1903.
February 26.

APPUHAMY *v.* HUDU BANDA.

C. R., Badulla, 24,135.

Kandyan Law—Diga *married husband's interest in his deceased wife's estate—Partition Ordinance, No. 10 of 1863, s. 2—Land belonging to plaintiff in common with others—Meaning of "belong to him"—Right to maintain partition suit.*

The property of a Kandyan *diga* wife dying intestate, leaving children by two beds, descends *per stirpes* to such children.

Failing children, her ancestral property goes over to the next nearest line which issues from the common ancestor, subject to a life interest in favour of her *diga* married widower.

The *diga* married widower as owner of a life interest is not entitled to a partition suit.

THE plaintiff prayed for a partition decree in respect of certain lands, alleging that his wife Hudu Menika received them as a gift from her father and died intestate, leaving three

children born of the plaintiff, and the defendant born of a previous husband, as her heirs; that the three children died unmarried and intestate; that their shares, namely, an undivided three-fourths, devolved on their father by the right called *daru-urume;* and that the defendant was entitled to the remaining one-fourth. 1903. *February 26.*

It was admitted that Hudu Menika married the plaintiff in *diga;* that she returned to her father's house with the plaintiff fifteen years before her death; and that the plaintiff sold all his lands and resided with his wife in her father's house.

The Commissioner (Mr. Bartlett) decreed a partition between the plaintiff and defendant in equal shares.

The defendant appealed. The case was argued on 19th February, 1903.

Bawa, for defendant, appellant.

Samarawickrama, for plaintiff, respondent.

Cur. adv. vult.

26th February, 1903. MIDDLETON, J.—

In this case one Bandirala, by deed on 17th June, 1884, gave certain property to Hudu Menika. Hudu Menika married first one Kirimitta, and had issue the defendant. On the death of Kirimitta, Hudu Menika married in *diga* one Appuhamy, and had issue, three children: Punchirala, Kalu Banda, and Hudu Konna. Hudu Menika died leaving her surviving Appuhamy, her husband, the defendant, and the three children by Appuhamy, who died respectively five, five, and eight years previous to this action.

It is admitted that when Hudu Menika died her heirs were her four children by her two marriages. The question here is whether Appuhamy, the father of the three children by the second bed, has a right of inheritance in their estate.

It is also, I believe, admitted that if the marriage had been in *binna* the plaintiff would have had no rights. (*Sawer's Digest, p. 14*).

The plaintiff Appuhamy brought this action for the partition of the landed property of his three deceased children and defendant on the footing that he was entitled to three-fourths and the defendant to one-fourth.

The first question is, (1) On whom did Hudu Menika's landed property devolve? (2) On whom does that portion of it falling to the children of the second bed devolve?

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According to the decision reported in *9 S. C. C. 45*, following D. C., Badulla, No. 14,512, reported in *2 Lorenz, p. 27*, Hudu Menika's property would descend *per stirpes* to her children of the two beds.

The half of her property would therefore devolve on the defendant, and the other half on the plaintiff's three children by her.

This being so, the plaintiff would not in any case be entitled through his children to three-fourths as he claims, but at the most to half. What right then has plaintiff to this half ?

Now, it seems to be the policy of the Kandyan Law that ancestral property, when the line of descent is broken, goes over to the next nearest line which issues from the common ancestor (*1 S. C. C. 3*). There is also, I believe, a recognized difference in the social status of a *binna* husband from that held by a *diga* husband.

According to *2 S. C. C., p. 176-7*, a *diga* husband inherits his issueless wife's acquired property. In D. C., Kandy 338 (*Modder, p. 45*) a *binna* widower has been held to have no right to or interest in his issueless wife's property, whether ancestral or acquired. See also the case decided by the Collective Court, reported in *9 S. C. C., p. 34*, which Mr. Justice Lawrie subsequently dissented from (*Modder, p. 166*).

There is therefore a marked inferiority shown in the inheriting status of *binna* to *diga* husbands in respect of an issueless wife's landed property.

Bearing in mind Sawer's dictum at page 14, it is not difficult to conclude that *Armour* at p. 76, section 15, paragraph 4, is speaking of a *diga* marriage.

Also that *Sawer* at p. 9 is referring to a *diga* marriage when he says: " that a wife dying intestate leaving a son who inherits her property, and that son dying without issue, the father has only a life interest in the property which the son derived or inherited from or through his mother; at his father's death such property goes to the son's uterine brothers or sisters, if he has any, and failing these to the son's nearest heirs or his mother's family. "

All the original authorities I have consulted on Kandyan Law seem to be indifferent to a regular discriminative and accurate use of words, which renders their meaning often somewhat obscure, but, so far as I am able to form an opinion, I hold that the plaintiff, the *diga* married widower, here succeeds to a life-interest in the estate of his three children.

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The next question is whether the plaintiff, as owner of a life interest, is entitled to demand a partition under Ordinance No. 10 of 1863. In my opinion he is not, as the land does not "belong to him in common with other owners" according to section 2.

All plaintiff has is a life interest in one moiety, and I do not think the Entail and Settlement Ordinance, No. 11 of 1876, could be applied on the ground of analogy. That Ordinance is directed to a specific object which does not include the case of an ordinary life interest. I think, therefore, the appeal must be allowed, and the judgment of the Commissioner set aside, and the action dismissed with costs.