1961 *Present :* **T. S. Fernando, J., and De Silva, J.**

M. SUBANCHINA, Appellant, *and* M. K. JAMES APPU and others, Respondents

S. C. 135 (Inty.) of 1959—D. C. Ratnapura (Testy.), 1354

Kandyan law—Adoption—Difference in caste between the adopter and the person adopted—Acquired property—Inheritance when adopter dies—Kandyan Law Declaration and Amendment Ordinance, s. 7.

Under the Kandyan law, persons of one caste adopted by a Kandyan of another caste who dies intestate and issueless can inherit the acquired property of the latter.

APPEAL from a judgment of the District Court, Ratnapura.

H. W. Jayewardene, Q.C., with *A. C. Gooneratne, N. R. M. Daluwatte* and *S. S. Basnayake*, for the petitioner-appellant.

E. B. Wikramanayake, Q.C., with *E. R. S. R. Coomaraswamy*, for the 5th to 7th respondents.

Cur. adv. vult.

December 21, 1961. T. S. FERNANDO, J.—

The question that arises for decision on this appeal is whether persons of one caste adopted by a Kandyan of another caste who dies intestate and issueless can inherit the acquired property of the latter.

One Maddumage Simion Singho, a person subject to the Kandyan law died intestate on 10th July 1955, and the petitioner who, it is admitted, had lived with the deceased as his mistress for a number of years was granted letters of administration in respect of his estate. In the course of the judicial settlement of that estate a contest arose as to who his intestate heirs were. On one side were the 1st, 2nd and 3rd respondents, three persons who alleged they had been adopted by him and by his mistress Subanchina (the petitioner), while on the other side were ranged the 5th, 6th and 7th respondents who are the illegitimate sons of one Lamaetana, a sister of the deceased. The District Judge, after a keenly fought contest in the District Court, reached the conclusion that the claims of the illegitimate children of the sister of the deceased had to prevail under the Kandyan law over the claims of persons who had in fact been adopted by the deceased as his children but were not of the same caste as himself. The learned judge observes that he reached this conclusion regretfully as he was satisfied that there was overwhelming evidence, both oral and documentary, to show that it was the intention of the deceased to adopt the 1st, 2nd and 3rd respondents as his children for the

purpose of inheriting his property. The administratrix has appealed against the decision given in the District Court and, in support of the appeal, three points were raised by Mr. Jayewardene :—

(1) That distinctions of caste can no longer be recognised by the courts of this country ;

(2) That even if it is a requirement of a valid adoption that the adopted and the adopter shall be of the same or equal caste, the concept of caste is now so vague and indefinite that the courts should regard it as no longer a condition of a valid adoption ;

(3) That in any event a difference in caste between that of the adopter and the adopted affects only the succession to the inherited property of the adopter and not to his acquired property.

It was not disputed in the court below that the 1st and 2nd respondents who were born in 1931 and 1933 respectively had been brought up in the household of the deceased and of Subanchina from their very tender years and certainly from a date anterior to 1st January 1939, while the 3rd respondent who had been brought up similarly was born only in 1950. By section 7 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, which came into force on 1st January 1939, no adoption is valid in law to create any right in the adopted person unless the adoption is evidenced by an instrument in writing and signed by both the adopter and the adopted in the presence either of specified officers or a notary and witnesses. In the absence of such an instrument in writing, Mr. Jayewardene was compelled to admit that the 3rd respondent who is still a minor had no claim to any of the property that is the subject of the present contest.

In regard to the claim of the 1st and 2nd respondents who are the children of one Menchi, a sister of Subanchina, the mistress of the deceased and the administratrix of his estate, it is necessary to advert to the Kandyan law in respect of adoption. In the chapter (Chapter X) relating to adoption in Sawers' Digest of Kandyan Law (see page 39) it is stated, inter alia, that " the adopted child nust be of the same caste as the adopting parent, otherwise the adopted child cannot inherit the *hereditary* property of the parent ". In Armour's Kandyan Law (Chapter III, section 10), there is the following reference to the question of caste in connection with adoption :—" However, this much is certain, that unless the child, and the person who had brought up and educated that child, were of the same caste, and . . . . that child will not be recognised as adopted and affiliated ". And in the translation of the *Niti Nighanduwa*, in a reference to the same question it is stated that " if any person takes charge of and adopts a child of equal caste, and in order that the child may at his death inherit his name and lands, makes known to the world . . . . , that child will inherit the property of his adopting parents at their death ". Among the requirements of a valid adoption as set out in Modder's Kandyan Law (see 1914 ed. page 539) is one that the child adopted and the parent adopting should be of the same caste. It

does not appear that the expression " equal caste " appearing in the passage from the *Niti Nighanduwa* reproduced above means, in the context, anything different from " same caste ".

The learned District Judge has found, and his finding is supported by evidence, that the deceased Simion Singho was a person of the Goigama caste while the 1st and 2nd respondents are children of parents who were of the Wahumpura caste. It must therefore be taken as proved that the 1st and 2nd respondents were not of the same caste.

Mr. Jayewardene, in support of his argument that caste will no longer be recognised by our Courts as a bar to the inheriting of property referred us to certain observations in judgments delivered in this country over a very long period of time, and notably to the following :—

(*a*) the judgment in D. C. Kandy Case No. 20090 reported in Austin's Reports, 1848, at page 236 :—

> " But if parties of different caste are clearly proved to have agreed to marry, by the usual wedding ceremonies having preceded their union, or other clear and positive proof of their intentions to marry, the court would not then declare such a marriage to be null and void, as being prohibited by any Kandyan custom now prevailing or in force, when all legal disabilities for caste are virtually abrogated and obsolete in the Colony ".

This passage was cited by Garvin A.C.J. in *Mahamadu v. Dingiri Menike* [1] in which case the Court held that there is no rule of Kandyan law under which a woman, who during the subsistence of a valid marriage commits adultery with a man of lower caste, forfeits her rights to ancestral property.

(*b*) the observations of Garvin A.C.J. himself in *Mohamadu v. Dingiri Menike* (*supra*) :—

> " it would, I think, be correct to say that at no time within approximately the last century have marriages between persons of different castes been prohibited or irregular carnal relationship between them penalised ".

and

(*c*) the observations of MacDonell C.J. in *Sinnacuddy v. Vethattai* [2], referring to the judgment in *Mohamadu v. Dingiri Menike* (*supra*) that :—

> " the meaning of the judgment in 35 N. L. R. is this, that the Courts no longer recognise these caste distinctions. In their own sphere of every day social life doubtless they are still valid but apparently we do not recognise them in a Court of Law ".

It was submitted to us on the strength of the observations referred to above and by reason of the circumstance that there is no recorded case discovered by counsel where a person who had been adopted after

[1] (*1933*) *35 N. L. R. at 339.* [2] (*1935*) *4 C. L. W. at 133.*

compliance with the other requirements of the Kandyan law has been held not to inherit his adopting parent's property because of a difference of caste between that of the adopter and the adopted that in the case before us this Court should treat the old condition relating to " same caste " as now being obsolete in this country. I did find Mr. Jayewardene's argument attractive and, speaking for myself, would have given serious consideration thereto on this appeal but for the reason that I am of opinion that this appeal can be decided upon another ground which renders unnecessary a consideration of the soundness of that argument.

It is not disputed that the property over which the contest we are concerned with in the case before us has arisen is all acquired property of and not property inherited by Simion Singho. According to the Kandyan law the incapacity of adopted children who are not of the same caste as that of the adopter to inherit the latter's property appears to be limited to the hereditary property of the adopter. Neither counsel in this case has been able to bring to our notice any previous decision of this Court directly to the point, but Mr. Jayewardene has referred us to the decision in the case of *Lapaya v. Dingiri and Kiri Bindu* [1] in the course of which Wood Renton J. (Hutchinson C.J. agreeing), after referring to the statement in Sawers' Digest, stated " There is no clear evidence (*a*) as to whether or not the parents of the adopted daughter were married—a circumstance which might have made a great difference to her caste or (*b*) as to whether or not the property in question is inherited. Sawers, in the passage above cited, seems to restrict the incapacity created by inequality of caste, to hereditary property ". Whatever theory may be advanced for the basis upon which the disability of a child or children of one caste adopted by a person of a different caste to inherit their adopting parent's inherited property is founded, there appears to my mind to be good sense in placing no fetters upon such children succeeding to their adopting parent's acquired property. I would, with respect, adopt and apply the interpretation of the law which appears to have found favour with Wood Renton J.

In the result the appeal succeeds, and the order of the District Court dated 21st October 1959 is set aside and the 1st and 2nd respondents are declared entitled to the acquired property of the intestate Simion Singho in equal shares. In all the circumstances I do not think it necessary to vary the order made by the learned District Judge in regard to the costs in the District Court, but the 5th to the 7th respondents must pay the petitioner the costs of this appeal.

DE SILVA, J.—I agree.

Appeal allowed.

[1] *(1909) 3 Leader L. R. 3.*