

DINGA v. HAPUWA.

C. R., Kurunegala, 8,908.

1902.
December 10,
and

1902.
February 9.

Kandyan Law—Inheritance—Diga married daughters.

A *diga* married daughter does not forfeit her right to inherit lands which had been acquired by her mother, or to which her mother had succeeded collaterally, or otherwise than by inheritance from her father.

THE plaintiff alleged that the land which formed the subject of dispute between him and the defendant originally belonged to one Pina by right of inheritance from his father Yakdessa; that Yakdessa had five sisters, viz., Ukku, Siriati, Tikiri, Hapu, and Dingira; that Pina died about 1892 without issue, when Hapu and Dingira and the children of Ukku, Siriati, and Tikiri, who had predeceased Pina, became entitled to the said land; that they divided the same into five shares and held each dividedly; that one of these shares was held by Ukku; that Ukku had four children, two of whom, Punchi and Hapu, were married in *diga*, one died without issue, and Dinga was the plaintiff; that Punchi and Hapu purported to sell the entire share which fell to their mother Hapu to the defendants; and that they had no right to do so because by their marriage in *diga* their rights to the land were forfeited.

The defendants contended that their rights were not forfeited, and that their conveyance to the defendants was good, in view of the fact that the plaintiff had dealt with another land in lieu of his share in the land in question.

The Commissioner gave judgment for the plaintiff.

The defendants appealed.

The case was heard in appeal on the 10th December, 1902.

Morgan de Saram, for appellants.

E. W. Jayawardene, for respondents.

Cur. adv. vult.

9th February, 1903. MIDDLETON, J.—

In this case Kiriya Davilkaraya owned a piece of land called Hittinawatte, and, dying, the land was inherited by his son Yakdessa, whose five sisters, of whom Ukku was one, for some reason not in evidence did not inherit.

Pina, the son of Yakdessa, inherited the land from him on his death, and dying without issue, a portion of the land now in dispute and marked " B " on the plan fell to the share of the heirs of Ukku, who predeceased Pina.

Ukku left two sons, Nandina and the plaintiff, and two daughters Punchi and Hapu married in *diga*. Nandina died without issue, and the plaintiff claims, and the Commissioner has awarded to him, the whole of the land " B " as against defendants, who aver title by purchase from Punchi and Hapu, who apparently sold them the whole land by notarial deed No. 12,827 on the 3rd January, 1901.

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The question in the case is whether Punchi and Hapu, by marrying in *diga*, have forfeited their rights of inheritance in the land.

I think it is clear that this land is derived from Punchi and Hapu's mother's paternal ancestors collaterally, and not directly.

In Perera's *Armour*, p. 80, § 84, it is laid down that if the mother left a daughter married in *diga* and a son, the latter will inherit the lands derived from his mother's paternal ancestors.

Sawers says (*Ondatjie's Digest*, p. 2.): " But the children born to a *diga* husband have no right of inheritance in the estate of their mother's parents. "

Armour, therefore, lets in the sons and excludes the daughters, while Sawers excludes both from inheriting lands derived from their mother's paternal ancestors.

In 123 D. C., Kandy, 11,125 (unreported), Lawrie, J., says: " A daughter by her *diga* marriage did not forfeit her right to inherit lands which had been acquired by her mother, or to which her mother had succeeded collaterally or otherwise than by inheritance from her father.

Lawrie, J., both in his judgment in 2 N. L. R. 92 and in 123 D. C., Kandy, No. 11,125, seems to hold that if the lands are not derived directly but collaterally, the forfeiture will not be applicable. It is difficult to ascertain whence this theory is derived, and although the learned Judge lays down what he considers to be good Kandyan Law in 123, D. C., Kandy, 11,125, he at the same time admits that it is not supported by any authority. Lawrie, J., was, however, a Judge of the Kandy District Court for many years, and must have had very great experience and knowledge of the Kandyan Law and customs.

Sawers' authority (*Ondatjie's Digest*, p. 2, par. 4) for saying that, upon the failure of issue of sons and daughters married in *binna*, the *diga* married daughter succeeds, but if she has previously died her father's brothers succeed before her children, but the brothers being deceased then the *diga* daughter's children succeed before the children of the father's brothers.

Armour also at page 82, says: " A woman, who was married and settled in *diga* having died intestate leaving sons and daughters

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her landed property (*sic*) will devolve to all her children in equal shares, although the daughters were married in *diga*."

Here the case is practically the same, as Ukku, who had no other brother but Yakdessa, must have married in *diga*, or she would have succeeded to the land directly from her father Kiriya Davilkaraya, and applying the principle expressed by Lawrie and Withers, J.J., in 2 N. L. R. 92, that where the written law does not expressly declare a forfeiture a daughter should not be cut off from the inheritance, I hold that the *diga* married daughters here have not forfeited their right of inheritance, and were entitled to convey to the defendants such shares as they succeeded to of the land "B." As they have conveyed the whole, the defendants' title will be only good to the extent of their interest.

I think, therefore, that the judgment of the Commissioner should be set aside in so far as it gives the plaintiff the whole land "B," and I hold that he is only entitled to $\frac{1}{4}$ from his mother Ukku plus $\frac{1}{4}$ of $\frac{1}{4}$ from his brother Nandina, the remainder only being that which Punchi and Hapu could have conveyed to the defendants. The appeal will be allowed with costs, each party to pay his own costs in the Court below.
