

[IN THE PRIVY COUNCIL]

1958 *Present*: Lord Oaksey, Lord Morton of Henryton, Lord Denning,
Lord Birkett and Mr. L. M. D. de Silva

T. M. T. B. AMUNUGAMA, Appellant, *and* H. M. T. B.
HERATH, Respondent

PRIVY COUNCIL APPEAL NO. 2 OF 1957

S. C. 1—D. C. Kurunegala, 6639

Fiduciary relations—Gaining of “pecuniary advantage” by fiduciary—Trusts Ordinance (Cap. 72), s. 90—Kandyan Law—Adoption.

In testamentary action No. 3714 instituted in 1929 by Bandara, a Kandyan widow, as the administratrix of her deceased husband's estate, Somawathie, who was one of the parties-respondent, was the adopted daughter of the deceased. Inasmuch, however, as the law relating to the quantum of evidence necessary to prove adoption was highly controversial at that time, the guardian-ad-litem who represented the adopted daughter, who was a minor, agreed, with the approval of the Court and on independent advice, to certain terms of settlement according to which the widow and the three respondents in the action were each allotted a quarter share of the estate. There was no reason to doubt the bona fides of the settlement. Had there been no settlement, Somawathie would have been entitled, if she had duly proved a valid adoption, to inherit all the property of the deceased and not merely got a part; at the same time Bandara would have got a life interest in the whole estate.

In a subsequent case No. 4402 it was held by the District Judge in August, 1942, and affirmed on appeal, that Somawathie had been validly adopted.

In the present action, the sole heir of Somawathie claimed whatever Bandara was allotted, or purchased from the other allottees, under the settlement in case No. 3714 and subsequently donated to the defendant. It was contended on his behalf that Bandara who had adopted Somawathie was in a fiduciary position towards her and that by reason of the operation of section 90 of the Trusts Ordinance she held the property in trust for Somawathie.

Held, that inasmuch as it was not established that the administratrix, Bandara, gained “any pecuniary advantage”, or anything else, section 90 of the Trusts Ordinance was inapplicable. There was nothing to show that Bandara's conduct in the settlement proceedings in case No. 3714 was in any way improper.

APPPEAL from a judgment of the Supreme Court reported in
56 N. L. R. 529.

Phineas Quass, Q.C., with *Sirimevan Amerasingha*, for the plaintiff
appellant.

Stephen Chapman, Q.C., with *John Stephenson*, for the defendant
respondent.

Cur. adv. vult.

March 5, 1958. [*Delivered by MR. L. M. D. DE SILVA*]

The appellants, who were the plaintiffs in the case, sued the respondent in the District Court of Kurunegala to have it declared that the respondent held certain land in trust for him, for an order directing the respondent to execute a conveyance of the said land to him, and for damages. After trial the District Judge entered judgment for the appellants. On appeal to the Supreme Court the judgment of the District Judge was set aside and the action dismissed. This is an appeal from the judgment of the Supreme Court.

The land in question belonged to one Edward Banda, a Kandyan (hereafter called Edward), who was married to one Bandara Menika (hereafter called Bandara). Edward died intestate in March, 1929.

On the 9th July, 1929, Bandara filed a petition supported by an affidavit in testamentary case 3714 of the District Court of Kurunegala in which she, as widow, prayed that letters of administration be issued to her. In the petition she named as first respondent one Somawathie who, she said, was the adopted child of the deceased, but as to whose adoption she was "unaware whether it is in accordance with the requirements of the Kandyan Law for the purpose of inheritance". She also named as 3rd and 4th respondents two nieces (children of a sister) of Edward "as they claimed an interest in the estate".

Earlier, on the 11th June, 1929, Bandara had filed an affidavit for the purpose of having a guardian appointed over Somawathie, who at that time was a minor of the age of 17 years, in which she had stated that Edward had died leaving as heirs herself as widow and one Somawathie "who is the adopted child of the said deceased". She had made no reference to the children of Edward's sister and she had not expressed any doubt about the validity under Kandyan Law of the adoption. On that occasion one Appuhamy, the natural father of Somawathie, was appointed guardian. He was the 2nd respondent to the petition.

On the 1st October, 1929, the 3rd and 4th respondents to the petition, the nieces of Edward, filed a statement in which they admitted the claim of Bandara to letters of administration but denied that Somawathie, the first respondent, was entitled to any share of the estate.

The denial was in effect a denial of the validity of the adoption of Somawathie. It is common ground that had the dispute proceeded to a judicial investigation Bandara would have got a life-interest in the whole estate, and, as to what remained, the successful side would have completely excluded the losing side from a share of the property.

On the 9th September, 1930, certain proceedings took place in Case No. 3714 which are recorded thus:—

"9th September, 1930.

"Wijesundara Mudiyansele Appuhamy, affirmed. I am the father of the minor, Somawathie Kumarihamy, 1st respondent. She was adopted by the deceased for purposes of inheritance. She was

18 months old when she was adopted by the deceased. There was no deed or writing. Ever since that time the 1st respondent was living with the deceased. I know that if I succeed in proving that the child was adopted she will be entitled to the whole of the immovable subject to the life interest of the widow and to half of the movables. I cannot say if I can prove the adoption.

"I can prove that the child was adopted. But I am not sure of proving the adoption. I think it will be to the advantage of the minor if I settle the matter.

(Sgd.) C. COOMARASWAMY,
D.J."

"Bandara Menika, affirmed. I am the widow of the deceased. The 1st respondent was brought up by my husband and by myself. My husband wanted to give the child also some property. He never wanted to give the entire property to the 1st respondent.

(Sgd.) C. COOMARASWAMY,
D.J."

"The father of the minor consents to the settlement as he thinks it is to the advantage of the minor. He is not sure of proving the adoption by the deceased.

"Under the circumstances I think the proposed settlement may be allowed.

"Let the papers of settlement be filed in the case.

(Sgd.) C. COOMARASWAMY,
D.J."

On the 9th October, 1930, a consent motion embodying the settlement was filed under which the parties, namely Bandara, Somawathie and the two nieces, were each to get an "undivided one fourth" of the estate. This motion is signed by Somawathie's guardian Appuhamy, by the proctors who represented them, by the other parties and their proctors and finally by the District Judge. Under section 500 of the Civil Procedure Code a settlement in which a minor is involved must be entered into with leave of Court and there was a compliance with the section.

Bandara Menika died intestate in July, 1940. Somawathie, now 28 years of age, applied for letters of administration to her estate in Case No. 4402 of the District Court of Kurunegala on the basis that she was Bandara's adopted daughter. A son of a sister and a son of a brother of Bandara contested Somawathie's claim on the ground that there had

been no valid adoption. It was held by the District Judge on the 24th August, 1942, and affirmed on appeal, that Somawathie had been validly adopted.

Earlier, in 1932, Somawathie, at the age of 20, had married the appellant. In 1944 after the decision mentioned in the preceding paragraph and after certain proceedings, which it is not necessary to go into, a consent motion was filed in Case No. 3714 to which all original parties except Bandara (whose estate was being administered), were parties, stating that Somawathie was the adopted daughter of Edward and moving that the settlement of the 9th October, 1930, be set aside and Somawathie be declared entitled to the whole of Edward's estate. A decree was obtained on this motion on the 21st August, 1944.

Bandara had in her lifetime donated to her nephew, the present respondent, a third share of the property (the quarter she had received under the settlement and a twelfth purchased from another of the parties thereto). The respondent was not a party to the consent motion and decree of the 21st August, 1944, in Case 3714, and it was conceded at the hearing of this case before the Supreme Court that he was not bound by its terms.

Somawathie died in September, 1945, and it is common ground that the appellant was her sole heir.

In this action the case for the appellant is that the settlement of 1930 in Case No. 3714 was obtained by fraud and collusion between Bandara, Appuhamy, Somawathie's natural father, and the two nieces of Edward, parties to that case, acting together to defraud Somawathie. The appellant, who is entitled to whatever property she died possessed of, says that Somawathie was entitled to the whole of the property in question, that by reason of the fraud she was allotted only a quarter in the settlement, and that whatever Bandara was allotted or purchased from other allottees she held by reason of the fraud as trustee, under a constructive trust, for Somawathie; that the respondent as a donee from Bandara is in no better position than Bandara, and that since the death of Somawathie the respondent held the property in trust for him, the appellant.

The appellant further says that even if fraud is not established, nevertheless, by reason of the operation of Section 90 of the Trusts Ordinance (Chapter 72 Ceylon Legislative Enactments Vol. 2 p. 220), the respondent must be held to be a trustee of the property for him, the appellant.

The respondent denied the allegations of the appellant appearing in the two preceding paragraphs and raised a further defence mentioned later.

The learned District Judge held in favour of the appellant and entered judgment in his favour. On appeal the Supreme Court held that no fraud and no trust had been established, reversed the judgment of the District Court and dismissed the action. Their Lordships are of the opinion that, upon the questions of fraud and trust the judgment of the Supreme Court is clear and unassailable. They agree that the action should be dismissed.

On the question of fraud their Lordships agree entirely with the view of the Supreme Court stated thus :—

“ When this action commenced, twenty years had elapsed since the settlement of 1930 was reached in the testamentary proceedings. During this long interval of time, Bandara Menika had died and could not give her version of the motives that induced her to agree to its terms: Mr. Wanduragala (who acted as her proctor in the litigation) and Mr. V. I. V. Gomis (who acted for the rival claimants) are also admittedly dead; so are Somawathie and her guardian *ad litem* who consented to the settlement on independent legal advice. In the absence, therefore, of most of the principal parties to the compromise, it is incumbent upon us to scrutinise the very belated allegations of fraud with considerable caution.”

It was argued before their Lordships that the unqualified statement of Bandara in the affidavit of the 11th June, 1929, to the effect that Somawathie was the “ adopted child of the deceased ” (Edward) when compared with the qualified statement made a month later on the 9th July, 1929, that she was the adopted child but that as to her adoption Bandara did not know whether it was “ in accordance with Kandyan law ”.. afforded evidence of dishonesty. The Supreme Court did not think any dishonesty was established by the statements mentioned or by any other material in the case. Their Lordships are of the same view. What the evidence appears to establish is that Edward and Bandara had regarded Somawathie as their adopted child but there was a challenge by the nieces, and when Bandara and her lawyers considered the matter, a doubt appears to have arisen and, as stated by the Supreme Court, “ in her honest opinion, which was shared by honest lawyers, a settlement of the dispute was in the best interests of the minor ”.

The Supreme Court, giving reasons in some detail, state that the law on the subject of adoption was highly controversial in 1930. Their Lordships agree with that statement. The Supreme Court quotes with approval the following from a text book published in 1923 :—

“ ... the numerous cases in which the Courts have refused to recognise adoption, although the intention to adopt seems to have been established, have apparently settled the law that there must be a public declaration, but what constitutes such a declaration has not been defined.”

It then refers to the case of *Tikirikumarihamy v. Niyarapola*,¹ in which what constituted a public declaration was discussed in detail in 1937 and goes on to point out :—

“ ... the conflict of authority as to the requirements of ‘ a public declaration ’ was again emphasised six years later, when a Bench of three Judges was constituted to decide the question authoritatively in *Ukkubanda v. Somawathie* ².”

¹ (1937) 44 N. L. R. 476.

² (1943) 44 N. L. R. 457.

This last case is Case No. 4402 mentioned earlier in this judgment in which Somawathie successfully asserted that her adoption was valid in a contest between herself and the nephews of Bandara in administration proceedings relating to Bandara's estate. In that case a bench of three judges confirmed the view expressed in 1937 in the case of *Tikirikumarihamy v. Niyarapola*, by two judges. Till those cases were decided there was great uncertainty and the Supreme Court was entirely right when it said:—

“The uncertainty was not removed at the time of the settlement and could not but have been prominently before the minds of the experienced lawyers who represented the parties at the relevant time.”

Two items of evidence in the latter case No. 4402 were brought to the notice of their Lordships and it was said that this material should have been placed before the judge in Case No. 3714 before he sanctioned the settlement of 1930. The first was the evidence of a Buddhist High Priest that Edward had told him that he had adopted Somawathie. It is not at all clear that Bandara knew this fact. The second is a statement by Bandara on affirmation on the 5th June, 1929, to the effect “once he (Edward) took me to the Ratamahathmaya's Walawwa and told the Ratamahathmaya that this girl was his adopted daughter”. It was argued that the statements made to persons of the standing of the High Priest and the Ratamahathmaya by a person in the position of Edward constituted “public declarations” and that the judge in Case No. 3714 should have had this material placed before him before he sanctioned the settlement. It is sufficient to say that for the reasons already mentioned, in 1930 no one could have said on this material that the question of Somawathie's adoption admitted of no doubt. The fact that this material does not appear to have been placed before the judge does not in their Lordships' opinion give rise to any indication of fraud.

It was said by the respondent during the argument and accepted by the appellant that for a valid adoption the person adopting must do so with the intention that the child adopted should inherit all his property and not merely get a part. In 1930 Bandara stated in the settlement proceedings “My husband wanted to give the child also some property. He never wanted to give the entire property” to Somawathie. There is no reason for thinking that Bandara was giving false evidence on this occasion, she made a similar statement to a revenue officer in 1929. Her belief regarding the property would have furnished a further reason for doubting the validity of the adoption.

The case put forward by counsel for the appellant in order to establish fraud and thus to establish a trust was that Bandara, Appuhamy and Edward's nieces well knowing that Somawathie's adoption was free from all legal infirmity on the facts and on the law, deliberately set out to perpetrate a fraud on Somawathie and succeeded in so doing. The only reason suggested why Bandara should behave in this way is that Bandara stood to gain by the settlement. Their Lordships agree with the Supreme Court that gain is far from established and, further, it is difficult to

imagine that Bandara would, for gain, behave so badly towards her adopted daughter. As regards Appuhamy, the natural father, acting on independent advice no reason has been suggested as to why he should have behaved as he is alleged to have done. Their Lordships can see no reason to doubt the bona fides of the settlement of 1930.

It was also argued for the appellant that even if fraud had not been established, nevertheless, Bandara, who had adopted Somawathie, was in a fiduciary position towards her and that by reason of the operation of section 90 of the Trusts Ordinance she held the property in trust for Somawathie. Section 90 says:—

“Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.”

As stated earlier it has not been established that Bandara gained “any pecuniary advantage”, or anything else. This alone makes section 90 inapplicable. There is nothing to show that Bandara’s conduct in the settlement proceedings was in any way improper and there is nothing on which it can be said that section 90 came into operation.

It was argued that the decree obtained on a consent motion on the 22nd August, 1944, in Case No. 3714 setting aside the settlement of 1930 affected the transfer made by Bandara to the respondent at a time when the decree had not been entered. This argument is unsustainable. It is sufficient to say that, as stated earlier, it was conceded, at the hearing before the Supreme Court, that the respondent was not bound by the decree. This concession was correctly made as the property had vested in the respondent before the date of the decree. He was not a party to it or to the proceedings which led up to it.

The conclusions which their Lordships have arrived at in the preceding paragraphs make it unnecessary for them to discuss the further plea set up by the respondent to the effect that even if a trust had been established it had ceased to exist by reason of certain proceedings in Partition Case 1052 of the District Court of Kurunegala.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.