1958 *Present:* **Basnayake, C.J., and K. D. de Silva, J.**

PERERA, Appellant, *and* ASELIN NONA and another, Respondents

S. C. 311—D. C. Panadura, 3,306

Kandyan Law—Diga *married woman—Re-acquisition of* binna *rights—Kandyan Succession Ordinance, s. 2 (b).*

Under Kandyan Law, a woman who marries in *diga* and returns to her parental home on the death of her *diga* husband and after the death of her parents cannot by mere residence in her parental home acquire the rights of a *binna* married daughter if she marries a second time while residing in the house of her deceased parents. To establish re-acquisition of *binna* rights, she must prove that those who inherited her parental property when she was out in *diga* agreed to share it with her.

APPEAL from a judgment of the District Court, Panadura.

N. E. Weerasooria, Q.C., with *Cecil de S. Wijeratne* and *B. S. C. Ratwatte*, for Plaintiff-Appellant.

Sir Lalita Rajapakse, Q.C., with *D. R. P. Goonetilleke*, for 1st Defendant-Respondent.

Cur. adv. vult.

June 18, 1958. BASNAYAKE, C.J.—

The main question that arises for decision on this appeal is whether or not the deceased Nandawathie contracted a marriage in *binna* with Piyasena Ranatunge (hereinafter referred to as Ranatunge), her second husband, the first Don Marthenis Wijemanne (hereinafter referred to as Wijemanne) having predeceased her.

It is common ground—

(*a*) that Nandawathie was subject to the Kandyan Law and that Ranatunge was not,

(*b*) that the former succeeded to a half share of the property of her deceased husband Wijemanne, also a person not subject to the Kandyan Law, and

(*c*) that on her death her property did not pass to Ranatunge.

The learned District Judge holds that Nandawathie's marriage with Wijemanne in 1921 was a marriage in *diga* and that her marriage with Ranatunge in 1932 was a marriage in *binna*. The former of these findings has not been challenged in appeal by either side; but the appellant challenges the latter. The learned Judge also holds as a fact that Nandawathie's marriage with Ranatunge was not arranged by the elders of either side and that in view of the circumstances under which they got married it must have taken place "without much publicity".

At the time of her second marriage Nandawathie had been a widow for three years and her parents were dead. She was the mother of two children by Wijemanne. Ranatunge who was eleven years her junior

in age was an assistant English teacher in a school nearby. She had become pregnant through her intimacy with him. Four days before the birth of the child they got married at the Registrar's office at Yatipahuwa, a place within the province of Sabaragamuwa, one of the Kandyan provinces. Although the marriage was registered in an area to which the Kandyan Marriage Ordinance applied the registration was under the Marriage Registration Ordinance and not under the Kandyan Marriage Ordinance. It should be noted that the Kandyan Marriage Ordinance then in force did not preclude the registration of a marriage between a woman subject to Kandyan Law and a man not subject to Kandyan Law as now under the Kandyan Marriage and Divorce Act, No. 44 of 1952, which confines registrations under that Act to cases where both parties are subject to the Kandyan Law. If the marriage had been registered under the Kandyan Marriage Ordinance the register would have indicated whether the marriage was in *binna* or *diga*. Such an entry though not conclusive proof of the fact that the marriage was in *binna* or *diga* would be an indication of the kind of marriage the contracting parties had in mind and is binding as far as they and their respective representatives in interest are concerned (*Mampitiya v. Wegodapola* [1]). The fact that the parties chose to have their marriage registered under the Marriage Registration Ordinance when they could if they so wished have registered their marriage under the Kandyan Marriage Ordinance is an indication that they were not thinking of their marriage in terms of *binna* or *diga*.

The learned District Judge's decision that Nandawathie's marriage with Ranatunge was a marriage contracted in *binna* cannot be sustained as it is based on an erroneous view of the law which he states thus in his judgment: "the essential factor of a marriage in *binna* is that the husband comes to live with the wife". Later in his judgment he sums up his view thus: "So that in my view when Ranatunge married Nandawathie and lived with her he was contracting a *binna* marriage".

A marriage in *binna* is a marriage in which the husband agrees to live in his wife's parental home after the marriage, subject to the incidents of such a marriage in order that she may not lose her right to inherit her parental property. A marriage in *diga* takes place when a woman is given in marriage and is in accordance with the terms of the contract removed from her parental home and makes her husband's house her home. In a *diga* marriage, subject to certain exceptions, the woman forfeits her inheritance. But she can regain those rights if she returns and settles down in her parental home and as indicated later in this judgment is admitted to the inheritance by those entitled to do so. In view of the fact that rights of succession to parental property are involved the parents of the wife must be consenting parties to a *binna* marriage. Where the husband and wife and her parents agree that she and her husband should make her father's house their home after the marriage, the marriage is a *binna* marriage in her father's house. Similarly where the husband and wife and her parents agree that she and her husband should make her mother's house their home after the marriage, it is a *binna* marriage in her mother's house. The rules of inheritance are not the same in each

[1] *(1922) 24 N. L. R. 129.*

case. There is also a difference in the authority exercised over the husband. In the one case it is the father who has authority over him and can expel him, in the other it is the mother (Armour, Ch. III sec. 6).

The husband occupies a subordinate position in the case of a *binna* marriage. He has no power over his wife's property. He may be expelled by his wife or her father or mother according as the marriage has been in *binna* in the father's house or in the mother's house. According to both Sawers and Armour a *binna* marriage " occurs only in the case of the bride being an heiress or the daughter of a wealthy family, where there are few sons " (Sawers, Ch. VII sec. 4 ; Armour, Ch. II sec. 2). This statement cannot be regarded as excluding *binna* marriages for reasons other than preserving the wife's inheritance. Perhaps it is founded on the fact that generally speaking except for the purpose of enabling his wife to retain her rights to her inheritance a man would not be too ready to accept the subordinate position of a *binna* husband.

A woman who marries in *diga* has a right to return to her parental home on the death of her *diga* husband and there to have lodging and support and clothing from her parents' estate ; but she cannot by mere residence in the parental home acquire the rights of a *binna* married daughter if she marries a second time while residing in her parents' home (Sawers, Ch. I sec. 3). *Simon v. Dingiri and others* [1]. Where the parental property has devolved on the heirs entitled to succeed to that property on the death of her parents, a *diga* married daughter who returns to the parental home and re-marries and remains there does not by that fact alone become entitled to a share of the parental property in the same way as if she had contracted a marriage in *binna* during the life-time of her deceased parents. For her to become entitled to a share in her parental property and the marriage to be regarded as a *binna* marriage those who succeeded to that property when she was out in *diga* must agree to give her a share. Such an agreement may be indicated either expressly by a notarial instrument or by an unequivocal course of conduct. As a course of conduct has to be established by oral evidence or by reference to a series of documents or both, by far the better way of admitting a woman to *binna* rights would be by an instrument in writing attested by a notary. The very useful observations on this topic of L. M. D. de Silva, A.J. in the case of *Mudiyanse v. Punchimenika* [2] bear repetition. He said, " I do not think that the fact that a *deega* married daughter has returned to the *mulgedera* or that she has maintained a close and constant connection with the *mulgedera* after marriage is conclusive of the question that she has acquired *binna* rights although such facts are of great evidentiary value in its determination. It must appear that the father in his life-time or the family after his death have manifested an intention to admit the daughter to *binna* rights either by express declaration or by conduct from which such an intention can be gathered. Proof of a course of dealing recognising such rights will go a long way in establishing such an intention. " In an earlier case De Sampayo J. (*Punchi Menika v. Appuhamy*[3]) expressed the same idea tersely thus : " The re-acquisition of *binna* rights is not a one-sided process, the father's family must intend, or at least recognize, the results. "

[1] *(1916) 3 C. W. R. 55.* [2] *(1933) 35 N. L. R. 179 at 181.*
[3] *(1917) 19 N. L. R. 353*

This reluctance to recognise claims to the re-acquisition of *binna* rights after the death of the parents when rights to property have vested in others, without clear proof that those who succeeded to the property have signified their intention expressly or by unequivocal conduct to part with their rights to the property to the extent of giving the *diga* daughter who has returned the share she would have got had she not gone out in *diga*, runs through our decisions. Any other rule will throw the succession to property among Kandyans into a state of confusion. Besides, those who have inherited property and acquired rights cannot be deprived of them by the unilateral action of another who had forfeited her rights to the inheritance. There must be consent on their part to such a deprivation or the surrender of their rights must be voluntary. In this connexion it is sufficient for the purpose of this appeal to mention only the cases of *Appuhamy v. Kumarihamy* [1], *Appuhamy v. Kiri Banda et al.* [2] and *Simon v. Dingiri and others* [3]. In the last mentioned case a *diga* married woman returned to the parental home about ten years after she had married in *diga* and after the death of her father and lived there for some time until she married another man and remained in her father's house. Shaw A.C.J. in holding that she did not acquire *binna* rights observed—" it would be most inconvenient if the law were otherwise, for it would be impossible to tell upon the death of an owner of the property who the heirs were, if daughters who had been married in *deega* were entitled, years after their father's death, to return to the property and claim to acquire rights to it on that ground ".

In the instant case it is not disputed that Nandawathie married Wijemanne in 1921 and that he died in 1929, and that the marriage with Ranatunge took place in 1932 when both her parents were dead. As the first marriage of Nandawathie has been held to be in *diga* those who assert that her second marriage was in *binna* must prove that she re-acquired *binna* rights. Although the evidence is not all one way (Ranatunge says they lived in the school, Muttetuwegama the ex-Ratemahatmaya says they lived in the house of her brother Yasaneris, and Dharmadasa her son by Wijemanne says they lived in her father's house), assuming that Nandawathie returned to her paternal home about 8 years after she went out in *diga*, and that after her marriage with Ranatunge she resided there, there is no evidence at all that those who had inherited her father's property intended to share it with her.

Marriage is primarily a matter of contract between the parties to it. The evidence of Ranatunge the surviving party to that contract is that he never consented to a marriage in *binna* and that they never lived in the parental house. The absence of any evidence that those who inherited her paternal property intended to treat Nandawathie as if she had not married Wijemanne in *diga* by giving her a share of what they inherited concludes the matter. Ranatunge's evidence that the marriage was not arranged by any one *in loco parentis* and that he did not contract a marriage in *binna* with Nandawathie is supported by the absence of evidence of intention to admit her to the inheritance. Ranatunge's children were therefore not persons subject to the Kandyan Law because they do not

[1] *(1922) 24 N. L. R. 109.* [2] *(1926) 4 Times 75.*
[3] *(1916) 3 C. W. R. 55.*

fall within the ambit of section 2(*b*) of the Kandyan Succession Ordinance which provides that the *issue of a marriage contracted in binna* between a woman subject to the Kandyan Law and domiciled in the Kandyan provinces and a man not subject to the Kandyan Law shall be deemed to be and at all times to have been persons subject to the Kandyan Law. Nandawathie's children by Ranatunge are dead. Succession to their property is governed by the *Matrimonial Rights* and Inheritance Ordinance.

We therefore set aside the interlocutory decree entered by the learned District Judge and direct him to enter a fresh decree on the basis that the rights that devolved on Nandawathie's death on her children by Ranatunge passed on their death according to the rules of inheritance contained in the Matrimonial Rights and Inheritance Ordinance.

The appellant is entitled to his costs both here and below. They should be paid by the 1st defendant-respondent.

K. D. DE SILVA, J.—I agree.

Appeal allowed.