

Present : Ennis and Schneider JJ.

APPUHAMY *et al.* v. KUMARIHAMY *et al.*

1922.

93—D. C. Badulla, 3,585.

Kandyan law—Re-acquisition of binna rights by woman married in diga—Property sold by other heirs before re-acquisition.

The re-acquisition of *binna* rights by a Kadyan woman, who was married in *diga*, does not give her title to property alienated by the other heirs before she re-acquired the *binna* rights.

The re-acquisition of *binna* rights is not a one-sided process; the father's family must intend, or at least recognize, the results.

THE facts are set out in the judgment of the District Judge. R. G. Saunders, Esq.):—

Loku Banda Arachchi was the original owner of the land in dispute. He was married to Kumarihamy, first defendant. They had two children, Hcen Banda and Badara Menika, second defendant. Bandara Menika married Punchi Banda (1) in *diga*, and consequently forfeited inheritance to paternal property. The chief point to be decided in this case is whether Bandara Menika re-acquired *binna* rights. This is purely a question of fact, and I hold that the evidence, even of the witnesses called by defendant, clearly shows that until the death of her husband Punchi Banda (1), second defendant was living in *diga* with her husband at Soranatota. The case for defendants is that

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after her marriage with Punchi Banda (1) she returned to the *mulgedera* at Kadurugamuwa and took up her abode there. The evidence called disproves this. That second defendant should return to the *mulgedera* from time to time and visit her mother is only natural, but it is quite clear they were mere "visits," and that second defendant did not return to live permanently at the *mulgedera* till after the death of Punchi Banda (1), when she returned to the *mulgedera* and contracted a second marriage. The fact, too, that he brother Heen Banda and Kumarihamy disposed of her original share of the land without consulting her and dealt with it, as Bandara Menika admits "without my knowledge or consent," clearly shows that they believed and acted on such belief, that by her marriage with Punchi Banda (1), Bandara Menika had forfeited her rights and had not re-acquired them at the time they dealt with the land. There is no doubt that the various documents produced were executed by Kumarihamy and her son Heen Banda, and that the land was possessed by the parties concerned in the documents. I accordingly hold that the plaintiffs became entitled to the land "Beeriyagaha Uhana" by deed of transfer No. 4,432 of November 2, 1913, and by prescriptive possession (issues 1 and 2). As regards the third issue: "Did defendants dispute title to the said lands in May, 1921, and unlawfully remove half the crop therefrom," there can be no doubt they did in fact do so, the defendants, undoubtedly, did remove half the crop, but their contention is that they did not oust plaintiffs from their (plaintiffs') half share (*vide* paragraph 2 of the answer). As, however, I have held that plaintiffs are entitled to the whole land, I must hold that defendants did remove half the crop belonging to plaintiffs, and I accordingly give issue (3) in favour of plaintiffs. As regards damages no very satisfactory evidence has been led, but I see no reason for not accepting plaintiffs' figure Rs. 82 (issue 4). As regards issue 6: "Is there a misjoinder of first and third defendants." I hold that they have been rightly joined, third defendant is the present husband of second defendant, and it was by the acts of first defendant in conjunction with Heen Banda that plaintiffs ultimately possessed this land and in any dispute to plaintiffs' right to the same. It appears to me natural and proper that the party on whom plaintiffs base their rights should be made parties to the action.

Zoyza (with him *Batuwantudawa*), for appellant.

H. V. Perera, for respondent.

September 6, 1922. ENNIS J.—

This was an action for declaration of title to a land in the Kandyan Province. To understand the case it is necessary to set out the chain of title. The land originally belonged to Loku Banda Arachchi who married Kumarihamy, the first defendant in this case. They had two children, Bandara Menika, the second defendant in the case, and Heen Bandara. Loku Banda died, and Bandara Menika married in *diga* and so forfeited her rights to the property. After this marriage, Heen Banda and first defendant executed a deed on June 15, 1909, by which they conveyed the land now in dispute to one Ahamadu Marikar who, in 1913, by the document P 1, conveyed it to the first defendant and his son Jayawardene. Jayawardene died, and his share devolved on his mother, upon whose death

it devolved on second plaintiff who is a daughter of first plaintiff. The first and second defendant disputed his rights to the land, and claimed a declaration of title and possession of the land. The only question which arose in the case is whether Bandara Menika, the second defendant, had regained her *binna* rights, or whether she had ever lost them. The first defendant said that she had no claim, and did not dispute plaintiffs' right. The case is mainly between the plaintiff and second defendant. On this question of fact, the learned Judge has held that Bandara Menika married her husband in *diga* and paid visits only to the *mulgedera* during his lifetime, and that she did not re-acquire *binna* rights in the paternal estate in that interval. This contention seems to be well founded. The evidence of Loku Banda, Arachchi of Sorantota, shows that she went to her husband's village within a few days of her marriage, and the marriage is admittedly one in *diga*, and is so registered. Moreover, it is clear that Heen Banda and Kumarihamy had not acquiesced in the recovery of *binna* rights by the second defendant at the time of their conveyance in 1909. The re-acquisition of *binna* rights "is not a one-sided process; the father's family must intend, or at least recognize, the results" as stated in the judgment of my brother De Sampayo in the case of *Punchi Menika v. Appuhamy*.¹ There is no evidence in the present case that Heen Banda and Kumarihamy recognized any *binna* rights in Bandara Menika until her first husband died, when, it appears, she returned to the *mulgedera* and married a second time in *binna*. At that time, however, the land in dispute had already been alienated by those who, at the time of alienation, alone had the right to alienate it. A curious argument was addressed to us, viz., that on her second marriage Bandara Menika regained all the rights which she might have had at the time of her first marriage, and that they included a right to a share of the land now in dispute. I am unable to agree with the contention, because Bandara Menika on her first marriage forfeited her rights, and Heen Banda and Kumarihamy had, therefore, full right to alienate the property, a right which they exercised in favour of the purchaser in 1909. Anything therefore which Bandara Menika could re-acquire at the time of her second marriage could be only such paternal property as remained with Heen Banda and Kumarihamy at the time of her re-acquisition of *binna* rights, and it cannot be said that Bandara Menika regained a share in property no longer belonging to the paternal estate. I see no reason to interfere with the finding of fact, and would dismiss the appeal, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.

¹ (1901) 19 N. L. R. 353.