

TIKIRA
v
THILAKARATNE

COURT OF APPEAL
ANANDACOOMARASWAMY, J.
EDUSSURIYA, J.
CA 625/86(F)
DC KULIYAPITIYA 5174/L
FEBRUARY 10, 1995

Kandyan Law Declaration and Amendment Ordinance Section 310 (2) – Acquired property and other acquired property – Law before and after the Ordinance as regards acquired property – Paraveni property – Inherited property – Meaning after 1939 – Nithi Niganduwa.

Held:

- (1) Prior to the date of the Kandyan Law Declaration Amendment Ordinance of 1939 where a person dies intestate and issueless without leaving a child or a descendant surviving him acquired property of his father which came to him by inheritance was deemed to be acquired property of the deceased.

The property to which one becomes entitled to on intestacy from a collateral was not regarded as ancestral property **prior** to the Kandyan Law Declaration and Amendment Ordinance of 1939.

- (2) In the instant case what B purchased from H which became the acquired property of B is deemed to be property of A, his daughter

who died without leaving any child or descendant and in considering the position regarding 1/12 share which B got on the death of his brother P, who died unmarried issueless in 1941 the law applicable is laid down in section 10 (1) – which confirms that the 1/12 share to which B succeeded on the death of P becomes Paraveni property of B.

APPEAL from a judgment of the District Court of Kuliypitiya

Cases referred to:

- (1) *Samaradasa and Dingiri Etana et al* 57 NLR 333.
- (2) *Appuhamy v Wijetunge* 14 CCR 114.

Harsha Soza for plaintiff-appellant.

T.B. Dissanayake PC with *B. Coswatte* for substituted defendant-respondent.

Cur.adv.vult.

May 12, 1995

EDUSSURIYA, J.

The plaintiff-appellant has filed this appeal from the judgment of the learned District Judge of Kuliypitiya which dismissed the plaintiff's action. The facts are as follows:

It is common ground that the parties are subject to the Kandyan Law. One Horatala by deed No. 5045 of 21st August, 1921 sold and conveyed an undivided 1/6 of the land described in schedule "ස" to the plaintiff Tikira, Bilinda and Petera. Petera died unmarried and issueless about the year 1945 and thus Tikira and Bilinda became entitled to an undivided 1/4 each. Bilinda died leaving as his heir his daughter Anulawathie. A partition action No. 7088 of District Court Kurunegala was instituted to partition the said land in which Tikira was made the 1st defendant Anulawathie was made the 5th defendant. As Anulawathie was a minor, her mother was appointed as *guardian-ad-litem* and named the 6th defendant. Anulawathie died during the pendency of the partition action and her mother was appointed the legal representative. By the final decree the 6th defendant in her capacity as the legal representative of the deceased 5th defendant Anulawathie was allotted lots 4 and 4A subject to a life interest in Horatala the 7th defendant in Plan N. 6519 made by G.A. de Silva, Licensed Surveyor dated 10th September, 1955. Horatala died in 1970.

The present case before us has been instituted by the 1st defendant in the partition case Tikira who was Anulawathie's father Bilinda's brother against Anulawathie's mother for the declaration of title and recovery of possession of the said lots 4 and 4A in the said Plan No. 6519 (which were allotted to the defendant as the legal representative of the deceased Anulawathie in the partition action No. 7088 of District Court Kurunegala).

Firstly, it was contended that lots 4 and 4A were not allotted to the respondent as the heir of the deceased Anulawathie in the partition case No. 7088 of the District Court of Kurunegala.

Although, evidence had been led to the effect that the respondent was the sole heir of the deceased Anulawathie, the allotment of lots 4 and 4A had been made in that case to the respondent in her capacity as the legal representative of the deceased Anulawathie. Thus the first contention must be upheld.

Secondly, it was contended that only newly acquired property of Bilinda would be deemed to be the acquired property of the deceased Anulawathie since she died without leaving a child or descendant surviving her and that rights acquired by Bilinda in 1921 cannot be regarded as newly acquired property at the time he died in 1949 which was twenty years after the acquired rights.

In this connection the Counsel for the appellant drew our attention to a passage from the Niti Niganduwa referred to in the judgment in the case of *Samadara and Dingiri Etana et al*⁽¹⁾ at 333.

That was a case where a Kandyan named Patabenda acquired the land in dispute by purchase in 1892, and died leaving his widow, a son named Appu and three diga married daughters. Appu thus inherited the property subject to a life interest in the mother. When Appu died in 1919 intestate and issueless the question arose whether for the purposes of devolution, the property was paraveni property or acquired property.

Their Lordships referred to a passage in the Niti Niganduwa which indicated that when a Kandyan dies intestate and issueless, property which had previously passed to him by inheritance as the "newly acquired" property of his deceased father would not fall into the category of paternal or paraveni property, and that on the contrary must be regarded as his

acquired property although it had come to him by inheritance from his father.

Their Lordships took the view that the proviso to section 10(1) of the Kandyan Law Declaration and Amendment Ordinance which set out that "Provided however, that if the deceased shall not have left him surviving any child or descendant, property which had been the acquired property of the person from whom it passed to the deceased shall be deemed acquired property of the deceased", is declaratory of the earlier law.

Then again, although newly acquired property was referred to in the Niti Niganduwa, it does not draw a distinction between newly acquired property and other acquired property and therefore the inference is that, prior to the date of the Kandyan Law Declaration and Amendment Ordinance where a person dies intestate and issueless without leaving a child or descendant surviving him, acquired property of his father, which came to him by inheritance was deemed to be acquired property of the deceased.

Thus, the 1/6 which Bilinda purchased from Horatala which was the acquired property of Bilinda is deemed to be acquired property of Anulawathie who died without leaving any child or descendant.

The Court will then have to consider the position with regard to the 1/12 which Bilinda got on the death of Petera his brother, who died unmarried and issueless in 1941.

According to the decision in *Appuhamy v Wijetunga*⁽²⁾, property to which one becomes entitled to on intestacy from a collateral was not regarded as ancestral property prior to the date of the Kandyan Law Declaration and Amendment Ordinance of 1939.

However, since Petera died in 1941, the law applicable is that laid down in section 10(1) (a) which states that "the expressions paraveni property, ancestral property or inherited property shall mean immovable property to which a deceased person was entitled (a) by succession to any other person who has died intestate".

Thus, the 1/12 share to which Bilinda succeeded to on the death of Petera in 1941 becomes Paraveni property of Bilinda in terms of section 10(1)(a) of the Ordinance.

Thus, the plaintiff-appellant as the brother of Bilinda is entitled to that 1/12 whilst the defendant-respondent is entitled to 1/6.

The appeal is dismissed subject to the above variation. There will be no costs in appeal.

ANANDACOOMARASWAMY, J. - I agree.

Appeal dismissed.