1953 *Present :* **Gratiaen J. and Weerasooriya J.**

L. A. DISSANAYAKE, Appellant, *and* G. M. PUNCHI MENIKKE *et al.*, Respondents

S. C. 159—D. C. Kurunegala, 3,902

Kandyan Law—Binna *marriage—Subsequently registered as* Diga—*Effect of such registration*—Binna *married daughter who leaves* mulgedera—*Her rights of inheritance.*

Where a Kandyan marriage contracted in *binna* was registered three years later and was described in the marriage register as a *diga* marriage—

Held, that the entry in the register as to the nature of the marriage was rebuttable by other evidence.

Held further, (i) that the marriage, upon its registration, became valid as from the date of the original association of the parties as man and wife.

(ii) that a *binna* married daughter, who severs her connection with the *mulgedera* after her father's death, does not forfeit her paternal inheritance.

APPEAL from a judgment of the District Court, Kurunegala.

H. V. Perera, Q.C., with *H. W. Jayewardene* and *D. R. P. Goonetilleke*, for the plaintiff appellant.

C. E. S. Perera, Q.C., with *T. W. Rajaratnam* and *A. Nagendra*, for the 1st, 2nd and 5th defendants respondents.

Cur. adv. vult.

August 25, 1953. GRATIAEN J.—

The property which is the subject matter of this action under the Partition Ordinance had admittedly belonged to a Kandyan villager named Mudalihamy who died on 30th October, 1886. Two sons named Yahapaththamy and Ukkubanda and a daughter Dingirimenika were the legitimate children of his marriage with Lama Etana. Lama Etana subsequently gave birth to another child named Menuhamy, but, although Menuhamy was also regarded as a sister of the other children, the date of her birth excludes the possibility of Mudalihamy having been her father.

The second son Ukkubanda died issueless after his father's death. Mudalihamy's estate therefore vested in Yahapathhamy and (provided that she had not forfeited her inheritance) in Dingirimenika in equal shares. Dingirimenika purported to sell an undivided one-third share of the property to the plaintiff by P2 of 1945. On the basis of this title her outstanding one-sixth share must be allotted to her son the 6th defendant.

The contesting defendants have succeeded to the interests of Mudalihamy's elder son Yahapathhamy. Their position is, however, that they are entitled to the entire property because Dingirimenika forfeited her share in the inheritance as a result of a *diga* marriage which she had contracted with the witness Appuhamy, the 6th defendant being a child of that union. The learned District Judge accepted this contention and dismissed the plaintiff's action on the ground that the conveyance P 2 executed in 1945 by Dingirimenika passed no title to any share in the property sought to be partitioned.

The main issue in the case was whether Dingirimenika's marriage with Appuhamy was in fact a *diga* marriage. Mr. H. V. Perera concedes that, if that be the true position, the question of any subsequent re-acquisition by her of *binna* rights does not arise upon the evidence in the case.

The 1st defendant, who is Yahapathhamy's widow, gave evidence which, if true, completely destroys the plaintiff's claim that Dingirimenika's marriage had been contracted in *binna*. She stated that, whereas the *mulgedera* was admittedly situated in the village of Welikara, Dingirimenika was " given out in *diga* " by her family to Appuhamy who, from the commencement of this association, lived with her in the neighbouring village of Kandagedera ; that their son the 6th defendant was born in Kandagedera and " did not live in the *mulgedera* a single day ".

The 1st defendant's version is, to say the least, demonstrably exaggerated. The 6th defendant's birth certificate P 3 proves that he was born *at Welikara* on 26th August, 1903, and that both his parents were residents of Welikara during that period. Moreover, the 1st defendant's witness Kusalhamy, who is a son of Yahapathhamy, admitted under cross-examination that " Appuhamy, at the beginning, came and settled down in Mudalihamy's house (i.e., the *mulgedera*). There their eldest son Gunerathhamy (the 6th defendant) was born after about two years of Appuhamy settling down there. Two or three years after the birth of Gunerathhamy, Appuhamy and Dingirimenika went to Kandagedera. *They registered their marriage and went to Kandagedera* ".

The learned Judge, for the purpose of his decision upon this vital issue, appears to have accepted Kusalhamy's evidence as substantially true. Indeed, this version is corroborated by the marriage certificate 1D7 which proves that the marriage of Appuhamy and Dingirimenika was not registered until 10th December, 1904 (i.e., nearly 16 months after the 6th defendant was born), and that Dingirimenika had at the date of registration been " living as a married woman for three years ". Upon these facts, the learned Judge accepted the submission made on behalf of the contesting defendants that after the 6th defendant was born, " the actual legal marriage took place according to law and the husband and wife left Welikara ".

The question to be decided is whether, upon the basis of these facts, the marriage of Dingirimenike can properly be regarded as a *diga* marriage. It is certainly a point in favour of this argument that when her *de facto* marriage with Appuhamy was eventually legalised by registration it was described in the Register as a *diga* marriage. If I may respectfully adopt, with the necessary variations, the observations of Pereira J. in *Sinno v. Appuhamy*[1]," this would be almost conclusive evidence *had the marriage been contracted at the time it was registered,* but this marriage was registered (three) years after it was contracted. In the circumstances, the entry in the marriage register as to the nature of the marriage is rebuttable by other evidence ".

We are here confronted with yet another instance of the difficulties which arise when Kandyan villagers refrain from prompt compliance with the strict provision of the Kandyan Marriage Ordinance whereby formal registration is essential to the validity of " an association which a *de facto* husband and wife, as well as all their neighbours, regard as an honourable union even without registration "—Modder : Kandyan Law p. 256.

If one analyses the facts in the light of the intention of the parties to the *de facto* marriage which was originally contracted in Welikara, it is not difficult to appreciate that when Appuhamy and Dingirimenika appeared before the Registrar on 12th December, 1904, they could not have regarded themselves as contracting a fresh marriage with effect only from that date; on the contrary, they intended merely to regularise their previous *de facto* marriage which they, and everyone else, considered to have honourably commenced when Appuhamy was first received in the *mulgedera* as her husband. The eldest child was born in the *mulgedera* during this *binna* association; and though he became legitimated only upon the registration of his parents' marriage, he had already been acknowledged as a " child of the *mulgedera* ". In the result, the registration of the marriage gave validity to the uninterrupted association which had originally commenced in the *mulgedera*. Dingirimenika and her husband must therefore be regarded, notwithstanding the entry in the marriage register and notwithstanding their subsequent departure to Kandagedera, as having married in *binna*. This marriage, upon its registration, became valid as from the date of their original association as man and wife—*Ukku v. Kirihonda*[2]. Pereira J. took a similar view in *Dingirihamy v. Mudalihamy*[3], and Ennis J. adopted the same line of reasoning " with diffidence ". It seems to me a sensible way of reconciling the statutory requirements of the Ordinance with the habits of the people whom it governs.

It would be artificial in the extreme to treat the earlier unregistered *binna* association as having been converted into an unregistered *diga* association, the latter association alone being eventually validated by registration. What these two people intended to register in 1904 was the uninterrupted association which has commenced three years earlier in the *mulgedera*. There is certainly no evidence from which one could infer that, shortly before the date of registration, Dingirimenika was, with due ceremony, " given out in *diga* " by her brothers to the

[1] *(1913) 1 Bal. N. C. 80.* [2] *(1901) 6 N. L. R. 104.*
[3] *(1912) 16 N. L. R. 61.*

same man whom everyone concerned already regarded as her husband. In these circumstances, the description which Appuhamy gave to the marriage as a "*diga*" marriage was at best a layman's expression of his opinion upon a mixed question of law and fact which even lawyers might well have difficulty in solving.

The view which I have taken gains support from the conduct of Dingirimenika's elder brother Yahapathhamy even after she had taken up residence with her husband in Kandagedera. In 1917 a Crown grant P4 was obtained by all the members of Mudalihamy's family (including his assumed child Menuhamy) in respect of another property which he had possessed during his lifetime, and a share was allotted to Dingirimenika on a basis which is consistent only with a continued recognition by her brothers of her status as a married sister who had not forfeited her paternal inheritance. Similarly, although Yahapathhamy had purported in 1922 to convey the entire property in dispute to his wife and children as if he were the sole heir of Mudalihamy, he later purchased in 1923 an undivided one-third share in the same property from Menuhamy (whose illegitimacy was at that time not appreciated) for the benefit of Kusalhamy and the 4th and 5th defendants. One may legitimately infer from this transaction that Dingirimenika was still recognised as being also entitled to the outstanding one-third share inherited from her father and her brother Ukkubanda (then deceased). To my mind, the evidentiary value of these circumstances outweighs that of the unilateral acts of Yahapathhamy's heirs who, on isolated occasions, subsequently acted as if Dingirimenika had forfeited her inheritance.

It remains to be considered whether Dingirimenika's subsequent departure to her husband's village operated so as to forfeit her inheritance. As Dr. Hayley points out (Kandyan Law p. 373-6) it is important to distinguish between the position of a *binna* married daughter who severs her connection with the *mulgedera after her father's death* from that of a daughter who is "given out in *diga*" during her father's lifetime. In the former case, the *binna* married daughter's title to a share in the paternal inheritance had already, before she left the *mulgedera*, become "crystallised", and no forfeiture can thereafter take place if she takes up residence elsewhere with the same husband—*Siripaly v. Kirihamy* [1]. *Vide* also Wood Renton J.'s observations regarding the position of the *binna* married daughter Ran Etana who had left her *mulgedera* with her husband after her father's death—*Ran Etana v. Nekappu* [2]. In such circumstances, the vested rights of a *binna* married sister cannot be extinguished except by prescription unless, apparently, they are forfeited by her contracting a second marriage in *diga with another man*. Neither of these events has occurred in the present case.

Dingirimenika, while still unmarried, merely enjoyed "a temporary interest" in her father's estate—*Hayley's Kandyan Law* p. 370-1. Thereafter, when her *binna* association with Appuhamy was validated by registration, her rights in the inheritance became indefeasible subject only to the limitations to which I have previously referred. Her subse-

[1] *(1917) 4 C. W. R. 157.* [2] *(1911) 14 N. L. R. 289.*

quent change of residence, even if it could be construed as an unequivocal severance of her connection with the *mulgedera*, left her vested interests unimpaired.

For the reasons which I have given, the learned Judge was wrong in taking the view that Dingirimenika forfeited her paternal inheritance. The true position is that her conveyance P2 in favour of the plaintiff vested in him an undivided one-third share in the property, and that her outstanding one-sixth share passed to her son the 6th defendant by maternal inheritance. Only a half-share in the property belonged to Yahapathhamy, whose interests subsequently devolved on the contesting defendants.

I would set aside the judgment under appeal and order the record to be sent back to the lower Court with a direction that an interlocutory decree be entered for the partition of the land in dispute, allotting

(*a*) a one-third share to the plaintiff ;
(*b*) a one-sixth share to the 6th defendant ;
(*c*) shares to the contesting defendants on the basis that Yahapathhamy, by his deed 1D1, conveyed only an undivided half share, and not the entirety, of the property to his wife and children.

The appellant is entitled to the costs of this appeal and to the costs of the contest in the Court below. The costs of partition will be borne *pro rata*.

WEERASOORIYA J.—I agree.

Appeal allowed.