

1950

Present: Jayetileke C.J. and Gunasekara J.

ASIRVATHAM, Appellant, and GUNARATNE, Respondent

S. C. 171—D. C. Ratnapura, 7,137

Kandyan Law—Succession—Illegitimate child—Right to inherit maternal grandfather's property.

Under the Kandyan law a child who was not born in lawful wedlock is entitled to succeed to the maternal grandfather's property if the child was not the result of an "unauthorised intercourse".

A PPEAL from a judgment of the District Court, Ratnapura.

S. J. V. Chelvanayagam, K.C., with *P. Navaratnarajah* and *V. Arulambalam*, for plaintiff, appellant.

H. W. Jayewardene, with *G. T. Samarawickreme* and *E. D. Atukorale*, for defendant, respondent.

Cur. adv. vult.

August 29, 1950. JAYETILEKE C.J.—

The plaintiff instituted this action for a declaration of title to a divided portion of a land called Tippolahena. One Mahabattanarallege Mudianse, a Kandyan, became entitled to the entire land under deed No. 12,619 dated October 9, 1906 (P1). He had children by two beds, to wit, Lokumenika and Heenmenika by the first bed and Kiri Banda, Dingiri Banda, Jotiranga Menika and Hamy Mahatmaya by the second bed.

Under the Kandyan law where a person leaves heirs by two beds his property devolves on them *per stirpes*. Lokumenika predeceased her father. The plaintiff alleged that Lokumenika left no issue and that Heenmenika became entitled to the half share of Tippolahena that devolved on the heirs of the first bed. The learned District Judge held that Lokumenika lived with a man called Seenikkavidaneralalage Podisingho and had a daughter called Martinahamy *alias* Podinona and that Heenmenika was married in deega. There is sufficient evidence to support these findings and we see no reason to disturb them. The main question for our decision is whether Martinahamy, who was not born in lawful wedlock, inasmuch as her parents were not married according to the Kandyan law, is an heir of Mudianse. If she is an heir she will be entitled to the moiety that devolved on the heirs by the first bed to the exclusion of Heenmenika who was married in deega. At the argument before us it was agreed that if our decision on the main question is against the appellant the appeal must fail.

Relying on the following passage in *Sawer*¹ Counsel for the appellant contended that under the Kandyan law an illegitimate child is not entitled to succeed to the maternal grandfather's property:—

(a) A daughter bearing children in the house of her parents without having an acknowledged husband such husband would have a doubtful

¹ *Sawer* : pages 3 and 4 cited in *Marshall* 331.

or weak claim to any share of their maternal grandfather's property and must depend chiefly upon the goodwill of their uncle or uncles for support and a provision out of the grandfather's estate.

(b) A daughter having unauthorised intercourse with a paramour in her father's house, bearing children such children have no right of inheritance in their maternal grandfather's or grandmother's property but the father being known and the children acknowledged by him they would have a claim of inheritance in his paraveni property provided the paramour were of equal rank and degree with the mother. The meaning of the expressions "unacknowledged husband" and "unauthorised intercourse" in the passages quoted above was considered by de Sampayo J. in the case of *Raja v. Elisa*¹ and in the course of his judgment the learned Judge said:—

"It is argued on behalf of the defendant that the expressions 'unacknowledged husband' and 'unauthorised intercourse' mean that unless the parents are legally married the children do not inherit from their grandparents. I think that this contention is not well founded. If what is meant is legal marriage, nothing is easier than to say so and there is no necessity for such laboured language as the above. To my mind the reference is to cases where the man and woman have cohabited without the approval of the woman's parents and brought disgrace upon the family. In this particular case it appears that Rankiri, so far from disapproving of her daughter Punchinona taking to herself a Tamil husband, recognised the alliance or, as the Commissioner puts it, she and her family eagerly 'acclaimed the so called husband who is a Tamil'. Moreover, on the death of Punchinona shortly after plaintiff's birth, Rankiri took the child and brought him up till her death, and thereafter another married daughter of hers did the same by the boy until he reached man's estate. In these circumstances the Commissioner was, in my opinion, right in holding that the plaintiff was not the result of an 'unauthorised intercourse' and did not incur the disability arising from such an origin. In this connection it may be remembered that among the Kandyan emphasis was laid not so much on strict forms of marriage as on observance of social rules as to rank and caste. Accordingly we find legitimacy and illegitimacy defined in the *Nitinighanduwa*, p13 as follows:—'If the father and mother are of equal caste and rank and have been married according to custom or, if not according to custom, if they have been married agreeably to the wish of their kinsfolk, their children are legitimate children and are entitled to their right of inheritance in their father's estate. But if a man marries a woman of lower caste than himself, or a woman within the prohibited degrees of relationship, or a woman of equal rank without the consent of the parents, the marriage is contrary to custom and the ties of relationship, the children born of it are illegitimate and their title to the paternal right of inheritance is very unstable'. British legislation has no doubt provided a uniform and compulsory system of marriage for the Kandyans, but the principles of inheritance to be found in the ancient Kandyan law remains unaffected.

¹ 112 C. R. Gampola 613. S. C. *Mirvites* of May 26, 1913.

“ The point involved in this case is not without judicial authority.

In *Appuhamy v. Lapaya* (1905 8 N.L.R. 328), it was decided that an illegitimate son of a predeceased son could inherit from the grandfather along with the surviving legitimate children. If this be so in the case of the male line, the right of succession would be much stronger in the female line, where legitimacy is of less account. The same decision is an authority against the argument of Counsel for the defendant that the existence of legitimate children excludes the illegitimate grandchild. Then it was sought to distinguish this case from *Appuhamy v. Lapaya* on the ground that the succession to the grandfather as distinguished from the grandmother is referable to the obligation on the grandfather's part to maintain his illegitimate grandchildren. I am not quite able to follow this reasoning but it is sufficient to say that the decision referred to is not based on any such views of the grandfather's obligation ”.

I find myself in entire agreement with these observations. The evidence of Wijesinghe, which has been accepted by the learned District Judge, shows that Lokumenika lived with Podisingho in her mulgedera and Mudianse recognised their alliance and treated Martinahamy as his grand-daughter. Mudianse was of the goigama caste and the gé name of Podisingho indicates that he, too, was of the same caste. On these facts it is not possible to say that Martinahamy was the result of an “unauthorised intercourse”. I would accordingly answer the question in the affirmative and dismiss the appeal with costs.

GUNASEKARA J.—I agree.

Appeal dismissed.
