1957 *Present :* Basnayake, C.J., Pulle, J., K. D. de Silva, J., T. S. Fernando, J., and L. W. de Silva, A.J.

MALLAWA and another, Appellants, *and* SOMAWATHIE GUNASEKERA, Respondent

S. C. 180—D. C. Kandy, P. 3,317

Kandyan Law (prior to Ordinance No. 39 of 1938)—Illegitimate daughter—Sole illegitimate child—Marriage in diga*—Right to inherit father's acquired property—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, s. 14.*

Under Kandyan Law prior to the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938, when a father died leaving legitimate children and also a sole illegitimate child who was a daughter, the illegitimate daughter did not forfeit her right to a moiety of the acquired property of her father by marrying in *diga* after his death, even where the parents of both the legitimate and the illegitimate children were the same.

APPEAL from a judgment of the District Court, Kandy. This appeal was referred to a Bench of five Judges under section 51 of the Courts Ordinance.

E. B. Wikramanayake, Q.C., with *W. D. Gunasekera*, for Defendants-Appellants.

H. V. Perera, Q.C., with *C. R. Gunaratne* and *B. S. C. Ratwatte*, for Plaintiff-Respondent.

Cur. adv. vult.

November 11, 1957. BASNAYAKE, C.J.—

The plaintiff-respondent (hereinafter referred to as the respondent) instituted this action for a partition of four lands which are the acquired property of her deceased father Singa. In each of them she claims she is entitled to an undivided half share.

The main question that arises for decision on this appeal, which has been referred to a Bench of five Judges under section 51 of the Courts Ordinance, is whether under Kandyan Law an illegitimate daughter who is also the sole illegitimate child of her father loses her right to his acquired property by marrying in *diga* after his death.

The facts as found by the learned trial Judge were not questioned. It would appear that the respondent's father Singa and mother Rankiri were married in 1905. They had one child, a son, Sumanasiri, born in wedlock in 1907. His parents obtained a divorce in 1908. Four years later, in July 1912, the respondent was born, Singa being the father and Rankiri the mother. Singa died in April 1912 before the respondent was born and had no other children born out of wedlock. The respondent married in *diga* in 1927. Her father left acquired property of which she

claims a moiety. The 1st appellant, who is Sumanasiri's successor in title, claims the entirety of the acquired property of Sumanasiri's father on the ground that the respondent forfeited her right to a share in them by going out in *diga*.

The precise question whether an illegitimate daughter who is the sole illegitimate child forfeits her inheritance by going out in *diga* has not been decided in any reported case. Learned counsel for the appellants relied on the case of *Ran Menike v. Nandohamy*, 57 N. L. R. 453. That case which decided the right of succession under the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, of an illegitimate daughter who married in *diga*, does not apply to the case now before us.

It is settled law that on a *diga* marriage the only legitimate daughter who is also the sole child of the father does not forfeit her right to succeed to his acquired property [1]. It is also settled that where a Kandyan father leaves both legitimate and illegitimate children his acquired property is shared between them, each branch taking a moiety [2]. In such a case the succession is *per stirpes* and not *per capita*. It is accepted that where a father leaves issue by two marriages and the issue of each marriage inherit a moiety, the only child of one marriage does not forfeit her moiety by marrying in *diga* [3].

The question that has not been settled is—What happens to the moiety that goes to the illegitimate children when there are legitimate and illegitimate children and when the only illegitimate child, a daughter, goes out in *diga* ? Does it go to the legitimate children or does it remain with the sole illegitimate child though married in *diga* ? Learned counsel for the appellants contended that on the *diga* marriage of the respondent her right to the acquired property of her father was forfeited and enured to the benefit of Sumanasiri, the legitimate son of the father. He argued that in the instant case the respondent did not as in the case of children of two marriages inherit a moiety because the respondent and Sumanasiri were children of the same parents and the rule of succession that would apply in their case would be the rule that applies to legitimate children of the same parents.

Learned counsel for the respondent contended that the respondent was an illegitimate child as the marriage of her parents had been dissolved at the time she was conceived, and that the moiety of the illegitimate issue is not forfeited on the *diga* marriage of the sole illegitimate child, a daughter, because there is no one in whose favour the forfeiture could operate. He submitted that where there are children of two or more marriages the division is *per stirpes* and not *per capita* and that the rule is the same in the case of legitimate and illegitimate children even though they be of the same parents. We are of opinion that the contention of the learned counsel for the respondent is entitled to succeed.

In our opinion the sole test of legitimacy in a case like the present one is the marriage of the parents and by that test Sumanasiri was legitimate and the plaintiff illegitimate, even though they were the

[1] *Ukkuwa v. Tikiri (1851) Austin 122.* [2] *Rankiri v. Ukku, 10 N. L. R. 129.*
[3] *Punchi Menika v. Tennekoongedera (1843) Morgan 350.*

children of the same parents. That marriage is the true test is recognised by the Legislature in section 14 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938.

If illegitimate children as a group are entitled to succeed to a moiety of their father's acquired property, there is no principle of Kandyan law which can be invoked to justify placing a sole illegitimate daughter contracting a marriage in *diga* in a less advantageous position than the sole legitimate daughter of the same father.

The rule that applies in the case of children of two marriages should apply to the case of legitimate and illegitimate children of the same father, and where there is a sole illegitimate child who marries in *diga* she does not forfeit her moiety even where the parents of both the legitimate and the illegitimate children are the same.

We accordingly hold that the respondent, the only illegitimate child of Singa, did not forfeit her right to her moiety of her father's acquired property by marrying in *diga*.

It was assumed for the purpose of this appeal that the fact that the respondent went out in *diga* fifteen years after the death of her father whereupon her moiety would have vested in her did not affect the rule as to forfeiture on a *diga* marriage.

There is only one other question that arises for decision in this appeal, namely, the question of *res judicata*. We are of opinion that the decision in M. R. Kandy 120, a case instituted after the respondent had married in *diga*, in which Sumanasiri sought a declaration that he was the sole heir of his deceased father Singa and that the respondent was not the child of Singa is *res judicata*. In that case it was decided that Sumanasiri was not the sole heir of Singa and that the respondent was the child of Singa and Rankiri. Reliance was placed on the fact that certain material issues which were framed by the learned trial Judge in that case were reserved for consideration in separate proceedings. It flows from the decree which declared that Sumanasiri was not the sole heir of Singa that any issue of fact, whether raised or decided at the hearing or not, directed to reverse the decree cannot be re-agitated in a subsequent case. We uphold the submission of learned counsel for the respondent that the 1st appellant cannot escape the operation of section 207 of the Civil Procedure Code by inviting the Court not to decide issues that arise on the pleadings unless the reservation of such issues comes within the provisions of section 406 of the Civil Procedure Code.

We accordingly dismiss the appeal with costs.

PULLE, J.—I agree.

K. D. DE SILVA, J.—I agree.

T. S. FERNANDO, J.—I agree.

L. W. de SILVA, A.J.—I agree.

Appeal dismissed.