Present: Wood Renton J. and Pereira J.

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MUDIYANSE *v.* APPUHAMY *et al.*

315—D. C. Kegalla, 3,236.

Law applicable to offspring of Kandyan father by Low-country Sinhalese woman—Domicil as a test on questions relating to applicability of Kandyan law—Rule of law as to nationality of wife or child—Applicability of section 2 of Ordinance No. 15 of 1876 to union between Kandyan and Low-country Sinhalese woman.

The offspring of a Kandyan father by a Low-country Sinhalese woman cannot be regarded as a Kandyan, subject to the incidents of the Kandyan law.

Domicil is not a test to be applied in the solution of questions as to the applicability of the Kandyan law.

The rule of law that the wife takes the husband's nationality, and the child the father's, holds good only where the term " nationality " is used in its strictly legal sense, that is to say, in the sense of subjection to the flag of a particular sovereign power. It has no place when the word is used in a loose sense, in the sense, for instance, of " race," there being no rule of law that the offspring of a mixed union belongs to the race either of the father or the mother.

Held, further, following *Manikkan v. Peter,*[1] that a Low-country Sinhalese woman is not a person of different race or nationality from a Kandyan. Section 2 of Ordinance No. 15 of 1876 does not therefore apply to the case of a union between a Kandyan and a Low-country Sinhalese woman.

THE facts are set out in the following judgment of the District Judge (W. de Livera, Esq.):—

I have to decide in this case pure questions of law. The plaintiff at the trial restricted his claim to Kehelkotuwawatta (half share) and half share of the other land; they belonged to Julis Appu, who died leaving a widow, Lucyhami, and two children, Mango Nona and Brampy. They were Low-country Sinhalese.

Mango Nona was married to Samuel Appu, a Kandyan, on June 2, 1887. Samel Appu lived with her in her house. They had a son, John Sinno, born in 1888, May 20 (P 1).

By mutual consent the marriage of Samel Appu and Mango Nona was dissolved on June 10, 1889 (D 6), and the child was to remain with the mother by agreement. Mango Nona died in January, 1899. John Sinno died on January 3, 1904, in the Karawanella hospital when he was sixteen years old (P 2).

Plaintiff purchased from Samel Appu by deed 20,579 in March, 1910, the entirety of the lands in question. The plaintiff at the trial restricted his claim to an undivided half share of the lands.

[1] *4 N. L. R. 243.*

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Brampy, the brother of Mango Nona, died about ten years ago, leaving his widow, Agidahamy, and two children, Mico Nona and Punchi Mahatmaya.

The defendants have purchased the entirety of the land from them—6,171, March 7, 1910 (D 1).

The first defendant has sold half share to one Punchi Appuhamy and Dingiri Appuhamy—20,689, June 29, 1910 (D 2). On the facts admitted several issues have been framed. In the view I take of this case only the first and second need be decided.

Though it was denied at first that John Sinno was a child of Mango Nona, later on, after production of documents, the defendants' counsel did not deny John Sinno was the child of Mango Nona and Samel Appu.

The important question, then, is, who is the heir of that child, the father, or Brampy, the uncle (child's mother's property) ?

Mango Nona was a Low-country woman settled in the Kandyan country; Samel Appu was a Kandyan. The child, I hold, acquires the nationality and domicil of the father, and would have to be taken as a Kandyan; and that being so, in my opinion the inheritance to the child's property would have to be regulated by the Kandyan law.

It was not disputed by the plaintiff's proctor that if the Kandyan law were to apply Samel Appu would have no right. In a recent case (11,017—C. R. Kegalla) decided by me on October 8, 1912, I held the father is not the heir of the property of his children born in a *bina* marriage, which they have acquired through their mother; the maternal uncles or next of kin on the mother's side are the heirs to such children. (*Sawer's Digest 18.*)

I have discussed all the authorities bearing on the point in 11,017, in which an appeal has been filed. The source from which the child acquired the property seems to me to be immaterial; once it is vested in the child, it must devolve according to the rules of the Kandyan law.

I hold Brampy, the uncle of John Sinno, succeeded to John Sinno's property, and not John Sinno's father, Samel Appu.

Holding, as I do, against the plaintiff on the second issue, there is no necessity to discuss questions of estoppel. If I had to decide them, I would hold the plaintiff is not estopped from denying title of Brampy owing to his taking a lease from Brampy, and the plaintiff's vendor signing as an attesting witness to the lease.

The plaintiff's action for declaration of title is dismissed with costs.

Bawa, K.C., for plaintiff, appellant.

De Sampayo, K.C., for defendant, respondents.

Cur. adv. vult.

February 28, 1913. PEREIRA J.—

The main question in this case is whether the deceased, John Sinno, an offspring (born within the Kandyan Provinces) of a Kandyan father by a Low-country Sinhalese woman, can be said to have been a Kandyan, subject to the incidents of what is known as the Kandyan law. As observed by Clarence J. in the case of *Wijesinghe v. Wijesinghe*,[1] Kandyan law is the customary law which

[1] *9 S. C. C. 119.*

a certain section of the community within the Kandyan Provinces, namely, the Kandyan Sinhalese, were allowed by the British Government to retain. "It did not amount to a distinct *lex loci rei citæ* governing absolutely the devolution of land." It is therefore not what may be termed a "local law" governing all persons living within a certain area; it is rather a personal law attaching to the individuals, wherever they may be, belonging to a certain particular class or section of the Sinhalese subjects of the Crown. That being so, the mere fact that a person is born or is resident within the Kandyan Provinces is insufficient to bring him within the pale of the Kandyan law. The District Judge seems to think that because a child acquires the nationality and domicil of the father, John Sinno should be regarded as a Kandyan. As regards domicil, it will be seen that Burnside C.J., in the case of *Williams v. Robertson*,[1] was of opinion that a person could not acquire a Kandyan domicil as distinguished from a Ceylon domicil. He argued: "It would not be possible in the present day to contend successfully that a domicil of choice could be obtained in a community which does not possess supreme or sovereign power." But, perhaps, the District Judge has used the term "domicil" in the less technical sense in which it is used in section 8 of Ordinance No. 5 of 1852, which speaks of "Europeans and persons commonly known as Burghers" who are "domiciled" within the Kandyan Provinces. In any sense, however, domicil, as shown above, is no test to be applied in the solution of questions as to the applicability of Kandyan law. As regards "nationality," the District Judge is apparently using the word in its strictly legal sense. It is only when the word is used in that sense that it can be said that the wife takes the husband's nationality and the child the father's. Thus, every subject of the Crown, be he Sinhalese, Tamil, Chinese, or Hottentot, is British in nationality, that is to say, he is subject to the British flag; but where the word is used in a looser and more popular sense—in the sense of race for instance—the rule relied on by the District Judge has no application at all. I am aware of no rule of law that makes the offspring of a mixed union belong to the race of either the father or the mother. Like the Eurasians of Ceylon and India, and the Mulattos of the Spanish settlements, they must fall into some separate and special group or groups to be known by some distinctive designation or designations. For these reasons, the offspring of a Kandyan father by a Low-country Sinhalese woman cannot be said to be Kandyan. It is not necessary to inquire how he may be classified. If he is not Kandyan, the special Kandyan law cannot, of course, apply to him. He must be governed by the general law of the land.

Section 2 of Ordinance No. 15 of 1876 has been cited in the course of the argument in appeal. With reference to this section,

[1] *8 S. C. C. 36.*

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it has been held by this Court, in the case of *Manikkan v. Peter*,[1] that a Low-country Sinhalese woman is not a person of different race or nationality from a Kandyan Sinhalese, and that, therefore, the section has not the effect of rendering a Low-country Sinhalese woman who marries a Kandyan liable to be regarded as a Kandyan. This decision is, I think, quite justified by the plain words used in the section, and it is therefore not permissible to speculate as to what was intended by it by the Legislature. The section refers also to Tamils of the Northern Province, who are governed by the Tesawalamai, and, whatever the Legislature may have intended, it will, I think, be doing violence to language to say that these Tamils are of a race or nationality different from that of the other Tamils in the Island. Moreover, the section is silent as to the offspring of a union between persons who are not of the same race or nationality.

For the reasons given above, I would set aside the judgment appealed from and remit the case to the District Judge for final decision, on the footing that the devolution of the property of John Sinno should be according to the general law of the land, and not the special Kandyan law.

The appellants should have their costs.

WOOD RENTON J.—

I have had some doubts, but on the whole I agree.