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Re Intestacy of UKKU BANDA, deceased.

SIYATU BANDA, Petitioner.

ANAGUHAMY, Opposing Petitioner.

D. C., Kurunegala, 637.

Kandyan Law—Dissolution of marriage, how constituted—Ordinance No. 3 of 1870, s. 23—Claim of widow to administer her deceased husband's estate—Civil Procedure Code, s. 523.

A Kandyan marriage cannot be dissolved except by an order of the Provincial Registrar duly made under the Ordinance No. 3 of 1870 and entered in the Register of Dissolution.

Section 523 of the Civil Procedure Code, which enacts that, in a case of conflict of claims for grant of administration where there is intestacy, "the claim of the widow or widower shall be preferred to all others," is not to be read with the qualification that they are to be preferred only where another claimant who would make a better administrator cannot be found. Nor does that section mean that in every case they are to be sole administrators, for if it is desirable in the interest of the estate, it is open to the District Court to associate some other person with them as joint administrators.

THIS was a contest for letters of administration in respect of the estate of one Ukku Banda Korala, a Kandyan, who died intestate on the 5th day of December, 1899, at Dambadeniya, within the jurisdiction of the District Court of Kurunegala, leaving property therein to the value of Rs. 23,000

The brother of the deceased, averring that the only next of kin and heirs-at-law of the said intestate were himself, his three sisters, his mother and her associated husband (who was one of the fathers of the deceased intestate), prayed for letters of administration.

Anaguhamy opposed his application on the ground that she was the lawful widow of the deceased, and as such was sole heir-at-law to all the movable property left by the intestate and so much of the immovable property as was acquired by him.

The following issues were agreed to by the parties:—

"1. Is the opposing petitioner Anaguhamy the lawful widow of the deceased intestate?

2. Is she entitled to sole administration of his estate?

3. Is she the sole heiress-at-law to all the movable property and the acquired immovable property of the intestate, or what is she entitled to?

4. Is the petitioner Siyatu Banda entitled to administration?"

The District Judge, after hearing evidence and arguments for both sides, found the issues in favour of the opposing petitioner.

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The following authorities were cited and considered in the Court below as bearing on the second issue: Civil Procedure Code, section 523; *3 N. L. R. 173; Perera's Armour, pp. 16 and 21; 8 S. C. C. 26.*

As bearing on the first part of the third issue: *Armour, 16; 3 Lorenz, 78; Marshall's Judgments, 346; Sawer, 23,* reported in *Perera's Selection of Cases, 120.*

As bearing on the second part of the third issue: *Perera's Armour, p. 18; 2 S. C. C. 176; Ram. 1863-1868, 190; 2 S. C. R. 142; 3 ibid, 167.*

The District Judge's order as to administration was as follows:—

" The relative beneficiary interests of the parties in the intestate's estate cannot be estimated with accuracy till the inventory has been filed and passed by the Court, but from the schedule it would appear that the value of the *paraveni* lands is about Rs. 8,000, that of the acquired lands about Rs. 9,000, and that of the movable property about Rs. 5,000.

" The *paraveni* lands would be taken possession of without delay by the brothers and *bina* married sisters of the intestate and the movable property by the widow, leaving a preponderance of interest ultimately in favour of the next of kin by reason of the acquired lands to them. Sufficient reason has not however, I think, been shown for depriving the widow of her preferential claim to administration, and I order that administration be granted to her if she can furnish sufficient security.

" As to costs, I think that the fairest order will be that the parties bear their own costs; there are a number of legal points at which the parties are at issue, and on the chief one, the right of a childless widow not being an *ewessaye*, the Kandyan Law is altogether silent, or at least makes no special provision, and the case is likely to go in appeal in any case."

The petitioner appealed.

Wendt, Acting A.-G. (with him *Bawa*), for appellant.—It was proved in the Court below that the intestate and the opposing petitioner agreed to dissolve their marriage. Being Kandyans, it was open to them to dissolve it by mutual consent, independently of section 23 of the Kandyan Marriage Ordinance of 1870. After such agreement was arrived at, the parties found themselves unable to appear before the registrar, but lived separately ever afterwards. [BONSER, C.J.—They do not appear to have given effect to their desire for divorce. Living separately does not mean a divorce.] But the husband took another woman for his wife. This second marriage was not registered, it is true, but he seems to have waited till a child was born of the new wife.

Granting, for the sake of argument, that the opposing petitioner's marriage was not dissolved according to law, her right to administer her husband's estate is not absolute. The District Judge has always a discretion in this matter. (*Rolintina's Case, Ram. 1876, p. 311*). It would be wise in the present instance to at least appoint the appellant as co-administrator.

Sampayo (with him *E. W. Jayawardena*), for respondent.—Joint administration will cause much inconvenience. By section 523 of the Civil Procedure Code the widow's right to administer her husband's estate is practically absolute.

BONSER, C.J.—

In this case the question arises as to the person to whom administration of the estate of a deceased Kandyan is to be entrusted. The contest is between the brother of the deceased and a lady who says she is his widow. The brother denies that she is the intestate's widow and says that, although she had been his wife, the marriage was dissolved some nine or ten years before the intestate's death.

It would appear that the intestate and his wife agreed to apply for a divorce, and on the 21st July, 1890, they presented a joint petition to the Provincial Registrar stating that they thought it desirable, having regard to family circumstances, that the marriage should be dissolved, and praying him to take the matter into his consideration and to grant them a dissolution of their marriage on the ground of mutual consent. Upon that the Provincial Registrar issued a summons to the parties to appear before him, for it was his duty before granting a dissolution to satisfy himself that it was a proper case for dissolution. In the first place, he would have to satisfy himself that there was a legal marriage that could be dissolved, and then that the parties were mutually consenting to the dissolution of that marriage. He therefore made an order summoning the parties to appear before him on the 5th September, 1890. Both parties failed to appear on that day, but apparently the reason was that the husband was detained by his official duties as Korala. The Provincial Registrar therefore fixed another date, the 17th October, 1890, on which the parties were to appear before him. On that day neither party appeared, and an order was made striking the case off the roll. Nothing further was done in the matter; but it is alleged that the parties lived separately from that date until the death of the intestate, and it was urged that this was, according to the Kandyan Law, sufficient proof of the dissolution of their marriage, especially as there was evidence that another woman was

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taken to the intestate's house and lived with him as his wife. The District Judge, however, was of opinion that it was not proved that the wife and husband did live apart during the whole of that period, or that this woman was taken into the intestate's house as his *de facto* wife.

But even were it proved that the parties had agreed to live apart, and that the husband had taken unto himself another woman to act as his wife, in my opinion that would not constitute a dissolution of the marriage. The case is governed by Ordinance No. 3 of 1870, which by section 23 provides that certain grounds enumerated therein are to be grounds for granting a dissolution of marriage. The Ordinance provides a procedure whereby the Provincial Registrar may dissolve a marriage on the application of either or both parties, and it enacts that if he is satisfied of good cause existing for the dissolution of marriage, he shall order such dissolution and make an entry thereof in a book to be kept by him for that purpose, and it goes on to declare that the marriage shall from that time be held to be dissolved. From that language it is clear to me that there can be no dissolution except by the order of the Provincial Registrar, and that such order only takes effect upon an entry in the Register of Dissolutions being made. In this case it is admitted that there never was any such entry. The parties made an application for a dissolution of their marriage, but they never appeared in support of that application, and the application fell through. For what reason they failed to appear is not clear, but it may be that for some reason they changed their minds. It seems to me to be clear that this lady is the lawful widow of the intestate.

Then, the next question which was raised is, Was she the person entitled to administer the estate, or was the brother of the intestate not entitled to do so in preference? It was argued that the widow had no preference. Now, section 523 of the Civil Procedure Code enacts that, in case of a conflict of claims for grant of administration where there is intestacy, the claim of the widow or widower shall be preferred to all others, but it was argued that that enactment must be read with a qualification, and that it means she is to be preferred, unless the judge thinks that some other claimant would make a better administrator. It seems to me that that is quite inconsistent with the plain language of the section, and that the cases referred to, which were decided before the passing of the Civil Procedure Code, have no application now. The Code, however, does not say that she shall be entitled to sole administration, but that her claim is to be preferred. It does not lay down that the Court must in every case appoint a sole

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administrator, and it does not repeal the preceding practice which is laid down by Chief Justice Marshall in his book. It seems to me that it is quite open to the Court, if it thinks it desirable in the interest of the estate, to associate some other person as a joint administrator.

Whether it is desirable to do so in the present case I express no opinion. I leave the case open to the District Judge, who is best able to decide, and if he thinks it desirable to appoint an administrator to act with the widow, he is at liberty to do so.

Then, there was a cross appeal. Although the District Judge found the issue as to the widow's right to administer in her favour, he ordered both parties to pay their own costs. The widow has appealed against that order as to costs, and she says that as she has succeeded in her contention she ought to be allowed her costs, and in my opinion she ought to be allowed her costs, so far as they have been occasioned by the first respondent disputing her status as widow and her right to administer.

There were several other issues stated by the parties; as to these the parties should bear their own costs.

The Secretary of the Court will find no difficulty in ascertaining what costs were occasioned by this ill-founded contention by the brother that this lady was not entitled to administration.

BROWNE, A.J., agreed.