1967 *Present :* **H. N. G. Fernando, C.J., and Sirimane, J.**

P. ABEYSINGHE, Appellant, *and* P. L. BAUDHASARA and 10 others, Respondents

S. C. 285/63(F)—D. C. Colombo, 8930/P

Adoption of Children Ordinance (Cap. 61)—Section 6 (3)—Deed of fideicommissum—Designation of lawful children or lawful heirs of donee as fideicommissaries—Adoption of child by donee subsequently—Death of donee without issue—Whether adopted child acquires any rights under the fideicommissum.

A condition in a deed of gift of 3rd February 1930 burdened the donated property with a fideicommissum in favour of the lawful children of the donee M or, failing such children, in favour of the lawful heirs of M. M died unmarried and without issue. But shortly before his death, M adopted a child under the Adoption of Children Ordinance.

The question to be decided in the present action was whether the adopted child became entitled to the property or any interest in it.

Held, that the proviso to section 6 (3) of the Adoption of Children Ordinance prevented the adopted child from acquiring any right, title or interest in the property whether as M's lawful child or as M's lawful heir.

APPEAL from a judgment of the District Court, Colombo.

C. Ranganathan, Q.C., with *N. S. A. Goonetilleke, D. C. Amerasinghe* and *D. S. Wijewardene,* for the substituted plaintiff-appellant.

H. W. Jayewardene, Q.C., with *C. D. S. Siriwardene* and *B. Bodinagoda,* for the 21st defendant-respondent.

Cur. adv. vult.

September 1, 1967. H. N. G. FERNANDO, C.J.—

This appeal involves an interesting and somewhat difficult question as to the property rights acquired by persons adopted under the Adoption of Children Ordinance (Cap. 61). It arises in an action for the partition of valuable residential property situated in the city of Colombo.

It is common ground that the property formerly belonged to one Aranolis Appuhamy, who by the deed P5 of 3rd February 1930 donated the property to his son Manis, subject to the following condition :—

" that the said donee shall not be entitled to sell, mortgage or lease for more than six months at a time or otherwise alienate the said premises during his life time and that after his death the said premises shall devolve on his lawful children. In the event of his dying without issue the said premises shall devolve on his lawful heirs. "

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It is not disputed that the condition had the effect of burdening the property with a Fideicommissum in favour of the lawful children of Manis or, failing such children, of the lawful heirs of Manis. Manis died unmarried and without issue. But shortly before his death, Manis adopted a child Tharika under the Adoption of Children Ordinance, the relevant Order (marked 21D3) having been made by the competent Court, the Court of Requests of Colombo. On 21st January 1959, Manis made a Last Will appointing Tharika his sole heiress to all his property.

The main dispute in this case was whether the corpus of this action passed on the death of Manis to his surviving three sisters (the 1st, 2nd and 3rd defendants), and to the 4th to 10th defendants and the plaintiff (all of whom are the children of a deceased sister of Manis), or else whether it passed under the Last Will or otherwise to Tharika the adopted child of Manis.

The learned trial Judge has held that Manis had no right in the property of which he could dispose by will. This finding has not been challenged at the hearing of the appeal, and I hold that it is correct. The question to be decided is whether Tharika, *qua* the adopted child of Manis, became entitled to the property or any interest in it.

Section 6 (3) of the Adoption of Children Ordinance provides as follows :—

> " Upon an adoption order being made, the adopted child shall for all purposes whatsoever be deemed in law to be the child born in lawful wedlock of the adopter :
>
> Provided, however, that unless the contrary intention clearly appears from any instrument (whether such instrument takes effect *inter vivos* or *mortis causa*), such adopted child shall not by such adoption—
>
> (*a*) acquire any right, title or interest in any property—
>
> (i) devolving on any child of the adopter by virtue of any instrument executed prior to the date of the adoption order ;
>
> (ii) burdened with a fideicommissum in favour of the descendants of the adopter ; or
>
> (iii) devolving on the heirs *ab intestato* of any child born in lawful wedlock of the adopter ;
>
> (*b*) becomes entitled to any succession (whether by will or *ab intestato*) *jure representationis* the adopter.

The first sentence of the sub-section (read without the Proviso) has the clear effect that for the purposes of any instrument an adopted child must be regarded as a child born in wedlock to the adopter. If that sentence had stood alone, therefore, Tharika, being deemed in law to be the sole " lawful child " of Manis, would have become entitled

to this property as a designated fideicommissary heir under P5. But Tharika becomes excluded by two of the clauses of Proviso (*a*), because she is prevented from acquiring any right title or interest in any property—

(i) devolving on any child of the adopter by virtue of P5, which was executed prior to her adoption ; or

(ii) which was by P5 burdened with a Fideicommissum in favour of the descendants of Manis.

Thus far, the opinion of the learned District Judge accords with mine, and I need add nothing to the reasons which he has stated for the opinion that the devise of the property by P5 to the *lawful children* of Manis was ineffective to pass the property to an adopted child. But the learned trial Judge nevertheless reached the conclusion that since an adopted child is by virtue of the first sentence in sub-section (3) of Section 6 of the Ordinance a lawful child of the adopter, he is therefore *the lawful heir* of Manis and thus the person entitled to succeed under the clause in P5 providing " in the event of his (Manis) dying without issue the premises shall devolve on his *lawful heirs* ". In reaching this conclusion, the learned trial Judge considers that the Proviso to s.6(3) excludes an adopted child only to the extent that he is not to be regarded as a lawful child or a descendant of the adopter for the purposes of any devise in an instrument in favour of *lawful children* or *descendants*. The final clause in the condition in P5, being a devise to *lawful heirs*, is not in his opinion a devise the benefit of which is denied to an adopted child by the Proviso.

With respect, and with some hesitation in a case of first instance, I must disagree with this opinion. Let me consider first the intention of the Legislature evidenced in the Proviso, in its reference to instruments executed prior to an adoption, and to properties burdened with a Fideicommissum in favour of descendants of an adopter. The Legislature appears to have taken into account the contemplation of a person executing such an instrument or so burdening property ; in this context, that children will be born in wedlock to the devisee. The adoption of children of a devisee would not ordinarily or naturally be within the contemplation of an executant. This aspect of the matter is emphasised in the clause (ii) of the Proviso, if, *even after the adoption* of a child by X, someone makes a devise to X, burdened with a Fideicommissum in favour of X's descendants, the Proviso excludes the adopted child from the devise, unless a contrary intention clearly appears from the terms of the devise. This clause of the Proviso confirms the impression that its purpose is to make effective the true intention of the executant, the intention to exclude being presumed unless the contrary is expressed. In my opinion therefore, a Court must, even if there be doubt, lean towards the construction that the Legislature had no intention that an instrument like P5 should benefit adopted children. The existence of any such intention in the mind of the donor in this case is completely

negatived by the fact that P5 was executed at a time (1930) when an adoption by Manis could not have in law passed any rights to an adopted child even in property owned absolutely by Manis.

Secondly, the learned Judge appears to have misunderstood the terms of the Proviso to sub-section (3) when he formed the opinion that its purpose is only to exclude an adopted child in a "conflict" with a lawful child or other descendant of the adopter. Clause (i) of the Proviso denies rights to an adopted child *under an instrument* executed prior to his adoption ; and clause (ii) denies to him rights *to any property burdened with a fideicommissum* in favour of descendants of the adopter. The Legislature has thus laid stress on the character of an instrument or of property, in its declarations that an adopted child cannot acquire an interest under such an instrument or in such property. The question whether Manis had or had not lawful children is therefore not relevant in construing or applying the Proviso.

The instrument in this case (P5) is, by reason of the time of its execution, clearly within clause (i) of the Proviso. The conclusion that Tharika takes under P5 conflicts with clause (i). The property in this case is brought within clause (ii), because it is burdened in the manner specified in that clause. The fact that it is subject to an additional burden does not in my opinion take it outside the scope of that clause.

The conclusion of the trial Judge in this case permits the adopted child Tharika to acquire title to the property on the ground that she is a lawful heir of Manis. But she is a lawful heir only because, by the first sentence of sub-section (3), she is the deemed lawful child of Manis, and such a child is denied rights in the present case by the first two clauses of the Proviso.

I must hold that the property which is the subject of this litigation is property in which the adopted child Tharika is prevented by the Proviso to s. 6 from acquiring any right title or interest, and also that the instrument P5 is one under which she is prevented from acquiring any right title or interest.

The learned District Judge has entered decree dismissing the plaintiff's action with costs payable to the 21st defendant. He has found that the 12th defendant is entitled to a sum of Rs. 9000/- for compensation for improvements to the property and for a *ius retentionis* until compensated, and this finding was not challenged before us.

I set aside the decree of dismissal and for costs, and I hold that the minor represented by the 21st defendant has no interest in the property in suit. I affirm the findings in favour of the 12th defendant, who will be entitled also to his costs of contest in the District Court.

The case is now remitted to the District Court for decree of partition to be entered in favour of the plaintiff and the 1st to 10th defendants in terms of the shares proved at the trial, and declaring the rights of the

12th defendant in terms of the judgment of the District Judge. If the parties desire a decree for sale, such a decree may be granted in the discretion of the Court. In the circumstances, the 21st defendant will not be liable for costs in either Court.

SIRIMANE, J.—I agree.

Appeal allowed.