1969 *Present:* H. N. G. Fernando, C.J., Weeramantry, J., and Wijayatilake, J.

SUJATHA KUMARIHAMY, Appellant, *and* S. R. M. DINGIRI AMMA and others, Respondents

S. C. 121/1965—D. C. Kurunegala, 1432/P

Kandyan law prior to 1938—Inheritance of paternal property by intestate heirs—Subsequent physical division of some of the undivided lands by the co-heirs by notarial deed—Whether a land owned dividedly thereafter by a co-heir should be regarded as entirely paraveni—Concept of "paraveni" prior to 1938—"Acquired property"—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, ss. 10, 27.

Held by H. N. G. Fernando, C.J. and Weeramantry, J. (Wijayatilake, J. dissenting), that, under the Kandyan law prior to the enactment of the Kandyan Law Declaration and Amendment Ordinance of 1938, when co-heirs who inherited several lands from their father who died intestate divided some of the lands physically between themselves by subsequent mutual agreement by the execution of a notarial deed in such a manner that they became sole owners of specific and separate portions, any one of such separate lands became "paraveni" property entirely in the hands of its owner and no portion of it partook of the character of "acquired" property.

One Appuhamy, who was subject to the Kandyan law, died intestate leaving as his heirs two children K and D and several lands. By deed P1 of 13th October 1893, K and D divided part of their inheritance in such a manner that K became the sole owner of sixteen lands and D the sole owner of twenty. It was further agreed that the other lands which they inherited were to be possessed in common.

The question for adjudication in the present appeal was whether Paragahapitiyahena, which was one of the lands of which K became sole owner under the deed P1 of 13 October 1893, was entirely "paraveni" in the hands of K or whether it partook of this character only in part. It was held by the trial Judge that inasmuch as K and D each became entitled on Appuhamy's death to an undivided half share in each of his lands, and inasmuch as K's title to the other half share of Paragahapitiyahena rested solely on the document P1, such latter half share was derived by acquisition from a collateral and not by inheritance from a parent and thus constituted "acquired" property in his hands.

Held, by the majority of the Court, that Paragahapitiyahena was entirely paraveni in K's hands inasmuch as it was property coming to him by right of paternal inheritance and attributable to no other source, despite the fact of the execution of P1. In such a case, prior to the enactment of the Kandyan Law Declaration and Amendment Ordinance of 1938, what paraveni in effect means is that which each heir gets in his capacity as heir, and, in considering what property was paraveni and what acquired, the old Kandyan law would consider the concrete thing to which a person so succeeds rather than indulge in an abstract analysis of legal concepts.

1*—J 11985—2255 (2/70)

APPEAL from a judgment of the District Court, Kurunegala.

H. V. Perera, Q.C., with *T. B. Dissanayake, Sepala Moonesinghe* and *Nalin Abeysekera*, for the 2nd defendant-appellant.

H. W. Jayewardene, Q.C., with *W. D. Gunasekera, M. Sanmuganathan* and *W. S. Weerasooria*, for the plaintiffs-respondents.

Cur. adv. vult.

October 28, 1969. H. N. G. FERNANDO, C.J.—

I have had the advantage of considering the drafts of the two judgments prepared by the other members of this Bench. I agree entirely with the reasons which have been stated by my brother Weeramantry for his conclusion that the appeal be allowed and the plaintiffs' action be dismissed with costs in both Courts. I need only to add some brief observations of my own.

The proposition that in ancient societies a physical division or distribution of property was made among the heirs of a deceased person is so reasonable that one scarcely needs for it the support furnished by the references cited in my brother's judgment. In the earliest times, chattels were probably the sole subject of such a division or distribution, for the concept of ownership of land developed only at a later stage. That being so, the custom of a physical division of chattels would probably have been followed and applied subsequently in the case of land as well.

The right which an heir in early times enjoyed on the occurrence of a death was the right to take a portion of the deceased's chattels or land, and his ownership or title would in reality have commenced only after he came into possession of the portion in the exercise of his right to a division. The concept that at a moment of a death each heir became the owner of some portion of a deceased's chattels or land, would in my opinion be too sophisticated for recognition in an ancient society, for physical possession was the distinctive mark of ownership.

In the case of land, a division among heirs could take different forms, but it is easy to envisage that ordinarily the division took one or two forms. *Firstly*, that each heir took for himself some separate lands, or separate portions of land, and *secondly*, that instead of a physical division the heirs decided that each of them should own a share of all the lands. But in either case each heir ultimately held his separate lands or separate portions, or else his shares in each land, by virtue of the fact of division. If this was not the case, then upon the death of every person leaving a plurality of heirs, the stage of separate ownership would invariably have been preceded by some interval, however long or brief or momentary, during which each heir had a right of ownership over all the property of the deceased. In the case where the heirs ultimately held only shares in one or more lands, the legal position in my understanding is that the right of ownership in common flowed either from an actual decision for

the holding of property in such shares, or else from an implication, arising upon the known facts, that such a decision had actually been made. Such an implication could well arise even from the single fact that the heirs did not exercise their rights to take separate portions on a physical division. I think therefore that when heirs who are subject to the Kandyan Law do possess in common the lands of the deceased, there is a presumption that they have decided to hold shares in common. But if a division into separate portions takes place within a reasonable time after the death, then the division is referable to an antecedent intention to take separate portions, and the presumption of common ownership is thus displaced.

I accordingly agree that the lands which Kiribanda took separately under the division by P1 of 13th October 1893 were lands which he inherited from his father and were therefore paraveni property.

WEERAMANTRY, J.—

One Appuhamy, a person subject to the Kandyan law, died intestate leaving two children, Kiribanda and Dingiri Amma. The several lands belonging to him thereupon devolved upon these two persons, who by deed P1 of 13th October 1893 divided their inheritance in such a manner that Kiribanda became the sole owner of sixteen lands and Dingiri Amma the sole owner of twenty. It was further agreed that the other lands inherited from Appuhamy were to be possessed in common.

The question arising on this appeal is whether a particular land, known as Paragahapitiyehena, which fell to Kiribanda upon this division, was entirely paraveni in his hands or whether it partook of this character only in part. The question assumes importance in the context of a partition action instituted by certain illegitimate children of Kiribanda who claim interests in Paragahapitiyehena on intestacy. The appellant, a transferee from some of Kiribanda's legitimate children, seeks the dismissal of this action on the ground that this land was entirely paraveni property in the hands of Kiribanda, and that the plaintiffs, being illegitimate children, are not entitled to any share therein.

The learned District Judge has held that these lands were paraveni only in regard to an undivided half share therein, and acquired, in regard to the other undivided half. This conclusion was reached on the basis that inasmuch as Kiribanda and Dingiri Amma each became entitled on Appuhamy's death to an undivided half share in each of his lands, and inasmuch as Kiribanda's title to the other half share of this land rested solely on the document P1, such latter half share was derived by acquisition from a collateral and not by inheritance from a parent and thus constituted acquired property in his hands.

On behalf of the appellant it is argued that Paragahapitiyehena was entirely paraveni in Kiribanda's hands inasmuch as it was property coming to him by right of paternal inheritance and attributable to no other source, despite the fact of the execution of P1.

The question before us is one which arose long anterior to the enactment of the Kandyan Law Declaration and Amendment Ordinance of 1938, and is not therefore affected or governed by the definition of paraveni property therein contained. Moreover this definition is partly declaratory of the pre-existing law and partly amending, and the Ordinance by itself would hence be an uncertain guide in regard to the pre-existing law. It is hence necessary to examine the nature of the concept of paraveni in the Kandyan law independently of this statute.

The expression "paraveni" carries varying connotations in varying contexts. For example Hayley enumerates a number of paraveni tenures in relation to lands alienated in fee simple.[1] So also the word is sometimes used in contradistinction to maruveni tenure.[2] Again, the expression may bear different meanings depending on the class of heir who claims a share in the property.[3] However, in the context with which we are concerned, the word is used in a sense opposed to acquired property, the word paraveni carrying the contrasting connotation of that which is inherited.[4]

Property derived by any other source of title or by any other means than inheritance was regarded as acquired,[5] and the average Kandyan spoke of paraveni property as contrasted with "athmudalatagath" or purchased property.[6] So important was this distinction that the Kandyan Law Commission observes in its Report that it is the pivot on which the whole law of succession turns, and, according to Hayley, it was rooted in the desire to keep the family property in the hands of those who bore the family name.[7]

I must stress that the problem we are here considering is one relating simply to the classification of property into one or other of the broad categories of paraveni and acquired, and not the question of the precise manner of devolution of property under the Kandyan law today. The concepts of paraveni and acquired property come down to us from the past and since their meaning has, so far as we are aware, been constant, the ancient bases of classification must still hold good. In order to decide the matter before us it seems necessary therefore to view the transaction as it would have been viewed under the Kandyan law, before the advent of modern notions of testamentary law and procedure; and if in the instance before us the Kandyan law would have regarded the property in the hands of Kiribanda as paraveni, rather than acquired, or vice versa, the fact that we are considering the problem in modern times should not be permitted to affect this result, or to cause property falling within one category to move over into the area of the other.

[1] *Sinhalese Laws and Customs, p. 249.*

[2] *Modder, Kandyan Law pp. 100,491; Kiri Menika v. Muthu Menika (1899) 3 N.L.R. 376.*

[3] *Hayley, Sinhalese Laws and Customs, p. 221.*

[4] *Lebbe v. Banda, (1928) 31 N.L.R. 28 at 31.*

[5] *See also paragraph 122, Report of the Kandyan Law Commission; Komalie v. Kiri (1911) 15 N.L.R. 371 at 374; Kiri Menika et al. v. Muthu Menika (1899) 3 N.L.R. 376.*

[6] *Report of the Kandyan Law Commission, paragraph 118.*

[7] *p. 347.*

Hayley reminds us that " before the introduction of British ideas the formal administration of estates, the appointment of administrators, filing of accounts and all the paraphernalia of modern testamentary or partition proceedings were practically unknown ".[1] In view of this the learned author observes that a vagueness of legal ideas and terminology was only to be expected and that the administration of justice was largely empirical, often taking the form of equitable settlement. The respect paid to the mother and the desire to keep the family property together would in many cases lead to a common enjoyment of the estate under the direction of the mother or elder brother until such time as one or the other of the heirs wished to have his portion divided off. At this stage the sons and the binna-married daughters took the property to themselves absolutely, while the acquired property was given to the widow for life.[2]

There are also many other passages in the texts indicating that the notion of physical division of an inheritance among intestate heirs was one with which the Kandyan law was quite familiar. Thus Sawers[3] speaks of the division of an inheritance into two or more shares when a man has children by different wives, and goes on to speak of estates which are enjoyed undividedly by two or three brothers. In this context it is clear that in certain instances there was division and in certain others there was not.[4] Physical division of an inheritance is also implicit in the passage to which I shall shortly refer, relating to the assignment of the mulgedera to the eldest son. Again, Hayley, while observing that there did not appear to have been any proceeding among the Kandyans in the nature of formal administration, notes that certain practices were recognised regarding management of assets, payment of debts and division of the property.[5]

If upon such a division between two heirs of a person who left two parcels of land, each heir took the entirety of one land, would the Kandyan law have regarded such land in the hands of one heir as partly paraveni and partly acquired from his co-heir or as entirely paraveni ? If the contention of the respondent is to succeed, we must be able to say that the Kandyan law looked upon this situation by considering that the estate devolved in such a manner as to give equal undivided shares in each property to each heir and that the heirs notionally went through a process of cross conveyances to each other. It accords far more with reality to expect this situation to be viewed as one of simple inheritance by each heir to the property of his choice.

Much light is thrown upon this by the reference we find in Hayley[6] to the practice by which the eldest son out of respect for his age was generally allowed the " mulgedera " or the ancestral home. Upon the contention

[1] *pp. 350–1.*
[2] *p. 351.*
[3] *Memoranda at p. 5—see Hayley appendix at p. 8.*
[4] *See also Sawers pp. 12–13.*
[5] *Hayley 492. See also pp. 359–61.*
[6] *op. cit., p. 331.*

of the respondent this home would in every case where there are more children than one be held by such eldest child only as paraveni in regard to such undivided shares of his father's estate as have devolved upon him and acquired in regard to such undivided shares as have come to him by exchange from his brothers and sisters. Thus a mulgedera falling to the eldest of five children upon such a family division would, in his hands, be paraveni only in regard to an undivided one fifth share thereof and the other four fifths would upon his death pass outside the legitimate line. It seems manifest that such a situation does not accord with the spirit of Kandyan law or with the nature of the division that must have been so common a feature in ancient times ; and it seems inconceivable that the mulgedera should be permitted so easily to pass out of the family by reason of its paraveni content being rendered subordinate to its acquired content in the very act of division of an inheritance.

Mr. Perera for the appellant rightly submits that what paraveni in effect means is that which each heir gets in his capacity as heir, and that the Kandyan law in considering what property was paraveni and what acquired, would consider the concrete thing to which a person so succeeds rather than indulge in an abstract analysis of legal concepts.

This view fits all the more readily into the framework of a law of succession which did not operate through the elaborate processes of modern administration or the precise logic of an immediate vesting. Against this background it is difficult to think that the Kandyan law in every case treated every item of property of a deceased person as vesting immediately in undivided shares in his heirs. If this be so it would lead to the curious result that there would be no single item of property to which a person could become entitled exclusively as paraveni where the deceased has left more than one child, for since death would precede division even by a moment of time, a separate item of property falling to one heir upon a division would always come to him partly by succession and partly by acquisition. This is indeed a situation too far removed from reality to command acceptance when one considers such common examples as the mulgedera which had so much significance for that society.

Moreover under the Kandyan law no deed of transfer was essential in order to pass title to land, so that the question whether a particular heir succeeded to a particular land was dependent not on legal formalities such as deeds executed by the heirs but on practical facts such as actual possession and enjoyment, whether following upon an actual division, or upon a division which might fairly be presumed from known facts. The authorities show that upon a division, which would usually be by mutual agreement, each heir might take particular lands or parts of land for his inheritance, or that alternatively the heirs may take undivided shares in one or more lands which would then be held in common ownership. The title of each heir would thus depend on mutual agreement either actual or presumed, as to the succession. Such lands or separate portions or alternatively each such share, would to the mind of the heir

so succeeding and to the society in which he moved, be attributable to no other source of title than succession. Furthermore inasmuch as the concept of paraveni evolved and had its being in the informal setting where deeds were not requisite, it is against that setting that it is necessary to view the question before us. The requirement of a deed is no doubt essential today for a conveyance of legal title upon such a division, but to lay too much stress on this modern and adventitious requirement is to obscure the practical simplicity of the Kandyan law of inheritance by a reliance on alien concepts and technical modes of thought.

Mr. Perera, in the course of his submissions, stressed the concept of a unity of title in the heirs as a group. In so doing he drew our attention to the fact that Hayley commences his discussion of the Kandyan law of intestate succession[1] by citing a significant passage on this principle from Maine's Ancient Law[2]. In this passage that distinguished jurist observes: "We know of no period of Roman jurisprudence in which the place of the heir or universal successor might not have been taken by a group of co-heirs. This group succeeded as a single unit, and assets were afterwards divided among them in a separate legal proceeding ... The mode of distribution is the same throughout archaic jurisprudence ..."

This passage contains the idea which seems in early systems of law to have characterised intestate succession and may well contain the basic idea underlying intestate succession among the Kandyans as well.

Indeed, though the modern law of Ceylon is entirely different, the same idea seems not unfamiliar even to the Roman-Dutch law. In discussing the *actio familiae erciscundae*, the action for the division of a family inheritance, Voet observes[3] that division may take place by consent among co-heirs and that such division is fettered by no fixed rules but is carried out in the manner appearing most advantageous and convenient to the persons dividing. They may decide for example that the elder divides the property and the younger chooses, or settle by lot to whom each share ought to fall, or let each single property go to the highest bidder, or plan that the whole inheritance should stay with one person and that he shall pay the rest a fixed sum of money.

Moreover, interesting traces of the concept of the heirs' unity of title are still discernible in such provisions of modern law as Item 29 of Schedule A, Part I of the Stamps Ordinance, and section 741 of the Civil Procedure Code. The former renders deeds of exchange between co-heirs subject to only a nominal stamp duty, while deeds of exchange even between co-owners attract the stamp duty appropriate to the value of the property exchanged. The latter provides for delivery of items of movable or immovable property to persons entitled to distribution of an estate, where all interested parties consent in writing to such arrangement.

[1] *Hayley op. cit. p. 330.* [2] *p. 227.*

[3] *10.2.2.*

It would thus appear that in attributing to the Kandyan law the notion that an heir taking a particular property takes it by inheritance, we give effect to no principle which is unfamiliar to the law but rather to one which accords with the mode of thinking of many a legal system and which one of the foremost authorities on the Kandyan law thought fit to set out in the forefront of his discussion of the Kandyan attitude to intestate succession.

Had the matter before us been then a division of paternal property under the Kandyan law prior to the superimposition on that system of modern testamentary and conveyancing rules, Paragahapitiyehena would unquestionably have been considered as paraveni in Kiribanda's hands. Considering as I do that the same classification must apply to the same type of division occurring at the present day, I have little difficulty in concluding that the appellant's contention is entitled to succeed. I would therefore allow this appeal and dismiss the plaintiffs' action with costs both here and in the court below.

WIJAYATILAKE, J.—

The principal question in this appeal is one of the Kandyan Law of inheritance. The answer to this question involves the construction and interpretation of the deed 15496 of 13.10.1893 (P1)/(2D13).

It is common ground that the parties are subject to the Kandyan Law. One Sri Ratnayake Mudiyanselage Appuhamy was the owner inter alia of the 36 lands dealt with in P1. He had died intestate in respect of these lands leaving as his heirs his children Kiri Banda and Dingiri Amma who became entitled to all these lands in equal shares. Admittedly, the lands they so inherited constituted their paraveni property. Thereafter they had executed the deed in question P1 in 1893. According to the plaintiff's translation it recites that "the undermentioned lands were possessed by the said two persons in common by right of paternal inheritance from their father Sri Ratnayake Mudiyanselage officer and the said Kiribanda and Dingiri Amma have divided the said lands in the following manner: The undermentioned lands are allotted to the said Kiri Banda (20 lands set out). The following lands are allotted to the said Dingiri Amma (16 lands set out)".

It would appear that the land called Paragahapitiyehena which is the corpus sought to be partitioned in this case is the first of the 20 lands allotted by deed P1 to Kiribanda. This deed further provides that the other lands be held in common by the said Kiribanda and Dingiri Amma. The relevant clause in the translation 2D13 reads as follows: "The said Kiribanda and Dingiri Amma by right of paternal inheritance from Sri Mudiyanselage Appuhamy officer are held and possessed in common of the following lands and they have amicably agreed to divide the said lands between them in the following manner:—And that in the said

division the following lands were given to the said Kiribanda, to wit (20 lands set out). The following lands were given to the said Dingiri Amma (16 lands set out) ".

The question which has arisen for adjudication is whether on the execution of deed P1 the half share of Dingiri Amma in the 20 lands, of which the corpus is one, to which Kiribanda became entitled shed its "paraveni" character and became his "acquired" property.

Therefore, it would appear that the crucial question for consideration is the effect of this transaction in the context of the Kandyan law of inheritance.

Mr. H. V. Perera, learned Queen's Counsel, appearing for the 2nd defendant-appellant has stressed the necessity to take a realistic view of this " amicable division " of family property and not to give too legalistic an interpretation to this transaction by permitting the deed P1 to nullify the intentions of the parties. He submits that although these properties were acquired by Appuhamy on deed No. 3741 of 15.5.1881 they were paraveni in the hands of his children on his death intestate and they continued to be paraveni despite the deed P1 of 1893 whereby they sought to make a " distribution " of some of the properties they had inherited from their father. Mr. Perera very strenuously submitted that it would be quite contrary to the spirit of the Kandyan Law of intestate succession to permit the deed P1 to destroy the essential character of these paraveni properties. He has drawn our attention to the observations made by the Kandyan Law Commission as to the meaning of "paraveni" property. See Sessional Paper 24/1935, pages 16 to 19. The Ordinance No. 39 of 1938 which adopted some of these recommendations sought to define the expressions "paraveni" and "acquired". However, as Mr. H. W. Jayewardene, learned Queen's Counsel, appearing for the respondents submits the definition given in this Ordinance is of no relevance in the instant case as section 27 expressly enacts that its provisions shall not have and shall not be deemed or construed to have any retrospective effect except where express provision is made to the contrary. Therefore we have to fall back on the Kandyan Law as it was prior to this Ordinance.

We have to constantly keep in mind that the Kandyan Law classifies property with reference to the manner in which a person becomes entitled to property. The distinction would really be between inherited and property acquired otherwise than by inheritance. Vide *Kalu Banda v. Mudiyanse* [1]; *Lebbe v. Banda* [2]. It has even been held that a gift or sale by a father of his inherited property to his son becomes acquired property in the hands of his son. Vide *Ukkuwa v. Banduwa* [3]; *Tennekoongedera Ukkurala v. S. W. Tillekeratne* [4]. No doubt, section 10 of the Ordinance No. 39 of 1938 seeks to bring about a change on the lines of

[1] *(1926) 28 N. L. R. 463.*
[2] *(1929) 31 N. L. R. 28.*
[3] *(1916) 19 N. L. R. 63.*
[4] *(1882) 5 S. C. C. 46.*

Mr. Perera's submissions but I am inclined to agree with Mr. Jayewardene that it has no application to the facts before us. Section 27 makes it quite clear that it is not retrospective in operation. In my view the Report of the Kandyan Law Commission and the subsequent legislation are of little avail to the appellant. In fact, in the light of section 27 they appear to confirm the position of the respondents.

Mr. Perera has very cogently argued that on a first appraisal of the question before us one may be led to an erroneous conclusion by the intervention of the deed P1 and he has therefore submitted that the background of this transaction has to be kept in mind and we should take a realistic view of this "distribution" of family property. With great respect it appears to me that there is a two-fold fallacy in his submissions; firstly in regard to the character of the property and secondly in regard to the nature and effect of the deed P1.

The character of "paraveni" is not something that the property acquires at the time of the death of the owner, but it is a character that the property assumes at the time that a person becomes entitled to it. In the instant case when the two children succeeded to Appuhamy's properties they assumed the character of "paraveni" but when the children sought by the deed P1 to put an end to the common ownership of 36 lands of this inheritance clearly Kiribanda became entitled to the half-share owned by Dingiriamma in the 20 lands not by virtue of succession from his father but by virtue of the deed P1. On this deed Kiribanda has, in my view, clearly acquired the rights of Dingiriamma to the 20 lands dealt with, of which the corpus in this action is the first. In this context we have to recognise the significance of only a portion of the inheritance being dealt with in P1. With great respect in my view the legal effect of P1 is the crucial point in this case. The question is not what the parties intended to do by entering into this deed, but what is the meaning of the words used in the deed and what is their legal effect. Vide *Jinaratna Thero v. Somaratna Thero* [1].

As Mr. Jayewardene submitted the simple question is how Kiribanda became entitled to the half-share of his sister. The answer is clear that it is by virtue of P1. Therefore this half share on the execution of P1 ceased to be "paraveni" property and it assumed the character of "acquired" property in the hands of Kiribanda. This deed has been called a deed of partition and/or a deed of exchange. However, on a perusal of its terms it would appear that it contains cross-conveyances. Dingiriamma has parted with her half share in the 20 lands and got in return a half share of 16 lands. These parties may have had good reason to part with these shares in these particular lands. This would, in my opinion, provide the consideration for the cross-conveyances contained in this deed which ultimately vests title in the parties in respect of the half-shares dealt with.

[1] *(1946) 47 N. L. R. 228.*

The expressions "ancestral" property and "paraveni" property are not synonymous. It was submitted that the people in the area would continue to refer to these lands dealt with in this deed as the ancestral property of Kiribanda; but here we are concerned with the distinction between "paraveni" property and "acquired" property and we have to face the legal effect of the transaction contained in P1.

Mr. Perera has relied on a passage from Hayley at page 221 dealing with the meaning of "acquired" property, but I do not think it is of much avail or significance in the context of this case where the deed P1 plays such a vital role. In the absence of P1, if there was only an oral arrangement, for instance, the position would have been different. With great respect I am unable to agree with the judgments of My Lord the Chief Justice and my brother Weeramantry.

I would accordingly dismiss the Appeal with costs.

Appeal allowed.