1955 *Present:* **Gratiaen J. and Sansoni J.**

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

S. C. 1—D. C. Kurunegala, 6,639

Fiduciary relations—Administrator and beneficiary—Gaining of "pecuniary advantage" by fiduciary—Constructive trust—Trusts Ordinance (Cap. 72), s. 90—Kandyan Law—Adoption—Ordinance No. 39 of 1938, s. 7.

A, the administratrix of her deceased husband's estate, was entitled, under the Kandyan Law, to a life-interest in the entire property of the deceased, who died issueless. Although, according to her application for letters of administration, the only other heir was B, the adopted child of the deceased, two other persons (C and D), who were the children of the deceased's sister, intervened in the testamentary action and claimed that they were the sole intestate heirs of the deceased (subject to the widow's admitted life-interest); C and D denied that the "adoption" of B was of a kind which entitled her to claim the status of an intestate heir. B, being a minor, was represented in the action by her natural father.

A was advised about the difficulty of establishing by oral evidence B's adoption for purposes of inheritance under the Kandyan law (prior to the enactment of Section 7 of Ordinance No. 39 of 1938). Accordingly, negotiations took place for a settlement of the dispute, and in due course the trial Judge, having given consideration to the circumstances placed before him and to the special interests of the minor B, gave his judicial approval on October 9, 1930, to the following bona fide settlement:

(1) B, C and D each received absolute title to a ¼ share of the estate free of a life-interest in favour of A.

(2) A thus waived her undisputed and indisputable life-interest in ¾ of the estate, and agreed to accept instead absolute title to a ¼ share (in which she already enjoyed a life-interest).

Twenty years later B's heir instituted the present action alleging that B was in fact the adopted child of the deceased in the testamentary case. He claimed that the share which was allotted to A under the settlement and which was subsequently donated by A to the defendant was impressed with a trust in favour of B and her heirs.

Held, that it could not be said that A was guilty of express fraud in regard to the settlement in the testamentary case or that she had abused her fiduciary position and thereby derived a pecuniary advantage at the expense of B within the meaning of section 90 of the Trusts Ordinance.

APPEAL from a judgment of the District Court, Kurunegala.

Sir Lalita Rajapakse, Q.C., with *C. R. Gunaratne* and *G. D. C. Weerasinghe*, for the defendant appellant.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the plaintiff respondent.

Cur adv. vult.

February 15, 1955. GRATIAEN J.—

A Kandyan landowner named E. Edward Banda Korale died issueless and intestate on 3rd March, 1926, leaving a substantial estate valued for

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purposes of duty at Rs. 129,918/09. His widow Bandara Menika was duly appointed administratrix of the estate in Testamentary Action No. 3,714 of the District Court of Kurunegala and it is common ground that under the Kandyan Law she was his heir to the extent of a life-interest in the entire property. She was about 49 years old at the time of her husband's death.

In or about the year 1913 Edward Banda and Bandara Menika had adopted as their child Somawathie Kumarihamy who was the infant daughter of a kinsman of Edward Banda. She was 16½ years old when Edward Banda died. Bandara Menika disclosed the fact of the adoption in her application for letters of administration, but her petition P5 dated 9th July, 1929, expressed ignorance as to whether the adoption complied with "the requirements of the Kandyan Law for the purpose of inheritance". Somawathie's natural father Appuhamy was appointed guardian-ad-litem to protect her interests in the testamentary action. Shortly afterwards, two persons named Kumarihamy and Ram Menika (the children of Edward Banda's sister) intervened and claimed that they were the sole intestate heirs of the deceased (subject to the widow's admitted life-interest). They denied that the "adoption" of Somawathie was of a kind which entitled her to claim the status of an intestate heir.

Had this dispute as to heirship proceeded to a judicial investigation, *either* Somawathie alone *or* Kumarihamy and Ram Menika jointly would have been declared entitled (subject to Bandara Menika's life-interest) to Edward Banda's estate to the complete exclusion of the contesting group or individual (as the case may be). This appears to have been the context in which negotiations took place for a settlement of the dispute, and in due course the (then) District Judge of Kurunegala, having given consideration to the circumstances placed before him and to the special interests of the minor Somawathie, gave his judicial approval on 9th October, 1930, to a settlement in the following terms:

(1) Somawathie, Kumarihamy and Ram Menika each received absolute title to a ¼ share of the estate free of a life-interest in favour of Bandara Menika;

(2) Bandara Menika thus waived her undisputed and indisputable life interest in ¾ of the estate, and agreed to accept instead absolute title to a ¼ share (in which she already enjoyed a life-interest).

This settlement was acted upon by all the parties and was assumed to be valid even after Somawathie (who married the respondent in 1932) attained majority under the Kandyan Law on 7th September, 1933. Bandara Menika died on 31st July, 1940, and it was only after her death that Somawathie and the respondent took steps to revive Somawathie's claim to have inherited the entirety of Edward Banda's estate. In the meantime, Bandara Menika had in 1936 donated to the appellant (her nephew) the undivided ¼ share of some of the properties which passed to her under the settlement of 1930 together with an additional 1/12 share which she had subsequently purchased from Ram Menika (who had similarly acquired those interests under the same settlement). There was

no evidence, however, that the subsequent donation was in anybody's contemplation in 1930.

On 21st July, 1942, the appellant, claiming title to the shares gifted to him by Bandara Menika in 1936, instituted action No. 1,052 in the District Court of Kurunegala for a partition of the property between himself, Somawathie, Kumarihamy and Ram Menika on the basis of a common title proceeding from the terms of the settlement previously referred to. In paragraph 4 of the plaint he pleaded that the settlement was *res adjudicata* between himself and his co-owners. Somawathie, on the other hand, had by then taken steps, in concert with her husband, to challenge the validity of the settlement of 1930 and she filed answer in the partition action denying all the material averments in the plaint. She specially denied that Bandara Menika had "*any right or title* to convey to the (appellant)".

Before the trial of the partition action commenced, Somawathie, in pursuance of a compromise privately arrived at with Kumarihamy and Ram Menika, had obtained an order in the testamentary action on 20th September, 1944, purporting to set aside the earlier settlement of 1930 and to substitute in its place a declaration that Somawathie as the adopted child of Edward Banda was in truth his sole heir. (It is now conceded that this compromise does not bind the appellant). On 6th October, 1944, she applied in the partition action for leave to amend her pleadings "owing to the order made on 20–9–44 in D. C., Testy: No. 3714". The application was (rightly or wrongly) refused, and no appeal was preferred against that decision.

On 20th October, 1944, an interlocutory decree for partition was entered declaring the parties entitled to shares on the basis of the settlement of 1930. Somawathie was not present at the trial, and her lawyers stated that they had received no instructions to appear for her. Her later application to re-open the proceedings was unsuccessful. In due course, a final decree for partition was passed in terms of which the appellant was declared the owner of a divided allotment of land (described in Schedule "B" annexed to the present plaint) in lieu of his former undivided interests in the larger land (described in Schedule "A"). Similarly, Somawathie and the other co-owners received other divided allotments. The title created by the settlement of 1930 clearly provided the foundation for the adjudication as to the rights of the parties in the partition action.

Somawathie herself died on 27th February, 1945, leaving a last will whereby she appointed the respondent her sole heir. He instituted this action on 25th July, 1950, for a declaration that the defendant held the property described in Schedule "B" in trust for him. He alleged that Bandara Menika, "well knowing that Somawathie was the adopted child of Edward Banda for purposes of inheritance under the Kandyan Law, and although bound in a fiduciary capacity to protect the interests of Somawathie, took advantage of her fiduciary position and, acting in fraud and collusion with the guardian-ad-litem of Somawathie in case No. 3,714, entered into a fraudulent and collusive agreement with the said guardian-ad-litem and Kumarihamy and Ram Menika to divide the estate

of Edward Banda to the detriment of Somawathie ". Accordingly, it was pleaded, the benefits which Bandara Menika improperly derived from this unconscionable compromise were held by her in trust for Somawathie ; the appellant's rights in the property as Bandara Menika's donee were impressed with the same constructive trust.

The learned District Judge held in favour of the respondent that Bandara Menika had fraudulently abused her fiduciary position in entering into the settlement of 1930 and accordingly became a constructive trustee for Somawathie to the extent of the improper benefits which passed to her thereunder. He held that the appellant, being a mere volunteer, also held the property in trust; indeed he took the view that the appellant had himself been a party to the fraud, but Mr. Weerasooria very properly did not invite us to adopt that fanciful theory (based as it was on extremely flimsy material). Finally, the learned Judge rejected the plea that the decree in the partition action operated in any event as *res adjudicata* and precluded Somawathie's successor in interest from reagitating any question relating to the validity or propriety of the settlement.

I have come to the conclusion that the judgment under appeal must be set aside because the respondent wholly failed to establish his allegation that Bandara Menika was guilty of express fraud or that (even on a slightly low plane of criticism) she had abused her fiduciary position and thereby derived a pecuniary advantage at the expense of her beneficiary.

Let us consider first the allegation of express fraud. 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 allegation of fraud with considerable caution.

The only direct evidence on which the learned Judge based his inference of express fraud was the testimony of a Proctor's clerk who claimed in 1952 to have overheard parts of certain vague conversations which took place twenty-three years earlier in Mr. Wanduragala's office. To my mind, this evidence (even if true) was quite inadequate to establish fraud against a woman who had since died. As for the circumstantial evidence referred to in the judgment under appeal, it only proves that Bandara Menika knew (as she had herself always admitted) that her husband in fact regarded Somawathie as their adopted child ; it does not justify the further inference that she did not entertain a genuine doubt as to the chances of convincing a Court of law in a contested litigation that the adoption was of a kind which constituted Somawathie the sole heir of her adoptive father under the Kandyan Law. The entire evidence is quite consistent with the more charitable theory that, in her honest

opinion, which was shared by honest lawyers, a settlement of the dispute was in the best interests of the minor whom she too regarded as her daughter.

The difficulty of establishing adoption for purposes of inheritance under the Kandyan Law by oral evidence (i.e., before the legislature enacted Section 7 of Ordinance No. 39 of 1938) is a matter of common knowledge, and the law on the subject was even more controversial in 1930 than it is now. *Hayley's Law and Customs of the Sinhalese*, published in 1923, states at page 203 that there must be proof of " an intention on the part of the adopter to make the adopted person his child, and constitute him or her his successor, coupled with acts of adoption and, according to the authorities, *an open declaration of the adoption* ". The learned author adds at page 207 that " *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* ". The uncertainty was not removed at the time of the settlement which is now impugned, and could not but have been prominently before the minds of the experienced lawyers who represented the parties at the relevant time. Indeed, the controversy continued even after this Court pronounced in November 1937 that " the declaration need not be made on a formal occasion "—*Tikirikumarihamy v. Niyarapola* [1]. For instance, this 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 *Ukku Banda v. Somawathie* [2], where the same Somawathie successfully established her adoption by the widow Bandara Menika. It is therefore quite wrong to infer that the settlement of 1930 was necessarily prompted by any other motive than to avoid the risks of a protracted and uncertain litigation which, if unsuccessful, would have completely disentitled Somawathie to any rights in her adoptive father's estate.

Has the evidence established a constructive trust against Bandara Menika even though there was insufficient proof of express fraud ? That she stood in a fiduciary position towards Somawathie is clear enough. But did she abuse that position in order to gain some personal advantage at the beneficiary's expense ? And, above all, did she in fact derive any demonstrable advantage from the settlement ? For then only can the plaintiff invoke the well-settled principle of law which has been incorporated in Section 90 of the Trusts Ordinance in the following terms :

> " When a person bound in a fiduciary capacity to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, ... he must hold for the benefit of such other person the advantage so gained. "

When Somawathie's adoption for purposes of inheritance was challenged by the rival claimants to heirship, she was represented by her natural

[1] *(1937) 44 N. L. R. 476.* [2] *(1943) 44 N. L. R. 457.*

father who had recourse to independent legal advice. In addition, her interests as a minor were protected by a very experienced Judge who approved the settlement. (The suggestion that he had perhaps sanctioned some different compromise seems to be quite fanciful ; the subsequent transactions negative this theory, and on this point at least the later partition decree places the matter beyond all controversy.)

I am very far from satisfied (even if one reconsiders the matter retrospectively) that Bandara Menika herself did gain any demonstrable pecuniary advantage from the settlement. Her own claim to a life-interest in the entire estate was certainly not in jeopardy. How then could it have been argued at the relevant date that she necessarily benefited by taking an absolute interest in a ¼ share of the estate in exchange for a life-interest in the entirety ? She had waived in favour of Somawathie and the other claimants her legal right to receive an assured immediate income during her life-time from the outstanding ¾ share of a valuable estate ; at the same time Somawathie herself had gained some immediate benefit by being assured of the title to and the income from ¼ of the estate in exchange for the bare possibility (let us even call it the probability) of becoming owner of the entirety, *but without any right to any income until Bandara Menika's death.* It would indeed have required an actuary to predict the financial advantages and disadvantages which would flow from the compromise agreed upon ; and, as to the greater risks presented by a contested litigation on the issue of heirship, no lawyer jealous of his reputation would, I fancy, have hazarded a confident opinion in 1930. Indeed it was in recognition of these risks that the Kandyan law of adoption for purposes of inheritance was amended in 1938. In this situation, one would hesitate to pronounce even now that the settlement of 1930 was in fact unwisely reached.

The learned District Judge has emphasised the fact that, according to the evidence, Bandara Menika appropriated her income of the entire property during her life-time. Even if that be true, it has no relevancy to the present cause of action, because such appropriation was contrary to and not a consequence of the terms of the impugned settlement. Similarly, no constructive trust could be imposed by law on Bandara Menika in respect of the benefits derived by Ram Menika and Kumarihamy. Indeed, I see no reason for assuming that she was in any way improperly concerned to promote their interests to her adopted daughter's prejudice.

For all these reasons, I am satisfied that the provisions of Section 90 of the Trusts Ordinance do not apply. In addition, I am inclined to the view that the decree in the partition action No. 1,052 instituted in 1942 precludes the plaintiff from attacking the validity of the settlement of 1930 on which that decree was based. It has no doubt been authoritatively decided that Section 9 of the Partition Ordinance does not necessarily extinguish constructive trusts—*Marikar v. Marikar*[1]. But in action No. 1,052 Somawathie, as she was entitled to do, expressly put in issue the validity of any rights which the appellant (as Bandara Menika's successor in

[1] *(1920) 22 N. L. R. 137.*

title) claimed by virtue of the settlement. She also attempted unsuccessfully to set up the subsequent rescission of the settlement as a bar to the appellant's title. In that situation I would have been prepared to hold, if necessary, that the decree in favour of the appellant operates as *res adjudicata* against the respondent. In *Marikar's case* (supra) the beneficiary (although a party) had not put in issue the bare legal estate of the constructive trustee. In action No. 1,052, by way of contrast, the alleged beneficiary asked for a dismissal of the action because she virtually denied that the alleged trustee had " any right or title " in the property sought to be partitioned. I would allow the appeal and dismiss the respondent's action with costs in both Courts.

SANSONI J.—I agree.

Appeal allowed.