

what number has been assigned to her in the record—appeal from a decree of the Court of Requests of Matale declaring the plaintiff entitled to one-fourth of a land called Dawatagahamulawatte.

The second defendant also appeals from the dismissal of his claim to compensation.

The land in question belonged in equal shares to Ukkubanda and Punchirala. The share of the latter is not in question in this appeal.

Ukkubanda died leaving as heirs two daughters, Punchimenika, who was married in *diga* on December 6, 1899, and Ukku Amma, the added party appellant, and a son Dingiribanda, who died on October 27, 1903, intestate and unmarried.

Punchimenika after the death of her brother sold a one-fourth share to plaintiff, one-eighth by deed No. 8,824 dated June 20, 1904, which he sold to his brother in 1905 and re-purchased in 1906, and the other one-eighth by deed No. 5,786 dated March 16, 1926.

The first defendant claimed Ukkubanda's half share by purchase from Ukku Amma, who he alleged was the sole owner of the share after the death of her brother.

The first defendant leased the whole land including Punchirala's share to second defendant by deed No. 878 dated June 2, 1919.

The second defendant in the alternative claimed a sum of Rs. 600 as compensation for improvements made by him. The amount was reduced to Rs. 100 at the trial.

There was a previous appeal by the plaintiff when a new trial was ordered before another Commissioner. Drieberg J. in the course of his judgment said that the evidence already recorded could be used and that the parties could lead further evidence on the points in issue.

The proper procedure to give effect to this order was to recall the witnesses already examined and read their evidence or, if the parties agreed, read the evidence without recalling the witnesses. Owing to a misconception of the procedure the

1930

Present : Maartensz A.J.

TUCKER v. APPUHAMY.

193—C. R. Matale, 17,733.

Kandyan law—Woman given out in diga—Marriage registered as binna—Forfeiture of rights of inheritance.

Where a Kandyan woman was given out in *diga* but her marriage was subsequently registered as *binna*,—

Held, that the *diga* association operated to forfeit her rights in the parental estate, despite the *binna* registration.

A PPEAL from a judgment of the Commissioner of Requests, Matale.

N. E. Weerasooriya, for first defendant, appellant.

F. J. Soertsz (with *N. Gratiaen*), for second defendant, appellant.

A. E. Keuneman, for plaintiff, respondent.

July 16, 1930. MAARTENSZ A.J.—

The first and second defendants and the added party Ukku Amma—I am not sure

only witness recalled was the plaintiff, and there is nothing on the record to show that the other evidence recorded at the first trial was read in evidence.

In appeal counsel very properly agreed that I should read the evidence recorded at the first trial rather than put the parties to the expense of a new trial.

I have read the evidence recorded at the first trial and in my opinion it does not affect the learned Commissioner's finding of fact that Ukku Amma was given in *diga* to her husband Kiribanda before her brother's death. Kiribanda's marriage with Ukku Amma was registered on May 17, 1904, and was described in the register as a *binna* marriage.

It was contended that as a marriage of Kandyans was invalid unless it was registered, Ukku Amma's earlier association with Kiribanda, in *diga* was not a marriage and did not involve a forfeiture of her rights to inherit from her father.

As regards the finding of fact there is an abundance of oral evidence that Ukku Amma was given out in *diga* to Kiribanda, a man of Nagolla, and lived with him in that village. The truth of this evidence is confirmed by the description of Ukku Amma's residence as Nagolla in the deeds P5 and P6. In addition to this evidence there is the first defendant's evidence at the inquiry held on a claim made by Ukku Amma to a field which was seized on a writ issued against Punchimenika. He there said that the field belonged to both Ukku Amma and Punchimenika, negating Ukku Amma's claim that she was entitled to the whole land seized.

I therefore see no reason for disturbing the learned Commissioner's finding that Ukku Amma was given out in *diga* to Kiribanda before the marriage was registered.

The question whether a *diga* marriage, if not registered, deprives a woman of the right to inherit from her paternal estate is covered by authority. The earliest case is the case of *Kalu v. Howwa*,¹ in which Lawrie J. held that a woman who

now lives in *diga*, but whose marriage has not been registered under the Amended Kandyan Marriage Ordinance, 1870, is in very much the same position as a *diga* married woman was before the Ordinance came into operation. Hence, a woman who so lives is not entitled to a share of her father's estate.

This decision was followed by Wendt J. in *Komale v. Duraya*,¹ and by Hutchinson C.J. and Middleton J. in the case of *Punchi Mahatmaya v. Charlis*,² In these cases the marriage was not subsequently registered.

In the case of *Ukku v. Kirihonda*,³ the facts are very similar to the facts in this case. There a Kandyan woman, having for two years cohabited with a Kandyan man in the *mulgedara* or ancestral house of her father, went with that man to his house and lived in it for some years, and their marriage was then registered. The marriage certificate described the marriage to be in *binna*. The defendant pleaded that the plaintiff during her father's lifetime was married out in *diga* and thus forfeited any rights to her father's estate. The Commissioner held that the plaintiff was married out in *diga*, notwithstanding the entry in the marriage certificate, and dismissed plaintiff's action. Moncrieff J., with diffidence, affirmed the judgment of the Commissioner. I am bound by these decisions, and they are, if I may respectfully say so, in accordance with my own opinion, that the giving out of a woman in *diga* operates to forfeit the right to inherit from her paternal estate, although the association with the man to whom she has been given in *diga* is not a legal marriage for want of registration.

The second defendant has not given evidence or called any witnesses to prove his claim for compensation for improvements.

I accordingly dismiss the appeal with costs.

Appeal dismissed.

¹ (1907) 3 *Bal.* 122.

² (1908) 3 *A. C. R.* 89.

¹ (1892) 2 *C. L. R.* 54

³ (1902) 6 *N. L. R.* 104