1925.

Present : Ennis A.C.J. and Dalton J.

PEIRIS *v.* KIRI BANDA.

82—D. C. Kandy, 31,963.

Kandyan law—Sale of property by Kandyan woman before marriage —Subsequent marriage in diga*—Forfeiture of rights.*

Where a Kandyan woman, after her father's death, alienated property which passed to her by inheritance and then married out in *diga*.

Held, that such marriage in *diga* did not deprive the purchaser for valuable consideration of his rights to the property sold.

THIS was a partition action instituted by the plaintiff, appellant, who claimed a share of the land on a transfer to him by one Punchi Menika. Punchi Menika was a daughter of Ukku Banda, admittedly the original owner of the land. At the time of the transfer by her, her father, Ukku Banda, was dead. Punchi Menika was unmarried, and was living at the mulgedera. Some time after she married out in *diga*.

The learned Judge dismissed plaintiff's action on the ground that he had no title, as Punchi Menika married out in *diga*, and had thereby lost her rights of inheritance from her father, Ukku Banda.

From this judgment the plaintiff appealed.

Navaratnam, for plaintiff, appellant.—It is not denied that Punchi Menika, vendor to plaintiff, had title to a share of the land at the time of the transfer, as her father was then dead and she was living at the mulgedera. This must be taken to be a vested right which has now passed on to the plaintiff. Her going out in *diga* subsequently cannot take away the right already acquired by a third party for value.

The District Judge merely says that any ruling to the contrary "would be entirely contrary to the spirit of the customary law." There is no evidence of what that customary law is.

It must be confessed that there is no authority directly in point.

There is one authority that deals with the converse case. That is *Appuhamy v. Kumarihamy*.[1] There it was held that reacquisition of *binna* rights by a Kandyan woman did not give her title to property already alienated by the others.

The appellant, therefore, has title to the share claimed, and should succeed.

Weerasuriya, for defendant, respondent.—The learned District Judge must be taken to know the customary law. It is no doubt unfortunate that no evidence has been led. The reason may be that the custom is so well known that it was thought no question would arise. If that were so, no injustice would be done, as the purchaser would have known that he was taking a risk in buying property under these conditions.

The right that a Kandyan woman has to an inheritance is a "temporary joint interest." See *Sawyer, p. 1*. On her marriage out in *diga* she loses that temporary interest. It is immaterial when that marriage out in *diga* takes place.

(ENNIS A.C.J.—These rules of Kandyans were meant to be personal rules, and they are very good ones too at that, *e.g.*, the rule *re* support of *diga* married sisters in case of destitution, but they cannot be made to apply to a third party.

There is clear authority for the proposition that when a woman after her father's death marries out in *diga*, she forfeits all rights to her inheritance. The fact that she has transferred her rights to a third party ought not to make any difference. Counsel cited *Meera Saibo v. Punchirala*[2] and *Ran Etana v. Nekappu*.[3]

Navaratnam (in reply).—Your Lordships are at liberty in a case, such as the present one, in the absence of custom, to apply the Common law rule which would be applicable to a similar case. Reference may be made to section 5 of Ordinance No. 5 of 1852.

[1] *(1922) 24 N. L. R. 109.* [2] *(1910) 13 N. L. R. 176*

[3] *(1911) 14 N. L. R. 289.*

1925.

Peiris v. Kiri Banda

July 14, 1925. ENNIS A.C.J.—

This was an action for partition. The learned Judge dismissed the plaintiff's action on the ground that he had no title. The plaintiff purchased the land in question from a Kandyan woman while she was still living unmarried in the mulgedera after her father's death, that is, after the property had passed to her by inheritance. After alienating the property to the plaintiff, she married in *diga*. The learned Judge has given two judgments in this case. In the first he found the facts which are not contested on the appeal, and he finished the judgment by saying that " Punchi Menika married out in *diga*, and has thereby lost her rights of inheritance from her father, Ukku Banda." After giving this judgment, the learned Judge appears to have heard further argument and written another judgment on the question already decided in the first. The second judgment was to the same effect, namely, that Punchi Menika had lost her rights. The learned Judge does not cite in either of the judgments any authority for the principle that an alienation by a woman who at the time was entitled to the property would be bad by the subsequent *diga* marriage by that woman. He merely says that any ruling to the contrary " would be entirely contrary to the spirit of the customary law." There is no evidence on record in this case as to the customary law affecting the point at issue, and, in the absence of evidence, the spirit of the customary law must be gathered from text-books and previously reported cases. It is conceded by counsel who have argued this appeal that there is no authority directly in point. A number of cases have been cited, among them *Meera Saibo v. Punchirala* (*supra*), *Ran Etana v. Nekappu* (*supra*), and an unreported case *Dingirihamy v. Mudalihamy*,[1] all of which establish the proposition that a woman, who after her father's death, that is, after she has actually inherited her father's property marries in *diga*, forfeits the rights already acquired. But, for the further proposition that the forfeiture operates against a third party who has acquired for valuable consideration from the woman during the time that the woman was the only person holding the legal title, no cases have been found.

Mr. Navaratnam for the appellant has cited to us section 5 of the Ordinance No. 5 of 1852, under which in such a case the Court is directed to have recourse to the law in force in the maritime provinces, and he has cited the case of *Appuhamy v. Kumarihamy* (*supra*) where a kindred point came up in appeal. There it was a question as to whether the reacquisition of *binna* rights gave any title to property which had been alienated before the date of the reacquisition, and it was held that the reacquisition of *binna* rights by a Kandyan woman did not give her title to property alienated by the other heirs, before she reacquired the *binna rights*.

[1] *S. C. M., October 15, 1912.*

Against this, Mr. Weerasuriya has cited a passage in *Sawyer, p. 1*, that "daughters while they remain in their father's house have a temporary joint interest with their brothers in the landed property of their parents. But this they lose, when given out in what is called a *diga* marriage, either by their parents or brothers after the death of the parents." It is suggested that this reference relates to title to land ; and it is further suggested that an unmarried daughter's right in the land after the death of her father is a limited right, and may be lost by and when there is a subsequent *diga* marriage. It is unnecessary to refer to the passages in *Armour*, *Modder*, and *Hayly*. They all go back to the same source. The passage in *Sawyer* is the foundation of the principle I have already mentioned, which was accepted as the law in the case of *Meera Saibo v. Punchirala* (*supra*). But it seems to me that it goes no further than this, and does not establish the proposition found by the District Judge, or show that the spirit of the Kandyan law is to deprive a purchaser for valuable consideration of his rights by making the right of an unmarried daughter a limited right.

In my opinion the basis underlying the Kandyan law with reference to land held by members of the family is the right of the members of the family to support by the family so as to create customs and rights in the family itself and between the members of the family alone. Sawyer on page 4 gives an illustration of this principle. He says that daughters are bound to accept the husbands provided for them by their brothers, and must go out with the chosen ones in *diga*. But according to Sawyer if such a marriage turns out badly, and the wife has to return to the mulgedera, then there is an obligation on the brothers to make provision for their unfortunate sister and her children out of the family estate. It seems to me that this is a liability which attaches to the brothers as members of the family, and it is not an obligation creating a tie on the land. At any rate not a tie which binds the land when the land itself has passed to persons who are strangers to the family. If that be so, then the spirit of the Kandyan law would make the obligation to which the learned Judge refers a family obligation only. So far as this land is concerned, I prefer to follow the principle I have already enunciated with regard to the reacquisition of *binna* rights. Even as the reacquisition of *binna* rights will give no title to lands which have passed outside the ownership of the members of the family, so the forfeiture of *diga* rights will not revest in the brothers lands which the woman alienated as of right before marrying in *diga*.

I would accordingly allow this appeal, set aside the decree appealed from, and send the case back for further proceedings and partition. The appellant should, in my opinion, have the costs of the appeal.

DALTON J.—I concur.

Appeal allowed.