1938 *Present :* **Hearne J. and Wijeyewardene A.J.**

APPUHAMY *v.* PERERA *et al.*

54—D. C. Colombo, 7,349.

Inheritance—Estate of illegitimate person—Husband sole heir in absence of mother—Other illegitimate brothers and sisters not entitled to succeed—Ordinance No. 15 of 1876, ss. 30, 36, 37.

Where an intestate, a person of illegitimate birth, dies leaving surviving her, her husband and other illegitimate children of her mother.

Held, that the husband was entitled to succeed to the entire estate.

APPEAL from a judgment of the District Judge of Colombo.

One Podihamy had seven illegitimate children, one of whom was Lucia. Lucia married in 1901 and died intestate in 1935 without leaving any descendants. The appellant, as surviving husband of Lucia, claimed the entirety of Lucia's property to the exclusion of the respondents who were either some of the illegitimate children of Podihamy or their descendants. The District Judge held that the husband was entitled

[1] *22 Cal. 176.* [2] *23 C. L. 983.*

to half of the intestate's property and the respondents to the other half. He was of opinion that The Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876, did not provide for a case like this, which had, therefore, to be decided, under section 40, according to the rules of the Roman-Dutch law as it prevailed in North Holland.

H. V. Perera, K.C. (with him *N. E. Weerasooria, K.C.*, and *P. A. Senaratne*), for petitioner, appellant.—The point at issue is governed by Ordinance and we need not speculate upon the Roman-Dutch law relating to it. Podihamy had seven illegitimate children, one of whom was the deceased Lucia, who died intestate. As Lucia died leaving no children, the appellant, her husband, is entitled to the entirety of Lucia's property. It is common ground that he is entitled to a half. As regards the remaining half, it is sufficient to consider the rights of the respondents who are the children of Podihamy, as the rights of the respondents who are the children of any deceased child of Podihamy cannot be greater.

The District Judge has purported to apply Roman-Dutch law, acting under section 40 of Ordinance No. 15 of 1876. The old Roman-Dutch law never recognized the surviving spouse as an heir. He took his share only as a partner of the community. The difference between Roman law and Roman-Dutch law on this point appears in *Van Leeuwen, vol. I., bk. 3, ch. 15, art. 7 at p. 417 (1881 ed.)*. Community of property was, however, abolished by Ordinance No. 15 of 1876. The Ordinance brought in the surviving spouse as an heir and gave him half and, in certain contingencies, the whole of the property. Under the old Roman-Dutch law, illegitimate children inherited from the relatives of the mother. Our Ordinance has not adopted that rule—section 37, the first part of it. By the second part of section 37, relatives are brought in only *to prevent an escheat to the Crown.* On the contrary, if there is a surviving spouse, the relatives of the mother cannot claim. The position, therefore, is that, where there is a surviving spouse, the second part of section 37 will not operate, and the first part of the section will be applicable unconditionally and conclusively. Sections 26, 28, 29, and 30 have all to be read with section 37. Section 40 will be applicable in the present case, only if there had been no surviving spouse.

Chelliah v. Kadiravelu[1], cited in the District Court, cannot help the respondents. That was a case under the Ordinance relating to *Thesawalamai*, whereas the present case has to be decided according to Ordinance No. 15 of 1876.

F. A. Hayley, K.C. (with him *M. Tiruchelvam*), for first and second respondents.—Section 26 of Ordinance No. 15 of 1876 has to be applied to the facts of this case. It definitely says that the surviving spouse shall inherit only a half. To claim the whole, he will have to satisfy the requirements of section 36. To satisfy that there are no other heirs, appellant has to argue that sections 29, 30, and 35 must each be read coupled with section 37. Section 37 comes after section 36. It is logical to presume that it would not cut into section 36, unless reference is made to section 37 in section 36.

[1] *(1931) 33 N. L. R. 172.*

The *ratio decidendi* in *Chelliah v. Kadiravelu et al.* (*supra*) is applicable to the present case.

Sections 29, 30, and 35 are not subject to section 37. "Children" include illegitimate children—*Maxwell on Interpretation of Statutes, p. 106 (1920 ed.)*. Interpret so as to maintain the law rather than to vary it. Who is a half-brother or half-sister? It is conceded that mother makes no bastard. The result is that, by virtue of sections 29 and 30, claimants have not failed. In a case where there are no heirs under sections 29 and 30, the provisions of section 35 have to be applied.

The only express provision is section 26, section 36 constituting only a proviso. Section 40 preserves the Roman-Dutch law in all matters where the Ordinance is silent. According to that law, relatives in the position of the respondents are considered half-blood for the purpose of inheritance. There is no provision which says that a brother of the half-blood, brought in by sections 29 and 30, does not include an illegitimate half-brother.

J. E. Alles (with him *S. J. Ranatunge*), for fourth respondent.

Peter de Silva (with him *A. P. de Zoysa*), for third respondent.—Under section 37, children cannot be described as relatives of the mother.

H. V. Perera, K.C., in reply, cited *Punchihamy v. Kostan*[1]. Relatives of the mother would include the other illegitimate children of Podihamy. The first part of section 37 leaves no doubt or room for argument.

Cur. adv. vult.

September 16, 1938. HEARNE J.—

This appeal concerns the rights of succession to an intestate of illegitimate birth.

The intestate, Lucia, was the wife of the appellant and the daughter of Podihamy who had predeceased her. Podihamy had other illegitimate children and these children are represented by the respondents.

The relevant law is contained in Ordinance No. 15 of 1876. By virtue of the provisions of section 26 of that Ordinance the Judge held that the appellant was entitled to one half of the estate of the deceased and, following the view of Lyall-Grant J. in *Chelliah v. Kadiravelu* (*supra*) that "the succession of a surviving spouse of a bastard is not expressly dealt with in Ordinance No. 1 of 1911 or in that of 1876", decided that according to the principles of Roman-Dutch law the remaining half "should go to the other children of deceased's mother" and their representatives.

In the case of *Chelliah v. Kadiravelu* (*supra*) it was held that where a woman of illegitimate birth, subject to the *Thesawalamai*, died intestate leaving her husband and no issue, the legitimate issue of the mother of the intestate was entitled to succeed to her dowry property to the exclusion of her husband.

Drieberg J. considered the effect of section 37 of Ordinance No. 1 of 1911 which reads "When an illegitimate person leaves no surviving spouse or descendants, his or her property will go to the mother, and then to the heirs of the mother so as to exclude the Crown." The corresponding section in Ordinance No. 15 of 1876—it is the second part of

[1] *(1902) 2 Mat. cases 35.*

section 37—is as follows: "Where an illegitimate person leaves no surviving spouse or descendants, his or her property will go to the heirs of the mother, so as to exclude the Crown".

Drieberg J. held that section 37 of Ordinance No. 1 of 1911 did not mean that on the failure of descendants the husband or a wife of illegitimate birth would take the entire estate to the exclusion of her mother and the mother's heirs: it meant that the rights of the mother of an illegitimate child were subject to the rights of the deceased's children and the rights of her husband, that is to say, "the right of the children to succeed to the entirety and the right of the husband to a separation of half of her acquired property".

With that view, if I may say so with respect, I am in complete agreement. It was a statement of the statutory law, in so far as it was necessary for the determination of the appeal which Drieberg J. was considering. As the deceased left no issue, as the husband had been given a half share of her acquired property, and as the mother's rights were only subject to the rights of descendants (if any) and the rights of the husband to particular property, viz., to a half of the after acquired property, the mother, and failing her, her heirs, were entitled to succeed to the dowry property to the exclusion of the husband. No further difficulty arose. The mother of the deceased was dead but her heirs were legitimate issue, and a consideration of section 36 of Ordinance No. 1 of 1911 did not arise. It is to be noted that Drieberg J. did not seek the aid of the principles of Roman-Dutch law: for in his opinion the point he had to decide was covered by the statutory law.

In the present case, however, there is an added difficulty. Lucia's mother is dead and, as it appears to me, the rights of her mother's other illegitimate children to succeed to any part of Lucia's property are barred by statutory law. The first part of section 37 of Ordinance No. 15 of 1876 reads "Illegitimate children inherit the property of their intestate mother, but not that of their father or that of the relatives of their mother". The relationship between a mother and her illegitimate child is well recognized in our law, and the consequence is that the respondents must fail. This being the case, and all other persons enumerated in the sections prior to section 36 also failing, in the sense that there are no such other persons *in esse*, the entire inheritance in my opinion must devolve under section 36 of the Ordinance upon the appellant as the surviving spouse.

I would, therefore, allow the appeal and declare the petitioner appellant entitled to the entirety of his deceased wife's estate with costs in both Courts.

WIJEYEWARDENE A.J.—

In this case certain questions of law arise with regard to the succession to the property of a bastard who died intestate in 1935 without leaving any descendants.

The deceased Lucia Moraes was the wife of the petitioner-appellant. She was an illegitimate child of one Podihamy who was also the mother of six other illegitimate children. Podihamy herself is dead.

The respondents fall into two groups :—

(*a*) illegitimate children of Podihamy.

(*b*) descendants of the deceased illegitimate children of Podihamy.

The petitioner's claim to the entire estate of Lucia Moraes was contested in the District Court by the respondents who claimed the entirety themselves as brothers and sisters of the deceased. The learned District Judge held that the petitioner was entitled to one-half and the respondents to the other half. The present appeal is by the petitioner. The respondents have not preferred an appeal against the order of the District Judge.

I propose to consider first the question of law whether the respondents have a right to succeed to any share of the estate of the deceased. I think it convenient, while discussing this question, to refer only to the rights of the respondents who are the children of Podihamy and that it is not necessary to refer to the rights of the respondents who are the children of any deceased child of Podihamy as the last-mentioned group of respondents cannot have greater rights than the other group.

The respondents' claim to a half-share of the estate is based on section 30 of Ordinance No. 15 of 1876 which reads :—" Father and mother both failing, the property of the intestate goes to his brothers and sisters, whether of the whole or half-blood, and their children and other issue by representation ".

It is argued on behalf of the respondents that the section does not require that the persons described in that section as " brothers and sisters " and the " intestate " should be the issue of a legitimate union and that in any event the respondents could claim to be " brothers and sisters of the half blood " as they are the children of Podihamy the mother of the intestate. The soundness of this contention could be tested by considering the following simple case :—X and Y are the illegitimate sons of a woman A who is dead. Could X succeed to the estate of Y who dies intestate leaving a spouse and no children ? Now Y, who is an illegitimate son of A, is a relative of A. If X could succeed to any share of the intestate estate of Y under section 30 on the ground that he is a " brother " or " half-brother " of Y, the result is that X an illegitimate child inherits the property of Y a relative of his mother. This right to inherit the property of a relative of the mother is denied by section 37 to illegitimate children. The portion of section 37 relevant to the present question is as follows :—" Illegitimate children inherit the property of their intestate mother, but not that of their father or that of the relatives of the mother ".

The correct legal position appears to be that section 30 should be read subject to section 37. The provisions of sections 26 to 36 of the Ordinance no doubt regulate the succession to the intestate estate of a person whether such person is an issue of a regular or irregular union but where the intestate is an " illegitimate person " or the heirs are " illegitimate children " within the meaning of section 37, the earlier provisions are modified by section 37.

In view of the argument put forward on behalf of the respondents that in the absence of any clear provision to the contrary Ordinance No. 15 of 1876 should not be so interpreted so as to make the law of

succession under the Ordinance differ from the law which governed the devolution of estates prior to the Ordinance, I think the decision of the Supreme Court in *Sinno Appu v. Abeywickreme*[1] is not without some interest. In that case the Court had to consider the succession to the intestate estate of a bastard who died before the Ordinance leaving him surviving his mother and a "brother" and a "sister" who were two "illegitimate" children of his mother. It was there held that whether the question was decided under the North Holland Law of Inheritance or the South Holland Law of Inheritance the "brother" and the "sister" were not entitled to claim any share of the estate.

I think therefore that the respondents do not inherit any share of the estate of the deceased.

It remains to consider the further question as to the rights of the petitioner. It is conceded by the respondents' counsel that the petitioner as spouse gets a half-share under section 26 of the Ordinance. The remaining half-share, also, I think, devolves on the petitioner by virtue of section 36 which reads :—"All the persons above enumerated failing, the entire inheritance goes to the surviving spouse, if any, and if none, then to the next heirs of the intestate *per capita*".

In the case of Lucia Moraes "all the persons above enumerated" have failed within the meaning of section 36. As she was a bastard she could not have a father entitled to succeed to her estate. Her mother predeceased her. She left no descendants. As stated by me earlier, in view of section 37 she could not have any brother, sister, grandfather or other relative entitled to succeed to her estate under the earlier provisions of the Ordinance.

I hold that the petitioner is the sole heir of the estate of the deceased and allow the appeal with costs.

Appeal allowed.