IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of Section 754(1) of the Civil Procedure Code.

C.A. Appeal No. 876/1997 (F)

D.C. Kandy Case No. 11951/P

M.K.M.G. Ganawathie (Deceased)
of Halpitiya, Manikhinna.
PLAINTIFF-APPELLANT

Malwadamge Sunil Sisira Kumara Jayalath,
No. 165, Palugasdamana,
Polonnaruwa.
Substituted PLAINTIFF-APPELLANT

-Vs-

1. **M.G. Karunawathie**
   of Pallekotuwawatte, Hipitiya,
   Manikhinna.
2. **Mudunkoth Gedara Wijesundara,**
   No. 47, Manikhinna.

DEFENDANT-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Lasith Kanuwanaarachchi for the Substituted Plaintiff-Appellant.

Sanjeewa Ranaweera for the Defendant-Respondents.

Argued on	:	07.08.2015; 13.11.2015 & 10.02.2016
Written Submissions on:		03.03.2016
Decided on	:	12.12.2017

A.H.M.D. Nawaz, J.

This case quintessentially raises the question of proof of paternity and poses the issue - is birth certificate the only made of proof of a person's birth? The whole case revolves around one M.G. Piyasena *alias* Horathala who, the Plaintiff-Appellant (hereinafter sometimes referred to as "the Plaintiff"), has asserted right throughout the trial and argument before this Court, was the father of Merayal Gedara Nandawathie-the plaintiff's predecessor in title. It is the plaintiff's assertion that since her predecessor in title-Nandawathie inherited one half of the property through Horathala, Nandawathie passed good title to the Plaintiff. On the other hand another daughter of Horathala-the 1st Defendant Karunawathie claims that Horathala (her father) did not father Nandawathie. In other words the 1st Defendant-Respondent (hereinafter sometimes referred to as "the 1st Defendant") has consistently argued that the Plaintiff did not get her title to the property in question because the plaintiff's predecessor Nandawathie was not a daughter of Horathala at all.

In other words the 1st Defendant (Karunawathie) has asserted that Nandawathie (the plaintiff's predecessor) is not her sister by consanguinity and as such Nandawathie could not have passed title to the Plaintiff-Appellant. That position of the 1st Defendant is to advance the position that the 1st Defendant alone inherited the property from the father figure-Horathala and she remained the owner until she transferred her own title to the 2nd Defendant.

So in the end the case presented to the learned District Judge of Kandy focused around the paternity of the plaintiff's predecessor-Nandawathie. Was Nandawathie (the Plaintiff's predecessor in title) the daughter of Horathala? Or was he the father of only Karunawathie (the 1st Defendant) as Karunawathie has averred? Or were Nandawathie

and Karunawathie (the 1st Defendant) children of Horathala? Were they in fact consanguine sisters? These are the issues that arise in this case. If they are in fact consanguine sisters, they would become co-owners of the property left to them by Horathala and if not, Karunawathie (the 1st Defendant) alone would inherit the property.

Did the Plaintiff establish on a balance of probabilities that her predecessor-Nandawathie was indeed a child of Horathala? The learned District Judge of Kandy in his judgment dated 04.04.1997 has dismissed the plaintiff's action holding *inter alia* that the Plaintiff has not established that Horathala was the father of her predecessor-Nandawathie. No birth certificate of Nandawathie was produced by the Plaintiff. Neither was the marriage certificate of Nandawathie's mother and Horathala produced at the trial. *So the paternity was in doubt and the fact that Horathala fathered Nandawathie was not established*-this was the reasoning of the learned District Judge.

The Plaintiff-Appellant has appealed against the judgment and revolving around this factual matrix, one has to turn to evidence that has been led on the part of the Plaintiff to ascertain whether the paternity of Horathala in relation to Nandawathie has been established.

The issue, as encapsulated above, is whether Nandawathie (the plaintiff's predecessor) is the daughter of Horathala. There were items of relevant evidence that were relied upon by the Plaintiff-Respondent to establish that Nandawathie (the plaintiff's predecessor) was in fact the daughter of Horathala. These items of evidence can now be gone into.

M.G. Piyasena *alias* Horathala whom both Nandawathie and Karunawathie claim as father became the owner of the property in dispute by a Deed of Transfer bearing No. 1403 and dated 10.02.1949. He had possessed the contiguous lands depicted in Schedules A and B.

The Plaintiff giving evidence stated that she knew Nandawathie as a child of Horathala, as she had lived in the same village. According to the witness, Horathala treated both

Nandawathie and Karunawathie as his daughters. Both went to school together as sisters. In fact, Nandawathie was the daughter of his 2nd wife.

The plaintiff's predecessor-Nandawathie testified next: she emphasized that Horathala treated her as his daughter and at no stage did her father tell her that she was not his daughter. When this witness was cross-examined, this position was not challenged. The defence never suggested to her that Horathala was not her father nor was it suggested to her in cross-examination that she was somebody else's daughter. In fact, I must observe that both Ganawathie (the Plaintiff) and Nandawathie (the plaintiff's predecessor) spoke to the conduct of Horathala. In fact this conduct of Horathala is indicative of his opinion that Nandawathie was not anyone but his daughter. This evidence is relevant and admissible under Section 50 of the Evidence Ordinance which states as follows:-

> *"When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as the existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:*
>
> *a) The question is, whether A and B were married. The fact that they were usually received and treated by their friends as husband and wife is relevant.*
>
> *b) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family is relevant."*

Another witness who was summoned to give evidence for the Plaintiff was one Gamagedara Nondoris who was 72 years of age at the time of giving evidence.

There is abundant testimony from this witness that Piyasena *alias* Horathala had two children namely Nandawathie (plaintiff's predecessor) and Karunawathie (the 1st Defendant) who were both acknowledged as his daughters. I have already adverted to Section 50 of the Evidence Ordinance which impinges on opinions of relationship. The

illustration (b) to Section 50 is to the effect that if a child was treated by a person as his son, it would amount to legitimacy and is relevant.

In ***Wijesekera v. Welivitigoda*** 61 N.L.R. 133, the question for decision was whether C was of the lawful issue of a valid marriage contracted between A and B. The evidence that during the lifetime of A his relatives regarded C as his legitimate child and conducted themselves accordingly towards her was admissible under Section 50 of the Evidence Ordinance.

The opinion must be of a person who as a member of the family or the person must have special means of knowledge on the subject. Members and friends of the family will be presumed to have special means of knowledge of the relationship and their conduct would be an important factor in determining the relationship.

The head note to the case of ***Cooray v. Wijesuriya*** 62 N.L.R. 158 states the following:

> *"Apart from proof by the production of birth, death and marriage certificates, the relevant provisions of the Evidence Ordinance in regard to proof of a pedigree are to be found in sections 32(5), 32(6) and 50 (2) of the Evidence Ordnance."*

Sinnetamby J. (with whom Basnayake, C.J concurred) stated at page 161:

> *"It almost always happens that birth and death certificates of persons who havedied very long ago are not available; in such cases the only way of establishing relationship is by hearsay evidence."*

Whilst Sections 32(5) and 32(6) are exceptions to hearsay evidence, Section 50(2) contains an exception to the exclusionary rule on opinion evidence.

It is to be noted that Section 50 differs from Section 32(5) in the following respects:-

(a) What is admissible under Section 32(5) is the statement giving the opinion of a deceased person or a person who cannot be produced, whereas under Section 50, the relevant fact is the opinion of persons, alive or dead, expressed by conduct, the qualification of special means of knowledge being common to both provisions.

(b) Under Section 32(5), the statement must be made *ante litem motam*, but under Section 50 the opinion may have been expressed before or after the controversy arose.

In this case the birth certificate of Nandawathie (the plaintiff's predecessor) was not produced. But yet the opinion of Horathala manifested by his conduct in acknowledging her as his daughter was adduced. This was certainly admissible under Section 50(2) of the Evidence Ordinance -one of the sections which make opinion evidence admissible.

I must state this stage that the relevant evidence that was led of the conduct of Horathala has not been rebutted and therefore the conduct is probative of the fact that Nandawathie was the daughter of Horathala.

Deed of Mortgage

A Deed of Mortgage (**P11**) was produced wherein both Nandawathie and Karunawathie (the 1st Defendant) stated that they had inherited the subject-matter from Horathala. In fact the 1st Defendant admitted the execution of this deed in cross-examination (see page 92 of the brief). By way of **P12**, both Nandawathie and Karunawathie partitioned the land into two portions. The documents **P11** and **P12** connote that Karunawathie (the 1st Defendant) held Nandawathie out as Horathala's daughter and her sister. Apart from the fact that this is conduct manifesting an opinion thus becoming admissible under Section 50, the fact that Karunawathie (the 1st Defendant) joined Nandawathie (the plaintiff's predecessor) as a co-mortgagor in **P11** unambiguously establishes her admission that Nandawathie is a daughter of Horathala. In fact that Deed of Mortgage (**P11**) recited that Nandawathie (the plaintiff's predecessor) and the 1st Defendant-Karunawathie were owners of the land that was being mortgaged, owing to a devolution on them through paternal inheritance. In other words the 1st Defendant-Karunawathie conceded in the mortgage bond that Horathala was the father of Nandawathie, inasmuch as he fathered her.

Horathala whose paternity of Nandawathie was denied at the trial by Karunawathie had passed away at the time of trial. But it was established at the trial that Karunawathie (the 1st Defendant) joined Nandawathie in executing the aforesaid mortgage of the land in question.

This mortgage speaks volumes. Both Karunawathie (the 1st Defendant) and Nandawathie (the plaintiff's predecessor) admit in the Deed of Mortgage bearing No. 6799 and dated 09.08.1974 that they are both entitled to the land uponan inheritance from their father Horathala. The Sinhala version of the relevant assertion in the deed is more specific as to the paternal inheritance of Horathala-the father flowing to both mortgagors: "ණයකාර අපට අපේ පියාවූ නැසිගිය හොරතල හෙවත් පියසේනගෙන් උරුමයට අයිතිව....."

Karunawathie admitted the execution of the mortgage bond along with Nandawathie. She identified the signatures of both. This Court has to take cognizance of this mortgage bond as one of the important items of evidence to determine Nandawathie's status as a child of Horathala. By joining Nandawathie as one of the joint mortgagors to the deed, Karunawathie (the 1st Defendant) made an informal admission that Horathala fathered Karunawathie. This assertion in the deed becomes relevant under Section 17(1) of the Evidence Ordinance –a provision which enacts the 1st exception to the rule against hearsay in the Sri Lankan Evidence Ordinance.

This statement of Karunawathie (the 1st Defendant) in the mortgage bondto the above effect- "that both Nandawathie and she are from the same loins" is an out of court statement which is prohibited as hearsay. But a hearsay statement is admitted into evidence if there are exceptions to the exclusionary rule and apart from Section 17(1) which defines an admission in a civil case, there are also other exceptions that would render the admission in the mortgage bond relevant.

When the deed was marked as **P11** and Karunawathie admitted the contents of **P11** (vide pages 90 and 92 of the appeal brief), these items of evidence became admissible as an exception to the hearsay rule under Sections 17(1) and 21 of the Evidence Ordinance.

The effect then of the deed **P11** is that its assertion can be relied upon for the truth thereof –namely Horathala was Nandawathie's father. There are other items of evidence that strengthen the argument based on admissions. Karunawathie admitted that the deed was prepared by the notary in accordance with the instructions given by them. The lawyer read out the contents and explained them to her before she signed the deed. Her husband signed as a witness. In the circumstances one is confronted with an admission within the ambit of Section 17(1) of the Evidence Ordinance.

The trial Judge can use this statement to rely upon its truth namely Nandawathie is also a daughter of Horathala, because Section 21 renders it provable against the maker of the statement-Karunawathie.

Sections 17(1) and 21 of the Evidence Ordinance which go hand in hand lay down the definition of an admission and its relevancy and admissibility as follows:-

> *"An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by* ***any of the persons, and under the circumstance hereinafter mentioned.****"-Section 17 (1).*
>
> *Admissions are relevant and may be proved against the person who makes them, or his representative in interest.....Section 21*

It is not every admission that is made relevant and admissible. Section 17(1) is prescriptive of certain category of persons who should make the admissions in defined circumstances. Admissions may be made in the first instance by a party himself, or it may be an admission falling into one of the categories of vicarious admissions. Sections 18 and 19 of the Evidence Ordinance indicate the persons by whom an admission must be made.

The relevant provision is Section 18 which lays down five classes of persons who can make admissions, namely;

(1) A party to the proceeding,

(2) An authorized agent such party

(3) Party suing or sued in representative character (*while holding such character*)

(4) **Persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding (*during the continuance of such interest*).**

(5) Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit (*during the continuance of such interest*).

In my view the admission made by Karunawathie (the 1st Defendant) in the deed of mortgage would amount to an admission she made against her proprietary interest in the property in terms of Section 18(3)(a) of the Evidence Ordinance.

Statements made by (i) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested; or (ii) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions if they are made during the continuance of the interest of the persons making the statements.

When several persons are jointly interested in the subject-matter of a suit, an admission of any one of these persons is receivable not only against himself but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. The three essential characteristics under this subsection are the joint proprietary or pecuniary interest, the making of the statement, in the character of a person so interested, and during the continuance of the interest. The requirement of the identity in the legal interest is of fundamental importance-***Amber Ali v. Lutfe Ali*** (1918) A.I.R Cal 971; ***Sohan Lal v. Gulab Chand*** A.I.R 1966 Raj 229.

Thus the pith and substance of my reasoning is as follows: Admissions under Section 17 go under the rubric of informal admissions as they are made outside Court but tendered in evidence later in the trial. In this case the mortgage bond **P11** made outside Court but tendered in evidence against the 1st Defendant contains an admission on the part of the 1st Defendant along with Nandawathie that Nandawathie is Horathala's daughter. It is a

relevant admission against Karunawathie-the maker of that admission under Section 18(3)(a) of the Evidence Ordinance. Admissions, oral or documentary must admit to a fact in issue or relevant fact. Here the fact in issue was the paternity of Horathala over Nandawathie namely was it Horathala who fathered her? Certainly the admission in the deed by the 1st Defendant-Karunawathie is relevant to the fact in issue. It may be proved against her under Section 21.

It is made relevant under Section 18(3)(a) because whoever makes an admission against her proprietary interest must be uttering the truth. Had Karunawathie had been the sole owner of this property, she could have mortgaged the entire property on her own. But instead she joined Nandawathie acknowledging her as having an interest in the land tracing it to paternal interest from Horathala. This shows that Karunawathie was holding Nandawathie out as Horathala's daughter.

Effect of an Admission-Section 31 of the Evidence Ordinance

The effect of an admission is clearly set out in Section 31 of the Evidence Ordinance. Section 31 is to the effect that admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under Sections 115-117. In other words the person, who made the admission, may show that what she said was not true or that she made a mistake-see ***Amritlal Narsilal v. Sadashive*** A.I.R (1944) Bom.233; ***Mst. Munia v. Manohar Lal*** (1941) 194 I.C. 161; ***Ram Jiwan v. Hanuman Prasad*** A.I.R (1940) Oudh.409.

The maker of the statement is at liberty to contradict it. Indian cases have gone to the extent of holding that an admission, unless explained away, may shift the onus of proof-see ***Rahmat Ali Sha v. Harbhajan Singh*** 223 I.C.505; ***Bhag Singh v. Jai Singh*** (1929) 116 I.C.903; 10 Lah.694; ***Narayanan Bhagwant Rao v. Gopal*** A.I.R (1960) S.C.100. In a domestic context, Gratiaen, J. held:

> *"An admission does not create a conclusive estoppel; it merely suggests an inference which a court of trial may properly take into account and the weight to be attached to it in any*

particular case depends on many considerations."-see ***Rev. Moragolle Sumangala v. Rev. Kiribamune Piyadassi*** *(1955) 56 N.L.R 322 at 326.*

So it was open to Karunawathie to contradict this evidence but instead she concurred in full force with the terms of the mortgage bond. Admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong. But they may raise an estoppel and shift the burden of proof on to the person making them or his representative in interest. Unless shown or explained to be wrong they are an efficacious proof of the facts admitted-see ***Avadh Kishore v. Ram Gopal*** A.I.R 1979 SC 861; see also ***United India Insurance Co. Ltd., v. Samir Chandra Chaudhary*** (2005) 5 SCC 784, 787 (para 11).

In my view an admission is the best evidence that an opposite party can rely on and though not conclusive is decisive of the matter unless successfully withdrawn or proved erroneous.

So if the admission in the mortgage bond is not rebutted by cogent evidence which has in any way not been led, Section 21 renders the admission provable against Karunawathie.

An admission contained in a registered deed of adoption formerly executed by a party with an endorsement showing that the executant was fully aware of the contents of the deed and was executed with due deliberation and full understanding is conclusive unless it is explained satisfactorily. The admission of an adoption in a deed amounts to an admission both of the fact and of the validity of the adoption and shifts the burden of proving the contrary to the party which made that admission-see ***Bhola v. Man Matin*** A.I.R 1965 All 258; ***Sooratha v. Kanaka*** A.I.R 1920 Mad 648; ***Govinda v. Chimabai*** A.I.R 1968 Mys 309 .

I must state in passing that an admission which remains uncontradicted may also operate as an estoppel-see Section 31 of the Evidence Ordinance. Let me make a few observations on estoppel before I part with this judgment.

Estoppel-Rule of Evidence

An estoppel, *i.e.*, a representation acted on by the other party, by creating a substantive right, does oblige the estopped party to make good his representation, in other words, it is conclusive. The maker of the admission would be precluded from going back on it based on the principle of estoppel if the person to whom it is made has acted on its faith-see ***Narayan Neelakutti v. Krishnan Veki*** A.I.R 1955 TC 199; ***Bhattacharjee v. Sentinel Assurance Co. Ltd.,*** A.I.R 1955 Cal 594. Does this admission of Karunawathie operate an estoppel? For that argument to be sustained, it must be shown that Nandawathie must have acted on the admission of Karunawathie to her detriment. I find evidence to the effect -see for instance the partition plan marked as **P12** where the subject-matter was partitioned into two lots with the northern portion going to the 1st Defendant and Nandawathie being allotted the southern part. How else could this have occurred if Nandawathie was not a daughter? Is this not an affirmation of the admission? Has she not acted to her detriment relying on the long held admission?

If one were to apply estoppel here, it would not be defence as it is the Plaintiff who would be seeking to raise it by way of a rule of evidence, because it arises on evidence in the case. Estoppel by representation would prevent the maker of a representation from adducing evidence to contradict the state of affairs as previously represented and adopted by the parties. Noteworthy is then the distinction between an admission and estoppel by representation. An admission is not conclusive and it can be shown to be false. If it remains uncontroverted, it is provable against the maker under Section 21 of the Evidence Ordinance. This is the view I have taken of the admission. An admission becomes conclusive when it is acted upon. When the representee acts on the admission made by the representor, the admission would then become an estoppel.

Estoppel by representation or Estoppel in pais

But it is arguable that there could be an estoppel by representation on the facts that emerged in the trial. This Court raised it in the course of argument but neither counsel fully addressed Court on this matter and the written submission filed refers to it as a

defence. It may be or may not be so on the facts of each case. In this case it would be the Plaintiff, if at all, to whom it is available and then it cannot amount to a defence. Rather, it would be a rule of evidence as they say, since estoppel by representation or estoppel in pais arises by evidence. Once the admission crystallizes into an estoppel by representation, there is evidence that the party who raises estoppel has acted on the representation to her detriment. Then the representor would be precluded from adducing evidence to contradict the state of affairs as previously represented and adopted by the parties-see ***Pickard v. Sears*** (1837) 6 Ad & El 469 at 472; 112 ER 179 at 180-1 per Denman C.J; also see how this principle has been articulated in the celebrated case on cheques ***Greenwood v. Martins Bank Ltd.,*** (1932) AC 51 at 59 per Lord Tomlin; ***Hopgood v. Brown*** (1955) 1 WLR 213 at 223; (1955) 1 All ER 550 at 559 per Evershed MR; ***National Westminster Plc v. Somer International*** (UK) Ltd., (2002) QB 1286 at 1302; (2001) EWCA Civ 970 at (36) per Potter LJ. Estoppel by representation is concerned with maintaining a particular state of affairs according to which the pre-existing rights and obligations between the parties will be determined.

As explained by Coke, "Estoppel is called as estoppel or conclusion, because a man's owne act or acceptance stoppeth or closeth his mouth to allege or plead the truth"-see Coke, *The First Part of the Institutes of the Laws of England or, A Commentary Upon Littleton*, 18th ed, corrected, 1823: reprinted by Law Book Exchange Ltd., New Jersey, 1999, vol 2, pp 352a-352b. See also Ben McFarlane, "The Limits to Estoppels" (2013) 7 Journal of Equity 250 at 253-4; Ben McFarlane, "Understanding Equitable Estoppel: From Metaphors to Better Laws" (2013) 66 CLP 267 at 272. Arguments were not addressed to me on estoppel which is codified for us in Section 115 of the Evidence Ordinance though the Court raised it with counsel. Estoppel can arise by evidence and it can be raised by a Plaintiff vis-à-vis the conduct of the Defendant. The Court raised it because the parties informally partitioned the land by **P12** after they had executed the mortgage bond **P11**. To that extent there was a reliance placed by Nandawathie on the admission of Karunawathie.

As I said previously this case can be disposed of on the relevant evidence that has been led in the trial without reference to estoppel by representation and it is on the unimpeached admission and opinion evidence by conduct that I proceed to determine the issue in the case.

If what Karunawathie (the 1st Defendant) represented in the deed is false now and she takes up a diametrically diverse position that Nandawathie is not an offshoot of Horathala, she has then intentionally misled Nandawathie into agreeing to guarantee a loan. The mortgage bond was a security for the loan given to them and if she was the sole intestate heir of Horathala, why did not she execute the mortgage bond herself? What is the import of stating in the mortgage bond that both of them (Nandawathie and Karunawathie) are entitled to the property by paternal inheritance?

It is preposterous to allow the 1st Defendant to renege on her earlier assertion in the mortgage bond. Other than a mere *ipse dixit* in the witness box that Nandawathie was not Horathala's daughter, there is no cogent evidence that inspires confidence in the evidence of Karunawathie.

As I said, I need not go so far as estoppel to determine the status of Nandawathie. I would rely on other items of evidence falling within Section 50 of the Evidence Ordinance and provisions relating to admissions to conclude that Nandawathie was a daughter of Horathala.

I find that no rebutting evidence has been led to contradict the mortgage bond or the assertion in the deed. In the circumstances I take the view that the relevant evidence pertaining to the paternity of Horathala over Nandawathie has not been rebutted nor has it been whittled down. Thus I conclude that the Plaintiff has proved her case on a balance of probabilities that Nandawathie-her predecessor in title was a daughter of Horathala. But the learned Additional District Judge of Kandy has not considered the import of some of the aforesaid relevant evidence and dismissed the plaint of the Plaintiff who instituted this action to partition the subject-matter which she had alleged belonged to her and Karunawathie.

I proceed to set aside the judgment of the learned Additional District Judge dated 04.04.1997 and allow the appeal of the Plaintiff-Appellant. Since I hold that Nandawathie is a daughter of Horathala and the Plaintiff and the 1st Defendant co-own the property, I direct the learned District Judge of Kandy to conduct a trial to ascertain their shares in the corpus and proceed to partition the property now that I have determined that both are children of Horathala. The partition action can proceed on the same pleadings that stand on the record with due changes necessary to bring in the new parties if there has been any change in status.

JUDGE OF THE COURT OF APPEAL