

1961 *Present* : Sinnetamby, J., and Tambiah, J.

DINGIRI AMMA, Appellant, *and* RATNATILAKA and others,
Respondents

S. C. 36 (Inty.)—D. C. Kurunegala, 8067/P

*Kandyan Law—Daughters married in diga—Re-acquisition of binna rights—Proof—
Evidential value of marriage certificate—Kandyan Marriages Ordinance,
No. 3 of 1870 (Cap. 36), s. 36.*

Under the Kandyan Law a diga married daughter would re-acquire binna rights if the father, during his lifetime, brought her into the mulgedera after the dissolution of her marriage and had her married in binna. Thereafter, if it be contended that the daughter, who was married in binna, forfeited her rights, it must be shown that she severed herself from her parental home before the death of the father.

A diga married daughter cannot re-acquire binna rights unless it is shown that she was not only received back at the mulgedera by her father and those who were entitled to the inheritance but also that they acquiesced in her re-acquiring binna rights and agreed to share the inheritance.

When a binna marriage certificate is produced, a presumption arises by virtue of section 36 of the Kandyan Marriages Ordinance that there was a proper binna marriage. This presumption, however, can be rebutted by clear evidence to the contrary.

The departure of a binna-married daughter from the mulgedera, after her father's death, does not entail any forfeiture of any rights which she might have acquired before her father's death.

APPEAL from an order of the District Court, Kurunegala.

C. Thiagalingam, Q.C., with E. A. G. de Silva, for the 1st Defendant-Appellant.

C. R. Gunaratne, for the Plaintiff-Respondent.

Cur. adv. vult.

June 2, 1961. TAMBIAH, J.—

The plaintiff brought this action to partition the field called Asseddu-mekumbure and Pillewa, depicted as lots A, B, C and D in Plan No. 3374, marked X in the course of the proceedings. The plaintiff stated that the original owner of the land was one Mudiyanse who died intestate leaving three daughters, Kumarihamy, Ukku Amma and Dingiri Amma. The plaintiff, who claimed title through Kumarihamy and Ukku Amma, stated that all three daughters of Mudiyanse were married in diga and thus he was entitled to 2/3ds share of the said land while the 1st, 2nd and 3rd defendants were entitled to 1/3rd share of the said land.

The first defendant-appellant, in her answer, stated that Kumarihamy and Ukku Amma were married in diga, but Dingiri Amma was married in binna, and consequently, she claimed the whole of the land through Dingiri Amma. The first defendant-appellant further asserted prescriptive title over the same land.

The following points in dispute were raised at the trial :—

1. On the death of Mudiyanse, did his daughters Dingiri Amma, Ukku Amma and Kumahamy, *alias* Kumarihamy, become entitled to a 1/3rd share each of the land sought to be partitioned ?
2. Did Dingiri Amma, Ukku Amma and Kumahamy, *alias* Kumarihamy, or any one or more of them, forfeit their rights by going out in diga ?
3. Did all, or any one or more of the said three persons, regain binna rights by
 - (a) acquiescence on the part of Mudiyanse or all or any one or more of the sisters ;
 - (b) by possessing the family lands with the acquiescence of the other sisters ?
4. Did plaintiff plant lots A and C and make the buildings on lot C with the acquiescence of Mudiyanse ?
5. If so to what compensation is he entitled to ?
6. Prescriptive rights of parties ?
7. Were Ukku Amma and Kumahamy, *alias* Kumarihamy, married in diga during the lifetime of their father and forfeit their rights ?

8. Was Dingiri Amma married in binna during the lifetime of her father ?
9. Has the 1st defendant been in exclusive possession of the land sought to be partitioned from 1939 and acquired a title to it by prescription ?
10. Did Dingiri Amma go out in diga with Kiri Banda in the year 1926?
11. If so, did she forfeit her rights ?
12. Even if she subsequently contracted a binna marriage, did she thereby regain binna rights ?

In the course of the trial, evidence was led to show that Kumarihamy and Ukku Amma were married in diga. Dingiri Amma, although married in diga first, came back to the mulgedera after the dissolution of her first marriage. The first defendant-appellant produced a marriage certificate, marked 1D7, which showed that Dingiri Amma was married a second time in binna to a man called Ran Banda.

The main points at issue at the trial were whether Dingiri Amma had re-acquired binna rights in spite of the fact that she had contracted a diga marriage earlier and also whether Ukku Amma and Kumarihamy re-acquired binna rights although they had contracted diga marriages earlier. The prescriptive rights of the parties were also at issue at the trial.

The learned judge, who tried the case, has not only misdirected himself on questions of law, but has also failed to answer some of the relevant issues in the case and, further, has failed to evaluate the evidence in the proper perspective. The learned judge took the view that none of the three daughters of Mudiyanse forfeited their rights as they were all married in diga and that consequently there was no question of their acquiring binna rights. The learned judge further misdirected himself in holding that although Kumarihamy and Ukku Amma were married in diga during the lifetime of their father, they did not forfeit their rights as they came and lived in the mulgedera. The learned judge also erred in holding that although Dingiri Amma was married in binna the marriage was in fact a diga marriage as she had subsequently left the mulgedera.

The learned judge has failed to evaluate the evidence given by the witnesses and further has failed to consider the evidence given by Appuhamy, a witness called on behalf of the first defendant. He has also failed to answer the important issue whether Dingiri Amma re-acquired binna rights. As the learned judge has misdirected himself both on questions of law as well as on questions of fact and has not come to a proper finding on title, any finding of the learned judge on the question of prescription also fails to stand the test of careful scrutiny.

The evidence led in the case discloses that Dingiri Amma, after the dissolution of her first marriage, came back to the mulgedera and lived with Mudiyanse. The certificate of marriage, marked 1D7, produced by the defendant-appellant creates certain presumptions which have to be examined: In the case of *Mampitiya v. Wegodapela et al.*¹, Ennis J., after referring to a diga marriage certificate, stated "In the absence of evidence there would be a presumption that the terms of the contract relating to residence had been carried out, but I can see no good reason for excluding oral testimony relating to the carrying out of this term of the contract". In this connection, Section 36 of the Kandyan Marriages Ordinance (No. 3 of 1870) (Cap. 36) enacts as follows:—

"The entry as aforesaid in the register of marriages and in the register of divorces shall be the best evidence of the marriage contracted or dissolved by the parties, and of the other facts stated therein. If it does not appear in the register whether the marriage was contracted in binna or in diga, such marriage shall be presumed to have been contracted in diga until the contrary be shown."

When the defendant produced the binna marriage certificate, marked 1D7, the presumption arose that it was a proper binna marriage as understood in Kandyan Law and that the terms of the contract were carried out. This presumption, however, could be rebutted by clear evidence to the contrary. The plaintiff led evidence to rebut the presumption but the defendant led evidence to show that Dingirihamy married in binna with the acquiescence of her father.

A binna married daughter would re-acquire binna rights if the father, during his lifetime, brought her into the mulgedera and had her married in binna (vide Sawers' Memoranda, etc. (Ondaatje's Edn.) 2; Perera's Armour 64-5; Niti Nighanduwa, translation by Le Mesurier and Panabokke, (Govt. Press) (1879) 36-40, 64, 66; Austin's Appeal Reports 96; Perera's Collection 182, followed in *Babanissa v. Kaluhami*²; *Samarakongedera Punchyralle v. Punchy Menika* (1828), Hayley (Sinhalese Laws and Customs) Appendix II, note 10). Thereafter, if it be contended that a daughter, who is married in binna, has forfeited her rights, it must be shown that she severed herself from her parental home before the death of the father. It is going out in diga and severance from the mulgedera during the lifetime of the father which brings about forfeiture, and not merely a temporary departure. (vide Modder's Kandyan Law (2nd Edn.) at pages 430-43; and the cases cited therein). The departure of a binna married daughter, after the father's death, does not entail any forfeiture as her rights would have crystallised at the time of her father's death (vide Niti Nighanduwa (supra) 35, 61, 63; Perera's Armour 59; *Siripaly v. Kirihame*³). Further, in considering the question as to whether the two daughters of Mudiyanse, Kumarihamy and Ukku Amma,

¹ (1922) 24 N. L. R. 129 at 135.

² (1909) 12 N. L. R. 105.

³ (1917) 4 C. W. R. 157.

who had admittedly married in diga, re-acquired, binna rights, it must be shown that they were not only received by Mudiyanse and those who were entitled to the inheritance at the mulgedera but further that they acquiesced in their re-acquiring binna rights and agreed to share the inheritance (Hayley (Sinhalese Laws and Customs) at page 385).

In view of the course we propose to adopt, namely, to send this case back for retrial, I do not wish to comment on the evidence of the witnesses. The learned District Judge should have been guided by the principles of Kandyan Law set out above. The plaint in this case was filed almost ten years ago and we regret that the parties have, after several years of litigation, failed to reach any finality. It is not possible for us, sitting in appeal, to decide questions of fact which arise in this case without the benefit of a proper finding of a judge of first instance. Therefore, we set aside the order of the learned District Judge and send this case back for retrial before another Judge. The costs incurred up to date will be borne by the parties who fail in the suit unless the parties come to some settlement in the course of the trial.

SINNETAMBY, J.—I agree.

Case sent back for re-trial.

