1978 *Present : Thamotheram, J., Ismail, J. and Weeraratne, J.*

RANHETIDEWAYALAGE RANA, Defendant-Appellant

and

RANHETIDEWAYALAGE KIRIBINDU, Plaintiff-Respondent

S. C. 185/71 (F)—D. C. Kegalle L/16312

Kandyan Law Declaration and Amendment Ordinance (Cap. 59), section 9 (1)—Marriage contracted in "diga" by daughter of deceased—Continued residence in "mulgedera"—Whether such daughter forfeits rights to inherit father's estate—Change in the law brought about by statute—Effect of dissolution of marriage.

The question that arose in this case was whether the plaintiff who was a person subject to the Kandyan Law was entitled to succeed to the inheritance of her father inasmuch as she had married in "diga". There was a finding of fact that the plaintiff although married in "diga" did not shift her residence from the "mulgedera". The defendant was the elder brother of the plaintiff and the plaintiff's position was that though she was married in "diga" she had remained in the "mulgedera" to look after three minor children of the defendant whose wife had died shortly before the plaintiff's marriage. The plaintiff's husband also died before her father. The provisions of Kandyan Law Declaration and Amendment Ordinance (Cap. 59) were applicable.

Held (Weeraratne, J. *dissenting*) : That the plaintiff was entitled to succeed to her father's inheritance.

After a consideration of the authorities the following propositions of law were laid down by Thamotheram and Ismail, JJ.:

1. The character of a marriage at the time of contracting is a question of fact and must therefore remain the same before and after dissolution. The same marriage cannot be diga before dissolution and not diga after.
2. The certificate of marriage is the best evidence of it.
3. While the marriage lasts the consequences of marriage flowing from the character of marriage cannot be changed.
4. After dissolution of marriage the diga married woman can regain her lost rights by change of residence, etc.
5. The husband's rights flowing from the character of marriage cannot be affected by dissolution.

Cases referred to :

Kalu v. Howwa Kiri, (1892) 2 C.L. Rep. 54.

Fernando v. Silva, 4 C.W.R. 9.

Punchi Menika v. Appuhamy, 19 N.L.R. 353.

Seneviratne v. Halangoda, 22 N.L.R. 472.

Mampitiya v. Wegodapela, 24 N.L.R. 129.

Chellapah v. Mutiapitiya Rubber Co., 34 N.L.R. 89.

James v. Meddume Kumerihamy, 58 N.L.R. 560.

APPEAL from a judgment of the District Court, Kegalle.

H. W. Jayewardene, Q.C., with *J. W. Subasinghe* and *Miss S. Fernando,* for the defendant-appellant.

C. Ranganathan, Q. C., with *C. R. Gunaratne,* for the plaintiff-respondent.

Cur. adv. vult.

March 1, 1978. THAMOTHERAM, J.

The plaintiff-respondent who is the younger sister of the defendant-appellant instituted this action for a declaration of title to a half share of the land called 'Gallajjewatta' and for damages for wrongful possession of her share by the defendant.

The plaintiff averred that the property in suit belonged to her father and that though married in diga she did not leave the Mulgedera and thus she became entitled to a share of the paternal land called 'Gallajjewatte' on her father's death.

The defendant-appellant filed answer denying the right of the plaintiff to inherit from her father as she had contracted a diga marriage in her father's lifetime after January, 1939.

The defendant had married and lived in the Mulgedera with his wife and children. The plaintiff and her parents too lived in that house. Shortly before the plaintiff got married the defendant's wife died. The plaintiff married in 1939. The marriage certificate stated that the marriage was in diga. Thereafter the plaintiff's husband Piyasena also died. Soon after her father also died. The plaintiff's position was that although she married in diga she remained in the Mulgedera to look after the three minor children of the defendant.

The learned judge held that on the evidence for the plaintiff which he accepted the plaintiff did not shift her residence though the marriage was registered as a diga marriage.

The argument in appeal proceeded on the basis of this finding and the question was—as the plaintiff did not leave the Mulgedera notwithstanding her diga marriage, had she forfeited her right to the inheritance of her father's estate?

We are called upon in this case to interpret section 9 (1) of the Kandyan Law Declaration and Amendment Ordinance (Cap. 59) Vol. 3 NLE. In doing so we have to keep in mind the object of this Ordinance which is stated to be " An Ordinance to declare and amend the Kandyan Law *in certain respects.*" It is necessary therefore to first state what the law was before 1.1.1939 in regard to the subject dealt by that section.

"A marriage in diga is when a women is given away and is according to the terms of the contract removed from her parents abode, and is settled in the house of the husband.

The conducting of a wife to and living in the husband's house, or in any family residence of his, or if he does not own a house and lands, the taking her as his wife, and the conducting away from her family to a place of lodging constitutes a diga marriage. *The predominant idea is the departure or removal from the family or ancestral home.*

A plurality of daughters in a family necessitates this mode of marriage with regard to the majority of them, the common property being too limited in extent to be enjoyed by a numerous family. The marriage of the daughters and the departures from the parental residence generally operate a forfeiture of the inheritance and thereby reduce the number of the shareholdings,—Modder page 229.

A diga marriage always involves forfeiture. It is the going out in diga that works the forfeiture that is to say the woman should be conducted by or go out to live with a man as his wife. *Kalu v. Howwa Kiri,* (1892) 2 C.L.R. page 54."

Hayley states in his book on Kandyan Law—

"There are two distinct forms of marriage called respectively diga and binna. In the former which is the usual type of alliance in a patriarchal system the husband conducts his bride to his own house or that of his parents, and she becomes, so long as the marriage subsists, a member of his family. The latter is perhaps the older form. In modern times it is usually entered into only where the bride is an heiress the husband is brought to the house of the wife on her relations. The essential factor being, his residence or property belonging to the wife's family not necessarily of her father. He continues throughout the alliance in a subordinate and somewhat humiliating position"— Hayley, Kandyan Law, page 193.

In *H. P. James v. Medduma Kumarihamy,* 58 N.L.R. 560, Sansoni, J. said—

"On production of the certificate of registration of marriage in diga the court must in law draw the inference that the bride left the Mulgedera and forfeited her paternal inheritance in accordance with the contract, unless the contrary is proved by the party who denies that the forfeiture

took place. This may be proved by facts which court would recognise as sufficient to rebut the inferrence. The certificate raises what Lord Denning has termed a "compelling presumption which would give rise to a separate issue on which the legal burden is on the other party to prove that there was no forfeiture."

I therefore have no hesitation in holding on the strength of these authorities, that in cases governed by the amended Kandyan Marriage Ordinance of 1870 the production of a diga marriage certificate is of itself sufficient to prove not only that the wife was married in diga but also that she forfeited her paternal inheritance. The burden thereafter shifts to her or to those claiming through her to prove that the subsequent conduct of the parties was such that no forfeiture in fact took place.

In *Fernando v. Bandi Silva,* IV Ceylon Weekly Reporter page 9 at 10—The question was whether a Kandyan woman can regain binna rights by readmission into the family of her brother after her father's death. Woodrenton, C.J. said—

> "The underlying principle is that the forfeiture by a marriage in diga of the rights of the diga married daughter to a share of the inheritance may be set aside by her readmission into the family, even though both the marriage in diga and the resumption of her relations with the Mulgedera took place after her father's death because that forfeiture is due not so much to the marriage as to the severance effected by the marriage of the daughter's connection with her father's house."

Woodrenton, C.J. in the case quoted his own words in an earlier case—

> " The question at issue in the present case is whether a wife married in diga can regain even after her father's death binna rights during the lifetime of her husband and without any divorce from him or remarriage in binna by maintaining a closer and constant connection with the Mulgedera.
>
> A daughter married in diga forfeits her interest in her paternal inheritance not by virtue of that marriage but because it involves a severance of her connection with her father's house. If that connection is re-established on its original basis and if the diga married wife is once more received into the family as a daughter it is only reasonable that she should enjoy a daughter's rights of inheritance."

In this same case cited by Woodrenton, C.J., Sampayo, J. said—

> "The point to be kept in view in all cases, I think is that the essence of a diga marriage is the severence of the daughter from the father's family and her entry into that of the husband and her consequent forfeiture of any share in the family property, and the principle underlaying the acquisition of binna rights as I understand it is that the daughter is readmitted into the father's family and restored to her natural rights of inheritance."

Shaw, J. in *Fernando v. Bandi Silva* while agreeing with Woodrenton, C.J. said the same point has very recently been very carefully considered by the Court in the case of *Punchi Menike v. Appuhamy*, 19 N.L.R. 353, where it was held that binna rights can be reacquired after the father's death if the diga married daughter is readmitted into or with the consent of her family, and resumed her position in the family.

In *Seneviratne v. Halangoda*, 22 N.L.R. 472, Sampayo, J. said :— The question whether the character of a Kandyan marriage can be proved by oral evidence to be other than that stated in the register was recently considered by the Chief Justice and Ennis, J. in *Mampitiya v. Wegodapela*. The learned judges have held that in section 39 of the Kandyan Marriage Ordinance, No. 3 of 1870, which declares that the entry in the register shall be the best evidence of the marriage and of the other facts stated therein and that if it does not appear in the register whether the marriage was in binna or diga, such marriage shall be presumed to have been contracted in diga until the contrary is proved. The expression 'best evidence' is used in the English Law sense, and excludes all evidence of an inferior character. I certainly accept this ruling with reference to the Kandyan Marriage Ordinance because under section 11 of the Ordinance registration is the only valid form of marriage for Kandyans and further because section 39 itself indicates the exceptional case in which oral evidence may be admitted.

The only consequence of a diga married daughter preserving or subsequently acquiring binna rights is that the forfeiture of the rights of paternal inheritance does not take place, but she inherits as though she was married in binna. It does not alter the character of the marriage itself. *The diga marriage remains a diga marriage so far as other results of such marriage are concerned. The husband does not cease to be a diga married husband and begin to be a binna married husband.*

In *Mampitiya v. Wegodapela*, 24 N.L.R. 129, Bertram C.J. said—

> "By contracting a marriage in diga, in which the bride's family participated, the parties bound themselves to each

other and the family, that the bride should be conducted in accordance with custom and should settle in the house of her husband. But if this for whatever reason was not done if with the acquiescence of her family, the bride remained in the Mulgedera then that forfeiture was never consummated. A diga marriage ceremony does not itself work a forfeiture irrespective of the subsequent action of the parties."

Ennis, J.—

"The forfeiture of the bride's rights in the paternal estate turns on the question of fact whether the bride left the parental home in accordance with the contract. In the absence of evidence there would be a presumption that the terms of the contract relating to residence had been carried out, *but I see no good reason for excluding oral testimony relating to the carrying out of this term of the contract, which* was not, a matter of fact, occurring at the time of the contract."

In *Chellapah v. Kuttapitiya Rubber Co.*, 34 N.L.R. 89, Garvin, S.P.J. said—

"Where a Kandyan woman whose marriage was registered as diga avoids a forfeiture of her rights in the parental-inheritance by preserving or subsequently acquiring binna rights, it does not alter the character of the marriage itself.

In such a case the diga husband is heir to his child in respect to land devolving on her from the mother who had inherited the property by virtue of the retention of her binna rights."

We may now look at section 9 of the Kandyan Law Amendment 39 of 1938—(1) *A marriage contracted after the commencement of this Ordinance in binna or diga should be a binna or a diga marriage as the case may be.*

This was the position before the amendment. It was a question of fact whether at the time of the contracting of the marriage the parties intended it to be diga and whether in fact the bride was conducted by the bridegroom away from her father's house.

After registration became compulsory the statement in the certificate of registration as to the character of the marriage, whether it was in diga or in binna was made the best evidence of the fact. There arose the necessary inference that there was a conducting away from the bride's father's residence where it was stated in the certificate that the marriage was in diga and the

reverse position where the marriage was stated to be in binna. If the certificate of registration did not state the character of marriage it was presumed that the marriage was in diga.

The position before the amendment under consideration in this regard was that it was possible to contradict a certificate of registration which stated that the marriage was in diga or in binna by oral evidence. It was permitted to prove by oral evidence that at the time of contracting the marriage the bridegroom did not lead the bride from her parental home and therefore the marriage was in fact not in diga and there was consequently no forfeiture of her paternal inheritance. The effect of the amendment was that it was no longer possible to prove the character of marriage by oral evidence.

In this respect the law as it was before was amended. The character of the marriage contracted remained so during marriage and after dissolution, it being a question of fact, the best and only evidence of which was the certificate of registration.

(2) *For all purposes of the law governing the succession to the estates of deceased persons.* The question whether a marriage was contracted in diga or binna is important mainly in regard to the succession to the estate of deceased persons. Whether at the time of contracting the marriage there was forfeiture of the bride's paternal inheritance will depend on what the certificate of registration states to be the character of the marriage, it not being permitted under this amendment to contradict the certificate of registration.

(3) *Could a bride married in diga regain her lost rights by returning to her parential house after marriage?*

Before the amendment this was possible. But after the amendment this was not possible as the amendment states—

> "No change *cfter* any such marriage and no conduct after any such marriage of either party to that marriage or of any other person shall convert or be deemed to convert a binna marriage or cause or be deemed to cause a person married in diga to have the rights of succession of a person married in binna or a person married in binna to have the rights of succession of a person married in diga."

This part of the section clearly refers to a change *after* the marriage is contracted. The legal consequences of a diga or binna marriage at the time of contracting is determined by the character of the marriage of which the certificate of registration is the best evidence. But whether there has been a change after marriage is a question of fact which is made irrelevant by this

amendment as far as the legal consequences which flow from the nature or character of the marriage. These remain so long as the marriage lasts. No subsequent change can affect the consequences which flow from the nature of the marriage itself.

The next question is if a subsequent change cannot affect the consequences of marriage when contracting, should this be so even after the marriage is dissolved ? The answer is to be found in the following words of the section—

> "*Until dissolution shall continue to be*"
>
> "A marriage contracted after the commencement of this Ordinance in binna or in diga shall be and shall continue to be a binna or a diga marriage for all purposes of the law governing the succession to the estate of deceased persons."

To my mind this is a limitation on the effect of a change of residence or conduct after marriage. Such subsequent change is irrelevant as long as the marriage lasts. After it is dissolved a change can alter the situation. A bride can regain her lost rights after the marriage tie is no more, but any rights of the husband flowing from the character of marriage will not be affected.

In our view the words—" Until dissolution" is a limitation imposed to permit persons re-acquiring lost rights after the dissolution of marriage. No doubt the Kandyan Law Commission had recommended a more far reaching change in the law but the legislature had thought fit not to adopt the recommendation in its entirety. This is something the legislature can do, and may have had good reason for doing so.

We are therefore of the view that the learned Judge was right in the order he made. On one point however, I disagree. There cannot be two different and valid descriptions of the same marriage. A particular marriage *cannot be both binna and diga at the time of contracting marriage.*

We can lay down the following propositions—

(1) The character of a marriage at the time of contracting is a question of fact and must therefore remain the same before and after dissolution. The same marriage cannot be diga before dissolution and not diga after.

(2) The certificate of marriage is the best evidence of it.

(3) While the marriage lasts the consequences of marriage following from the character of marriage cannot be changed.

(4) After dissolution of marriage the diga married woman can regain her lost rights by change of residence, etc.

(5) The husband's rights flowing from the character of marriage cannot be affected by dissolution.

We agree with the order of the Judge and dismiss the appeal with costs.

ISMAIL, J.—I agree.

WEERARATNE, J.

I have had the advantage of reading Thamotheram, J.'s judgment with which Ismail, J. has agreed. The careful detailing of the facts and the reference to the authorities relevant to this matter in that judgment makes my task easier. I find myself however taking a view different from that expressed by my two brothers.

The question for decision in the present matter is one of law which the learned trial Judge has decided in favour of the plaintiff-respondent, namely, whether by reason of the plaintiff Kiri Bindu's marriage in "diga" she was entitled to succeed to the inheritance of her father Ukkuwa. The following dates are relevant in this connection—

(1) The plaintiff married in "diga" on 27.7.39.

(2) The plaintiff s husband died on 30.7.46 prior to the death of her father.

The learned trial Judge having evaluated the evidence given by the witnesses has found that the plaintiff continued to live in the "Mulgedara", although her marriage was registered in "diga". I see no reason to disagree with this finding of fact, nor was it seriously contested before us.

The provision which is relevant to the question to be answered and which is sought to be interpreted is section 9(1) of the Kandyan Law Declaration and Amendment Ordinance (Cap. 59), which came into operation on 1.1.39. Learned Counsel on both sides dealt exhaustively with the authorities relating to the Kandyan Law prior to 1939. The said Ordinance (Cap. 59) is stated to be an "Ordinance to declare and amend the Kandyan Law." It is relevant to mention in this connection that a Sessional Paper was published in 1935 consequent to the setting-up of the Kandyan Law Commission. It would not be unsafe to presume that the amendment to the Kandyan Law were to some extent influenced by the findings of the Commission.

It would be unnecessary for me to describe in any detail the Kandyan Law that existed *prior* to 1939 in relation to binna and diga marriges, since I find that the matter is fully discussed in Thamotheram, J.'s judgment. I would however make reference to De Sampayo, J.'s judgment in the case of *Punchi Menika v. Appuhamy,* 19 N.L.R. p. 353 where he states :—

> "The point to be kept in view in all cases, I think, is that the essence of a diga marriage is the severance of the daughter from the father's family and her entry into that of the husband, and her consequent forfeiture of any share in the family property, and the principle underlying the acquisition of binna rights, as I understand it, is that the daughter is re-admitted into the father's family and restored to her natural rights of inheritance".

As commented by learned Counsel the character of the marriage is not lost, but her rights to inheritance were regained. To describe the state of the Kandyan Law prior to 1939, succinctly there were two aspects of the Kandyan Law applicable at that time, namely the opportunity to re-acquire binna rights during marriage, or even after the dissolution of marriage.

Section 9 (1) of the "Kandyan Law Declaration and Amendment Ordinance" reads as follows :—

> (1) "A marriage contracted after the commencement of this Ordinance in binna or in diga shall be and until dissolved shall continue to be, for all purposes of the law governing the succession to the estates of deceased persons, a binna or a diga marriage, as the case may be, and shall have full effect as such ; and no change after any such marriage in the residence of either party to that marriage and no conduct after any such marriage of either party to that marriage or of any other person shall convert or be deemed to convert a binna marriage into a diga marriage or a diga marriage into a binna marriage or cause or be deemed to cause a person married in diga to have the rights of succession of a person married in binna, or a person married in binna to have the rights of succession of a person married in diga."

In seeking to interpret this provision it would be appropriate at this stage to refer to certain paragraphs of the report of the Kandyan Law Commission, since the Legislature certainly must have had before it the Sessional Paper XXIV—1935 in which certain important recommendations were made by an eminent body of commissioners who were knowledgeable and competent to present a report on the subjects under consideration.

How then did the Legislature address itself to the findings of this Commission in regard to the matters adverted to above. Mr. H. W. Jayewardene, Counsel for the defendant-appellant submitted that section 9 of Chapter 59, gave effect to the recommendations of the Commission. Mr. C. Ranganathan, for the plaintiff-respondent on the other hand submitted that in section 9(1) there is a departure from the existing state of the Kandyan Law and the only new element in section 9(1) is once the marriage is dissolved, when she can re-acquire binna rights. Mr. Jayewardene posed the question as to what is the mischief which was sought to be remedied. Counsel in providing the answer stated that the mischief the Legislature wished to do away with is the conflicting decisions regarding the state of the law.

It would be seen that the Commission commented that :—

> "The comparatively simple rule excluding the diga married daughter from the inheritance has become complicated at the outset owing to modern ideas regarding marriage."

Then referring to the decision is the case of *Mampitiya v. Wegodapela*, 24 N.L.R. 129, the Commission stated that—

> ".....Notwithstanding the registration of the marriage as a diga one, the Court allowed the fact that the daughter continued to live with her parents virtually to convert it into a binna marriage, entitling her to a share in her father's estate. *The result of this decision is to allow proof in every case of the nature of the marriage in order to contradict the register,* although section 89 of Ordinance 5 of 1870 says that registration of the nature of the marriage shall be the best evidence."

Then at paragraph 171, the Commission states :—

> "As it is only in matters connected with succession that the difference between diga and binna marriages is of importance, *we are of opinion that modern conditions make it advisable to enact that a marriage registered as a binna marriage should be deemed to be a binna marriage,* and conversely that the exclusion of the daughter from the inheritance will only take place where there is a diga marriage valid in law."

At paragraph 174 the Commission after giving excerpts from decided cases categorically states :—

> "....We are of opinion that the time has come when end must be made of the nice questions which arise and the

interminable argument and litigation that they give occasion to, on these cases continuing to be accorded legal recognition and we would therefore recommend that it be declared that a marriage registered as in diga or in binna shall for all purposes be deemed to be a marriage in diga or binna as the case may be, *and that in no circumstances can a marriage, once registered as in diga be altered into a binna one and vice versa.*"

Concluding this aspect of Kandyan Law, the Commission at paragraph 175 sets out :—

"*We are of opinion that these recommendations if given legal effect will settle several vexed questions and close up for all times a fertile source of litigation.*"

It is indeed a well-known principle that you interpret a statute to do away with the mischief it was sought to remedy. Mr. Jayewardene submitted that the mischief that was intended to be remedied is the conflicting decision regarding the law. The Commission finally expressed the view that once a Kandyan marriage is registered as a binna or diga it must be regarded as so. He submitted that the legislature was giving effect to the view expressed that the mischief must be put right and the law be made certain. The then existing state was that it was open to a lady to establish that there was a re-acquisition of binna rights. Judges would have agreed and disagreed. Counsel then submitted that the operative clause of section 9(1) is the second part of it, commencing after a semi-colon :—

" and no change after any such marriage in the residence of either party to that marriage and no conduct after any such marriage of either party to that marriage or of any other person shall convert or be deemed to convert a binna marriage into a diga marriage or a diga marriage into a binna marriage or cause or be deemed to cause a person married in diga to have the rights of sucession of a person married in binna or a person married in binna to have the rights of succession of a person married in diga."

It must be noted that this part of the provision lays down almost precisely what the Kandyan Law Commissioners have recommended. Mr. Ranganathan however strenuously argued that what is significant in the provision are the words " or after dissolution ", in the first part of the section. He submitted that the only element which is touched in section 9(1) and departs from the Commission's recommendations are the words just referred to above, by the inclusion of which a woman married

in diga can return to her parental home and re-acquire her binna rights of inheritance after the dissolution of her marriage by the death of her husband. Mr. Ranganathan went on to state the wording of the provision does not permit her to do so during the subsistence of her marriage.

It seems to me that section 9(1) is capable of analysis to show the real intention of the legislature and the mischief which was sought to be remedied.

Section 9(1) could be conveniently analysed as follows :—

(*a*) A marriage contracted after the commencement of this Ordinance in binna or in diga shall be, for all purposes of the Law governing the succession to the estate of deceased persons, a binna or diga marriage and shall have full effect as such.

(*b*) A marriage contracted after the commencement of this Ordinance in binna or diga until dissolved shall continue to be a binna or diga marriage and shall have full effect as such.

In paragraph (*b*) until dissolved a binna or diga marriage continues to be a marriage. This is stating the obvious, because when the "marriage state" subsists the marriage continues. *The "marriage state" ceases on dissolution and therefore such marriage does not continue.* Paragraph (*a*) now deals with that situation and for the purposes of this section when the "marriage state" ceases by dissolution which can be by death of one of the spouses or by a decree of divorce it shall be considered a marriage although in fact the marriage ceased to exist.

This emphasises the view that once a diga marriage is contracted it will be a diga marriage for the purposes of this section, whether that marriage subsists at the time of succession or does not subsist (i.e. dissolved) at that time. This is the mischief which the section sought to remedy.

"The subsequent wording of this section :—

> "and no change after any such marriage in the residence of either party to that marriage and no conduct after such marriage of either party to that marriage or of any other person shall convert or be deemed to convert a binna marriage or cause or be deemed to cause a person married in diga to have the rights of succession of a person married in binna, or a person married in binna to have the rights of succession of a person married in diga."

refers to both these situations and sets out the legal effect of such marriage.

The analysis of section 9(1) illustrated above, to my mind shows that the Legislature has certainly acted upon the recommendations of the Kandyan Law Commission.

For the reasons given I would allow the appeal and direct judgment to be entered for the defendant-appellant with costs.

Appeal dismissed.