Present: Pereira J. and Ennis J.

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DINGIRIHAMY *v.* MUDALIHAMY *et al.*

209—D. C. Kurunegala, 4,402.

Kandyan marriage — Entry in marriage register that marriage was "bina" is not conclusive evidence of "bina" marriage—Effect of registration — Marriage dating back to date of native ceremony — Daughter marrying in "diga" after father's death loses right to paternal inheritance.

Per PEREIRA J. and ENNIS J. with diffidence :—

(1) The fact that a marriage of Kandyans is described in the register of marriages as a *bina* one is not evidence of *bina* marriage ; evidence is admissible to contradict the register and to prove that the marriage was *diga*.

Per PEREIRA J. with diffidence :—

(2) The registration of a marriage among Kandyans has the effect of making the marriage date back to the actual native ceremonies performed for the purpose of constituting the marriage.

Per PEREIRA J. and ENNIS J.—A woman who after her father's death, that is to say, after she has actually inherited her father's property, marries in *diga*, forfeits her rights already acquired.

THE facts are set out in the judgments.

Morgan de Saram, for plaintiff, appellant.

Allan Drieberg, for first and second defendants, respondents.

V. Grenier, for third defendant, respondent.

Cur. adv. vult.

October 15, 1912. PEREIRA J.—

In this case the plaintiff's marriage appears to have been registered in 1907, but the customary ceremonies appear to have been performed many years before that. I have read the evidence carefully, and I am inclined to think that its weight is in favour

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of the contention that those ceremonies were ceremonies proper to a *diga* marriage. In the register, however, the marriage is entered as a *bina* marriage, and a question arises here, in view of section 39 of the Kandyan Marriage Ordinance, whether the entry in the register is not conclusive on the question as to the nature of the marriage. That section enacts that if it does not appear in the register whether the marriage was contracted in *bina* or in *diga*, such marriage shall be presumed to have been contracted in *diga*. That being so, if it does appear in the register whether the marriage is contracted in *diga* or in *bina*, it may well be argued that that entry has a greater effect than that of a mere presumption. It may be said that the entry is conclusive on the question as to the nature of the marriage, but I see that the question has been considered by Moncreiff J. in *Ukku v. Kiri Honda*,[1] and by my brother Wood Renton in *Ram Etana v. Nikappu*,[2] and that they are of opinion that the entry in the register may be rebutted by evidence. I think that the entry in the register in the present case is sufficiently rebutted by evidence. It has also been held in the first case cited above that the registration of a marriage dates back to the actual native ceremonies performed for the purpose of constituting the marriage. I adopt this view also, although I felt it a little difficult to reconcile it with the fact that the ceremony prescribed by section 20 of the Ordinance reads like a ceremony intended to constitute a marriage for the first time. If the woman had already been taken by the man to be his wedded wife, I thought there would be incongruity in the question—" Do you take this woman to be your wedded wife? "—given in section 20.

Then comes the question whether a woman who, after her father's death, that is to say, after she has actually inherited her father's property, marries in *diga*, forfeits her rights already acquired. On this question the decision in *Meera Saibo v. Punchirala*[3] is in point . . . . . .

I would dismiss the appeal.

ENNIS J.—

The points for determination in this appeal are whether a form of marriage gone through according to Kandyan custom about the year 1885 is valid under the Ordinance No. 3 of 1870, and if not a valid marriage, whether it has any effect. There seems no reason to doubt that the particular form of marriage gone through was " in *diga* " as found by the District Court.

The parties to the marriage, however, in 1907 registered a marriage under the Ordinance No. 3 of 1870, and the certificate of that marriage contains, *inter alia*, the following particulars:

[1] *6 N. L. R. 104.* [2] *14 N. L. R. 289.*

[3] *13 N. L. R. 176.*

that the date of the marriage was July 29, 1907, and that the marrriage was in *bina*. The provisions of section II of the Ordinance No. 3 of 1870 are to the effect that no marriage contracted after September 30, 1860, or "hereafter," *i.e.*, after December 31, 1870, should be valid, unless registered in the manner and form and before the registrar as provided in the Ordinance, with the exceptions contained in the Ordinance.

The only exception is in section 25, which provides that marriages celebrated according to Kandyan custom after the passing of Ordinance No. 13 of 1859, which are void for want of registration or for invalid registration, should be deemed good and valid and operate to dissolve all former marriages. Reading this with section 11, it would seem that the exception does not extend to Kandyan marriages contracted from and after January 1, 1870.

Section 30 of the Ordinance of 1870 provides for legitimization of children born to the parties prior to the registration of a marriage under the Ordinance, and finally section 39 provides that the certificate of registration shall be the best evidence of the marriage and of the facts stated therein.

The construction I place upon this Ordinance is that Kandyan marriages celebrated after September 30, 1860, and before January 1, 1871, which have not been registered or invalidly registered, and which are otherwise valid by Kandyan custom, shall be deemed good and valid marriages without registration at any time. That after December 31, 1870, the only valid Kandyan marriage is one in manner and form and before a registrar as provided in the Ordinance No. 3 of 1870.

A perusal of the Ordinance makes it clear that a registrar can register only "intended" marriages, the notice to issue under section 15 is a notice of a marriage to be "contracted," the form of notice under the section runs: "I hereby give notice that a marriage is intended to be had within three months of the date hereof," and section 20 requires the registrar by whom any marriage is to be registered to ask certain particulars of the parties "to be married," after which the contract of marriage is entered into before him and registration ensues.

Section 22 makes provision for the subsequent registration of "such" a marriage (*i.e.*, marriage before the registrar) in any case where, without fault of the parties, the registration has been omitted or erroneously made.

There is no provision in the Ordinance for the subsequent registration of marriages already contracted, which under section 11 are invalid. Certain of these marriages are to be deemed to be valid, but some after January 1, 1871; and section 30 provides that every marriage registered under this Ordinance, *i.e.*, a registered marriage as distinct from one by custom, shall render legitimate the children born to the parties previous to their intermarriage.

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The best evidence of the marriage is, by section 30, the entry in the register, which is also the best evidence of the other facts stated therein. These entries can be made only, as I have shown above, with reference to a marriage before the registrar, and after inquiry from the parties as to the nature of the marriage intended to be entered into before him.

I, therefore, hold that the form of marriage gone through by the parties according to the Kandyan custom for a marriage in *diga* about the year 1885 did not constitute a valid marriage, or using the words of section 25 with regard to marriage by custom between October 1, 1860, and January 1, 1871, the " marriage " was " void," and no provision exists in the Ordinance to make such a void marriage valid at a subsequent date.

Had this void *diga* marriage any effect? In *3 A. C. R. 87* Hutchinson C.J. and Middleton J. held that under Kandyan law a woman who leaves her parental home and takes her permanent abode at her husband's house and lives in *diga* with him, although she contracts no legal marriage, forfeits her right to her parental inheritance. In *3 Bal. 122* Wendt J. held that under Kandyan law a woman going out in *diga* would not be entitled to claim a share of her parental inheritance, although she may not contract a legal marriage.

In *2 C. L. R. 54* Lawrie J. held that the exclusion under the Kandyan law of a *diga* married daughter from a share in her fathers' property still attaches to a daughter who goes out in *diga*, even though the marriage is invalid by reason of its non-registration under the provisions of Ordinance No. 3 of 1870.

The last of these decisions was on the ground that the subsequent registered marriage dated back to the previous ceremony for the purpose of constituting the marriage, and the same reason was expressed in *6 N. L. R. 104* by Moncreiff A.C.J., who said: " With some diffidence I am inclined to think that subsequent registration dates back to the original beginning of the connection between the parties."

In view of the decisions cited which were followed in the cases cited in *13 N. L. R. 176* and *14 N. L. R. 289*, I also with some diffidence arrive at the conclusion that, for the purpose of ascertaining whether the statement of the parties before the registrar as to the nature of the marriage is correct, the previous ceremony may be referred to, and that the facts stated in the register may be rebutted by evidence of the previous ceremony.

The Kandyan law that a marriage in *diga* by a woman after the death of her father, and consequently after the inheritance had vested in her, causes inherited property to revert to the other heirs, is also established by the cases cited.

I would, therefore, dismiss the appeal.

Appeal dismissed.