

1943

Present: Howard C.J. and Keuneman J.

ELLEN NONA AND OTHERS, Appellants and
PUNCHI BANDA, Respondent.

27—D. C. Kandy, 572

Kandyan law—Acquired property of Kandyan wife—Contest between illegitimate child and widower—Rights of child.

The property of a Kandyan wife acquired before her marriage is inherited by her illegitimate child and her *diga*-married husband has neither title nor life-interest in such property.

THIS was a partition action in which the dispute was with regard to a one-fourth share of the land between the plaintiff and the 3rd defendant.

The owner of this one-fourth share was Muttu Menika, who obtained title to it in 1913 and who was unmarried at the time. In 1916 an illegitimate child, Punchi Appuhamy, was born to her. The plaintiff claimed the whole of Muttu Menika's share by purchase from Punchi Appuhamy. In 1918 Muttu Menika married the 3rd defendant in *diga*. Muttu Menika died in 1920 leaving no issue by the 3rd defendant.

The learned District Judge, held in favour of the plaintiff.

L. A. Rajapakse, for the 3rd defendant, appellant.—It is the widower who should succeed to the property in question. The District Judge has purported to follow *Seneviratne v. Halangoda et al*¹. That case, however, can be, and has been, distinguished in *Dunuweera v. Muttuwa et al.*² where all the authorities are reviewed. See also *Seneviratne v. Halangoda et al.*³ and *Ausadahami v. Tikiri Etana.*⁴ Even if the illegitimate child can succeed, the widower is at least entitled to the life-interest. It makes no difference whether the property was acquired by the wife before coverture or during coverture. *Dunuweera v. Muttuwa et al.* (*supra*) is applicable and was apparently not cited at the trial.

N. E. Weerasooria, K. C. (with him *H. W. Thambiah*), for the plaintiff, respondent.—Kandyan law draws no distinction between legitimate and illegitimate children as regards right to the maternal inheritance—*Hayley's Sinhalese Laws and Customs*, p. 462.

There is, no doubt, authority for the proposition that a husband surviving his *diga*-married wife is entitled to a life-interest over the landed property acquired by her during coverture, where the deceased wife had left children. But in the present case (1) there are no children by the marriage, and (2) the property under consideration was acquired *before* coverture. In *Seneviratne v. Halangoda et al.* (*supra*) the law applicable to a case similar to the present one is fully discussed. *Dunuweera v. Muttuwa et al* (*supra*) can be distinguished because in that case the deceased left no issue. Moreover, certain passages in the judgment in that case are contradictory and are not supported by the authorities which they purport to follow.

L. A. Rajapakse, in reply.—The case of *Kalu v. Lami*⁵ was not considered in *Seneviratne v. Halangoda et al.* (*supra*). There is no reason for any

¹ (1922) 24 N. L. R. 257.² (1942) 43 N. L. R. 512.³ (1921) 22 N. L. R. 472.⁴ (1901) 5 N. L. R. 177.⁵ (1905) 11 N. L. R. 322.

distinction between property acquired before coverture and property acquired during coverture. Such a distinction is criticised as quite artificial in *Dunuweera v. Muttuwa et al.* (*supra*). See also *Rankiri v. Ukku*¹ and *Ranhami v. Menik Etana*².

Cur. adv. vult.

November 12, 1943. KEUNEMAN J.—

This is a partition action. The title to one-fourth share of this land is in dispute between the plaintiff and the 3rd defendant.

The owner of this one-fourth share was Muttu Menika, who obtained title under P 2 of 1913. Muttu Menika was at the time unmarried. In 1916 (see X 1) an illegitimate child, Punchi Appuhamy, was born to her. The plaintiff claims the whole of Muttu Menika's share by virtue of transfer P 3 of 1938 from Punchi Appuhamy to Hendrick Appuhamy, and transfer P 4 of 1940 by the latter to the plaintiff. In 1918 Muttu Menika married the 3rd defendant in *diga* (see 3 D1), and a child was born of the marriage, Heen Menika, who died on December 2, 1920 (see X 2) before the death of her mother. Muttu Menika herself died on December 9, 1920.

The plaintiff claims the whole share of Muttu Menika through the illegitimate child, Punchi Appuhamy. The 3rd defendant, as the *diga*-married widower, claims to be entitled to the same share in preference to the illegitimate child. In the alternative, the 3rd defendant claims a life-interest in the share of Muttu Menika, and this was the argument mainly pressed before us.

The first question to be decided is the right of the illegitimate child to succeed the mother. On this point there is clear authority—see *Nitinighanduwa*, p. 106.

“ There is no distinction or difference amongst children. The child born to a woman whilst in an unmarried state, the child born to her whilst in concubinage with a man of a higher caste than herself, and the child born to her while living with a man of an inferior caste—these several children—will have an equal right to the maternal inheritance.”

See also *Nitinighanduwa*, p. 15; *Perera's Armour*, p. 83.

I think it is clear that the husband has no title to the share of his deceased wife as against the illegitimate child of the deceased wife.

The question that remains is as regards the husband's claim to a life-interest in the land. In this case it must be noted that the property is to be regarded as the acquired property of the wife—but it is property acquired *before* the marriage.

Fortunately, on this particular point there is good authority. In *Perera's Armour*, p. 29, section 34, appears a quotation from Sawers.

“ A wife dying (intestate) leaving a husband and children, her peculiar property of all description goes to her children, and not to her husband.”

In the same volume, p. 30, section 36, where the *diga*-married wife died *without issue*, it is stated,

“ A *deega*-married woman having died without issue and intestate leaving goods, partly acquired during the coverture, and partly

¹ (1907) 10 N. L. R. 129.

² (1907) 10 N. L. R. 153.

consisting of goods which she has brought with her at her marriage, the goods first mentioned will remain to her husband, and the rest will go to her parents.”

This in terms applies only to goods and not to landed property but I think it is clear that differentiation between property brought by the wife to the marriage, and property acquired during the coverture was of wider application. *Hayley (Sinhalese Laws and Customs)* at p. 461 quotes from *D'Oyly's Sketch of the Kandyan Constitution*, p. 308, as follows:—

“ If the wife dies leaving a husband and children, all property acquired from her husband reverts to him—by herself (from parents or otherwise) goes to the children, everything acquired during coverture goes to her husband.”

D'Oyly clearly deals with all classes of property, and I do not think there can be any doubt that he was referring to a *diga*-married wife. There should, however, I think, be one qualification for this passage, namely, that the husband obtained not the dominium but only a life-interest, at any rate where the deceased wife left children, in the two classes of property specified, namely, (a) property acquired from the husband himself, and (b) property acquired during the coverture. In my opinion, this point is brought out in *Nitinighanduwa* at p. 114—the passage itself deals with the case where the wife left no issue:

“ If the proprietress has no children or grandchildren, and dies leaving a parent, or her husband, all the property obtained through her parents, and all property acquired by her in any manner whatsoever before her marriage with the herein mentioned husband, will be inherited by the parent. The property acquired jointly with her husband after the marriage will come into possession of her husband.”

In cases decided by our Courts, the law relating to property acquired during coverture is emphasized—see *Austin* 66; *Naide Appu v. Palin-gurala*¹. In *Saduwa v. Siri*² it was expressly held that “ a husband surviving his *diga*-married wife is entitled to a life-interest over the landed property acquired by her during coverture, where the deceased has left children”. This was subsequently upheld in the three-Judge case of *Tikiri Banda v. Appuhamy*³, which also clearly and in express terms related to property acquired by a *diga*-married wife during the coverture.

In this particular case I do not think it is necessary to comment on the passage in *Sawers' Digest*, p. 11, namely:—

“ The husband is the heir to his wife's landed property, which will at his demise go to his heirs”.

This was the opinion of Doloswela Dissave and was opposed to the opinion of the chiefs of the Udaratta. This will have to be read in conjunction with the quotation from *Sawers* cited earlier and with a later passage in *Sawers*:

¹ 2 S. C. C. 176.

² 18 N. L. R. 105.

³ 3 Bal. Re.p 18..

“ 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.”

I need only say that this passage has been very fully dealt with in *Tikiri Banda v. Appuhamy* (*supra*) in *Seneviratne v. Halangoda*¹ and in *Dunuweera v. Muttuwa*², and I do not think there is anything which I can usefully add. In the particular instance involved in this case, I think it will be sufficient for us to follow the decisions of our Courts, which have granted to the *diga*-married widower only a life-interest in property acquired by the wife during coverture where the wife left children. It is too late now for a *diga* husband to claim more than a life-interest in such a case.

In arriving at a decision in this case, I am not unmindful of the fact that there are divergent opinions expressed in our Courts as to the position of a *diga*-married widower, in the case where the deceased wife left no children. In *Seneviratne v. Halangoda* (*supra*) it was held that where a Kandyan wife married in *diga* died issueless, the husband did not inherit any portion of the wife's landed property acquired before marriage. In that case the property in question was landed property given as dowry to the wife. The contest in the case was between the assignee from the husband and the devisee of the mother. In the later case of *Dunuweera v. Muttuwa* (*supra*), the authority of *Seneviratne v. Halangoda* was doubted and it was held that where a Kandyan woman married in *diga* dies without issue, the surviving husband succeeds to her acquired property in preference to her brothers and sisters, and no distinction was drawn between property acquired before marriage and property acquired after marriage. In each of these cases the earlier writers and cases were exhaustively examined and a study of these cases brings home to the reader how dangerous are the “quicksands” (to use the phrase of Pereira J.) which beset the student who adventures on the study of Kandyan law.

However, in my opinion, it is possible in this case to steer clear of the quicksands. In the difficult condition of the law, I think there are two beacons to guide us. One is the passage from D'Oyly I have already mentioned, which refers in clear terms to the case where the Kandyan wife died leaving both husband and children. I have already made my comment on this. The distinction between property acquired during marriage and property otherwise acquired is clearly brought out. Further, it follows from the decisions of our Courts that the right of the surviving husband is only a life-interest in property acquired during the marriage. I think those decisions I have referred to provide another beacon. I may add that the passage I cited from D'Oyly does not appear to have been considered in any of the cases previously decided in our Courts.

I am of opinion in this case that the property of the Kandyan wife acquired by her before her marriage, was inherited by her illegitimate child, and that the husband had neither title nor life-interest in that property.

¹ 24 N. L. R. 257.

² 43 N. L. R. 512.

I may add that this decision is based upon the fact that the deceased wife left both a husband and a child. I have no desire to trespass upon the further question as to what the law is when a Kandyan wife dies intestate without issue, leaving a husband and either a parent or brothers and sisters. That matter will no doubt come up for final decision on some later occasion.

The appeal is dismissed with costs.

HOWARD C.J.—I agree.

Appeal dismissed.
