

1947

Present : Wijeyewardene S.P.J.

SETUWA, Appellant, and SIRIMALIE, Respondent.

S. C. 76—C. R. Matale, 8,939.

Kandyan Law—Kandyan Law Amendment Ordinance, proviso to section (10), (1)—Meaning of “child”—Includes illegitimate child—Paraveni property and acquired property.

The word *child* in the proviso to section 10 (1) of the Kandyan Law Declaration and Amendment Ordinance means not only a legitimate child but also an illegitimate child.

A PPEAL from a judgment of the Commissioner of Requests, Matale.

S. R. Wijayatilake (with him R. S. Wanasundere), for the first defendant, appellant.

No appearance for the plaintiff and the second defendant, respondents.

Cur. adv. vult.

July 16, 1947. WIJEYWARDENE S.P.J.—

This is an action for declaration of title to an undivided one-third share of a land. One Puncha was admittedly the original owner of the land by right of purchase under a deed P2. He died intestate leaving his three children—Setuwa, Hapuwa and Nanduwa. Nanduwa died intestate about 1943. The plaintiff filed this action as the next friend of three minors who, she alleged, were the children of Nanduwa. The defendants denied that allegation.

I accept the finding of the Commissioner that Nanduwa was the father of the minors. The oral evidence and the document P1 prove beyond any doubt that the minors were the illegitimate children of Nanduwa.

The Commissioner held, further, that the minors were entitled to Nanduwa's one-third share and gave his reason very briefly as follows:—“This property is the acquired property of Nanduwa, *vide* P2”. The Commissioner appears to have thought that, as the property had been purchased by Nanduwa's father, it should be regarded as the acquired property of Nanduwa, when the Court considers the succession to the estate of Nanduwa. The question, however, does not admit of such an easy solution under the Kandyan Law Declaration and Amendment Ordinance which is applicable to the present case.

Section 10 (1) of the Ordinance enacts that “paraveni property” shall mean *inter alia* “immovable property to which a deceased person was entitled by succession to any other person who has died intestate”. The property in question would, therefore, be paraveni property for the purposes of this case, unless it comes under the proviso to section 10 (1) which reads:—

“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”.

Did Nanduwa die leaving him surviving a "child" within the meaning of the proviso? The answer depends on the meaning of "child". Does it mean only a legitimate child or a child, legitimate or illegitimate?

No doubt, the rule of interpretation is that, in the absence of a contrary intention either expressed or deducible by necessary inference, all provisions respecting "children" contained in any laws or instruments having a legal operation, refer exclusively to legitimate children (*vide* 17 *Hailsham*, Para. 1424). But a study of the provisions of the Ordinance shows that the word "child" is used to mean a child, legitimate or illegitimate (*vide* sections 8, 16, 18, 21 and 23). I shall refer to some of these sections in detail. Section 23 says that "when any person shall die intestate after the commencement of the Ordinance leaving no child . . . the surviving spouse . . . shall succeed to all the movable property of the deceased". Now if the "child" in this section is construed to mean only a legitimate child, then this section will nullify section 22 which recognizes the right of an illegitimate child to succeed to the movable property of his father, if there is no legitimate child, and to succeed to the movable property of the mother in all cases. Again section 16 provides that, where a person dies leaving no surviving spouse or "child", the acquired property of the deceased should devolve in a certain manner on his parents, brothers and sisters. If "child" here means only a legitimate child then section 16 cannot be reconciled with section 15 (b) which states that an illegitimate child "shall, subject to the interests of the surviving spouse, if any, be entitled to succeed to the acquired property of the deceased in the event of there being no legitimate child . . .". Moreover, where the Ordinance has to refer to a legitimate child only, it does not use the word "child" but "legitimate child" or some such expression as "child by a former marriage" (*vide* section 11 (1) (a) proviso).

There would have been some room for doubt as to the meaning of "child" in the proviso to section 10 (1), if that section referred only to the estate of a deceased male. In that case it was possible to argue that there was no need to refer in the proviso to the case of the deceased dying without leaving an illegitimate child, as an illegitimate child could not inherit the paraveni property of his deceased father. But section 10 (1) refers to the estate of a "deceased person" and would therefore include the estate of a deceased female. That is made clear by sub-sections 3 and 4 of section 10. Now in the case of a deceased female, her illegitimate children would become entitled to her paraveni property in certain circumstances (*vide* section 18). It was therefore necessary for the proviso to section 10 (1) to provide for the case of the "deceased person" dying without leaving illegitimate children.

I think the proviso to section 10 (1) was intended to deal with cases where the Court has to consider the nature of the property in order to decide, for instance, the conflicting claims of the widow and the maternal and the paternal relations of a deceased person. This proviso appears to me to have been inserted to give effect to the "relative signification" of the term "acquired property" under the Kandyan Law referred to in

the following passage of Hayley's *Sinhalese Laws and Customs* (page 221) :—

“It would seem that the term ‘acquired property’ has a relative signification, varying in accordance with the classes of heirs who claim a share; for whereas any property descended from a man's father is inherited property for the purpose of distribution amongst his widow and children, when the contest is between maternal uncles and paternal uncles, the former are entitled to the deceased's acquired property, which in that case includes property newly acquired by the deceased's father which has descended to the deceased. This modification is a logical one; for when such heirs as the father's brothers succeed to part of the estate, on the ground not so much of true succession, but rather by virtue of the principle that lands must revert to the source whence they came, there is no reason for assigning to them an interest in property which was acquired separately by their deceased brother and never formed part of the family lands of themselves or their father.”

I hold that the proviso to section 10 (1) does not apply to the property in question, as Nanduwa left illegitimate children.

The minors in this case cannot, therefore, get a share of the property in view of section 15 (a), as it is a paraveni property within the meaning of the Ordinance.

I set aside the judgment of the Commissioner and direct decree to be entered, dismissing the plaintiff's action with costs here and in the Court below.

Appeal allowed.
