1978 *Present:* Samarakoon, C.J., Ismail, J. and Ratwatte, J.

DON SADIRIS MAHAVITHARNE, Appellant

*and*

ATTANAYAKE MUDIYANSELAGE UKKU AMMA and OTHERS, Respondents

*S. C. No. 103/71 (Inty.)—D. C. Kandy No. 6207/P*

*Estoppel—Plea taken against plaintiff in partition action—Admission of title by such plaintiff in a testamentary action and settlement then entered—Plaintiff not a party in such testamentary action—Undertaking to file present action on basis of settlement—Different position taken up—Amended plaint in partition action—Whether plea of estoppel against him entitled to succeed.*

The plaintiff instituted a partition action claiming a 3/8 share of a land upon shares purchased from certain heirs of the original owner now deceased, acknowledging title in the others as heirs of the deceased owner. Later he filed an amended plaint pleading that two of the heirs (1st and 5th defendants respectively) since they had gone out in deega, had forfeited their rights to the paternal inheritance and accordingly plaintiff now claimed a 3/6 share. Counsel for 5th defendant argued that the plaintiff was estopped from denying the rights of the 1st and 5th defendants by reason of his admissions in D.C. Kandy Case No. 1047/T. The plaintiff was not joined as a party in that testamentary case but had participated in a settlement thereby facilitating it and agreed to the rights of the present 1st and 5th defendants.

*Held:* That the plea of estoppel taken on behalf of the 5th defendant must be upheld. Although the plaintiff-appellant was not a party to the testamentary case, yet he attended Court and took part in the settlement in that action. He undertook and promised that this action would be in conformity with that settlement and cannot now be allowed in equity to go back on such a promise.

*Central London Property Trust, Ltd. v. High Tress House Ltd.*, (1956) 1 All E. R. 256 (per Denning, J.) cited with approval.

APPEAL from a judgment of the District Court, Kandy.

*C. Ranganathan*, Q.C., with *A. Chinniah* and *A. Sirinivasan*, for the plaintiff-appellant.

*T. B. Dissanayake*, for the 5th defendant-respondent.

*Cur. adv. vult*

July 25, 1978. SAMARAKOON, C.J.

The plaintiff-appellant instituted this action on 12th April, 1962, for a partition of a land called Ambagaspitiya. Admittedly the original owner of it was one Attanayake Mudiyanselage Punchirala. He died in December, 1951, leaving as his heirs Loku Menika, Ukku Amma, Appuhamy, Dingiri Banda, Mutu Menika, Kiri Banda, Ran Banda the grandchild of Kiri Banda, and 2 children of a deceased son named Punchi Banda and Bandara Menika. Loku Menika died leaving as her heir Bisso Menika (5th defendant). The plaintiff in his original plaint claimed upon shares purchased from Ran Banda, Punchi Banda, Bandara Menika and Kiri Banda and acknowledged title in others as heirs of Punchi Rala. He thus claimed a 3/8 share. On the 29th July, 1963, he filed an amended plaint wherein he pleaded that Loku Menika and Ukku Amma went out in *deega* and thereby forfeited their rights in the paternal inheritance. He therefore claimed a 3/6 share. This allegation was denied by some of the defendants. At the inquiry an issue was raised on this point by counsel for the plaintiff and counsel for the 5th defendant countered by issue 14 that the plaintiff was estopped from denying the rights of the 1st and 5th defendants by reason of his admissions in Case No. 1047 Testamentary of the District Court of Kandy. At the commencement of the trial the 1st, 2nd, 3rd, and 4th defendants admitted that the 5th defendant was an heir of Punchirala.

To answer the issue of estoppel (issue 14 (*a*) (*b*) (*c*)) the learned Judge relied entirely on the evidentiary value of P12A which is a certified copy of the proceedings held in the said Testamentary Case No. 1047 of the District Court of Kandy on 30th March, 1962. It is recorded there that all parties agreed that issues in regard to heirship be decided first and the accounts be looked into after the decision on heirship. Appuhamy, the administrator of the estate, then gave evidence on being affirmed. He stated in the course of his evidence, that Loku Menika married in *deega* to one Mudiyanse and lived in Hewaheta which is 29 miles away from the mulgedera and that she thereby forfeited her right to the paternal inheritance. After some evidence was recorded the

dispute regarding heirship was settled. The settlement is recorded thus :—

"At this stage Mr. Perera for 2nd, 3rd and 4th respondents agrees that Loku Menika was an heir of the deceased and was entitled to a share of the estate, and that Loku Menika's interests have devolved on the 9th respondent Biso Menika. Mr. Martin for the administratrix also accepts that position. Mr. Desinghe for the 5th respondent also agrees that Loku Menika was entitled to a share that has now devolved on Biso Menika, the 9th respondent. He also withdraws from his position that Ukku Amma the 2nd respondent, was married in *deega* and had forfeited her rights to the paternal estate, and now consents to Ukku Amma, being declared entitled to a share of the estate of the deceased as an heir. The petitioner and the 2nd to 4th and the 9th respondents undertake to plead the order in this case in regard to heirship as *res judicata* in regard to the right of the 6th, 7th and 8th respondents who claim to be the *heirs* of the deceased, in any action to be filed by one Mahavitharne who claims to have purchased the interests of the 5th, 6th, 7th and 8th respondents. Mahavitharne who is present in Court admits that Biso Menika, the 9th respondent, and Ukku Amma, the 2nd respondent are both heirs of the deceased and are entitled to a share of the estate of the deceased. The petitioner and the 2nd to 4th and the 9th respondents do not admit that the 6th, 7th, and 8th respondents are heirs of the deceased and they deny that these respondents are entitled to any share of the estate of the deceased.

It is further agreed between the parties that if in any action a plea is raised by any party that either Ukku Amma or Biso Menika are not entitled to any share of the estate of the deceased it will be open to the petitioner and the 2nd to 4th and 9th respondents to plead the order in this case in regard the heirship as *res judicata* against such party."

The learned Judge then made the following order :—

"ORDER

In view of the agreement between the parties, subject to any order that may be made by Court in an action to be

field by the Mahavitharne, I make Order that the petitioner and the 2nd to 5th respondents and the 9th respondent are the heirs of the deceased Punchirala. I fix the case for inquiry into the petitioner's accounts on 10.5.62.

Mahavitharne who is present in Court states that he will file the proposed action before that date.

*Sgd.* S. Sivasupramaniam, D.J.

30.3.62"

Mahavitharne is the plaintiff-appellant in this case. He seems to have intervened in the case without being joined as a party, participated in the settlement, and agreed to the rights of Loku Menika and Ukku Amma. His intervention has facilitated the settlement. Obviously this case is the "proposed action" referred to in the order. The petitioner in that case is the 2nd defendant-respondent in this case. The 2nd, 3rd and 4th respondents in the testamentary case are the 1st, 3rd and 4th defendants-respondents respectively in this case. The 5th respondent in that case is one Kiri Banda who is not a party to this case but a witness in this case. The 9th respondent in the testamentary case is the child of Loku Menika and is the 5th defendant-respondent in this case. It is therefore clear that the appellant and respondents in this case were party to the settlement recorded in P12A. Plaintiff filed the original plaint in accordance with this agreement in P12A.

The trial proceeded on the amended plaint. After trial the Judge finds that there is no acceptable evidence that Loku Menika married in *deega*. In regard to Ukku Menika he finds that she married in *deega* and left the father's house (P5) but after her husband's death in a railway accident she returned to the village and re-acquired rights to the paternal inheritance. In respect of both he held that by reason of the agreement P12A the appellant was estopped from denying that Loku Menika and Ukku Menika were heirs, entitled to share in their father's estate. Counsel for the appellant argued that the appellant was not bound by the

agreement as he was not a party to the testamentary case and that he did not take part in the settlement. Although he was not a party he appeared in Court and the record shows that he took part in the settlement. His intervention and admissions seem to have triggered the settlement. In his evidence in this case he stated that he attended Court because of this testamentary case and he also stated that he retained Counsel in that case. The original plaint filed by him in this case accords with the heirship in the settlement P12A. It is only an year later that he amended it denying the settlement P12A. It was therefore futile for him to deny that he was a party to the settlement. Counsel further argued that deeds in his favour, P1, P2 and P3 were anterior to the settlement (P12A) and that admissions made by the transferor after title had passed were not binding on the appellant. The two admissions that estop him were made by him in open Court and recorded by the Judge. They were his own admissions and not only that of his transferors. Furthermore he acquiesced in these admissions being made matters of record in the testamentary case. Appuhamy's opposition to Loku Menika appears to have been abandoned on account of this settlement. All parties agreed that Mahavitarne's (plaintiff-appellant's) proposed action should conform to the settlement. Apparently his research done in 1963 and 1964 (after the settlement P12A and after the original plaint was filed) disclosed Loku Menika's marriage certificate (P7) and Ukku Menika's marriage certificate (P5) both of which disclosed that the marriages were in *deega*. He then seems to have resiled from his original agreement and decided to try his fortune at gaining extra rights. He cannot now be allowed to blow hot and cold. One party at least, i.e. Appuhamy, altered his position for the purpose of the settlement (P12A). The others established their rights. The Court itself was persuaded to make order based on the settlement. The appellant, no doubt, was not a party to the case, but yet assumed the role of a consenting party to a settlement in a case. He cannot now be heard to state that his undertaking given on record was not intended to be binding on him or even to be acted upon. It was acted upon in that it ended a dispute and closed a chapter in its history. He undertook and promised that this action would be in conformity with the

settlement (P12A) and he cannot now "be allowed in equity to go back on such a promise" per Denning, J. in *Central London Property Trust Ltd. v. High Trees House Ltd,* (1956) 1 A.E.R. 256. More so because the parties in the testamentary case are forever precluded from resucitating their former claims. No doubt such an undertaking cannot form a cause of action but it certainly can be utilised to prevent a litigant going back on his word. I therefore hold that issues 14 (*a*) (*b*) (*c*) were correctly answered in the affirmative. In view of this conclusion no useful purpose will be served in considering Counsel's second line of argument. I would therefore dismiss the appeal with costs.

ISMAIL, J.—I agree.

RATWATTE, J.—I agree.

*Appeal dismissed.*