1928.

Present : Fisher C.J., Garvin and Lyall Grant JJ.

UKKU BANDA *et al.* *v.* HEENMENIKA.

139—D. C. Nuwara Eliya, 916.

Kandyan law—Widow's right of inheritance—Acquired property of deceased—Re-marriage—Forfeiture.

The right which a kandyan widow has to a life interest in the acquired property of her deceased husband is generally lost by her re-marriage in *diga*.

The circumstances, in which a re-marriage does not involve a forfeiture, indicated.

Menika v. Horetala,[2] *Nila Henaya v. Dissanayaka*,[3] *and Hudi v. Rangi* [4] overruled.

THIS was an action instituted by the heirs of one Punchi Banda, a Kandyan, for a declaration that they are entitled to the possession of certain allotments of land belonging to his estate, of which the defendant was said to be in wrongful possession. It was admitted that these lands formed part of the acquired property of the deceased and that the defendant, his widow, had contracted a second marriage. It was contended on behalf of the

[1] *(1915) 1 C. W. R. 197.*
[2] *3 S. C. R. 167.*
[3] *6 N. L. R. 214.*
[4] *19 N. L. R. 260.*

plaintiffs that the defendant had lost her rights to her husband's estate on re-marriage. The learned District Judge decided in favour of the defendant.

H. V. Perera, for plaintiffs, appellants.

Keuneman, for defendant, respondent.

November 9, 1928. GARVIN J.—

This was an action by certain persons who claim to be the heirs of one Punchi Banda, deceased, for a declaration that they are the owners of and entitled to the immediate possession of certain allotments of land alleged to belong to his estate of which the defendant was said to be in wrongful possession. It was admitted that these allotments of land formed part of the acquired property of the deceased and that the defendant, his widow, had contracted a second marriage after his death. It was submitted on behalf of the plaintiff that under the Kandyan law—which is applicable to this case—the defendant lost all her rights to her husband's estate on re-marriage. This point was made the subject of a preliminary issue of law which the District Judge has decided in favour of the defendant. The plaintiffs appeal.

The question of law is raised in very wide terms. The Court was invited to try the issue.

> " Does the re-marriage of a Kandyan widow with or without the consent of his relations involve the forfeiture by her of her right to the property acquired by the deceased husband during his lifetime " ?

By " right to the property acquired " it is evident that the parties meant the life interest of a Kandyan widow in the acquired property of her husband. But it does not appear whether the second marriage was in *bina* or *diga*.

The District Judge in a carefully considered judgment has followed the decisions of this Court in *Menika v. Horetala*, [1] *Nila Henaya v. Dissanayaka Appuhami*, [2] *Hudi v. Rangi*, [3] but has suggested that the point should receive further attention and consideration.

The first reported case in which the proposition was laid down that a Kandyan widow did not lose her life interest to her deceased husband's acquired landed property on contracting a second marriage is that of *Menika v. Horetala* (*supra*). The principal judgment is that of Lawrie A.C.J., who was satisfied that by the Kandyan law a widow who left her husband's house to live with a second

[1] *3 S. C. R. 167.* [2] *6 N. L. R. 214.* [3] *19 N. L. R. 260.*

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husband lost her rights to be maintained from the produce of his ancestral lands. In regard to her rights in the acquired landed property all the learned Judge says is :—

> "I do not find authority of a kind which I think sufficient, that the widow's possession of acquired land was to come to an end on a second marriage, one reason why she was allowed to possess it for her life was that in most cases it had been purchased by the savings and exertions of the wife as much as of the husband."

There is however no reference to or citation from any work on Kandyan law in this judgment. The case was heard and determined in 1894. The next case in point of time is that of *Nila Henaya v. Dissanayaka Appuhami* (*supra*). The judgment delivered in 1903 is that of a single Judge, Moncrieff J.; it refers to the judgment of Lawrie J. in *Menika v. Horetala* (*supra*) and proceeds as follows :—

> "As there is nothing in Perera or Thomson, or so far as I know anywhere else, in contradiction of this, I think that Setu's (*i.e.*, the widow's) interest in the acquired property did not come to an end."

The point next came before this Court in the year 1916, and arose in the case of *Hudi v. Rangi* (*supra*). The judgment was delivered by Shaw A.C.J., with whom de Sampayo J. agreed. The case was that of an action by a childless Kandyan widow for a declaration that she was entitled to possession of her husband's acquired landed property and to a life interest therein. Her claim was resisted on the plea that she had married a second time contrary to the wishes of the heirs and had left her late husband's house. Apart from the two earlier cases referred to above, the only other citation was a passage from page 27 of Pereira's edition of *Armour's Grammar of Kandyan Law* which also appears in *Marshall's Judgments at page 326*. In point of fact both passages are taken from *Sawer's Digest, Chap. I., s. 6*, but this was not brought to the learned Judge's notice. In the result Shaw J. remarks that the passage occurs in a part of Armour's work which deals with the widow's right to her husband's *paraveni* property, and concludes that the passage was intended to refer to her interest in her husband's *paraveni* only and not in his acquired property. Shaw J. does refer to *Modder, Art. 169, p. 296*: but that article if read with article 173, p. 302, shows clearly that Mr. Modder has based this proposition on the law as declared in *Menika v. Horetala* (*supra*) and *Nila Henaya v. Dissanayaka Appuhami* (*supra*).

On the other hand, there is the high authority of Sawer for the following statement of law :—

> "A widow loses her rights and life interest in her husband's estate by taking a second husband contrary to the wish of her first husband's family : or by disgraceful conduct, such as, glaring profligacy or adultery ; or by squandering the property of her deceased husband. Any of these being proved against her by the children would subject the widow to exclusion from the house of her late husband and deprive her of any benefit from his estate." [1]

It is this passage which is referred to by Shaw A.C.J. in *Hudi v. Rangi* (*supra*) as a passage from *Armour* "which is cited in *Marshall's Judgments*." As I observed earlier, it has been taken over from *Sawer's Digest*. It is therefore of importance to note that it appears in a chapter in which Sawer is setting down the rules of succession to "landed property." The five preceding paragraphs lay down the rules of succession to a man's "landed estate" drawing no distinction between inherited and acquired property. The only reference to the two classes of property is in section (2), which says :—

> "The widow of a husband dying childless has the same life interest, and that only, in her husband's landed property, whether hereditary or acquired, as the widow of a husband, who has died leaving issue."

I can find no reason therefore for giving to the very general words "a widow loses her *rights and life interest in her husband's estate* by taking a second husband, &c.," a construction which restricts their application to his *paraveni* property. There is certainly no indication either in the language of the section or of the chapter in which it occurs that the forfeiture does not extend to the life estate in the acquired property.

The quitting of the family house by a widow which in most cases results from a second marriage involving a severance of the family tie was apparently regarded as a serious offence meriting a forfeiture of all rights in her husband's property and in certain cases even the right to succeed as heir of a deceased child to any part of such property :—

> "A widow, who quits the house of her deceased husband leaving her children by her deceased husband to the care of their father's relations, to form another marriage, loses not only her own immediate rights in her first husband's estate, but the right to inherit the property of her children borne to her deceased husband and abandoned by her ; but if she carries the children of her

[1] *Sawer's Digest, Chap. I.*

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first husband to the house of her second husband, or if she affords them assistance and performs the last duties to them on their deathbed, she does not lose her right to inherit their property."[1]

These passages in themselves are a strong basis for the contention that the proposition that under the Kandyan law re-marriage of a widow does not under any circumstances involve a forfeiture of her life interest in her husband's acquired property is unsound.

In Chapter V., s. 8, of *Pereira's Edition of Armour* there appears the following passage :—

> " If the deceased left a widow, the whole of his movable property will devolve to the widow by *lat himi* right, in preference to the mother, brother, and sister. And the widow will not forfeit her right to such property by subsequently contracting another marriage in *diga*. *Such marriage will have* the effect of depriving *her only of the* life interest she *had in her husband's landed estate.*"[2]

The words appear to be too clear to need comment, but if there is any doubt as to Armour's opinion the matter is set at rest by his statement of the law when considering in Chapter I., s. 24, the consequences of " Dissolution of marriage by death : "—

> " If the deceased husband left other landed property, besides his *paraveni* or ancestral lands, that is to say, lands acquired by purchase or lands which he, the deceased, had received from his adopted father, in such case the widow may have possession of the whole of such acquired land, for the remainder of her life, provided she remained single ; in the event of her death or of her contracting a subsequent marriage, the said land will revert to her aforesaid deceased husband's heir-at-law."[3]

On turning to the *Niti Nighanduwa* one finds several passages which are wholly irreconcilable with the proposition laid down in the judgment of Lawrie J. and those which followed it, that under no circumstances does the second marriage of a Kandyan widow involve a forfeiture of her life interest in the acquired landed property of her deceased husband. In this work the rights which a wife acquires by reason of her marriage is referred to as " her marriage right." After considering certain cases other than that of dissolution by the cancellation of the marriage according to custom which may involve a forfeiture of the marriage right the work proceeds as follows :—

> " The marriage right, however, thus established, will only remain in force so long as the wife does not contract a

[1] *Sawer's Chap. VII., s. 23.* [2] *Perera's Edition, p. 86.*
[3] *Perera's Edition, p. 18.*

second marriage after her husband's death. As soon as she is married again, she loses the maintenance from her former husband's property.

" In some instances, however, even though she contracts another marriage after her husband's death, her prior marriage right may continue in force, viz., on the husband's death, if his children are very young and their mother is unable to perform the services of the land and to support the children, and if with the consent of the deceased husband's relatives, she contracts a *bina* marriage on his premises, her marriage right will not be vitiated." [1]

These passages occur in a chapter headed " How a married woman inherits the land of the husband." But any doubt as to whether the application of this passage is limited to the inherited lands of her husband is set at rest by the following passages which appear later :—

" If a man dies without leaving legitimate children, and if at the time, his wife, a brother, or a sister of his be living, the paternal lands of the deceased will at once revert to the brother or sister, and all his acquired lands will be given over into the charge of the wife. However, on the marriage again (in *diga*) of this wife, or on her death the lands so given over will devolve on the brother or sister aforesaid, or on the grandchildren descendant from them, or on the heirs of the brother or sister." [2]

While considering the case of the death of a man leaving him surviving no legitimate child or grandchild or adopted child but his wife, father and mother, and brothers and sisters, the *Niti Nighanduwa*, page 91, says with reference to the aquired lands :—

" She has only the power to remain in possession of them during her lifetime or until she contracts a *diga* marriage ; and therefore, she cannot sell or give away any portion of the lands so given over into her charge."

" If this wife, while in possession of her deceased husband's lands, contracts another *diga* marriage, or dies, and if the father of the aforesaid husband is then living, he will come into possession of those lands ; and if the father is dead the mother will obtain them . . . ."

With the sole exception of the one passage from *Armour* referred to in the judgment of Shaw J. in *Hudi v. Rangi* (*supra*) not one of these passages appear to have been brought to the notice of the Judges who heard and determined the three cases referred to. This examination of the orginal authorities renders it impossible to

[1] *Niti Nighanduwa, C. III., s. 8., p. 31.*
[2] *Niti Nighanduwa. C. IV., s. 4., p. 96.*

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justify the proposition laid down in those cases. While there undoubtedly are certain cases in which a second marriage does not necessarily involve a forfeiture of a widow's right in her deceased husband's landed property, there can be no doubt that under the Kandyan law there are cases in which such a forfeiture is a necessary consequence of a second marriage.

However reluctant one might be to dissent from a proposition of law stated in a judgment of this Court as far back as 1894, which has since been followed and accepted in at least two other judgments, I do not, however, think that the law as stated there can fairly be said to have been definitely settled and established for so longa period that we are bound to follow it even in a case where it is so clearly at conflict with all the original writers from whom we derive our knowledge of the Kandyan law. Hayley in his book on *Sinhalese Law and Customs* cites four cases: one reported at page 85 of *Austin's Reports*, and three others discovered by him and printed in Appendix II. of his book as note 14. These cases all seem to be at conflict with the law as laid down in *Menika v. Horetala* (*supra*) and the cases which followed it. Inasmuch however as the words " landed property " or " lands " are not expressly preceded by the word " acquired " it is possible to argue that they are not of themselves conclusive of the matter.

The broad principle underlying the Kandyan law of inheritance is that a man's landed property must remain in his family. If he leaves acquired property, his widow is given the right to enjoy the produce thereof. She is only permitted to share in the profits of his *paraveni* property if there is no acquired property or if the profits of such property alone are insufficient for her maintenance.

The right of a widow to a life interest in the acquired property appears to proceed, not from a desire to enlarge her rights in her deceased husband's estate, but rather to exclude her completely from the *paraveni* estate whenever the circumstance that the deceased has left acquired property renders that possible. The right of a widow is in substance a right to sustenance and support from the profits of her deceased husband's landed estate. This right is a burden imposed on his acquired property if there is any; recourse can only be had to the profits of the *paraveni* property if there is no acquired property or if what there is, is insufficient to provide the widow with the means of maintaining herself.

It is this right to take by inheritance benefits from her deceased husband's landed estate which is determined by dissolution of marriage and which ceases or is forfeited in those cases in which a second marriage is visited with forfeiture.

Whether in this case the defendant's second marriage has resulted in a forfeiture of her interest in the land which is the

subject-matter of the action it is impossible to say without evidence as to the type of marriage and all other circumstances relevant to the determination of the question.

I would therefore set aside the judgment under appeal and send the case back for further trial and determination. The appellants are entitled to the costs of this appeal ; all other costs will abide the event.

FISHER C.J.—I agree.

LYALL GRANT J.—

The only point put in issue in this case was whether a Kandyan widow necessarily forfeits by re-marriage without the consent of the deceased's relations her rights in her first husband's immovable property.

There can be no doubt but that the District Judge rightly answered this issue in the negative, as he was bound by a chain of authorities dating from 1895.

This case has been brought before a Bench of three Judges in order that these decisions may be reviewed.

A perusal of the institutional writers and an examination of some of the old decisions collected in Appendix II. of Mr. Hayley's *Kandyan Law* makes it very doubtful whether the later decisions correctly set forth the Kandyan law.

It is with great reluctance that I would agree to disturb a principle of law which has been repeatedly enunciated by this Court and which has presumably been accepted for a third of a century.

Personally I should be disposed to follow the later decisions and to leave undisturbed the law which has for long been accepted and acted upon. If that law causes hardship or is not acceptable to those whom it affects, I think the most satisfactory course is to leave the remedy to the Legislature.

The question has not however, previously come before a Bench of Three Judges and we have the power to overrule previous decisions.

In these circumstances I acquiesce in the order proposed by my brother Garvin and agreed to by my Lord the Chief Justice.

Set aside and remitted.