1933 *Present :* **Akbar J. and de Silva A.J.**

MUDIYANSE *v.* PUNCHIMENIKA *et al.*

147—D. C. Kegalla, 8,254.

Kandyan law—Deega married daughter—Re-acquisition of binna rights—Intention of father or family to readmit—Proof of intention.

To establish that a *deega* married daughter has re-acquired *binna* rights it must be proved that the father in his lifetime or the family after his death had manifested an intention to admit her to *binna* rights either by express declaration or by conduct from which such an intention may be gathered.

Such an intention may be proved by evidence of a course of dealing with property recognizing such rights.

APPEAL from a judgment of the District Judge of Kegalla.

C. V. Ranawaka, for defendants, appellants.

Navaratnam, for plaintiffs, respondents.

May 8, 1933. DE SILVA A.J.—

The first defendant in this case is the daughter of one Punchirala. She was married in *deega* in 1897, in Punchirala's lifetime, and the question for decision is whether she has subsequently acquired *binna* rights and retained them up to the date of action.

The text books on Kandyan law state that *binna* rights are acquired by a daughter who has been married in *deega* in the following circumstances :—

(*a*) By being recalled by the father and remarried in *binna* ;

(*b*) By her father, on her return to his house along with her husband, assigning to them and putting them in possession of a part of his house and a specific share of his lands ;

(*c*) On her returning home along with her husband and attending on her father, and rendering him assistance until his death ;

(*d*) On her coming back and attending on and assisting her father during his last illness, and the father on his deathbed expressing his will that she should have a share of his lands.

It was held by Wood Renton C.J. in the case of *Punchi Menike v. Appuhamy*[1] that the four sets of circumstances set out above are illustrative and not definitive. He stated " that the ancient standard text books on the Kandyan law consists for the most part of reports of, or comments upon, particular decisions, rather than legal treatises in the modern sense of the term ". It is, therefore, not correct to regard them as though they had been set out in a statute as necessary conditions for the acquisition of *binna* rights. On the one hand, these sets of circumstances are not exhaustive but mere instances illustrating the principles under which a *deega* married daughter acquires *binna* rights. On the other hand, I doubt whether the fact that one or more of these sets of circumstances exists, is conclusive in law of the question that a *deega* married daughter has acquired *binna* rights. They appear to be of evidentiary value and to create strong presumptions that *binna* rights have been acquired. The principle underlying the acquisition of such rights has been laid down by Wood Renton C.J. in the following passage in the case referred to :—

> " A daughter married in *deega* forfeits her interest in her paternal inheritance, not by virtue of that marriage, but because it involves a severance of her connection with her father's house. If that connection is re-established *on its original basis,* if the *deega* married daughter is once more received into the family as a daughter it is only reasonable that she should enjoy a daughter's rights of inheritance."

It appears from the observations in the case itself as well as from observations in later decisions that emphasis must be laid on the words " on its original basis ". The basis existing before a marriage in *deega* is that the daughter is entitled to certain rights of inheritance to her father's property. The question to which a Court has to address its mind with particularity is whether relations with the daughter have been resumed on this basis or in circumstances from which this basis can be inferred. A father, or after his death, his widow and children may receive back into the family a daughter married in *deega* on grounds merely of compassion or charity or out of affection arising from family ties. She may also be received for the purpose of providing her with maintenance to which she is in law entitled. In such circumstances she would not acquire *binna* rights of inheritance.

[1] *(1917) 19 N. L. R. 353.*

De Sampayo J. in the case referred to said " the principle underlying the acquisition of *binna* rights, as I understand it, is that the daughter is readmitted into the father's family and restored to her natural rights of inheritance. This, of course, is not a one-sided process; the father's family must intend, or at least recognize, the result ". Dalton J. in the case of *Appuhamy v. Kiri Banda*[1] reviewed exhaustively the previous authorities and commenting on the first passage which I have quoted above from the case of *Punchi Menike v. Appuhamy* (*supra*) said:—

" The above extract sets out very clearly a most reasonable proposition, but the difficulty lies in applying it, to ascertain whether or not *the original basis has really been resumed,* whether or not all parties, for example the father in his lifetime, or his sons after his death, have accepted and approved of the position, and whether the connection maintained is not merely the connection that a daughter naturally still maintains even after a *deega* marriage, with her father, mother, brothers, and sisters. It must, of course, also not be lost sight of that the daughter is entitled in any case to return for maintenance. If it can be deduced from this close and constant connection in the absence of direct evidence on that point, that the father has, or after his death her brothers have, by some means or other signified his or their consent that the daughter shall enjoy rights of inheritance to the paternal estate, then it would be difficult to see on what ground, having regard to what the text writers I have referred to say, a *deega* married daughter should not be held to have regained *binna* rights. All the cases given seem to require that consent in some form or other, and it seems reasonable that it should be ".

With this view I respectfully venture to agree. Each case must depend upon its own circumstances, but I do not think that the fact that a *deega* married daughter has returned to the *mulgedara* or that she has maintained a close and constant connection with the *mulgedara* 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 lifetime 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 recognizing such rights will go a long way in establishing such an intention.

In the case under consideration it is claimed by the first defendant-appellant that there are a large number of facts from which an intention to recognize acquisition of *binna* rights can be gathered. She states that her father was instrumental in having the first marriage cancelled and in bringing about another marriage which though not registered was in every other detail similar to a *binna* marriage. She states that the child of the first marriage was left with the first husband and it is argued that this fact coupled with the divorce establishes a complete obliteration of the *deega* marriage and of its consequences. It is claimed that her father built a house for her on a land held in common between the father and her husband. It is also asserted that she attended on the father during his last illness.

[1] *7 C. L. R. 176.*

With regard to the alleged second marriage the learned Judge has held that there is no evidence that the defendant was married in *binna*. Counsel for defendant admits that it was not registered and therefore not valid in law. In considering however the question whether *binna* rights have been acquired registration of the marriage is not of primary importance. It has been held that the forfeiture of rights of inheritance on a marriage in *deega* takes place not because of the marriage but because of the severance from the family which is a consequence of the marriage (*Punchi Menike v. Appuhamy* (*supra*)). It is not necessary that a *deega* marriage should be registered for a forfeiture to take place (*Tucker v. Appuhamy* [1]). Similarly for the acquisition of *binna* rights it is the cessation of the severance that one has to consider. It appears to be clear that the first defendant lived with a man after her divorce. The learned Judge should consider whether there was a marriage at all, and the nature of the incidents accompanying, and consequent on, the living together. If they were similar to those of a *binna* marriage then in spite of the absence of registration they tend to indicate the acquisition of *binna* rights.

The learned Judge has held that " there is some strong evidence in defendant's favour ". He has held that she undoubtedly went back to the father's house. He points out correctly that she does not say, and that no one else states, that the father expressly declared a wish that she should take a share of the inheritance. It appears from his judgment that he found the evidence placed before him by both sides unreliable and he was not able to arrive at safe conclusions of fact. His final decision is that the first defendant did not reacquire *binna* rights although he stated earlier that there was strong evidence in her favour. It will appear from what follows that one test which should be applied to the fullest possible extent has not been availed of.

On the question of prescription the learned District Judge held that " there was no prescription ", meaning, I take it, thereby that no question of prescription could arise as the parties were brothers and sisters. Presumably because he held this view he has not examined the manner in which the parties dealt with the property of Punchirala since his death which took place so long ago as 1901. In the case of *Punchi Menike v. Appuhamy* (*supra*) de Sampayo J. examined the dealings of the parties with the property, and a very important factor in the decision which he arrived at was the nature of these dealings. In the case under consideration we have a period over 30 years during which the property has been dealt with after the death of Punchirala. Evidence of the possession of the property must be obtainable and such evidence, even if not entirely reliable, is likely to be reliable at least with regard to possession for a considerable period immediately preceding the filing of the action.

I think that the parties ought to be given an opportunity of placing such evidence before the Court and the learned Judge should consider it very carefully. On the one hand it might disclose that the first defendant was in possession of a share of these properties indicating thereby a recognition by her brother if not by her father of her acquisition of

[1] *(1930) 32 N. L. R. 41.*

binna rights. On the other hand, if it discloses that she was not in possession it would indicate the absence of such a recognition and it might indicate also that other parties have prescribed against her.

On the question of prescription the learned Judge has referred to the case of *Hamidu Lebbe v. Ganitha*[1]. I need only say that in that case Ennis A.C.J. refused to hold that the defendant had established a title by prescription owing to the unsatisfactory nature of the evidence led by him—"The defendants, upon whom the burden lay, gave evidence in chief which is contained in five lines of the typewritten record and in cross-examination made admissions which militate against his claim to have prescribed. The defendant called no witnesses". That case was heard by a bench of three Judges who all approved of the principles laid down in *Tillekeratne v. Bastian*[2] relating to prescription by a co-owner. A fuller investigation of the course of dealing with the property which is the subject matter of this case and incidentally with other property of Punchirala during the last thirty years may disclose rights arising by prescription.

I set aside the order of the learned Judge and send the case back for an investigation on the lines indicated. The learned District Judge will consider the material obtained by such investigation together with all other material which the parties may place before him on the issues framed in the light of the principles I have set out. Costs of this appeal and of all proceedings up to date will be costs in the cause.

AKBAR J.—I agree.

Sent back.