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*Present:* Wood Renton A.C.J. and De Sampayo A.J. 1913.

APPUHAMY *v.* TIKIRI MENIKA.

*353—D. C. Kurunegala, 4,733.*

*Kandyan law—"Bina" marriage—Right of father to succeed to property inherited by his children from their mother.*

The father is not the heir of the property of his children born in a *bina* marriage which they have acquired through their mother; the maternal uncles or next of kin on the mother's side are the heirs to such children (in the absence of the mother).

*Semble*,—The father's right to the life interest over such property depends on the fact of his having kept the child under his care and custody.

THE facts are set out in the judgment.

*E. W. Jayewardene*, for the plaintiff, appellant.—On the death of the child (Punchi Menika) the father, Bandirala, was the heir to the child. Armour says that the father is the heir. *Appuhamy v. Dingiri Menika* [1] is an authority to the contrary. But the correctness of this judgment was doubted by Lawrie J. in C. R. Kurunegala, 4,944.[2] In view of the conflict of authorities it is well that the point should be reconsidered. In any case the father is entitled to life interest. Counsel also cited *Modder 168, Sawer 9, Marshall 340, Niti Niganduwa 111, Armour 48, Austin 155.*

*A. St. V. Jayewardene* (with him *A. R. H. Canekeratne*), for the defendant, respondent.—[Their Lordships wished to hear counsel only on the right of the father to a life interest.] That point was not raised in the lower Court, and it is not open to the appellant to raise it in appeal.

*E. W. Jayewardene*, in reply.

[1] *(1889) 9 S. C. C. 34.*

[2] *S. C. Min., May 30, 1898.*

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November 27, 1913. WOOD RENTON A.C.J.—

This is an action for declaration of title. The plaintiff, the appellant, claims an undivided 1-4th share of land No. 1 and an undivided 3-16ths share of lands Nos. 2, 3, 4, and 5 described in the plaint. Land No. 1 was admittedly property acquired by a woman, Ukku Menika, before her marriage. Lands Nos. 2, 3, 4, and 5, according to the plaintiff's contention, she inherited from her father, Mudianse. Ukku Menika was married to Bandirala, the plaintiff's vendor, and died leaving one child, Punchi Menika, who died without issue. The plaintiff alleges that Ukku Menika's marriage was in *bina*, and that Bandirala is the heir of Punchi Menika, to the exclusion of her maternal relatives, the defendants. The defendants, on the other hand, allege that Ukku Menika was married out in *diga;* that she thereby forfeited her rights to the 2nd, 3rd, 4th, and 5th lands; and that, as regards the 1st land, which devolved on her child, Punchi Menika, Bandirala was not the heir-at-law of the latter, but that it passed to the defendants as her maternal relatives. The learned District Judge held on the evidence, and his finding on this point was not challenged at the argument of the appeal, that Ukku Menika was married in *bina*, and, on the law, that Bandirala, as a *bina* husband, was not the heir of his daughter Punchi Menika. He therefore dismissed the plaintiff's action with costs. The plaintiff appeals. The decision of the learned District Judge on the point of law, with which alone we are here concerned, is in accordance with that of the Full Court in *Appuhamy v. Dingiri Menika* [1] and with the *obiter dictum* of Wendt J. in *Dingiri Menika v. Appuhamy*,[2] that it " had often been decided " that the father was not the heir of his child born in a *bina* marriage in respect of property inherited from the mother. Those authorities are binding upon us, and they are founded upon the principle enunciated by Sir John Phear C.J. in *Ranghami v. Pinhami*,[3] that under Kandyan law ancestral property, when the direct line of descent is broken, goes over to the next nearest line issuing from the common ancestral rooftree. Mr. E. W. Jayewardene, the appellant's counsel, pressed us with the following passage from *Pereira's Cases* (*page 77*):—

> If the child was the issue of a *bina* marriage, and if, after the death of that child's mother, the father had deserted the child and left it entirely to the care of the mother's family, in that case the father will have no right to the reversion of any property that belonged to the child ; that property will, therefore, at the child's death, devolve to his or her nearest of kin on the mother's side, in preference to the father, and in preference to the said child's paternal half-brother and half-sister, it being premised that the father was not also an *ewassa* cousin of the said child's mother.

[1] (*1889*) *9 S. C. C. 34.*
[2] (*1907*) *10 N. L. R. 114.*
[3] (*1876*) *1 S. C. C. 3.*

> But if the child, albeit issue of a *bina* connection, had remained under the father's care after the mother's demise, in that case the father will be entitled to a reversion of the child's estate in preference to the child's distant maternal relations.....

I am by no means satisfied, however, that this passage has any application to a case like the present. It seems to me to contemplate a case in which after the death of a mother married in *bina* the father had done something for the child outside and beyond the scope of his ordinary parental duty as a *bina* husband. Mr. E. W. Jayewardene's last contention was that, in any case, under the Kandyan law, the father was entitled to a life interest in the child's property. That point was not taken at the trial. It is not mentioned in the petition of appeal, and I entirely agree with what my brother De Sampayo has said in regard to it.

DE SAMPAYO A.J.—

This case raises a question of Kandyan law under the following circumstances. One Mudianse, who was admittedly the owner of certain lands, died leaving his wife (the first defendant), his son (the second defendant), his daughter (the third defendant), and another daughter, Ukku Menika, now deceased. Ukku Menika was married to one Bandirala in *bina*, and died leaving one child, Punchi Menika, who succeeded by inheritance to her mother's share of the lands. Punchi Menika herself died, and her father, Bandirala, claiming to be his daughter Punchi Menika's heir, sold to the plaintiff the said share of land. The question thus is whether the said share went to Punchi Menika's father, Bandirala, or to her maternal relatives, the defendants. The Kandyan law appears to draw a distinction, in regard to succession by a father to his children's property, between children born of a *bina* marriage and those born of a *diga* marriage, and between property acquired through the mother and property otherwise acquired. The authority of *Sawer* (*page 14*) is distinct, and is to the effect that " the father is not the heir of the property of his children born in a *bina* marriage which they have acquired through their mother: the maternal uncles or next of kin on the mother's side are the heirs to such children. " This is in harmony with the general principle, affirmed in *Ranghami v. Pinhami*,[1] that in default of descendants, ancestral property goes over to the nearest line issuing from the common ancestral rooftree. On the other hand, *Armour* (*page 76*) says that " the father is entitled to inherit the land and other property, which his deceased infant had inherited from the mother, in preference to the relations of the person from whom that property had been derived to the said child's mother. " This passage in Armour is, however, reconcilable with Sawer, if we assume that Armour was referring to

[1] *(1876) 1 S. C. C. 3.*

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children born of a *diga* marriage. This is the explanation suggested by Mr. Modder in his book on *Kandyan Law 167*, and I am inclined to think that it is the right explanation. The current of decisions is in favour of the rule laid down by Sawer. The earliest case is the unreported case of 1866 (D. C. Kurunegala, No. 14,628), a note of which is given in Modder's *Kandyan Law 165*. In *Appuhamy v. Dingiri Menika* [1] all the authorities were examined by the Full Court, and it was unanimously held that the lands of a *bina* daughter inherited from her mother devolved on her maternal relatives in preference to the father. It is true that Lawrie J. in C. R. Kurunegala, No. 4,944,[2] doubted the correctness of that decision, but he considered himself bound by it and followed it. In the later case of *Dingiri Menika v. Appuhamy* [3] Wendt J., who was himself no mean authority on such a question, reviewed the principal texts in the Kandyan law and affirmed the rights of the maternal relatives as against the father in the case of a *bina* child. In this state of matters it is not right, even if it were possible, for us to accede to the suggestion of counsel for the plaintiff that we should reconsider the Full Court decision in *Appuhamy v. Dingiri Menika, supra*, which has been generally accepted as a correct exposition of the law and is binding upon us.

Counsel for the plaintiff next invited us to hold that Bandirala was entitled at least to a life interest in the property, and on this point he relied on *Niti Niganduwa 114 and Sawer 8 and 9* and *Armour 76 and 77*. These passages in themselves are not very clear, and do not seem to be reconcilable with the principles elsewhere enunciated. It appears, however, from the *Niti Niganduwa* and *Armour* that the father's right, if any, depends on the fact of his having kept the child under his care and custody. In this case the claim of a life interest was not made in the Court below. The necessary facts were not brought out by means of an issue stated between the parties for that purpose, nor is there any finding by the Judge on that point. Moreover, Wendt J. in *Dingiri Menika v. Appuhamy, supra*, considered that the father's life interest arises only in the case of a child born of a *diga* marriage, and I venture to think that that is so. It seems to me also that another condition is that the child should have been an infant or minor at his or her death. In this case whether Bandirala's daughter Punchi Menika was a minor or not does not appear. In these circumstances, I do not think that we should disturb the judgment of the District Judge on the claim actually put before him by the plaintiff.

In my opinion the appeal on the whole fails, and should be dismissed with costs.

*Appeal dismissed.*

[1] *(1889) 9 S.C. C. 34.*

[2] *S. C. Min., May 30, 1898.*

[3] *(1907) 10 N. L. R. 114.*