
(b) That on Ran Banda's death the property devolved on his paternal grandfather (Kirimenike's husband) and that;
(c) in the hands of Tikiri Banda himself the property was acquired, and not *paraveni* or ancestral property.

The decision in *Dingiri Banda* (*supra*) was followed in *Ukkuwa* v *Banduwa*(3), where Ennis and De Sampayo, J.J., held that property gifted to a person is acquired property of that person. Considering the question in issue, De Sampayo, J. stated that,

> "Property gifted to a person is 'acquired property' of that person. *Ukkurala* v *Tillekeratne* and *Kiri Menika* v *Mutu Menika*. The view taken in those cases appears to be in accordance with the principle; and I myself adopted it in *Dingiri Banda* v *Madduma Banda*, and held that, "acquired property" is opposed to *paraveni* or inherited property, and that property gifted to a son by the father was 'acquired property' of the son."

Discussing the types of property and what they include, FA. Hayley (A Treatise on the Laws and Customs of the Sinhalese, Navrang, New Delhi, 1993 pg. 220) has clearly stated that,

> *"Acquired property includes things obtained by personal effort, by gift in return for assistance rendered, by sale or exchange, by way of dowry, gift or royal favour."*

On consideration of the aforementioned it is evident that Ranmenike's property was acquired property, which was later inherited by her daughter, Podimenike. Accordingly the property inherited by Podimenike was also acquired property.

The next question which arises is that on whom the acquired property of Podimenike devolved on her death. If I may repeat, the Kandyan Law Declaration and Amendment Ordinance came into effect in January 1939 and Podimenike had died in 1944. Since at the time of Podimenike's death, the said Ordinance had come into effect, the provisions of the said Ordinance would be applicable in deciding the succession of Podimenike's acquired property.

As stated earlier, Podimenike had died intestate and issueless. She had no surviving brothers or sisters and only her father was among the living at the time of her death. Section 16 of the Kandyan Law Declaration and Amendment Ordinance deals with succession to person dying intestate leaving no surviving spouse or descendant. Considering the fact that it was only Podimenike's father who had survived her, provisions of Section 16(c) of the Ordinance should be applicable to the property and the said section reads thus:

> *"If there be no brother or sister or descendant of a deceased brother or sister, the parents in equal shares, or the surviving parent as the case may be, shall become entitled to the property;"*

Accordingly, Podimenike's father Haramanis Appu, being the only surviving parent, should be entitled to the 1/3 share of Podimenike, which was in dispute.

In the circumstances, the respondents, who had later bought the property from Haramanis Appu on P4, would be entitled to the said 1/3 share.

It is thus, apparent that the learned District Judge in his judgment had correctly held that it was Imihamilage Haramanis

Appuhamy, the father of Podimenike, who had inherited her title to the property in question upon her death and on that basis had held that the respondents were entitled to the 1/3 share of Ukkinda on the property being partitioned, which judgment was affirmed by the learned Judges of the Court of Appeal.

For the reasons aforesaid, I answer both questions of law, Nos. 1 and 2, on which Special Leave to appeal was granted, in the negative. The judgment of the Court of Appeal dated 05.11.2003 is accordingly affirmed and this appeal is dismissed.

I make no order as to costs.

DISSANAYAKE, J. – I agree.

SOMAWANSA, J. – I agree.

Appeal dismissed