1951 *Present:* **Gratiaen J. and Gunasekara J.**

KOBBEKADUWA, Appellant, *and* SENEVIRATNE *et al.*, Respondents

S. C. 383—D. C. Kandy, 1,874

Evidence Ordinance—Evidence in a former judicial proceeding—Admissibility—Section 33—" Representative in interest ".

Kandyan Law—Adoption—Public declaration.

Prescription—Co-owners—Evidence of ouster.

The term " representative in interest " in the proviso to section 33 of the Evidence Ordinance covers " not only cases of privity in estate and succession of title, but also cases where both the following conditions exist, viz.—(1) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding; and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical ".

Observations in regard to the requisites of a valid adoption by public declaration, under the Kandyan Law.

The mere fact that a co-owner who was in occupation of the common property purported to execute deeds in respect of the entirety of it for a long period of years does not lead to the presumption of an ouster in the absence of evidence to show that the other co-owners had knowledge of the transactions.

APPEAL from a judgment of the District Court, Kandy.

H. W. Jayewardene, for the plaintiff appellant.

Cyril E. S. Perera, with *B. S. C. Ratwatte*, for the first defendant respondent.

K. Sivasubramaniam, for the second defendant respondent.

Cur. adv. vult.

August 20, 1951. GUNASEKARA J.—

The plaintiff instituted this action for declaration of title to a parcel of land known as Adikariyewatta, valued at Rs. 500, and for ejectment of the seven defendants therefrom and damages. At the trial he proceeded only against the first to fourth defendants, of whom the first and second claimed to be entitled each to a one-third share of the property and the third and fourth disclaimed any interest. After trial the learned District Judge declared the plaintiff and the first and second defendants entitled to a one-third share each and directed the plaintiff to pay these two defendants their costs. Against this order the plaintiff has appealed.

It is common ground that the original owner of the property was one Bandara Menika and that she had two brothers, Kalu Banda and Muhandiram Nilame. According to the case for the plaintiff, Bandara

Menika adopted as her heir Tikiri Kumarihamy, a daughter of one of these brothers, and upon her death Tikiri Kumarihamy inherited the property in question, and from Tikiri Kumarihamy it passed by a series of transfers to the plaintiff. The defendants deny the alleged adoption. Their case is that upon Bandara Menika's death intestate, her brothers Kalu Banda and Muhandiram Nilame succeeded to the property as her heirs and that from them it devolved by intestate succession on Tikiri Kumarihamy and her brothers Loku Banda and Tikiri Banda in equal shares, and that the first and second defendants eventually became entitled to the two-thirds that devolved on Loku Banda and Tikiri Banda. It is admitted by the plaintiff that these two were Tikiri Kumarihamy's brothers.

After the disposal of a preliminary issue the case was tried on the following further issues:—

" (1) Did Bandara Menika adopt Tikiri Kumarihamy for the purpose of inheritance as stated by the plaintiff ?

(2) Did Bandara Menika leave as her heirs her two brothers Muhandiram and Kalu Banda as stated by the first to fourth defendants ?

(3) Prescriptive rights of parties.

(4) Damages."

The plaintiff relied for proof of his title on a chain of deeds, whereby the property was sold by Tikiri Kumarihamy to Nagapitiye Walawve Loku Banda in 1895, and by him to her son Punchi Banda in 1908, and by Punchi Banda to the plaintiff's father S. D. Kobbekaduwa in 1939, and was gifted by the latter to the plaintiff in 1941. The preliminary issue was one raised by the plaintiff as to whether the judgment in an action brought by S. D. Kobbekaduwa against the first to fourth defendants, District Court, Kandy, Case No. L. 476, to vindicate his title to another piece of land operated as *res judicata* against these defendants in the present action. One of the issues tried in that case was whether Tikiri Kumarihamy was adopted by Bandara Menika and was her sole heir. The learned District Judge held against the plaintiff on the preliminary issue, relying on the decision in *Molagoda Kumarihamy v. Kempitiya* [1], for the reason that the judgment pleaded as *res judicata* was delivered in 1943, after S. D. Kobbekaduwa's gift to the plaintiff. The plaintiff's counsel did not canvass this finding at the hearing of the appeal.

On the issue of adoption the plaintiff relied on evidence of statements made by Tikiri Kumarihamy on various occasions about her relationship to Bandara Menika. Tikiri Kumarihamy appears to have died very many years ago; according to the first defendant, who says that he is now 50, she died when he was yet a " very small boy ". In her deed of 1895, she recited her title as " inheritance from my deceased aunt Dugganarallage Bandara Menika ". In the same year she and her son Punchi Banda were sued in the Court of Requests, Kandy (as the first and the second defendant respectively), for declaration of title to a

[1] *(1943) 45 N. L. R. 34.*

property called Pissakotuwahena and in their answer they referred to their possession of what they said was a property called Mulmediahena that adjoined it on the west. They said:

> " The defendants who are mother and son are in possession by right of inheritance from one Dugganaralagedera Bandara Menika the aunt of the first defendant and the grand aunt of the second defendant of the eastern two pelas and five lahas of the land called Mulmediahena of five pelas in extent."

Giving evidence in that case, on the 27th August, 1895, she said in the course of her examination in chief:

> " Bandara Menika was my aunt. She owned the E 2½ pelas of Mulmediyahena. She died about 20 years ago. As her heir I inherited the land. I was her only heir. I possessed the land to date. There is only one Pissakotuwahena now in possession of the Kobbekaduwa R. M., my portion is the E No. W portion of the 5 pelas. Sarana Veda owns the W portion of Mulmediahena."

Under cross-examination she said:

> " My aunt had lost her husband long before and she had no relations but me. Sarana Veda is a rich and influential man. My uncle Kalu Banda once owned that portion of Mulmediyahena which Sarana Veda has."

She has not on any of these occasions referred to any adoption, and the relationship by virtue of which she has claimed to be Bandara Menika's heir is that she was her niece and her sole surviving relative. I agree with the learned Disrrict Judge that this evidence does not prove that Tikiri Kumarihamy was adopted by Bandara Menika.

The plaintiff also sought to put in, as being admissible under section 33 of the Evidence Ordinance, the record of certain evidence given by Punchi Banda in Case No. L. 476 on the 28th September, 1943: he had died on the 27th December, 1946, before the trial of the present action. The learned District Judge excluded this evidence, holding that the conditions laid down in the first proviso to that section were not satisfied. His reason for this view was that " the plaintiff cannot be considered a representative . . . in interest of his father because the plaintiff got title from his father before the decree was entered in that case ". Mr. Jayawardene has pointed out, however, that the interpretation of the proviso upon which the learned District Judge's order was based has been expressly overruled by the Judicial Committee of the Privy Council in *Krishnayya v. Venkata Kumara* [1] (which was not cited to the District Judge). It was held in that case that the party to the first proceeding must have represented in interest the party to the second proceeding, and not the other way about, and that there need be no privity in estate between them:

> " It covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist, viz., (1) the interest of the relevant party to the second proceeding in the

[1] *A. I. R. (1933) Privy Council 202.*

subject matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding ; and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical. There may be other cases covered by the first proviso ; but if both the above conditions are fulfilled, the relevant party to the first proceeding in fact represented in the first proceeding the relevant party to the second proceeding in regard to his interest in relation to the particular question in issue in the first proceeding, and may grammatically and truthfully be described as a representative in interest of the party to the second proceeding."

When this test is applied it appears that S. D. Kobbekaduwa was in Case No. L. 476 the representative in interest of the plaintiff in the present case. The other conditions laid down in section 33 are satisfied and it seems to me that the evidence in question was admissible.

With the consent of counsel for both parties we have obtained the record in Case No. L. 476 and read the evidence of Punchi Banda. He has said that Tikiri Kumarihamy, who according to him died about 1900, had told him " that Bandara Menika adopted her ". He also deposed that Bandara Menika died about 15 years before Tikiri Kumarihamy and that the latter had lived with her in her house in Adikariyewatte (which is the subject-matter of the present action) and continued to live there after her death.

Under the Kandyan Law, which has been assumed by the parties to be the law that is applicable, the requisites of a valid adoption for the purpose of inheritance include a public declaration by the adoptive parent that the child was adopted for that purpose: *Tikiri Kumarihamy v. Niyarapola* [1], *Ukkubanda Ambahera v. Somawathie Kumarihamy* [2]. It seems to me that the statement alleged to have been made by Tikiri Kumarihamy to Punchi Banda is not sufficient evidence of such an adoption, particularly when it is considered with her statements in the deed of 1895, and in the proceedings in the Court of Requests case. Had she been adopted in order that she might inherit Bandara Menika's property, and not merely brought up in the house of a childless aunt and treated as her child, she would on each of those occasions have based on adoption her claim to the inheritance and not on an allegation that Bandara Menika was her aunt and had no other relatives besides herself. Her continuing to live in Bandara Menika's house after the latter's death is not inconsistent with co-ownership of the property with other heirs. In my opinion, if the rejected evidence had been received it ought not to have varied the decision on the issue as to adoption.

The learned Judge's finding that Tikiri Kumarihamy was entitled to only an undivided one-third share which devolved on the plaintiff, and that her co-owners are now represented by the first and second defendants is supported by the evidence and must be affirmed. The plaintiff would therefore be entitled to no more than a one-third share unless he has proved a title by prescription to the whole property. It is contended for the appellant that the evidence of prescriptive possession relied on by him has not been adequately considered.

[1] *(1937) 44 N. L. R. 476.* [2] *(1943) 44 N. L. R. 457.*

The action was instituted on the 3rd May, 1946, about six years and a half after Punchi Banda's conveyance to the plaintiff's father, S. D. Kobbekaduwa. The only evidence of Tikiri Kumarihamy's possession of the property is that she lived in the old house that stood there. There is no evidence that Nagapitiya Walauwe Loku Banda to whom she purported to convey the whole property in 1895, was in possession of it at any time. The facts relied upon to prove Punchi Banda's possession are that he too lived in the old house and when it came down he built a new one and lived in it; that he planted with tea about ¼ acre of the property, the whole extent of which is about 1½ acres, and took the produce of that plantation; that he also took the produce of the coconut and arecanut trees that were scattered about the rest of the land and some of which he himself had planted, according to the plaintiff's witness Ukkurala; and that he mortgaged the whole property on five occasions—in 1921, 1923, 1933, 1938 and 1939 respectively. According to Ukkurala, the house that Punchi Banda built was built " on the portion where the tea was planted ".

According to the case for the plaintiff, Tikiri Kumarihamy could have had no more than ten years' possession of the property before she purported to convey it to Loku Banda in 1895 ; for that is the effect of Punchi Banda's evidence in Case No. L. 476. As she was only a co-owner it must be presumed that she possessed in that capacity and that her possession enured to the benefit of all the co-owners. The decision in *Corea v. Iseris Appuhamy* [1] laid down the principles.

> " that the possession of one co-owner was in law the possession of the others; that every co-owner must be presumed to be possessing in that capacity; that it was not possible for such a co-owner to put an end to that title, and to initiate a prescriptive title by any secret intention in his own mind; and that nothing short of ' an ouster or something equivalent to an ouster ' could bring about that result ". *Per* Bertram C.J. in *Tillekeratne v. Bastian* [2].

There is nothing in the evidence to rebut the presumption that Tikiri Kumarihamy possessed in the capacity of a co-owner or to show that any of her co-owners or their successors in title became aware of her deed of 1895 at any time before 1939. Punchi Banda, who was 85 at the time of his death, would have been 34 at the time of the execution of this deed and must have been fully aware that his mother was entitled to convey only a one-third share. He could have had no reason to think that Loku Banda was entitled to convey to him anything more by the deed of 1908. His case is, therefore, very different from such a case as that of the purchaser in *Punchi v. Bandi Menika* [3], who " entered into possession of the field upon the assumption that his vendor was the sole owner and that the deed in his favour gave him a sound title ".

[illegible]mstances in which Punchi Banda acquired Loku Banda's [illegible] than rebut, the presumption from co-ownership [illegible] property in his capacity of a co-owner.

[1] *(911) 15 N. L. R. 65.* [2] *(1918) 21 N. L. R. 12 at 13.*
[3] *(1942) 43 N. L. R. 547 at 548.*

The learned District Judge has considered the question whether it has been proved that Punchi Banda's possession became adverse to his co-owners and has held that it has not. As he points out, Punchi Banda's possession of the improvements made by him was no more than an exercise of his rights as a co-owner. The only fact relied on by the plaintiff as proof that Punchi Banda's co-owners were aware of the mortgages is that the first defendant was one of the witnesses to the bond of 1933. The first defendant, who gave evidence, denied that though he signed as a witness he was aware that the instrument was a mortgage of the entire property. The learned Judge finds himself unable to reject his explanation: " whether or not the first defendant ", he says, " who signed as a witness, was aware of the contents of the deed, I am not in a position to say ". Moreover, the first defendant became a co-owner of the property only six years later when he bought his father's share upon a deed executed on the day after Punchi Banda's conveyance to S. D. Kobbekaduwa. There is thus no evidence that it was with the knowledge of their co-owners that Tikiri Kumarihamy and her successors in title purported to deal with the whole property before Punchi Banda's conveyance to S. D. Kobbekaduwa in 1939. There is no evidence of an ouster and nothing in the circumstances of the case to warrant a presumption of ouster. It was held in the case of *Careem v. Ahamadu*[1] that (to quote the head-note) " the mere fact that one co-owner was in occupation of the entirety of a house which was owned in common and purported to execute deeds in respect of the entirety for a period of over ten years does not lead to the presumption of an ouster in the absence of evidence to show that the other co-owners had knowledge of the transactions ". The same principle is affirmed in *Sideris v. Simon*[2] and *Ummu Ham v. Koch*[3]. I agree with the learned District Judge's finding that the plaintiff has failed to establish a title by prescription.

I would dismiss the appeal with costs.

GRATIAEN J.—I agree.

Appeal dismissed.