

1917.

Present: Ennis J. and De Sampayo J.

TIKIRI MENIKA v. MENIKA.

478—D. C. Kegalla, 4,307.

*Kandyan law—Kandyan dying leaving a widow and children by first wife
—No paraveni property—Is widow entitled to a life interest over
all the acquired property of deceased ?*

Where the entire estate of a deceased consists of acquired property only, and there are children by a former marriage, the widow's life interest extends only to a part of such acquired property.

A PPEAL from a judgment of the District Judge, Kegalla (H. E. Beven, Esq.). The facts are set out in the judgment of Ennis J.

Cooray, for appellant.

J. W. de Silva, for respondent.

Cur. adv. vult.

February 7, 1917. ENNIS J.—

This is a partition action. The lands to be partitioned belonged to one Mudianse, a Kandyan, who sold certain shares to the plaintiff. Mudianse married twice, and by his first wife, whom he divorced, he had three children, the second, third, and fourth defendants, respondents (represented in the action by their guardian *ad litem*, the fifth respondent). The second wife and widow is the first defendant, respondent.

The contest is between the first defendant, respondent, and the children of the first bed. It is admitted that Mudianse died possessed of acquired property only; he had no *paraveni* property. The learned Judge has awarded the first respondent a life interest in half only of Mudianse's shares in the lands. She claims a life interest in the whole, and appeals.

The appellant relied principally upon a passage in *Armour 18*, which is to the effect that, when a deceased husband leaves both ancestral property and acquired property, the widow is entitled to a life interest in the entirety of the acquired property.

It is clear that this passage is not directly applicable to the present case, as there is no ancestral property; and no definite statement of Kandyan law has been cited to us in support of the appellant's contention that, where the estate consists of acquired property only, the childless widow is entitled during her life to possess the whole, to the exclusion of the children by a previous

marriage. If one seeks for elementary principles in the inchoate Kandyan law of intestate succession, it would seem that the children of the intestate inherited the entire property, and that the widow obtained only a share of the usufruct "suitable" for her maintenance. Where both ancestral and acquired property were left, the usufruct of the acquired property was ordinarily considered a suitable portion for the widow. Where there was no acquired property, suitable provision had to be made for the widow from the *paraveni* property. It seems to me that in the absence of any express law to the contrary, it must be assumed that the Kandyan law did not contemplate leaving the children without any provision for their maintenance during the life of a childless widow; and just as "suitable" provision had to be made for the maintenance of a childless widow from the *paraveni* property when there was no acquired property, so suitable provision for the maintenance of the children should be made from the acquired property when acquired property only is left. The allowance made by the learned Judge does not seem to be inequitable, and in the circumstances I would dismiss the appeal, with costs.

DE SAMPAYO J.—

The question in this case is whether the appellant, who is the childless widow of Mudianse, is entitled as against the respondents, who are Mudianse's children by his first wife, to a life interest in the whole of his acquired property as contended on behalf of the appellant, or only in part of that property as decided by the District Judge. I am inclined to think that the life interest of a widow, especially a childless widow, does not extend to the entirety of such property where there are children of the first bed. On this point *Marshall's Judgments 326* states as follows: "A widow of a husband dying childless has the same life interest, and that only in the husband's landed property, whether hereditary or acquired, as the widow of a husband having issue, but if the widow be a second wife with issue, and there be issue by a former wife, the widow or widows must depend on the shares of their children, and if the share of one of the widows be insufficient for her and their maintenance, the widow shall have a temporary allowance out of the other share." This passage is founded on *Sawers' Digest 1*, and *Armour 24* is to the same effect. The rule here stated appears to require modification as regards hereditary or *paraveni* property, inasmuch as it is now well settled that the widow has no life interest in such property, but only a right of maintenance out of it. That modification does not favour the widow, but restricts her rights still more. But as regards acquired property, I do not find any comment in the books on Kandyan law showing that no distinction arises from the fact of there being children of a former marriage. It was suggested at the argument that the rule as stated by Marshall

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had reference only to *paraveni* property. But that cannot be its meaning, because both *paraveni* and acquired property are mentioned. We must, however, take note of certain judicial decisions bearing on this subject. In *Kalu v. Lami*¹ it was decided that a Kandyan widow had the right to retain possession during her lifetime of the acquired property of her husband, whether such property be acquired before or after the marriage. That decision, however, does not directly touch the present question, because in that case it does not appear that the deceased had married twice and had children by the first wife. But *Joshi Nona v. Babun Nona*² is a better authority. The facts of that case are similar to those of the present case, with the difference that the deceased had left children of the second bed also; and upon a review of all the previous decisions, it was held that the widow was entitled to a life interest in all the acquired property. There too, however, the point with which the Court was immediately concerned was an argument that the widow's life interest should attach only to the property acquired during the subsistence of her marriage, and the question whether her rights were cut down by the existence of children by a previous marriage was not considered or decided. In this state of the law the point is practically *res integra*, and I think it is open for us to follow Sawers, Armour, and Marshall; and say that there is a distinction as to the extent of the widow's life interest where there are children of the deceased by a previous marriage, and that the life interest in such a case is restricted to a part only of the acquired property.

Moreover, there appears to be also a distinction discernible in the Kandyan law depending on the nature of the property left by the deceased. The law as to a widow's rights is to be found at page 17 and the following pages of *Armour*. After stating that a widow is only entitled to support out of the *paraveni* property, *Armour*, at page 18, proceeds as follows: "If the deceased husband left other landed property besides his *paraveni* or ancestral lands, that is to say, lands acquired by purchase, or lands which he, the deceased, had received from his adopted father, in such case the widow may have possession of the whole of such acquired land for the remainder of her life."

The District Judge has, I think, rightly considered that the existence of *paraveni* property, in addition to acquired property, is a condition upon which depends the widow's rights to a life interest in the whole of the acquired property. This appears also to be the interpretation put upon *Armour* by Layard C.J. in *Kalu v. Lami* (*supra*), for the learned Chief Justice concluded his judgment by saying: "We think we must follow the general rule laid down in *Armour*, that if the deceased, in addition to his ancestral property, left acquired lands, the widow will have the possession of the

¹ (1905) 11 N. L. R. 223.² (1908) 2 Leader L. R. 47.

acquired lands in their entirety for the remainder of her life." The reason for this is easy to gather. The children of a man are, as appears from the other rules of inheritance under the Kandyan law, the first objects of consideration, and in the absence of *paraveni* property, they would be absolutely without any provision, especially in the case of first-bed children, if the widow were to have possession of the entirety of the acquired lands. I therefore think that where, as in this case, the entire estate of the deceased consists of acquired property only, and there are children by a former marriage, the widow's life interest extends only to a part, and presumably to a half, of such acquired property.

I agree that this appeal should be dismissed, with costs.

Appeal dismissed.

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