

[FULL BENCH.]

1914.

*Present: Pereira J., Shaw J., and De Sampayo A J.*TIKIRI BANDA *v.* APPUHAMY *et al.*

419—D. C. Kandy, 22,747.

*Kandyan law—Diga marriage—Widower has a life interest in acquired property of wife.**The widower of a diga marriage has a life interest in the acquired property of his deceased wife.*

**K**ALU MENIKA, the *diga* married wife of the first defendant, was the owner of the lands described in the plaint, she having purchased them subsequent to her marriage with first defendant.

Kalu Menika died intestate leaving three children, Mutu Menika, Punchi Menika, and the second defendant. Mutu Menika, on August 26, 1913, sold her undivided one-third share of the said lands to plaintiff, and Punchi Menika sold her one-third share to the third defendant.

Plaintiff averred that the defendants denying plaintiff's title have, since his purchase, been in wrongful possession of his one-third share. Plaintiff claimed a declaration of title, damages from the date of his purchase, and that he be placed in quiet possession.

The defendants admitted plaintiff's title to one-third share, but denied his right to possession. The first defendant (the *diga* married widower of Kalu Menika) claimed to be entitled to the possession of the lands in dispute, which are the acquired property of Kalu Menika.

The District Judge (F. R. Dias, Esq.) delivered the following judgment:—

This case raises an interesting question of Kandyan law which is not quite free from doubt. When a Kandyan woman is conducted by a man in *diga*, acquires property during coverture, and dies intestate leaving a husband and children, does her acquired property vest absolutely in her children, or is it subject to a life interest in her husband? The text books on Kandyan law do not contain an exactly parallel case, but in a C. R. Kegalla case it was decided by the Commissioner of Requests in favour of the latter view on the authority of *Sawers' Digest*, p. 8, and the Supreme Court has confirmed that decision (*vide Saduwa v. Siri*<sup>1</sup>). This decision has not been set aside, and is therefore binding on us. I may point out that the same point arose in two cases of this Court in 1909 and 1913 (*vide* Nos. 18,568 and 21,553) where that ruling was followed.

<sup>1</sup> 3 *Bal.* 18.

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The passage in *Sawers' Digest*, p. 8, that was relied upon simply says this, namely, "The husband is heir to his wife's landed property, which will at his demise go to his heirs." It will be noted that this does not say what kind of property is meant, or whether the wife has left no children—circumstances which undoubtedly have an important bearing on all questions of the Kandyan law of inheritance. If we look two paragraphs lower down in this same book, page 9, we find it distinctly stated that where a wife dies intestate leaving a son who inherits her property, and that son dies without issue, the father has only a life interest in the property which the son inherited from his mother. In other words, the moment a woman dies her property passes to her issue, and the husband will get a life interest only in the event of the death of that issue leaving no descendants. Paragraphs 81 and 83 of *Marshall's Judgments* also favour this view. See also the case of *Naide Appu v. Palingurata*,<sup>1</sup> where it was held that a *diga* husband is the heir to the acquired property of his deceased wife, but that is a case where the wife left no issue.

The law on this question is certainly very doubtful, and worth reconsidering by the Supreme Court.

In the present case the owner of the two lands in claim was a woman named Kalu Menika, who obtained them in 1897 under the deed No. 5,954, while she was the *diga* married wife of the first defendant. She died in 1902 leaving her husband and three children, Mutu Menika, Punchi Menika, and Punchi Banda (the second defendant). The plaintiff is a purchaser in 1913 of Mutu Menika's one-third share, but the first defendant is and has been in possession ever since his wife died. In view of the authority first cited, I am compelled to hold that the plaintiff is not entitled to possession of his one-third share until the death of the first defendant.

Let decree be entered declaring the plaintiff to be entitled to an undivided one-third share of the lands in claim, but subject to a life interest in the first defendant. The plaintiff must pay the defendant's costs.

*A. St. V. Jayewardene*, for the plaintiff, appellant.—The ruling in *Saduwa v. Siri*<sup>2</sup> is opposed to the text books on the Kandyan law, and is not supported by any authority. The statement on page 8 of *Sawers' Digest* is repudiated by Sawers himself lower down in the very same paragraph (see *Marshall's Judgments*, p. 339, sec. 81).

The opinion of the Udarata chiefs is against the ruling in 3 *Bal. 18*.

The right of a widow to life interest over her deceased husband's acquired property is clearly stated in the text books. But the right of the widower to a life interest, if it existed, would have been equally clearly stated.

Counsel cited *Sawer*, p. 9, para. 2; p. 16, para. 3; *Armour*, pp. 29, 30, ss. 34 and 36; *Nitti Niganduwa*, pp. 106, 107, 111, 112; 17 *N. L. R.* 1; *Austin* 66, 11; *Pereira's Armour*, vol. II., p. 112; 2 *C. L. R.* 76.

<sup>1</sup> 2 *S. C. C.* 176.

<sup>2</sup> 3 *Bal.* 18.

*E. Jayewardene*, for defendants, respondents.—The case is covered by authority. *Saduwa v. Siri*;<sup>1</sup> see also *Modder 326, 338 339.* <sup>2</sup> *E. C. R. 176.*

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*Cur. adv. vult.*

December 30, 1914. PEREIRA J.—

The question in this case, as stated by the learned District Judge, is "whether when a Kandyan woman conducted by a man in *diga* acquires property during coverture and dies intestate leaving her husband and children, her acquired property vests absolutely in her children, or is subject to a life interest in her husband." The question has been decided by the District Judge on the authority of the judgment of this Court in the case of *Saduwa v. Siri*.<sup>1</sup> That decision appears to have turned on a passage in *Sawers' Digest*, p. 8, which is as follows: "The husband is heir to his wife's landed property, which will at his demise go to his heirs." This is a sweeping proposition, which does not appear to have been accepted by Judges and text writers in its integrity. Chief Justice Marshall commenting on this passage says (*Marshall's Judgments*, p. 339, par. 81): "This, adds Mr. Sawers, is the opinion of Doloswelle Dissawa"; and the Chief Justice himself adds as follows: "But the chiefs of the Udarata are unanimously of opinion that the husband is not the heir to his wife's landed *paraveni* estate which she inherited from the parents nor to her acquired landed property; that, on the contrary, the moment the wife dies all interest in her estate, if she has left no issue, reverts to her parents or her heirs, and that though the wife is entitled to the entire possession of her deceased husband's estate so long as she continues single and remains in his house, yet the husband must quit his wife's estate the moment she dies." I may here mention that this last passage is, possibly erroneously, cited by Mr. Modder, in his new work on the Kandyan law, as a passage from *Sawers' Digest*; but from *Marshall's Judgments* it appears that it is a comment by the Chief Justice, and that what is stated in *Sawers* ends with the observation that the above proposition is the opinion of Doloswelle Dissawa. Anyway, between the Doloswelle Dissawa and the Udarata chief's we find ourselves face to face with a hopeless state of confusion in the law. Sawers, apparently, adopts the opinion of the former, and Sawers has been accepted as a very high authority on what is commonly known as the "Kandyan law." In spite, however, of the high authority of Sawers, the effect of the proposition contained in the passage from his *Digest* cited above has been whittled down a great deal by other text writers and Judges. In *Dingirihamy v. Menika*<sup>2</sup> it was held that by Kandyan law a widower has no "right of life rent in the *paraveni* lands of his deceased wife," and Mr. Modder has enlarged on this proposition, or perhaps has legitimately amplified it, in the case of

<sup>1</sup> 3 *Bal. 18.*

<sup>2</sup> 2 *C. L. R. 76.*

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a *binna* husband, and laid down in the shape of an article in his work (Art. 197, p. 338) as follows: "A *binna* husband surviving his married wife (*sic*) has no interest at all in her property, whether ancestral or acquired." In *Naide Appu v. Palingurala*,<sup>1</sup> Dias J. appears to have thought that a *diga* husband was "the heir, and was entitled to succeed to the acquired property of his deceased wife," but from the judgment of Cayley C.J. in the same case it is clear that the proposition is to be confined to the case of a wife dying without issue. Mr. Modder's "Article" on this part of the subject is as follows (Art. 204, p. 347): "A *diga* married widower (*sic*) succeeds to all the acquired property of his wife dying intestate and without issue in preference to her brothers and sisters."

We have thus three objects that militate against the full operation of the general proposition cited above from *Sawers' Digest*, namely *binna* marriage, *paraveni* property, and children. Steering clear of these quicksands, I think that the proposition might be given effect to to the extent of allowing the widower of a *diga* marriage a life interest in the acquired property of his deceased wife. This is the view taken in the judgment in the case of *Saduwa v. Siri*<sup>2</sup> and "Article" 196 (page 326) in Mr. Modder's book is to the same effect. For these reasons I would affirm the judgment appealed from with costs.

SHAW J.—

I agree. I think that some operation should be given to the paragraph in *Sawers* cited before us. That it does not apply to a *binna* marriage or to *paraveni* property sufficiently appears from other passages in *Sawers* and from the authorities referred to by Mr. Justice Pereira. The only other case to which it can be applied is to the acquired property of a woman in *diga*, and I think the decision in *Saduwa v. Siri*<sup>2</sup> correctly holds that the husband has a life interest in the property acquired by the wife during such a marriage.

This decision seems also to be equitable, as it would appear very hard on the husband to divest him of interest in the property acquired by the wife during a marriage in *diga*, which property may very possibly have been acquired largely by his own exertions. I would therefore affirm the judgment appealed from with costs.

DE SAMPAYO A.J.—

The determination of the question involved in this appeal mainly depends on the correct interpretation of two passages at pages 8 and 16 of *Sawers' Digest of Kandyan Law*. The passage at page 8 is: "The husband is heir to his wife's landed property, which will at his demise go to his heirs, but in the event of the wife having left a son, and the father contracting a second marriage and having issue of the

<sup>1</sup> 2 S. C. C. 176.<sup>2</sup> 3 Bal. 18.

second bed, in this case, on the death of the father, the son of the first bed inherits the whole of his mother's estate with a moiety of the father's estate." The other passage at page 16 is: "A wife dying leaving a husband and children, her peculiar property of all description goes to her children and not to her husband. A wife dying barren or without surviving children, all the property which she derived from her parents reverts to her own parents or brothers and sisters and their issue, but the husband inherits all the property acquired during the coverture." It will be noticed that neither of these passages expressly refers to the kind of marriage between the spouses, whether in *binna* or in *diga*, and that the first of these passages does not refer to the kind of property, whether *paraveni* or acquired. I think, however, that these distinctions, which generally pervade the Kandyan law of inheritance, should be taken into account in interpreting the statements of text writers, who professedly give a mere abstract and not a full exposition of the whole law. Now, it appears to be well settled that a *binna* widower has no interest in his deceased wife's property, whether ancestral or acquired. See *In re Molligodde Coomarihamy*,<sup>1</sup> *Dingirhamy v. Menila*,<sup>2</sup> and the authorities cited in *Modder's Kandyan Law* under sections 197 and 203 (new edition). That being so, what does *Sawers* mean when at page 8 it states that the husband is heir to his wife's landed property? It seems to me that it here deals with the case of *diga* married spouses and of acquired property. This is the view taken in *Naide Appu v. Palingurata*,<sup>3</sup> which lays down that a *diga* married husband is his wife's heir so far as the acquired property is concerned. It is true that in that case the wife had died without issue, and Cayley C.J. refers to that fact in his judgment. But I do not think that the reasoning in the judgment of the Court is restricted to the case of a wife dying without issue. Dias J. puts the decision on very broad grounds. He discusses the distinction between a *binna* and a *diga* marriage, and points out that, while a *binna* husband has no interest at all in his wife's property, "a *diga* married woman is under greater obligations to her husband than a *binna* married woman." It seems to me that this view of the "obligations" of a wife to her husband is quite in accordance with the spirit of the Kandyan law. As regards the argument that this decision turned upon the fact of there being no issue, it is to be noted that the decision was that the husband succeeded to the acquired property absolutely, and not merely to a life interest therein. That decision is therefore no authority for saying, as contended by counsel for the appellant, that when there are children the husband is not entitled even to a life interest, which is all that is claimed in this case. In my opinion the Kandyan law gives to the *diga* husband such a life interest in the acquired property of the deceased

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wife, where there are children, just as a *diga* wife has a life interest in the acquired property of her deceased husband in the event of there being children. *Sawers' Digest*, p. 1; *Manika v. Horatala*:<sup>1</sup> *Nila Henaya v. Dissanayake Appuhamy*.<sup>2</sup> I do not think that the argument, to the effect that *Sawers' Digest*, p. 8, read with *Sawers' Digest*, p. 16, indicates that the rule is applicable only to a case where there are no surviving children, is well founded. These passages, when closely examined, will be found to support the contrary proposition. For the passage at page 8, after stating that the husband is heir to his wife's landed property, goes on to say that if the wife left a son he would succeed to her estate on the death of the husband, which, in other words, means that in the case supposed the husband has the enjoyment of the property during life. A son is, of course, mentioned only by way of illustration, and it is obvious that the law there laid down contemplates the case of children generally. The comment on this passage by *Marshall*, p. 339, only goes to the extent of modifying it by excluding from its purview the case of *binna* married spouses. The passage at page 16 of *Sawers' Digest* appears to me to be not inconsistent with this interpretation of the passage at page 8. For when it says that the wife's "peculiar property of all description goes to her children and not to her husband," it apparently speaks only of the *dominium* of the property, and does not necessarily imply that the husband has no right of possession of the acquired property. The next paragraph deals with the case of a wife dying without children, and lays down the rule that the husband in that case inherits the acquired property, meaning that that property devolves on him in full right. This, as I above indicated, is I think the point of the decision in *Naide Appu v. Palingurala* (*supra*). Lastly, we have the direct judicial authority of *Saduwa v. Siri*,<sup>3</sup> which we were invited to reconsider, but which I think is a correct exposition of the Kandyan law on the point at issue in this case.

I would dismiss the appeal with costs.

*Appeal dismissed.*

<sup>1</sup> 3 S. C. R. 167.

<sup>2</sup> 6 N. L. R. 214.

<sup>3</sup> 3 Bal. 18.