KIRI PUNCHA

v.

KIRI UKKU AND OTHERS

SUPREME COURT
ISMAIL, J., WANASUNDERA, J.,
AND WIMALARATNE, J.,
S. C. APPEAL NO. 44/79
C. A. APPEAL NO. 736/75(F), CA(LA) 73/79(SC)
D. C. KURUNEGALA NO. 2353/L
MARCH 2, 1981.

Declaration of Title — Succession — Paraveni property — Rights of illegitimate children — S. 10(3) & proviso to s. 10(1) of Kandyan Law Declaration and Amendment Ordinance.

When the deceased did not leave behind legitimate children or a widow or parents his brothers and sisters are entitled to succeed to his property. This was the principle of succession prior to the enactment of the Kandyan Law Declaration and Amendment Ordinance and the Ordinance has not affected any change in the position. The proviso to s. 10(1) of the Ordinance is declaratory of the then existing law and has not effected a change in the law. The words 'child or descendant' in the proviso includes an illegitimate child or descendant.

The general principle of Kandyan Law is that an illegitimate child was not entitled to inherit the *paraveni* property so long as there were other heirs howsoever remote and *paraveni* was always understood to mean property which a deceased person was entitled to by succession to another.

Illegitimate children are entitled to succeed to their father's acquired property. It was also the position in the general Kandyan Law that an illegitimate child cannot inherit the property of his grandfather. If his father had predeceased the grandfather, he would not be in a better position than if his father had survived and the property would still descend as *paraveni*.

As the property which is the subject matter of the action constitutes *paraveni* it would devolve on the deceased's paternal heirs and not on his illegitimate children.

Appuhami v. Lappaya (1905)8 NLR 328 disapproved and not followed.

Cases referred to:

(1) Sonnadara v. Dingiri Etana (1956) 57 NLR 333.
(2) Rankiri v. Ukku (1907) 10 NLR 129.
(3) Appuhami v. Lapaya (1905) 8 NLR 328.
(4) Ukku v. Horathala (1948) 50 NLR 243.
(5) Punchi Banda v. Nagasena (1963) 64 NLR 548.
(6) Tammitta v. Palipane (1965) 70 NLR 520.
(7) Dullewe v. Dullewe (1968) 71 NLR 289.
(8) Sujatha Kumarihamy v. Dingiri Amma (1969) 72 NLR 409.

(9) *Mohideen v. Punchi Banda (1947) 48 NLR 318.*
(10) *Setuwa v. Sirimalie (1947) 48 NLR 391.*
(11) *Ausadahamy v. Tikiri Banda (1950) 52 NLR 314.*
(12) *Wimalawathie v. Punchi Banda (1955) 57 NLR 73.*

APPEAL from judgment of the Court of Appeal.

Everard Ratnayake with P. Samararatne for plaintiff-appellant
N. R. M. Daluwatte with K. S. Tillekeratne for 4th defendant-respondent.

Cur. adv. vult.

April 1, 1981.

WANASUNDERA, J.

This is an action for declaration of title and ejectment filed by the plaintiff-appellant against the 1st to 4th defendants-respondents to an undivided 1/4th share of a land called Kadjugahamulla Kumbura. This 1/4th share was originally owned by one Kirimudiyanse, who sold it in 1941 to Sala. Both the plaintiff and the defendants trace their title to Sala. Sala died in 1946, leaving two children — a son, Sevranga and daughter, Sudhathi. Sudhathi went out in *diga* during her father's lifetime and had a son Siriya who, by deed P3 of 1958 which recites title by way of maternal inheritance, transferred this undivided 1/4th share to the plaintiff. Sala's son Sevranga, though he had married, died leaving behind only four illegitimate children, the 1st to 4th defendants. The above facts have been established at the trial, and it is also common ground that, as the parties are Kandyans, their rights of succession are governed by the Kandyan Law, more particularly by the Kandyan Law Declaration and Amendment Ordinance (Cap. 59).

The real issue in this case is whether or not Sevranga's paternal relations, from whom the plaintiff claims title, are entitled to succeed to Sevranga's property in preference to Sevranga's illegitimate children, the 1st to 4th defendants. The learned District Judge, apparently following earlier decisions, held that, as the property which is the subject matter of the action constitutes *paraveni*, it would devolve on Sevranga's paternal heirs and not on his illegitimate children. The Court of Appeal, relying on the proviso to sub-section (1) of section 10 of the Ordinance, disagreed with this view and, in the face of numerous decisions which both expressly and impliedly take a different view, has given judgment for the defendants.

Mr. Ratnayake for the plaintiff-appellant submitted that the general principle of Kandyan Law is that, in a situation such as

this, when the deceased did not leave behind legitimate children or a widow or parents, his brothers and sisters are entitled to succeed to his property. This was the principle of succession prior to the enactment of the Kandyan Law Declaration and Amendment Ordinance (Cap. 59) and the Ordinance has not affected any change in the position. He has submitted that it is settled law that the proviso to section 10(1), on which the defendants rely, is only a restatement of the general Kandyan Law that existed prior to the enactment and that in the case of succession by ancestors or collaterals of the deceased, like in this case, a special rule converting or transmuting *paraveni* property into acquired property comes into play to make as equitable as possible the distribution of the deceased's property among heirs on both the paternal and maternal sides. If however the normal rule regarding the devolution of *paraveni* were to apply, it would result in such *paraveni* property devolving entirely on the heirs on the paternal side.

Although the overriding principle in Kandyan Law is that lands must revert to the source from which it came, Kandyan Law found it possible in refining that principle to draw a valid distinction between real ancestral property forming part of the family estate and *paraveni* property which was recently acquired by the deceased's father. There is no question that the former must devolve on the heirs on the paternal side, but the question was asked why the latter too should be dealt with in the same way. Hence the principle that in such situations recently acquired *paraveni* is deemed to be acquired property to enable maternal heirs also to make a claim. Mr. Ratnayake has therefore submitted that the proviso to sub-section (1) of section 10 must be interpreted in the light of the above background and can have no wider application than to that peculiar situation. His submissions, I may say, do not lack substantial support from the case law and the writers of Kandyan Law.

Hayley, in his Laws and Customs of the Sinhalese, at page 221, has declared the prevailing law on this topic in the following words —

> ". . . . . it would seem that the term 'acquired property' has a relative signification, varying in accordance with the classes of heirs who claim a share; for whereas any property descended from a man's father is inherited property for the purpose of distribution amongst his widow and children, when the contest is between maternal uncles and paternal uncles, the former are entitled to the deceased's acquired property, which in that case includes property newly acquired by the deceased's father

which has descended to the deceased *(Niti.* 103; P.A. 46-7). This modification is a logical one; for when such heirs as the father's brothers succeed to part of the estate, on the ground not so much of true succession, but rather by virtue of the principle that lands must revert to the source whence they came, there is no reason for assigning to them an interest in property which was acquired separately by their deceased brother and never formed part of the family lands of themselves or their father."

In *Sonnadara v. Dingiri Etana* (57 N.L.R. 333)[1] Gratiaen, J., held that "the proviso to section 10(1) of the Ordinance is in truth declaratory of the earlier law."

It would thus appear that this principle of conversion of *paraveni* to acquired property has limited application and was never intended to apply to a case such as the present, which involves the devolution of such property to an illegitimate child. Where an illegitimate child is concerned, the general principle of Kandyan Law is that an illegitimate child was not entitled to inherit the *paraveni* property so long as there were other heirs howsoever remote, and *paraveni* was always understood to mean property which a deceased person was entitled to by succession to another.

Illegitimate children are however entitled to succeed to their father's acquired property, and *Rankiri v. Ukku* (10 N.L.R. 129)[2] settled any doubt that may have existed on this matter. When the Court of Appeal relied on this decision, it probably overlooked the fact that the acquired property in this case was acquired property in the normal and usual sense and not in the extended sense contained in the proviso.

It was also the position in the general Kandyan Law that an illegitimate child cannot inherit the property of his grandfather. Even if his father had predeceased the grandfather, he would not be in a better position than if his father had survived and the property would still descend as *paraveni.* Hayley, page 391.

Armour, referring especially to such a case stated —

> "Therefore in case that man died before his parents, his children by that woman will have no right to any share of his parent's estate, the said children will be entitled to inherit only such property as their father had himself acquired by purchase or other means of acquest (P.S.8)."

The case of *Appuhami v. Lapaya* (8 N.L.R. 328)[3] cited by the Court of Appeal, constitutes a departure from the above principles. In this case, dealing with the rights of an illegitimate child of the deceased person called Rattarana who had predeceased his own father, Wendt, J. sitting alone, said —

> "He succeeds directly to his grandfather; the property does not come 'through' his father Rattarana in the sense that the father ever had any interest in it, and there is therefore no reason for the argument that when it reached Wattuwa it was Rattarana's *paraveni* property".

This view is clearly not in accordance with the principles of Kandyan Law. Hayley at page 392 of his book shows by reference to the passage from Armour and other institutional writers on Kandyan Law that Wendt, J. had overlooked certain basic features of the Kandyan Law in coming to this conclusion. Hayley observes —

> "If his Lordship's attention had been drawn to it, his decision would perhaps have been different. In allowing the appeal, Wendt, J. relies mainly on the proposition that the property descended to the grandchild directly in its character of acquired property. Such a view, however, disregards the general principle of representation on which the rights of grandchildren are based, and also fails to take account of the fact that illegitimacy itself usually arose from the refusal of the grandparents to recognize the marriage, for which very reason the issue of such marriage was debarred from inheriting any property descending from them."

It may be added that Wendt, J. had not resorted to the principle of the conversion of *paraveni* into acquired property, which he probably knew did not apply to the case, but sought to create new law on the fiction of a direct succession of the grandchild to the acquired property of the grandfather. Such a basis is totally unknown to the Kandyan Law and the solution he has offered stands out as a novelty quite out of character with the general principles of Kandyan Law.

The Court of Appeal was also of the view that the proviso to section 10 embodies the recommendations of the Kandyan Law Commission which are contained in paragraphs 125 and 133 of their Report, and those paragraphs have recommended a change in the law. It is a cardinal principle of interpretation that in constru-

ing the words of a statute we must look to the statute itself for an answer. Courts however have thought it permissible when the wording of a statute was ambiguous to ascertain the previous state of the law and the reasons which led to the enactment of the legislation and have for this purpose looked at Reports of Commissions which led to the legislation. *Vide Ukku v. Horathala* (50 NLR 243)[4], *Punchi Banda v. Nagasena* (64 NLR 548)[5], *Thammitta v. Palipane* (70 NLR 520)[6] *Dullewe v. Dullewa* (71 NLR 289)[7] and *Sujatha Kumarihamy v. Dingiri Amma* (72 NLR 409)[8].

I am at a loss to understand how the Court of Appeal could have arrived at that conclusion when paragraphs 125, 130 and 133 have set out the intention of the Commissioners in the plainest terms. If they left any room for doubt, the express reference in these paragraphs to the passage from Hayley, which I have quoted earlier, would have made that intention doubly certain that the Commission wished to have the law restated in the same terms as it was then existing and did not venture to advocate a change of the law. Accordingly our courts have hitherto found no difficulty in holding that the proviso to section 10(1) was declaratory of the then existing law and has not effected a change in the law.

So much for the background to the legislation. Let me now turn to the actual task of interpreting the provisions of section 10 of the Ordinance. Section 10 seeks to define the expression *'paraveni* property.' Section 10 sub-section (1) contains the following proviso:—

> "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."

The plaintiff's case is that the words "any child or descendant" in the proviso must be construed to include both a legitimate and illegitimate child or descendant, while it has been contended for the defendants that that expression takes in only the legitimate children and not the illegitimate children.

In *Mohideen v. Punchi Banda* (48 N.L.R. 318)[9], the then Supreme Court was called upon to decide this same question, namely whether or not the words "child or descendant" in the proviso to section 10(1) included an illegitimate child or descendant. Keuneman, A. C. J., in a careful judgment after scrutinising the provisions of sections 10, 11, 13, 14, 15, 16, 17 and 18, and

Chapter V (and not merely sections 16 and 18, as the Court of Appeal seems to suggest), held that "where the draftsman of the Ordinance used the word 'child' or 'descendant' he meant a wider class than the legitimate issue, and that these words cover both the legitimate and illegitimate issue."

In *Setuwa v. Sirimalie* (48 N.L.R. 391)[10], Wijeyewardene, S.P.J., added his authority having independently arrived at the same conclusion. Wijeyewardene, S.P.J., too considered the wording of sections 8, 11, 15, 16, 18, 21 and 23 and subjected them to a detailed analysis. He has rightly linked the proviso to section 10(1) with the special situation relating to the conversion of *paraveni* to acquired property mentioned by Hayley and stated that the proviso appears to have been inserted to give effect to the "relative signification" of the term 'acquired property' under the Kandyan Law referred to in Hayley's Laws and Customs of the Sinhalese, page 221, which he has quoted with approval.

It may be added that in both these cases the Judges had approached the issue with due regard to the proper canons of statutory interpretation and was mindful of the rule that a reference to children or descendant in a law or instrument should *prima facie* have the meaning of legitimate children or descendant unless a contrary intention is expressed or is deducible by necessary inference.

These two decisions have been accepted as correctly stating the law and had been followed by the courts of this country for nearly a third of a century. *Vide* also *Ukku v. Horathala (supra)*. The Court of Appeal has not succeeded in pointing out any error or fault in the method of approach or reasoning in the judgments of these two Judges and has only been able to make some observations on section 18 about which there can hardly be a difference of views.

In fairness to the Court of Appeal I have taken the liberty of re-considering those two judgments and after a careful consideration of the relevant provisions I find that there is little I could usefully add to the cogent reasoning and conclusions of these two eminent Judges. These decisions have also indicated that some of the other sections of the Ordinance would be unworkable if the word 'child' in the proviso to section 10(1) is given the meaning contended for by the defendants.

The Court of Appeal would not have misdirected itself had it understood the true import of section 10. This section is a defini-

tion section and does not purport to set out a devolution of title as, for example, section 15 which deals with the rights of illegitimate children. It would be noted that in section 15 the draftsman has been careful to describe the word 'child' as 'illegitimate,' while on the other hand there is the absence of such an adjective in the proviso to section 10(1). If the proviso also had the word 'legitimate' or 'illegitimate,' then there may have been some justification for connecting up the proviso with the provisions of section 15 even in some remote way but as presently worded there is no room for it to function in any other way except as a defining section.

Another matter worthy of attention is that in defining the two expressions *'paraveni* property' and 'acquired property,' the Ordinance proceeds in the first instance to define the term 'paraveni' in a detailed manner and then states in negative terms that all property which is not *paraveni* is deemed to be acquired property — section 10(3). As against this, the proviso to section 10(1) and section 10(2) appear to deal with certain intermediate situations which are in the nature of exceptions to the general division referred to earlier. *Prima facie* then the primary meaning of acquired property as contained in sub-section (3) of section 10 should be assigned to that expression whenever it occurs in the body of Ordinance. As Nagalingam, J. pointed out in *Ausadahamy v. Tikiri Banda* (52 N.L.R. 314)[11], the term 'acquired property' in the proviso to section 10(1) cannot have the same meaning as that term has in sub-section (3) of section 10, and the expression 'acquired property' in the proviso to sub-section (1) of the Section 10 must be limited to the special situation which the Legislature had in mind. What then was this special situation ? As shown earlier, this is the situation referred to by Hayley at page 221 of his book and which was cited by the Kandyan Law Commission. There could be little doubt as to the connection between the two and the meaning that should be given to the proviso.

The judgment of the Court of Appeal leaves one with the impression that it proceeded under the misconception that the whole of the Kandyan Law is to be found within the four corners of this Ordinance and accordingly disposed of the issue in the case in a narrow and technical manner. The decisions of our courts show that they have always approached such matters differently and it is relevant to have regard to the accepted principles of general Kandyan Law in matters as this — *Wimalawathie v. Punchi Banda* (57 N.L.R. 73)[12]. Such an approach was absolutely necessary in the present case, for there are ample grounds to show that the proviso to sub-section (1) of section 10 was merely declaratory of the then existing law.

For these reasons I am of the view that this appeal must succeed. The judgment of the District Court is restored. The Plaintiff-appellant would be entitled to costs, both here and in the Court of Appeal.

ISMAIL, J. — I agree.

WIMALARATNE, J. — I agree.

Appeal allowed.