

1949 Present : Wijewardene C.J., Canekeratne and Gratiaen JJ.

MOHOTIHAMY, Appellant, and ALNINONA, Respondent

S. C. 350—D. C. Ratnapura, 8,097

Kandyan Law—Intestate succession—Children by two beds—Devolution per stirpes or per capita—Inneterate error.

Where a Kandyan, whether male or female, dies leaving children by two beds, the children succeed *per stirpes* and not *per capita*.

APPPEAL from a judgment of the District Judge, Ratnapura.

E. B. Wikramanayake, K.C., with *A. H. E. Molamure* and *J. W. Subasinghe*, for defendant appellant.

U. A. Jaydsundere, K.C., with *Vernon Wijetunge* and *C. G. Weeramantry*, for plaintiff respondent.

¹ (1930) 32 N. L. R. 81.

April 6, 1949. WIJEWARDENE C.J.—

One Salishamy, a Kandyan woman, was married twice. She had two children, Maggie Nona and defendant, by her first marriage and four children, Saralis, Themis, Jane and Baby by her second marriage. Salishamy died before the commencement of the Kandyan Law Declaration and Amendment Ordinance, leaving her six children as her heirs. Maggie, Saralis and Baby died intestate and issueless. Under the Kandyan Law the share of Maggie would have devolved only on the defendant and the shares of Saralis and Baby only on Themis and Jane (*vide* Hayley on Sinhalese Laws and Customs, page 440).

By deed P1 of 1945 Themis sold to the plaintiff $\frac{1}{3}$ share of certain lands and houses. By deed P2 of 1945, Jane sold to the plaintiff $\frac{1}{3}$ share of one of the houses.

The defendant filed answer pleading that the plaintiff was entitled to claim under P1 only $\frac{1}{4}$ share of the lands and houses and under P2 only $\frac{1}{4}$ share of the house referred to in P2. The District Judge held in favour of the defendant.

The question we have to decide on this appeal is whether the devolution of the property on the death of Salishamy among the children of her two marriages should be *per capita* or *per stirpes*.

It has been settled by a long series of decisions of this Court that the succession should be *per stirpes* where children of different marriages claim property of their father [*vide* (1843) Austin Reports 105; (1851) Austin Reports 122; *Ran Menika v. Ran Menika* (1857) 2 Lorenz 27; (1870) Vanderstraaten's Reports 43; *Banda v. Lebbe et al.* (1916) 2 Ceylon Weekly Reporter 108]. It is contended by plaintiff's Counsel that those cases have been wrongly decided and that we should not follow them when we consider the succession of the children to the property of their mother. It is conceded, however, by him that the early text writers do not draw any distinction between the rule governing the succession of children of different marriages of a father and that governing the succession of children of different marriages of a mother. Moreover, there are definite decisions of this Court adopting the rule of succession *per stirpes* in the case of the property of a mother [*vide* *Siriya v. Kaluwa* (1889) 9 Supreme Court Circular 45, *Appuhamy v. Hudu Banda* (1903) 7 New Law Reports 242 and *Nanduwa v. Punchirala et al.* (1922) 24 New Law Reports 249.] Even if the decisions of this Court are contrary to the rule to be gathered from Sawyer and Armour, I think that the present case is one of those cases in which inveterate error should be left undisturbed because it would be unjust to disturb titles and transactions founded on such an error (*vide* *Pate v. Pate* (1915) 18 New Law Reports 289 at 293.)

I would dismiss the appeal with costs.

CANEKERATNE J.—I agree.

GRATTIAEN J.—I agree.

Appeal dismissed.