

MUTHU BANDA
V
SAMARAKOON BANDA AND OTHERS

COURT OF APPEAL
VIKARAJAH, J. AND A. DE. Z. GUNAWARDENA.
C. A. NO. 319/82(F)
D. C. KURUNEGALA 4842/P
MAY 29, 1989

Kandyan Law — Succession — Paraveni property — Illegitimate children.

Under Kandyan Common Law rules of succession illegitimate children succeed in equal shares to all the property of their mother whether paraveni or acquired.

Case referred to:

1. *Menika v. Menika* 25 NLR 7.

APPEAL from judgment of the District Court of Kurunegala.

C. R. Gunaratne with T. R. Rajapakse for 8th Defendant-Appellant
E. Ratnayake with A. Rodrigo for Plaintiff-Respondent

Cur. adv. vult.

July 24, 1989

VIKNARAJAH, J.

This is an appeal by the 8th defendant-appellant from the judgment of the learned District Judge according to which the paddy field sought to be partitioned devolved on the plaintiff and the 1st to 7th defendants.

According to the pleadings of the plaintiff the original owner of the land was one Mudiyanse and his successors in title were the plaintiff and the 1st to 7th defendants. The 8th defendant contended the original owners were Mudiyanse and his sister Bandi Menika and that Bandi Menika was entitled to an undivided $\frac{1}{2}$ share which devolved on his son Appuhamy and thereafter on the 8th defendant who is the son of Appuhamy.

The plaintiff in his evidence admitted that Mudiyanse had a sister by the name of Bandi Menike and that Bandi Menike had a son by the name of Appuhamy who is the father of 8th defendant. Plaintiff's evidence is that he cultivated a portion of the paddy field and 1st and 4th defendants were cultivating another portion and that 8th defendant does not possess any portion of this field.

The 8th defendant in his evidence stated that Bandi Menika was married in binna and remained in the Mulgedera. He claimed $\frac{1}{2}$ share through Bandi Menika as Paraveni property. He stated that as they were all relations he did not go to claim this land.

The learned trial Judge has rightly held that there is no evidence that the plaintiff and 1—7th defendants have

prescribed adversely to the rights of Bandi Menika and her successors in title by ouster. The plaintiffs' Counsel in his written submissions in the District Court had taken up the position that other ancestral lands were given to Bandi Menika and that Mudiyanse was given this land. By this submission the plaintiff concedes that Mudiyanse and Bandi Menike were the original owners but by some arrangement Mudiyanse was given this land. The plaint does not set out this position and there is no evidence to this effect.

The plaintiffs' Counsel in his written submission has taken up the position that as Bandi Menike was married in Binna, as stated by 8th defendant and that according to the birth certificate (8DI) of Appuhamy the father of 8th defendant, he (Appuhamy) was an illegitimate child of Bandi Menike, under the proviso to section 18 of the Kandyan Law Declaration and Amendment Ordinance (Cap. 71) the 8th defendant cannot succeed because an illegitimate child of a binna association cannot succeed to mother's interests. This submission was for the first time made only in the written submission of the plaintiffs' Counsel in the District Court. There was no issue on this. The learned trial Judge had accepted this submission and held that 8th defendant cannot succeed to Bandi Menika's interests.

Section 8 (1) will apply only to married women who died after the commencement of the said Ordinance and the proviso will apply only if the deceased was married in Binna.

According to 8DI the Birth Certificate the parents of Appuhamy were not married. Further there is no evidence as to when Bandi Menike died. Her son Appuhamy was born on 18th May 1875. Thus section 18 will not apply to this case. Thus the Kandyan Common Law rules of succession in regard to Paraveni property will apply.

Under the Kandyan law the illegitimate offspring of parents of the same social status succeed to the inherited or paraveni property of the mother.

In the case of *Menika vs. Menika* (1) Schneider, J. at page 7 states as follows:—

“Armour in Chapter V in which he deals with the rights of inheritance as between the mother and her children says if a woman died intestate leaving issue, a son and a daughter born out of wedlock and if neither of the children have an acknowledged father, the whole of the mother's estate will devolve in equal shares to the son and the daughter, and that even if the daughter were married and settled in diga”.

“I would regard this as a clear authority for the proposition that illegitimate children succeed to all the property of their mother whether paraveni or acquired. It does not seem to me that it is essential that their father should not be acknowledged to give them that right. Sawyer says: “If a concubine or a prostitute have issue, they inherit their mother's property”.

Schneider, J. goes on to state as follows:—

“Modder formulates the proposition of law on this point as follows: “Section 296, illegitimate children inherit the estate of their mother in equal shares”.

The learned trial Judge has misdirected himself in applying Section 18 of the Kandyan Law and Declaration Ordinance.

In this appeal counsel before us for both sides argued on the basis that Kandyan Law applies and the property is paraveni property. At the trial the 4th defendant raised the following issue:

“Even if Bandi Menika is Mudiyanse's sister, has she forfeited her right to succeed as she was married in diga”.

The 8th defendant in his evidence stated that Bandi Menika was married in binna to Kaurala. Thereafter in the written submissions in the District Court plaintiff's Counsel himself submitted that under section 18 of the Kandyan Law Declaration and Amendment Ordinance Cap. 71 as Bandi Menika was not legally

married her illegitimate son cannot succeed to Bandi Menika's interests. Now realising that this submission which the District Judge has upheld cannot be supported. Counsel for Respondent in this Court in his written submission for the first time has taken up the position that the Kandyan Law does not apply but it is the Roman Dutch Law that applies. I do not think that Counsel can change front in this manner. I hold that it is Kandyan law that applies in this case.

I hold that Bandi Menika is entitled to a 1/2 share and her 1/2 share devolved on the 8th defendant appellant. Mudiyanse is only entitled to a 1/2 share which devolved on the plaintiff and 1-7 defendants.

I set aside the judgment of the learned District Judge and allow this appeal with costs.

I direct that the land be partitioned in the shares stated above. Plaintiff will be entitled to cost of partition pro rata. Enter Interlocutory decree accordingly.

A. DE Z. GUNAWARDENA, J. — I agree

Appeal allowed
