

Present : Mr. Justice Wendt and Mr. Justice Middleton.

1909.
May 12.

BABANISSA *et al.* v. KALUHAMI *et al.*

GIRA ETANA, Added Defendant, Appellant.

D. C., Ratnapura, 1,414.

Kandyan Law—Associated marriage—Diga married daughter subsequently contracting a bina marriage—Right to inherit father's property.

A Kandyan woman who had contracted a *diga* marriage but who subsequently returned to the parental roof and contracted a *bina* marriage during the lifetime of her father is entitled to succeed to her father's property to the exclusion of his other *diga* married sisters.

*D. C., Kandy, 18,457,*¹ followed.

ACTION *rei vindicatio*. Appeal by the added defendant, originally 4th plaintiff, from the judgment of the District Judge (Allan Beven, Esq.), which was as follows (March 31, 1908):—

“ In this case there were originally five plaintiffs, who jointly asked for a declaration of title to eleven-twelfths of the land Kamaidegeliyadda, after admitting the title of the 11th defendant, Kirihamy, to one-twelfth. Subsequently the 4th plaintiff, Gira Etana, withdrew her proxy given to her Proctor (*vide* Journal of January 29, 1907), and on September 10 filed an affidavit to the effect that the plaint did not correctly disclose her title to the land, and that the instructions given by the other plaintiffs to her Proctor were not correct. On October 12, 1907, she was allowed to be made an added defendant, and subsequently filed a separate statement of claim for half the land. On January 27, 1908, Menikhamy, the 3rd plaintiff, withdrew her proxy given to her Proctor, Mr. Dharmaratne, and was represented by another Proctor. She filed no separate statement of claim, as her title to the land was set out in the original plaint.

“ The case against 4th, 5th, 6th, 7th, 8th, 9th, and 10th defendants had been withdrawn at an early stage of the case (*vide* Journal of October 6, 1908). The 2nd and 3rd defendants never filed answer, nor was any evidence led as regards them. So the position of all these defendants need not be discussed. The 5th plaintiff was not present at the trial, nor did he withdraw his proxy from Mr. Dharmaratne, the original Proctor for all the plaintiffs. On the other hand, Mr. Dharmaratne received no instructions from him, but his interests are identical with those of 3rd plaintiff and 11th defendant.

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“ It is admitted by all the parties to the case that Kitanhamy, Ukkuhamy, Heenhamy, and Tenanhamy were the original owners of the land, each being entitled to one-fourth, also that Heenhamy and Tenanhamy sold their half share by deeds Nos. 2,614 and 4,895 in 1858 and 1869 to Adonchia Waduwa, who by deed of gift No. 8,721 dated November 14, 1892, gifted this share to his daughter Gnathi, who in 1898 sold her interests in the land to the 1st and 2nd plaintiffs. Their title to half the land is therefore not disputed. The only question I have to decide as regards them is what damages they suffered by the alleged unlawful entry by 1st defendant and his workmen to dig for gems. The issues framed as between 3rd plaintiff, added defendant (original 4th plaintiff), and 1st to 11th defendants are as follows :—

- “(1) Did Ukkuhamy and Kitanhamy live as associated husbands of Punchi Etana, or did Ukkuhamy die issueless? (Third plaintiff admits that Ukkuhamy and Kitanhamy were associated husbands.)
- “(2) Did Menikhamy (3rd plaintiff) and Kombihamy (mother of 5th plaintiff and Appuhamy) forfeit their rights to the paternal property by their *diga* marriages?
- “(3) Was Gira Etana married in *bina*?
- “(4) Did Kitanhamy possess his brother Ukkuhamy’s one-fourth share in the assignment of the mortgage referred to in paragraph 9 of 1st defendant’s answer? (It is admitted by 1st defendant that Kitanhamy was in possession of half the land after the assignment.)
- “(5) Were Rattranhamy and Mohottihamy (vendors to 1st defendant) the children of Tenanhamy, and were they entitled to the one-eighth conveyed to 1st defendant?
- “(6) Prescriptive rights of parties.
- “(7) Damages.
- “(8) Even if Ukkuhamy lived in association with Kitanhamy, was such associated marriage valid in law?

“ With regard to the 1st issue, there is abundant evidence, both document and oral, to prove that Ukkuhamy and Kitanhamy lived as associated husbands of Punchi Etana. By deed No. 1,866 dated February 24, 1857, Ukkuhamy had mortgaged one-fourth of this land to Kirihamy (A D 5) and the endorsement is by Punchi Etana, ‘ wife of Ukkuhamy.’ The caption of deed No. 780 dated October 12, 1860 (A D 6), recites that Punchi Etana, ‘ widow of the late Aluwatte Kapuge Ukkuhamy,’ and Kombihamy, his daughter, do hereby mortgage one-fourth of Kamanaidegeliyadda. There is, therefore, not the slightest doubt in my mind that both Ukkuhamy and Kitanhamy lived as associated husbands of Punchi Etana. That was before 1859, for in the deed of 1860 Punchi Etana is described as the widow of Ukkuhamy. In 1862 Punchi Etana and Kitanhamy

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registered their marriage (D 3). Ukkuhamy, therefore, did not die issueless. There were three daughters of the associated marriage : Kombihamy, Menikhamy (3rd plaintiff), and Gira Etana (added defendant). There were no sons of the marriage. The added defendant, Gira Etana, claims the half share of this land belonging to her two fathers, on the ground that her two sisters were married in *diga*, and she alone was married in *bina*, as evidenced by her marriage certificate (A D 1).

“ On the other hand, it is contended on behalf of Menikhamy, 3rd plaintiff, that Gira Etana was first given out in *diga* to one Hanakahage Ranhamy of Halpe, and that she is therefore in no better position than her two *diga* married sisters. This Gira Etana denies. But the production of the deed of gift No. 1,689 dated September 3, 1867 (P 1), puts the matter beyond doubt. By that deed Kitanhamy and Punchi Etana gifted an undivided half share of this land amongst others to the three daughters : Kombihamy of Halpe, Menikhamy of Uva, and Dingiri Etana (*alias* Gira Etana) of Halpe, and their two sons-in-law, Dingirihamy, Vel-Vidane of Halpe, and Harankahage Ranhamy of Halpe. It is admitted that Dingirihamy was married to Kombihamy, therefore it follows that H. Ranhamy of Halpe must have been the husband of Dingiri Etana, who would not have been described as ‘ of Halpe ’ unless she was living there. It may be that she subsequently returned to the ancestral house and contracted a *bina* marriage, but I do not think that fact will operate as a bar to the rights of the two *diga* married sisters. In other words, when there are three *diga* married daughters, and one of them subsequently returned to the parental roof and contracted a *bina* marriage, that fact does not, *ipso facto*, divest the other two daughters of their rights. In this case there were no sons, and at first no *bina* married daughters, therefore all the *diga* married daughters would succeed equally.¹ It was contended that the deed of gift was never acted upon as it was never registered. But the same may be said of deed No. 2,271 dated January 19, 1884 (A D 2), in favour of Gira Etana (added defendant) and her husband, which was not registered till February 15, 1906, just before the institution of this case.

“ Besides, there is evidence to show that 3rd plaintiff returned from Uva with 11th defendant, her son, who was then eleven or twelve years old. Added defendant has admitted that she adopted Appuhamy, the other son of 3rd plaintiff, who helped in the cultivation and took part of the crop of this field. She also adopted 5th plaintiff, the son of her sister Kombihamy. There can be no manner of doubt that the rights of Menikhamy (3rd plaintiff) and her sons and of the son of Kombihamy have all along been recognized. The husband of Gira Etana took a lease No. 17,466 dated January 23, 1906 (P 2), from Horatalhamy, 5th plaintiff, for one-sixth of this

¹ *Marshall's Judgments 328 and Thomson's Institutes, Vol., II., 632.*

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land. His excuse for doing this is, I think, very feeble. He states that although he knew 5th plaintiff had no right, he took the lease because he found 1st defendant, an influential man, might take a similar deed from 5th plaintiff, but if his wife had been in possession and entitled to half the land, there was no absolute need for this. One of the sons of Kombihamy, by deed No. 15,497 dated January 27, 1906, transferred his half share to the 11th defendant. I hold therefore, after carefully considering the evidence, that Gira Etana had no adverse possession of the half share of her fathers Ukkuhamy and Tenanhamy, but that all three daughters succeeded equally to the extent, viz., to one-sixth each. Gira Etana would therefore be entitled to one-sixth, Menikhamy (3rd plaintiff) to one-sixth, 11th defendant to one-twelfth, and 5th plaintiff to one-twelfth. The 1st defendant alleges that Ukkuhamy died issueless, and his one-fourth share devolved on his three brothers, each of whom became thus possessed of one-twelfth. Subsequently Heenhamy died without issue, and his one-twelfth was divided between the two surviving brothers Kitanhamy and Tenanhamy, whose shares from Ukkuhamy and Tenanhamy thus amounted to one-twelfth and one twenty-fourth, equal to one-eighth each. He then goes on to say that Tenanhamy died leaving two sons, Ratranhamy and Mohottihamy, who entered into possession of this one-eighth, and by deed No. 2,852 dated December 4, 1905 (D 2), sold to him.

“ He has not produced a scrap of evidence to substantiate these allegations, nor has he called upon his vendors to warrant and defend his title. I have already held that Ukkuhamy was an associated husband of Kitanhamy, and it has been proved that Tenanhamy and Heenhamy lived in association with one wife, Yahapathhamy, and sold their half share to Adonchia Waduwa in 1869.

“ The 1st defendant has absolutely no title whatever to the land. He has denied that he opened or caused to be opened a pit for gemming on this land, and alleges that 2nd defendant did so. But the evidence is very strong against him on this point. He is a speculator of the worst kind, and has been involved in several cases before this, having had three injunctions at least issued against him. Having heard that gems were being found on this land, he forthwith went and got a bogus deed in his favour from two men who are absolute strangers to the other co-owners, and who had not the courage to come to Court and warrant his title. I have no doubt that it is he who was instrumental in stirring up strife amongst the plaintiffs, who are now divided amongst themselves as regards their respective shares. My only difficulty is as regards damages. There is no evidence to show the value of the gems taken by the 1st defendant from this land. There is evidence to show that shortly before 1st defendant's entry on the land a pit was sunk by the added defendant's husband and Rs. 2,000 worth of gems were found. Out of this the ground owners were entitled to one-tenth or Rs. 200.

“There is another method of estimating damages. This land is a field, and after gemming operations are over the pits are covered up and the field cultivated. Its yield is 25 bags of paddy, averaging 2 parras a bag, a parrah being worth Re. 1.50. This would give a yearly sum of Rs. 75, of which the ground owners would be entitled to half. But this action asks for damages for gems found and appropriated by the 1st defendant, and an injunction was obtained against him. I therefore think the measure of damages should be the value of gems found in the pit adjoining the one opened by 1st defendant. In a case like this, when the output of a pit is a matter within the peculiar knowledge of 1st defendant, everything should be presumed against the trespasser. It is for him to render an account of the gems, if any, found on the land. He has contented himself with merely denying that he sank a pit. I think Rs. 200 a fair estimate of the damages. Enter judgment for 1st and 2nd plaintiffs for an undivided half of the land, 3rd plaintiff to an undivided one-sixth, added defendant Gira Etana to an undivided one-sixth, 5th plaintiff to an undivided one-twelfth, and 11th defendant to an undivided one-twelfth, with Rs. 200 damages, which are to be divided proportionately amongst them. The 1st defendant to pay all damages and costs of 1st and 2nd plaintiffs and added defendant. The costs of 3rd plaintiff will be borne by 1st defendant and added defendant. Fifth plaintiff, who did not appear at the trial, will have his own costs.”

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The added defendant appealed.

Bawa, for the added defendant, appellant.

Samarawickrama, for the plaintiffs, respondents.

Cur. adv. vult.

May 12, 1909. MIDDLETON J.—

This, the second appeal in this case, was that of the 4th plaintiff, who was subsequently, by order of the District Court, made added defendant upon a representation of her case distinguishing it from that of the other plaintiffs.

The appellant claims to be a daughter of the associated marriage of the brothers Kitanhamy and Ukkuhamy with Punchi Etana, the other issue of which marriage were the 3rd plaintiff and Kombihamy, now deceased, and represented by the 5th plaintiff and the 2nd defendant.

The action being one for vindication of title to and damages for illegal gemming in a garden called Kamanaiidegeliyadda, the learned District Judge gave judgment awarding amongst other shares one-sixth of the land to the added defendant. The added defendant appealed, and claimed that she was entitled to at least one-third.

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The District Judge has found, and rightly so I think, that Kitanhamy and Ukkuhamy, owners of a half share in the garden in question, were the associated husbands of Punchi Etana before 1859; that Ukkuhamy died before 1860; that the 3rd plaintiff, added defendant, and Kombihamy, were the only issue of the marriage, there being no sons; that in 1862 Punchi Etana and Kitanhamy registered their marriage; that the added defendant first went out in *diga* with one Ranhamy of Halpe, and that the other daughters were also married in *diga*; that added defendant was subsequently married in *bina*, as proved by the marriage certificate A D 1 dated December 13, 1871. This *bina* marriage must have occurred in the lifetime of Kitanhamy, the added defendant's father, as shown by the fact that he is a party to deed A D 2 dated July 19, 1884.

The deed of P 1 of September 3, 1867, shows that Kitanhamy and Punchi Etana gifted an undivided one-half share of the land in dispute to their daughters and sons-in-law, and although this deed was not relied upon by the plaintiffs in establishing their title, but was discovered in some way by the 1st defendant, whose appeal has already been disposed of, it must, I think, be given effect to, as there is no evidence that it has been revoked.

By this deed the 3rd plaintiff, added defendant, and Kombihamy would each get one-third of the whole half share formerly belonging to Kitanhamy and Ukkuhamy in common or one-sixth. As, however, Kitanhamy would only have a right to dispose of his own share of one-fourth, they would each get one-twelfth only by this deed.

By the decision in D. C., Kandy, 18,457, affirmed in appeal on December 7, 1849, reported at page 182 of *Perera's Collection*, the added defendant would have the advantage of her subsequent *bina* marriage in Kitanhamy's lifetime, which would prevent her *diga* married sisters participating in any share in the inheritance derived from Ukkuhamy.¹ This would, therefore, give the added defendant the whole one-fourth derivable from Ukkuhamy.

The judgment of the District Judge must therefore be amended by awarding $\frac{1}{2} + \frac{1}{4}$ or $\frac{3}{4}$ to the added defendant = $\frac{1}{3}$ claimed in the appeal. The shares of the 3rd plaintiff and Kombihamy must also be reduced to one-twelfth each, thus diminishing the shares of the 5th plaintiff and 2nd defendant to one twenty-fourth each. With these amendments the judgment of the District Judge must stand. The added defendant will have the costs of this appeal.

WENDT J.—I agree.

Judgment varied.

¹ *Modder 65.*