1970 *Present:* **H. N. G. Fernando, C.J., and Thamotheram, J.**

H. M. TIKIRI BANDA, Appellant, *and* R. M. DINGIRI BANDA and 2 others, Respondents

S. C. 176/68 (Inty.)—D. C. Kurunegala, 2953/P

Kandyan Law Declaration and Amendment Ordinance (Cap. 59)—Sections 11 (1) (a), 13—Right of a widow to life interest in the acquired property of her deceased husband—Effect thereon when there are children by her and by a previous marriage of the deceased.

When a person who is subject to the Kandyan Law Declaration and Amendment Ordinance dies leaving his widow and children by her and also children by a previous marriage, the *per capita* shares of the children of the previous marriage are not subject to the widow's life interest in a one-half share of the acquired property of the deceased except if, and to such extent as, the *per capita* shares of the widow's own issue are less than one-half.

APPEAL from an order of the District Court, Kurunegala.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne* and *G. M. S. Samaraweera*, for the plaintiff-appellant.

W. D. Gunasekera, for the defendants-respondents.

Cur. adv. vult.

November 8, 1970. H. N. G. FERNANDO, C.J.—

The facts in this action for partition are not in dispute. They are that one Appuhamy acquired the property which is the subject of the action, leaving his widow the 3rd defendant and a child by her who is the 2nd defendant, an adopted son who is the 1st defendant, and also a child by a previous marriage who is the plaintiff. It is also common ground between the parties that Appuhamy died after the date of the commencement of the Kandyan Law Declaration and Amendment Ordinance of 1939. Accordingly, ss. 11 and 13 of that Ordinance govern the devolution of the property: the widow (3rd defendant) is entitled, under the first proviso to s. 11 (1) (*a*) of the Ordinance, to an estate for life in one half of this property, and the plaintiff, the 1st defendant and the 2nd defendant are each entitled to a 1/3 share of the property. The only question in dispute is whether the 1/3 share of the plaintiff, who is the child of Appuhamy's first marriage, is or is not free of the life interest in a half-share to which the widow (the 3rd defendant) is admittedly entitled.

The learned trial Judge felt himself able to dispose of this difficult question of law without pronouncing an answer to it. He relied on the fact that, in the testamentary proceedings which followed Appuhamy's death, there was recorded a settlement by which it was agreed that the 3rd defendant is entitled to an

interest for life in a "*half-share of the acquired properties of the entire estate*". On this basis, the decree for partition provides that one-half of each of the 1/3 shares, to which the plaintiff the 1st defendant and the 2nd defendant are respectively entitled, is subject to the life interest of the 3rd defendant.

The testamentary proceedings (marked D1 in the present case) show that the only matter in dispute in the Testamentary case was whether the present 1st defendant was duly adopted by the deceased Appuhamy. After evidence clearly establishing the adoption had been led, the settlement mentioned above was reached. Its effect was to settle the legality of the adoption and to recognize the adopted child's right to share equally with Appuhamy's natural-born children. I cannot agree with the learned trial Judge that the settlement decided the altogether different question, whether and to what extent the shares of each of the 3 children are subject to the widow's life interest. True, she has a life interest in one-half of the entire estate; but the other half is free of that interest, and the plaintiff's present claim is that he can take his one-third share out of this free half of the property.

The contention of Counsel for the plaintiff is that, when s. 11 of the 1939 Ordinance declared that a surviving widow has a life interest in one-half of her deceased husband's acquired property, it gave statutory recognition to the decision in *Hapu v. Esenda*[1] (26 N. L. R. 298). The deceased in that case was survived by the child of his first marriage and by the widow and issue of his second marriage; and the decision was that the first child "was entitled immediately to a half of the acquired property, subject to an equitable allowance in the event of it proving that the remaining one-half was insufficient for the maintenance of the widow and her own children". The decision obviously implied that the surviving widow had a life interest in the one-half share of the property which would ultimately pass on her death to her own children by her deceased husband; and s. 11 of Ordinance subsequently recognized that right of a widow. But apart from that, s. 11 is silent as to the question whether or not the legal title of children of a former marriage is "encumbered" in favour of the widow.

Learned Counsel for the widow, and also the trial Judge, have relied on s. 13 of the Ordinance, which provides that all children of a deceased inherit *per capita*, even when there are children of two or more marriages. But s. 13 only has the effect that *the legal title* to the property devolves in equal shares on all surviving children. This Section again is silent as to the question now under consideration.

[1] *26 N. L. R. 298.*

Thus there is nothing in the Ordinance which purports to modify expressly the principle which the judgment in *Hapu v. Esenda* derived from the earlier authorities as being applicable in a case where there are children by two marriages : namely, the issue of the second marriage " are entitled to a moiety subject to the widow's right of maintenance out of that moiety ", and " the widow must depend on the shares of her children ". There is however, a modification which can arise by implication in consequence of the rule of *per capita* devolution stated in s. 13. Where the share or shares of the widow's own issue is less than one-half, then the widow's right under s. 11 to a life interest in one-half has to be " fed " out of the shares to which other children have title. But in a case where the shares of the widow's children do exceed one-half, the principle can apply, for she can then depend on the shares of her own children for her life-interest. Considering that a widow must maintain her children out of the proceeds of her life-interest, those children would have an unduly favourable double benefit if they have title to more than a half-share and yet enjoy the benefit of a contribution towards their maintenance out of the shares to which the issue of the former marriage have title.

I hold therefore that the *per capita* shares of children of any former marriage are not subject to the widow's life interest in a one-half share except if, and to such extent as, the *per capita* shares of the widow's own issue are less than one-half.

As already stated, the 1st defendent is an adopted child of the deceased, and the learned trial Judge has held that a half-share of his 1/3 share will be subject to the life-interest of the widow. Since no argument was addressed to us as to the correctness of this finding, my opinion on this matter has to be expressed with some hesitation. The evidence in the former Testamentary proceedings shows that the 1st defendant was born and adopted during the subsistence of the deceased's marriage to the 3rd defendant. That being so, it seems to me proper to regard the 1st defendant for present purposes as a child of this marriage, and not of the deceased's first marriage. (Had the 1st defendant been adopted before the deceased contracted his second marriage, the position could have been different, for he may then have had to be regarded as a child of a former marriage.)

In the result, the position in this case is that of the three heirs who each have title to a 1/3 share of the property, two of them (the 1st defendant and the 2nd defendant) have to be regarded as the children of the marriage between the deceased and the 3rd defendant. Since the share of these two heirs (2/3) exceeds one-half, that share suffices to feed the widow's life interest, and the plaintiff's 1/3 share is free of that interest.

The order in the decree under appeal that " half share each of the shares allotted to the plaintiff, 1st and 2nd defendants will be subject to the life interest of the 3rd defendant " is set aside, and the following is substituted therefor :—

> " Out of the 1/3 share allotted to the 1st defendant and to the 2nd defendant respectively, a 3/12 share shall in each case be subject to the life-interest of the 3rd defendant. "

In the circumstances, I would make no order as to the costs of this appeal.

THAMOTHERAM, J.—I agree.

Order varied.