

1943 Present : Moseley S.P.J., Hearne and Wijeyewardene JJ.

UKKUBANDA AMBAHERA *et al.*, Appellants, and SOMAWATHIE KUMARIHAMY, Respondent.

116—D. C. (Inty.) Kurunegala, 4,402.

Adoption—Public declaration—Requisites of adoption—Kandyan law.

A declaration to a Buddhist Priest and an *ex-Arachchi* by the adoptive parent that a child is being brought up for purposes of inheritance is sufficient to constitute adoption under the Kandyan law.

*Tikiri Kumarihamy v. Niyarepola et al.*¹ followed.

THIS was an appeal from a judgment of the District Judge of Kurunegala, which was referred to a Bench of three Judges.

The relevant findings of fact and law of the learned District Judge are stated as follows : —

The petitioner is a daughter of Appuhamy, a cousin of Edward Banda. She is of the same caste as Edward Banda and Bandara Menika. One of the requirements of law has been satisfied. Her father Appuhamy lived in Bandara Menika's house. He is still living there. It is in evidence that her mother too lived in their house. There is the evidence of the Buddhist monk, Sangarakkita, who is a Nayaka Priest, that Edward Banda used to bring the infant to the Temple and tell him that he was bringing up the child to inherit him. There is the evidence of Kiribanda *ex-Arachchi* who says that Edward Banda told him that he was bringing up the girl for the purpose of inheriting him I have no hesitation in accepting the evidence of petitioner, Sangarakkita Thero, and Kiribanda *ex-Arachchi*. Applying the principles laid down in the case reported in *2 Ceylon Law Journal*, I have come to the conclusion that the petitioner has proved that she has been adopted by Bandara Menika, the deceased, for purposes of inheritance.

H. V. Perera K.C. (with him E. B. Wikremanayake) for the appellants.—Edward Banda Korala who was married to Bandara Menika had no children. They appear to have brought up a number of children including Somawathie, the petitioner, and provided for them. They took under protection Somawathie's parents who also lived in Edward Banda's house. Edward Banda died leaving a widow, Bandara Menika, who continued to have under her care Somawathie. After Bandara Menika died the question arose in this case whether Somawathie was the adopted daughter of the deceased, Bandara Menika, according to the Kandyan law. The District Judge held in the first place, that Edward Banda adopted Somawathie and that this was also an adoption on the part of his wife, Bandara Menika. It is submitted that this finding is erroneous. There is no such thing as "joint adoption" in the Kandyan law. There is no presumption that if a husband adopts a child the wife also adopts that child. Adoption in Kandyan law means adoption for purpose of inheritance. The intention that the child shall succeed

¹ 2 C. L. J. 222 ; 44 N. L. R. 476.

to the adopter's estate is essential. Bandara Menika was only entitled to a life-interest in the property of her husband. There is therefore no question of a joint adoption here.

On the other finding of the District Judge that there was evidence of an independent adoption by Bandara Menika, it is submitted that the evidence is not sufficient to indicate that the adoption was publicly declared as required by the Kandyan law.

On this point it is necessary to consider what are the *facta probanda* with regard to adoption. *Facta probanda* and the evidence necessary to prove the *facta probanda* must be distinguished. Viewed in this light there are three necessary elements in a valid Kandyan adoption, viz., an act of adoption, an intention to adopt for the purpose of succeeding to the inheritance and a public declaration. This last element is not mere evidence of the intention but an actual *factum probandum*. If only intention is necessary then a casual statement is good evidence of intention. But such a statement is not sufficient evidence of a public declaration. It is therefore submitted that a casual declaration of a pre-existing relationship is insufficient to constitute an adoption. There must be a public declaration which itself constitutes one of the three elements necessary to establish the relationship. As to what is meant by a "public declaration" there is a conflict of authority. See *Sawyer: Digest of Kandyan Law, ch. 7*, and *Loku Banda v. Dehigama Kumarihamy*² for one view, and *Tikiri Kumarihamy v. Niyarepola*³ for another. The necessity of a public and formal declaration was stressed by Hutchinson C.J. in *Loku Banda v. Dehigama Kumarihamy (supra)*. It is submitted that this is a binding authority and expresses the correct view.

[MOSELEY J. What is there in *Tikiri Kumarihamy v. Niyarepola (supra)* which is repugnant to the Kandyan law principles?]

There is nothing, if certain *dicta* be excluded. In any case that decision can be distinguished on the facts. There a statement was made to a schoolmaster in such circumstances that it would constitute a sufficient public declaration of an adoption. In the present case statements were made to a Buddhist priest which were merely of a casual nature. The declaration must be made with the purpose of making known the adoption and not merely incidentally. Some degree of deliberation is necessary as it confers a status. The circumstances must show deliberation. This is the irreducible minimum of the requirements of the Kandyan law of adoption. It is submitted that both on the facts and law there has been no valid adoption.

N. E. Weerasooria, K.C. (with him *S. R. Wijayatilake*) for the respondent, was not called upon.

Cur. adv. vult.

August 23, 1943. MOSELEY S.P.J.—

This appeal involves a point of Kandyan law in regard to the adoption of children for the purpose of inheritance. The parties went to trial on the following issues:—

- (1) Is Somawathie Kumarihamy, the petitioner, the adopted daughter of the deceased?
- (2) If so, was she adopted for the purpose of inheritance?

² (1904) 10 N. L. R. 100.

³ (1937) 2 C. L. J. 222; 44 N. L. R. 476.

The learned District Judge in addressing his mind to the answering of these questions remarked that the law relating to the matter is clearly laid down in the case of *T. P. W. Tikiri Kumarihamy v. M. B. A. Niyarepola and 2 others*¹. In that case an exhaustive review of existing authorities was made and I am in respectful and full agreement with the conclusion at which the Court arrived. In the light of that judgment the District Judge answered each of the issues in the affirmative. There is, in my view, ample evidence to support the finding in each case. *Ex abundanti cautela* perhaps, the District Judge went on to hold that an adoption by a husband, during their joint lives and during the subsistence of the marriage, is the adoption of the wife as well. Without expressing an opinion as to the correctness or otherwise of that view, I would merely say that such a finding is superfluous to the requirements of the present case.

The appeal is dismissed with costs.

HEARNE J.—I agree.

WIJEYWARDENE J.—I agree.

Appeal dismissed.