In re the Estate of SEELAVATI KUMARIHAMY.

25—D. C. (Inty.) Badulla, B 483.

A. St. V. Jayewardene, for petitioner, appellant.

Bawa, K.C., (with him *J. W. de Silva*), for respondents.

1916. DE SAMPAYO J.—

This is the matter of an application for letters of administration to the estate of Seelavati Kumarihamy, who died intestate on July 27, 1915. The applicant is her husband, and the respondents are her parents. On the service of the order *nisi* the respondents filed an affidavit denying that the applicant was an heir of the deceased or was entitled to administer her estate, and stating that they were her sole heirs and had a preferential claim to letters. The denial of the applicant's right was founded upon an allegation that the deceased was married to the applicant in *binna*. When the matter came up for consideration the respondents were unable, in view of the provisions of section 523 of the Civil Procedure Code, to resist the applicant's claim as widower to administer the deceased's estate, and they restricted their own claim to joint administration with the applicant. The District Judge considered, notwithstanding an argument to the contrary on behalf of the applicant, that the question whether the deceased's marriage was in *binna*, and whether therefore the applicant was an heir of the deceased, was relevant to this claim for joint administration and should be inquired into. He accordingly framed two issues on this point and heard evidence, and in the result he decided these issues against the applicant, and in effect ordered that another (meaning no doubt one of the respondents) should be associated with him as co-administrator. The applicant has appealed.

1916.

I think that the contention of behalf of the appellant that the inquiry was premature, and that the order as to joint administration was not justified, is entitled to prevail. If the appellant's status as lawful husband had been denied, and his claim to administer the estate had been challenged on that ground, that would have been the denial of a material allegation in his petition, which would require to be determined on *viva voce* evidence. But the disputed right to inherit is a different matter, and I do not think that the inquiry in this case was irregular. I need not refer to the decisions on this subject; they will be found cited in *Fernando v. Fernando, (1914) 18 N. L. R. 24.* Mr. Bawa, for the respondents, however, relied on *Re Ibrahim Lebbe, (1900) 1 Browne 358*, but that was a case touching certain persons who had not been made respondents, but who claimed to be heirs, and the point of the decision appears to be that, as it is parties "interested in the administration of the estate" that are entitled to oppose a grant of letters and to take part in the testamentary proceedings, the Court may well inquire into the heirship of such persons at an early stage. That decision, therefore, has no direct bearing on the present case, in which the respondents were all along designated as heirs and were made parties to the suit.

As I said, the District Judge made the inquiry into the question of *binna* or *diga* marriage, as, in his opinion, it was relevant to the matter of the respondents' claim for joint administration. If he means that in every case where the applicant, though widow or widower, is not also an heir, another person should be associated with her or him as co-administrator, there is no legal authority for such a proposition. In *In re Ukku Banda, (1900) 4 N. L. R. 257*, the Court upheld the preferential right of a widow to grant of letters under section 523 of the Code, but Bonser C.J., in the course of his judgment, added that the Code did not mean that the widow was entitled to sole administration, and that it was quite open to the Court, if it thought it desirable in the interest of the estate, to associate some other person as a joint administrator. This enunciates the right principle. Each case must be governed by its own circumstances. In this case there is no suggestion that the appellant will not administer the estate properly if there is no co-administrator with him. On the other hand, there appears to be some reason for considering it undesirable to appoint either of the respondents as co-administrator with the appellant. For instance, the appellant charges the respondents with having taken and retained some articles of jewellery belonging to the deceased. Again, the bulk of the deceased's estate consisted of certain immovable property donated to her by the respondents on a deed of gift, and it appears that after her death and during the pendency of these proceedings the respondents purported to revoke the deed of gift, with a view, no doubt, of claiming the property as their own and as no longer belonging to the estate. These matters will in all probability lead to some litigation, in which the interests of the estate will be directly opposed to those of the respondents.

At the argument of the appeal I had some doubt as to whether, an inquiry having rightly or wrongly taken place, the District Judge's finding on the question of *binna* or *diga* marriage should not in any case be allowed to stand. But having looked into the recorded evidence, I think it would be of advantage to have the whole matter gone into more fully and more precisely on some subsequent and more appropriate stage of the testamentary proceedings.

I would quash the proceedings, and direct that letters of administration should be issued to the appellant as applied for, leaving it open to the respondents at the proper time to raise the question of the appellant's right to share in the distribution of the estate. As neither party was really responsible for the course of the proceedings, there is no need to make any order as to costs in the District Court, but the respondents strenuously supported those proceedings before us and I think the appellant should have the costs of this appeal.

SHAW J.—I agree.