

WEERASINGHE

v.

RAN BANDA AND TWO OTHERS

COURT OF APPEAL

TAMBIAH, J. AND ABEYWARDENA, J.

C. A. (S. C.) 28/76 (CIVIL)- D. C. KANDY 5428/A:

NOVEMBER 9, 1983.

Kandyan law- Adoption- Requirements of a valid adoption under Kandyan law.

In the course of proving title to the land in suit, the plaintiff sought to establish that one B had adopted M for the purpose of inheritance. It was in evidence that P had gifted certain lands to M by deed of gift (P 4) which he later revoked and that P 4

contained the words "adopted daughter". There was also the oral testimony of the plaintiff and two others who stated that B had told them that he was adopting M for the purpose of inheritance and that this had been said in the presence of others too. It was also however revealed that B had executed deeds in favour of his relatives. The plaintiff too had in an action for declaration of title to this land indicated that he did not accept the position that M was the heir of B.

Held—

(i) The mere words "adopted daughter" in the deed of gift are not sufficient to constitute a valid adoption. It must be established that the child was not merely adopted, but adopted in order to be heir.

(ii) The evidence in the case negatives the plaintiff's position that M was adopted for the purpose of inheritance. Even if the original intention of B was to adopt M for the purpose of inheritance, the revocation of the deed of gift shows that he had changed his mind as he is an law free to do.

Cases referred to

- (1) *Loku Bandara v. Dehigama Kumarihamy*, (1904) 10 N.L.R. 100.
- (2) *Dayanganie v. Somawathie* (1956) 58 N.L.R. 337.
- (3) *Amunugama v. Herath*, (1958) 59 N.L.R. 505, 510.

APPEAL from the District Court, Kandy.

I. S. de Silva for the appellant.

Faiz Mustapha for the respondents.

Cur. adv. vult.

January 16, 1984.

TAMBIAH, J.

The plaintiff-appellant filed action No. 5428/L, D.C., Kandy, against Ran Banda (the 1st defendant), and his wife, Bandara Menika (the 2nd defendant) for a declaration of title to four lands described in the schedule to the plaint, for ejectment and damages. According to the plaint (P8A), one Punchi Banda and his wife, Muthu Menika, were the owners of the said four lands; Punchi Banda died intestate and issueless, leaving as his heir, his widow, and the latter by deed No. 8225 of 10.11.57 (P 7), and by deed No. 93 of 7.12.57 (P 6) sold the said lands to the plaintiff; the two defendants who have no manner of title were disputing his title and were in wrongful possession of the same. The defendants filed answer (P 8 B) and stated that Punchi Banda adopted for the purpose of inheritance the 2nd defendant, and by his deed of gift No. 12667 dated 10.7.45 (P 4) gifted to her his interests in the said four lands; they denied

that Muthu Menika inherited any interests in the said lands from her deceased husband. The case was settled and consent decree was entered (P8C), in terms of which the plaintiff became entitled to the 2nd and 4th lands in the schedule to the plaint, and the 2nd defendant to the 1st and 3rd lands in the schedule to the plaint.

The plaintiff took out writ against the 1st and 2nd defendants and when the Fiscal Officer went to the 4th land called Pahalawatta to deliver possession of the land to the plaintiff, the 3rd defendant-respondent obstructed the delivery of possession.

The plaintiff made an application under s.325 of the old Civil Procedure Code and prayed that the 3rd defendant-respondent be dealt with under sections 326 and 326A of the Code, that the 3rd respondent be ejected and that he be placed in possession of the land. The 3rd respondent filed petition and affidavit and denied the plaintiff's right to have him ejected and stated that the land belonged to his brother who died intestate and issueless, and that he and his sisters inherited the land from their deceased brother. The petition of the plaintiff was numbered and registered as a plaint under s. 327A of the Code. At the trial, the plaintiff withdrew the case against the 1st and 2nd defendants and the case was proceeded with against the 3rd defendant-respondent only.

It is common ground that the owner of the land in question was Punchi Banda and that he died leaving his widow Muthu Menika. It is the case of the plaintiff that Punchi Banda adopted the 2nd defendant Bandara Menika as his child, and by deed P 4 gifted to her two lands called Pahalawatta, which he later revoked by deed (P 5) of 25.3.51; that on Punchi Banda's death the property devolved on his widow Muthu Menika and Bandara Menika; that in view of the settlement and decree in Case No. 5428/L., D.C. Kandy, he was entitled to the land in question. The defendant denied the adoption and it was his position that on Punchi Banda's death, his father Punchi Appuhamy became entitled to the properties of Punchi Banda, and that the interests of his father devolved on him.

The question that arose for decision at the trial was whether Punchi Banda adopted Bandara Menika for the purpose of inheritance. The plaintiff gave evidence and stated that Punchi Banda and Muthu Menika had no children and Bandara Menika was

adopted and brought up in their home ; she was 6 to 7 years when she was brought to the house ; that Punchi Banda told him and his father that he would give all his lands to Bandara Menika ; that deed (P 4) was executed at the time of marriage of Bandara Menika to the 1st defendant ; that he went to Punchi Banda's house on the day of the wedding and Punchi Banda told him that he adopted and brought up Bandara Menika as his daughter in order that she will be heir to his properties and that he would transfer all his properties to her ; there were other persons as well when the statement was made ; Punchi Banda had told the people in the village so and they were aware that Bandara Menika was being brought up as his daughter. The plaintiff produced the deed of gift (P 4) and relied on the words " adopted daughter " contained in the deed.

The plaintiff called two witnesses to support him. The witness Ranhamy's evidence was that he had been working as a Kangany under Punchi Banda at Aranayake during the nineteen twenties. Punchi Banda had stayed at the house of Bandara Menika's parents and had his meals there. It was during this time that she was born. Punchi Banda was fond of her and was saying that he was taking her away to be adopted as his own child for the purpose of inheritance. She was 6 to 7 years when she was brought to Punchi Banda's house. He used to visit Punchi Banda at his house and he made a statement to him as well as to others in his presence that he would give his properties to her as he had no children.

The witness Rupasinghe stated in evidence that when he visited Punchi Banda's house with his grandfather, Punchi Banda told his grandfather in his presence that he adopted Bandara Manika as his child so that he could give his properties to her.

The 3rd defendant gave evidence and his position was that Bandara Menika was not adopted but was a servant.

On the question of adoption, for the purpose of inheritance, the learned Judge held against the plaintiff. He commented adversely on the fact that Bandara Menika was not called by the plaintiff to testify. He took the view that though the original intention of Punchi Banda was to adopt Bandara Menika for the purpose of inheritance, he had later revoked the deed of gift and therefore changed his

mind. In the result, he held that the plaintiff had not proved his ownership of the 4th land in the Schedule to the plaint and dismissed the action.

It seems to me that the learned Judge was right in deciding the issue relating to adoption against the plaintiff.

The petition of the plaintiff was treated as a plaint. The plaintiff was claiming title to the land in question ; the burden was on him to establish title to the land.

To constitute adoption under the old Kandyan Law before Ordinance No. 39 of 1938, the necessary requisites were :-

- (1) The parties should be of the same caste.
- (2) The adoption should be public and formally and openly declared and acknowledged.
- (3) It must also clearly appear that the adoption was for the purpose of inheriting the property of the adoptive parents.

Loku Banda v. Dehigama Kumarihamy (1). In this case, the claimant who pleaded adoption relied on a recital in the deed which described him as " my nephew adopted by me ". This was held insufficient to prove adoption.

In *Dayanganie v. Somawathie* (2), the Supreme Court took the view that a public declaration on a formal occasion was not necessary to constitute adoption. All that is needed is reliable, clear and unmistakable evidence in whatever form of the deceased's intention to adopt the adopted child as his heir. Basnayake, C.J. observed (p.345)-

" A person who has brought up a foster child and at one moment intended that the child should be his heir is not tied down to that intention. He is free to change his mind. He can say : ' I once meant to make this foster child my heir, but I do not now propose to do so. I have changed my mind' the intention (to adopt the foster child as his heir) must be one that persists from the date of adoption throughout the life of the adoptive parent, especially at the time of his death. "

In *Amunugama v. Herath* (3), Mr. L. M. D. de Silva said—

“ 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. ”

The mere words “ adopted daughter ” do not help the plaintiff, for, he must establish that Bandara Menika was not merely adopted, but adopted in order to be heir. To establish this, the plaintiff relied on oral statements made by Punchi Banda to him and to his two witnesses and in the presence of others that he was adopting Bandara Menika for the purpose of inheritance. Is plaintiff’s evidence credible on this point? His own conduct belies his evidence. The plaintiff filed the Kandy case on the basis that Muthu Menika only became entitled to the entirety of lands on the death of Punchi Banda, and that Bandara Menika and her husband who had no manner of title were denying his title and were in wrongful possession, thereby indicating that he himself did not accept the position that Bandara Menika was a heir of Punchi Banda. The plaintiff did not call Bandara Menika to give evidence; instead, it would appear that the plaintiff had searched and brought two witnesses to support him:

There is other evidence in the case which negatives the plaintiff’s position that Bandara Menika was adopted for the purpose of inheritance. The deed P 4 donated only two lands to Bandara Menika. The plaintiff himself conceded that Punchi Banda had executed deeds in favour of his relatives and that a deed was also executed in favour of the 3rd defendant-respondent and his father.

The learned Judge was right in holding that even if the earlier intention of Punchi Banda was to adopt Bandara Menika for the purpose of inheritance, he had subsequently changed his mind. This is evidenced by deed P 5 which revoked the deed of gift P 4, and stated that the gift was being revoked as Bandara Menika had failed to care for him and render assistance and succour and had acted so fraudulently that he lost all affection for her.

The appeal is dismissed with costs.

ABEYWARDENA, J.—I agree.

Appeal dismissed with costs.