1923. *Present :* Schneider J. and Jayewardene A.J.

MENIKA *v.* MENIKA *et al.*

356—D. C. Kurunegala, 8,677.

Kandyan law—Right of illegitimate children to inherit from their mother—Action to partition twenty-seven lands—Plaint allotting shares to one defendant only in seven lands—Misjoinder of parties and causes of action—Deed of gift—Acceptance.

The illegitimate offspring of parents of the same social status succeed to the inherited or *paraveni* property of the mother.

In a partition action the plaintiff sought to partition twenty-seven lands, but allotted to second defendant a share in only seven of them.

Held, that there was a misjoinder of causes of action and of parties.

THE facts are set out in the judgment.

Joseph, for the appellant.

Soertsz, for the defendant.

Cur. adv. vult.

May 31, 1923. SCHNEIDER J.—

In this action the plaintiff claimed an undivided one-fifth share of the lands numbered 21 to 27 in the schedule attached to the plaint. She set out title to them in the following manner: She stated that they belonged to Punchi Menika, who died leaving five children by her husband, Bandirala, viz., the first, second, third, and fourth defendants, and one Vaithala Menika. She claimed Vaithala Menika's one-fifth share as the daughter of Vaithala Menika. It was admitted that Vaithala Menika, with the approval of her parents, lived as the wife of one Ukku Banda, and that the plaintiff is the child of this union, but that no marriage was registered between them. The cohabitation began about twenty-three years ago. It appears to have been contended on behalf of the plaintiff in the lower Court that she was a legitimate child, as being the offspring of a union recognized by Kandyan customary law as marriage. The parties are admittedly governed by the Kandyan law. The learned District Judge held against the plaintiff, and she has appealed. The contention on her behalf in the lower Court was an idle one, in view of the decision in 1920 in *Kuma v. Banda*[1] that such a union was not a valid marriage for want of registration. But counsel for the plaintiff presented her claim in appeal somewhat differently. He conceded that the

[1] *(1920) 21 N. L. R. 294.*

union of the plaintiff's parents was not a legal marriage, and that the plaintiff was accordingly an illegitimate child, but he contended that the plaintiff was nevertheless the heir to her mother's property of all description. It seems to me that this contention is sound, and should be upheld. It is well-settled law that illegitimate children succeed to the acquired property of their father. For this statement I need refer only to the Full Bench decision in *Rankira v. Ukku.*[1] There is also direct authority in the Kandyan law that the illegitimate son of a man by a woman of a lower social status does not succeed to his *paraveni* property.[2] The learned District Judge appears to have thought that the lands in dispute in this case were *paraveni* property. He is right in so regarding them. For authority I need refer only to *Kiri Menika v. Muttu Menika*[3] decided by Lawrie J.—a Judge distinguished for his knowledge of the Kandyan law. But, in view of what I shall be saying later, the question whether the lands in question were *paraveni* or acquired property does not arise and has no bearing.

The precise point raised by the appeal is covered by authority. 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. Sawer[4] says: "If a concubine or a prostitute leave issue, they inherit their mother's property." This is given under the head of "Succession to Movable Property," but if regard be had to the language of section 11 which immediately precedes section 12, and in which lands are expressly mentioned, I think section 12 may also be fairly regarded as not confined to "movables." Modder[5] formulates the proposition of law on this point as follows: "Section 269, illegitimate children inherit the estate of their mother in equal shares," and then proceeds to give his comment referring to the original authorities which I have cited.

The *Niti-Niganduva* at pages 15 and 16 has the following: "The children of a woman married to a man of her own caste according to usual rites and customs, or of a woman who after cohabitation with a man of higher or of a lower caste than herself, and when still in an unmarried state has intercourse with a man

[1] *(1907) 10 N. L. R. 129.*
[2] *Armour, chapter III., section 2.*
[3] *(1899) 3 N. L. R. 376.*
[4] *Modder's Edition, p. 21, section 12.*
[5] *Kandyan law, p. 506.*

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who is not known, all inherit the estate equally. There are however, exceptions, viz., if the parents of a woman marry her to a man in *binna*, and she bears a child to him, but after cohabits with and bears a child to a man of lower caste than her own, the child born in proper wedlock as aforesaid inherits, by maternal right of inheritance, all the ancestral property of the mother, of which nothing goes to the child born to the low caste man. However, putting aside this ancestral property, all the acquired property of this vile outcast woman is divided amongst all her children.

The mother inherits the property of her children at their death by filial right of inheritance, whether they were born in proper wedlock or in proper cohabitation, but if the mother has become an outcast, the usage is different; as, for instance, if a woman has a child by a legally married husband and another by a man of a lower caste than herself, on the death of the former child all its property devolves on its father or on any near relation, but not on the outcast mother, though on the death of the child born to the man of inferior caste the property which devolved upon that child may be inherited by the mother." The exceptions mentioned in the passage do not arise upon the facts of this case.

De Sampayo J. in *Raju v. Elisa*, which is reported in full by Modder at page 508, states: "It is settled law that illegitimate children of a woman inherit her acquired property equally with legitimate children," but gives no reference to that statement.

It is also significant that in all the passages in the text-books in which the exclusion of illegitimate children from succession to the father's *paraveni* property is set out, no reference is made to any such exclusion as regards the mother's *paraveni* property.

I would, therefore, hold that the plaintiff is entitled by maternal inheritance to an undivided one-fifth share of the lands in question. Her costs of this appeal will be paid by the first and third defendants, who alone resisted her claim. But I have some comments to offer upon the constitution and conduct of this action. The plaintiff sought to obtain partition of twenty-seven lands. Only in seven of them did she allot a share to the second defendant. On the face of it, therefore, the plaint disclosed a clear misjoinder of causes of action and of parties. It should, in the first instance, have been returned for amendment or rejected. That was not done. In their answer the first and third defendants took objection to the form of the plaint, but their objection does not appear to have been pressed, and the learned District Judge has entirely ignored the defects in the plaint. Considering that this is a partition action, he should have taken notice of them.

The evidence produced at the trial is unsatisfactory and quite inadequate. It consisted of the evidence of Ukku Banda, the father of the plaintiff, who stated that Vaithala Menika was the daughter of Bandirala, and that the latter gifted twenty lands to

all his chidren, except Kalpa Menika (second defendant) by the deed P 1, and that the lands 21 to 27 belonged to Bandirala's wife, Punchi Menika.

Upon this evidence the learned District Judge gave judgment allotting a one-fourth share in the lands 1 to 20 (that is, those included in the deed) to the plaintiff and to each of the first, third, and fourth defendants, and in lands 21 to 27 a one-fourth share to each of the first, second, third, and fourth defendants. He directed that an interlocutory decree be entered. The decree which has been entered is not an interlocutory decree, but only a declaratory decree. There is no order for partition—nor did the District Judge direct it. Except for the statement in the deed P 1, there is no evidence that Bandirala had five children, or who they were. There is no proper proof of his title or that of his wife. The deed P 1 deals with only an undivided one-sixth of land No. 1, of an undivided half of land No. 8, and of land No. 19, and with portions only of lands 13 and 16, from which it excludes certain other portions. How can these lands be dealt with in an action for partition without all the owners being before the Court? The deed P 1 sets out the title of the donor as derived by virtue of certain deeds. These are not produced in evidence, nor reasons given why they are not. The deed P 1 is a donation. It is not accepted by the donees on the face of it, and there is no evidence that it was accepted. It states that the possession of the donees shall begin after the death of the donor. There is no evidence that the donor is dead. P 1 is a copy. There is no evidence to account for the absence of the original. The bond giving security for the costs in appeal is not duly executed in conformity with the provisions of Ordinance No. 17 of 1852. It appears to have been signed before a Justice of the Peace, but nothing to show that that gentleman is specially authorized to act in that behalf. It is not attested by witnesses. The petition of appeal does not give the names of all the respondents. I am mentioning all these details, even at the risk of appearing captious, to show that the plaintiff's proctor has bungled along literally from start to finish. He has no excuse for the blunders he has committed. It is not fair to his clients that they should have to pay for his blunders. I must, therefore, much as I regret having to do so, direct that he is to pay personally the costs referred to below.

Acting in revision, I set aside all the proceedings from the presentment of the plaint, except in so far as they relate to the determination of the question of the plaintiff's claim by right of maternal inheritance. Lands 1 to 20 cannot be the subject-matter of this action. The plaint must be amended so as to confine it to the lands numbered 21 to 27, in which alone all the parties to the action have shares. When that amendment has been made, the action will proceed as if that amended plaint was the institution

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of this action. The plaintiff's proctor must pay to all the defendants such costs as they may have incurred from the date of the institution of the action up to the date of the decree appealed against.

JAYEWARDENE A.J.—

I agree. Being on circuit I have not been able to consult all the authorities bearing on the question whether under the Kandyan law, the illegitimate offspring of parents of the same social status succeed to the inherited or *paraveni* property of the mother, but the authorities I have been able to consult appear to support the view taken by my brother Schneider. I am, however, somewhat doubtful whether under the Kandyan law, a deed of gift, such as the one produced in this case, P 1, requires acceptance either on the face of it or otherwise.

Sent back.