

1918.

Present: Shaw J. and De Sampayo J

DINGIRI v. UNDIYA et al.

431—D. C. Kegalla, 4,534.

Kandyan law—Husband dying leaving behind widow and illegitimate children—Life interest of widow.

A Kandyan widow is entitled to a life interest in the whole of the acquired property of her husband to the exclusion of her husband's illegitimate children.

KIRIBANDIYA, a Kandyan, died leaving a childless widow (who married a second time after Kiribandiya died) and an illegitimate child, the second defendant, a minor, who appeared by his guardian, first defendant.

The widow (plaintiff) claimed in this action a life interest in the entire property, which consisted of only the acquired property of the deceased.

The second defendant contended that plaintiff was entitled to a life interest in one-half of the property, and that second defendant was entitled to the entirety of the property and to a life interest in one-half. The District Judge upheld the contention.

The plaintiff appealed.

J. W. de Silva, for the appellant.—The learned Judge is wrong in deciding that the plaintiff was entitled to possession of only one-half. Her second marriage does not deprive her of her rights (see *Modder's Kandyan Law*, 325, 330; 6 N. L. R. 214; 19 N. L. R. 260). Even the legitimate children cannot deprive the widow of her life interest. It was held that the children cannot bring a partition action for the acquired property during the widow's lifetime (15 N. L. R. 154). They cannot sue her in ejectment (*Modder* 326).

[De Sampayo J.—Is *Tikiri Menika v. Menika*¹ against you?] There the children were legitimate children by another bed. The same principles do not apply to illegitimate children merely because they have a right to inherit the father's property along with legitimate children. Moreover, in the case referred to the Court gave several illegitimate children only a life interest in one-half, but here there is only one illegitimate child. The most that the second defendant can claim, if that case applies, is some allowance, and not a life interest in one-half the property. The Full Bench has in *Rankiri v. Ukku*² decided the point against the respondents.

¹ (1917) 20 N. L. R. 12.

² (1907) 10 N. L. R. 129.

[De Sampayo J.—That was a contest between the rights of a sister and an illegitimate child.] The widow was alive, and her rights to life interest had to be considered. The Court held that the illegitimate children were entitled to the dominium only, and the widow to the life interest; the decision in so far as it refers to the widow's right is not a mere *obiter dictum*. Counsel cited *Modder*, 403, 405, 408, and 409; *Rankiri v. Ukku*.¹

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H. J. C. Pereira (with him *Batuwantudawe*), for the respondent.—In *Rankiri v. Ukku*¹ the widow's life interest was not in issue, but only the question of title. Illegitimate and legitimate children are now placed on the same footing. On the principle enunciated in *Tikiri Menika v. Menika*² the illegitimate child must have a share, otherwise he will have nothing to depend upon as long as the widow is alive. According to Kandyan law the father must maintain the illegitimate children. [De Sampayo J.—Yes, the father, but not the widow. She is entitled to life interest in property earned by her along with her husband.] That will be the same when there are legitimate children by the first bed, as in *Tikiri Menika v. Menika*.²

In *Rankiri v. Ukku*³ *Wendt J.* says: "It appears to be well settled that where a man leaves both legitimate and illegitimate children, his acquired property is shared between them, each branch taking a moiety." The widow's rights are limited where all the property consists of acquired property. Counsel referred to 6 *N. L. R.* 214; 19 *N. L. R.* 260.

J. W. de Silva, in reply.—*Wendt J.* in the passage cited at page 135 refers to the ultimate rights after the death of the widow (see *Modder* 408)

Cur. adv. vult.

January 29, 1918. DE SAMPAYO J.—

The facts on which a point of Kandyan law has arisen for decision are as follows. The plaintiff is the widow of *Nekatdurage Kiribandiya*, who died intestate leaving an estate consisting entirely of acquired property. There were no children of the marriage between the plaintiff and *Kiribandiya*. The second defendant, who is a minor and is represented in this action by the first defendant, is an illegitimate child of *Kiribandiya* by another woman. The plaintiff, who, as widow, claims to be entitled to a life interest in the entirety of the property, has brought this action for possession of the property and for damages. The defence is that the second defendant is solely entitled to the lands in question, subject only to the plaintiff's life interest in half thereof; and the first defendant, who has been in possession of the lands on behalf of the second defendant, pleads that he is, and always was, willing to render to the plaintiff a half

¹ (1903) 7 *N. L. R.* 364.

² (1917) 20 *N. L. R.* 12.

³ (1907) 10 *N. L. R.* 129, at page 135.

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share of the produce. The District Judge has upheld the contention of the defendants, and has entered judgment for the plaintiff for possession of an undivided half share of the lands and for the value of half share of the produce as damages. The plaintiff has appealed.

It is true, as a general proposition, that under the Kandyan law there is no distinction between legitimate and illegitimate children with regard to succession to the acquired property of the father, but how far can the widow's life interest be affected thereby? The right of inheritance appears to be founded on the supposed obligation of the father to make provision for the maintenance of his illegitimate children, but the same consideration does not apply to the widow, who is entitled to the life interest by matrimonial right rather than by succession. As was observed by Lascelles C.J. in *Kuda Etana v. Ran Etana*,¹ the widow's right to the life interest is "a privilege allowed her by the law, which rests, at any rate partly, on the presumption that the acquired property was purchased by the savings and exertion of the wife as much as by the husband." Legitimate children born to her and the deceased have no right of possession during her lifetime, and I can find no indication in the Kandyan law that illegitimate children of the deceased by another woman are in a better position. Nor can the contention to the contrary derive any support from the decision in *Tikiri Menika v. Menika*.² It was no doubt decided there that, where the deceased had children by a first wife and left no *paraveni* property the widow's life interest did not extend to the entirety of the acquired property, but only to a share, and that the children of the first bed were themselves entitled to the immediate possession of the other share. The District Judge has, I think, made too large a deduction from that decision. Because illegitimate children are put on the same footing as legitimate children with regard to succession, he has regarded illegitimate children as having the same right as the first bed children as against the widow. There is no warrant for such extension of the above decision, which was founded on authorities dealing with the case of the widow of a man who lawfully married more than once and left children by a former wife. The case of children of a concubine is quite different, and the Kandyan law does not appear to recognize any right in them to cut down the widow's life interest. This point is not without judicial authority. See the Full Bench decision in *Rankiri v. Ukku*.³ There, no doubt, the question was as to the right of a sister as against the illegitimate children, but it was necessary for the decision of that question to consider whether the widow did not exclude the illegitimate children. The District Judge in that case had purported to follow the judgment of Lawrie A.C.J. in *Mahatmaya v. Banda*,⁴ and had decided

¹ (1912) 15 N. L. R. 154.

² (1917) 20 N. L. R. 12.

³ (1907) 10 N. L. R. 129.

⁴ (1893) 2 S. C. R. 142.

that the widow excluded the illegitimate children, and his decision was affirmed in appeal.¹ But in review preliminary to an appeal to the Privy Council the judgment in appeal was reversed, and the Court explained or over-ruled the judgment of Lawrie A.C.J. in *Mahatmaya v. Banda*,² and held that the illegitimate children were entitled to succeed to the acquired property in preference to the sister, but subject to the widow's life interest. If the illegitimate children, in the view of the Court, had any right to immediate possession even of a share, it would have been necessary, in that case, to decree it to them. I think it is clear that the effect of the decision was to hold that the widow was entitled to a life interest in the entirety of the acquired property.

I accordingly think that this appeal is entitled to succeed. I would set aside the judgment appealed from, and direct that the plaintiff should have judgment for possession of the entirety of the lands, and also for damages at the rate of Rs. 350 per annum, which it was agreed at the trial was the total nett income. It was the first defendant who was in possession of the lands, and he alone was originally sued. The second defendant was added as a party in consequence of his allegations in the answer, and probably on that account the District Judge ordered the plaintiff to pay costs of action to the first defendant. But now that the plaintiff fully succeeds, I think the first defendant alone should pay to plaintiff the costs of the District Court and of this Court.

SHAW J.—

I agree that we should follow the opinions expressed by the Judges of the Full Court in the case of *Rankiri v. Ukku*,³ that a Kandyan widow is entitled to a life interest in the whole of the acquired property of her husband to the exclusion of her late husband's illegitimate children, and that the case of *Tikiri Memika v. Memika*⁴ is not an authority in favour of the respondent's contention in the present case. The appeal should, therefore, be allowed, and I agree to the order as settled in my brother De Sampayo's judgment.

Appeal allowed.

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¹ (1903) 7 N. L. R. 364.
² (1893) 2 S. C. R. 142.

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