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Present : Bertram C.J. and Garvin J.

HAPU *v.* ESANDA.

136—D. C. Kurunegala, 1,724.

Kandyan law—Widow's right to acquired property—Paraveni property *inconsiderable—Children by two beds—Rights of issue by the first bed—Widow's equitable claim.*

Where a Kandyan who was possessed of *paraveni* property, which was negligible, and of considerable acquired property, died leaving as his heirs a widow and children and also issue by a previous marriage,—

Held, that the issue of the first bed became entitled to a half share of the entire property, both *paraveni* and acquired, subject to equitable rights on the part of the widow and her children.

APPEAL from an order made by the District Judge of Kurunegala on a petition for the judicial settlement of the estate of a Kandyan. The deceased Ungu Duraya died, leaving a widow, the administratrix. He was married twice, and had issue, the first respondent, who is a minor, by the first marriage, and six children by the second marriage. The *paraveni* property which he left was inconsiderable, and the acquired property substantial. The widow claimed that the life interest in this acquired property was absolutely hers. It was assumed that she proposed to maintain her six children out of this property. It was further contended that the first respondent must depend only on the *paraveni* property. The District Judge upheld the widow's claim.

Drieberg, K.C. (with him *Weerasooriya*), for appellant.

Samarawickreme, for administratrix, respondent.

November 17, 1924. BERTRAM C.J.—

This is a question arising under the Kandyan law of inheritance on a petition for the judicial settlement of an estate. The deceased Unga Duraya died, leaving a widow, the administratrix. He was married twice, and had issue, the first respondent, who is a minor, by the first marriage, and six children by the second marriage. The *paraveni* property which he left was inconsiderable, and, indeed, almost negligible. The acquired property was substantial, and the reason for this was that the deceased's father had made him a gift during the father's lifetime of a substantial portion of his ancestral lands. It must be taken as settled that a gift of ancestral land by a father to his son converts the lands into acquired

property. See *Hayley's Sinhalese Laws and Customs, p. 222.* I agree with Mr. Hayley that this seems contrary to principle. But in view of the authorities which he cites this must be taken to be the law until the matter is further considered by a Full Court.

In the present instance the result works out in this way: There are three *paraveni* lands, and in each of these the deceased had a share of one-third, as he had two brothers. Only one of these, however, effectively belongs to the estate, one of the others being claimed by one of the deceased's brothers on the ground that he planted it at the request of his father, and the other being claimed by the other brother on a deed of gift from his father. The income of one-third of the remaining *paraveni* property works out only at Rs. 8 a year. I am not clear whether by this is meant the income of the whole property, or the income of the one-third share which belonged to the deceased, but, according to one of the brothers, "the income of the whole land is Rs. 8 a year." The income from the acquired property, on the other hand, works out at Rs. 1,431 a year.

The widow claims that the life interest in this acquired property is hers absolutely. It appears to be assumed that she proposes to maintain her six children out of this property, but if her claim is sound, she is entitled to it independently of her children, and their step-brother must look solely to the *paraveni* property.

The principles regulating the rights of a widow with regard to her intestate husband's estate, as they have been settled by modern decisions and the statements of institutional writers, appear to be that in ordinary circumstances she can claim the control and management of the whole estate as administratrix, if she has taken out letters of administration, or as guardian of her children, if they are minors. If the children are of full age, they are entitled to enter into their shares, and she is merely entitled to maintenance out of her husband's ancestral lands. The heir-at-law can either support her out of the income of the property, or he may set aside a portion of the estate for her to cultivate for her maintenance. See *Hayley's Sinhalese Laws and Customs, pp. 355-356.*

This principle is subject to another principle, namely, that if there is acquired property, the widow has the option of taking this acquired property for her maintenance, and, in that event, she is entitled, not merely to a reasonable sum for maintenance out of this acquired property, but to an absolute life interest in it. These rights are most fully and explicitly set out in *Armour's Kandyan Law, section 24 (Perera's ed.).* It seems to me clear (notwithstanding the doubts expressed in Mr. Hayley's book at page 357) that this is an option to which the widow is entitled. Armour says: "In such case the widow may have possession of the whole of such acquired land for the remainder of her life." And, again, "in case the widow preferred having possession of the deceased's acquired land."

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But these principles are subject to modification when there have been two marriages, and there are children surviving by a former marriage. In such a case it would appear to be settled that the issue by the first marriage are entitled to one-half the property immediately on the death of their father, the issue of the second marriage being entitled to the remaining moiety subject to the widow's right of maintenance out of that moiety. See *Modder's Kandyan Law, section 164, on p. 188.* The chief authority for this principle is a passage from *Sawers' Digest of Kandyan Law (Modder's ed.), p. 1,* which had been previously, prior to its publication, cited by Marshall on page 339:

That passage is as follows:—

> "The widow of a husband dying childless has the same life interest; and that only, in her husband's landed property, hereditary or acquired, as the widow of a husband, who had died leaving issue; but the widow being the second wife with issue, and there being issue by the first wife, the widow or widows must depend upon the shares of their children, unless the children's share of one of the widows should be insufficient for her support and that of her children; in that case the widow would have a temporary allowance out of the other shares."

This passage contains two singular expressions which cause perplexity, "the widow or widows" and "one of the widows." In ordinary circumstances a man can leave only one widow. Cases of polygamy under the Kandyan system were rare. The phrase, I presume, must be understood as having reference to such rare cases, and possibly to cases in which a wife had been divorced, but after her husband's death was given the status of his widow. In the note to paragraph 18 of *Sawers*, the case is discussed in which it is said: "Nuwerewewe Mudianse died intestate in the king's time, leaving two sons by his first wife and one son by his second wife, both wives being alive, but dwelling in different *walauwes*." The passage in *Sawers*, has, however, never been understood to be confined to these particular cases, but has been treated as of general application.

The question which now confronts us is whether this principle applies only to *paraveni* property, or whether it applies under any circumstances to acquired property as well. On this subject there are two decisions of this Court, *Joshi Nona et al. v. Batin Nona et al.*[1]; *Tikiri Menika v. Menika.*[2] The latter case has been followed in *Muthumenika v. Heenmenika.*[3] The reasoning in these two cases—

Note.—Joshi Nona v. Batin Nona will be found summarised in *Modder's Kandyan Law 288-289.*

[1] *(1908) Leader L. R. 47.*

[2] *(1917) 20 N. L. R. 12.*

[3] *(1917) 4 C. W. R. 268.*

Joshi Nona v. Batin Nona and *Tikiri Menika v. Menika* (*supra*)—cannot, in my opinion, be wholly reconciled, but they are distinguishable on the facts. In the first of them, *Joshi Nona v. Batin Nona* (*supra*), the Court, which was composed of Wendt J. and Wood Renton J., held that a widow was entitled to a life interest in the whole of her husband's acquired property, in spite of the fact that there were children surviving by a former marriage, and that the property was acquired during the continuance of that marriage. De Sampayo J. in *Tikiri Menika v. Menika* (*supra*) seeking to distinguish that case said that the point with which the Court was immediately concerned was an argument that the widow's life interest should attach only to the property acquired during the subsistence of her marriage, and the question whether her rights were cut down by the existence of children by a previous marriage was not considered or decided. This does not seem to be the case. Wood Renton J. expressly says that counsel for the appellant " was unable to furnish us with any authority for refusing to apply the principles of these decisions to the present case on the mere ground that there are issues of the first marriage." It is true, however, that the judgment does not discuss the question whether the principle laid down in the passage from *Sawers* above cited extends to acquired property. It was assumed by both Judges that it did not so extend, and that it only applied to *paraveni* property. The circumstance that in the introductory sentence hereditary and acquired lands are both mentioned indiscriminately (a point on which De Sampayo J. laid stress) was not noted. Nevertheless, this must be regarded as a very weighty authority. In that case, however, it may be assumed that there was substantial *paraveni* property in addition to acquired property.

In Tikiri Menika v. Menika (*supra*), however, there was no *paraveni* property at all, and the two members of the Court dealt with the situation in two different ways.

De Sampayo J. put the case in this way: He held that the right of the widow to an absolute life interest in the acquired lands only arose where there was *paraveni* property as well. I take it that what De Sampayo J. meant is that the widow is entitled to the acquired property only by way of option. She may take the acquired lands if she prefers them to maintenance out of the *paraveni* property. If the circumstances are such that no option can arise, then she has no definite life interest in the acquired lands. I confess that I think this is the inevitable interpretation of the passage from *Armor*, in which the widow's right to the acquired property is expounded. Acting on this principle, De Sampayo J. said: " I think, therefore, that whereas in this case the entire estate of the deceased consists of acquired property only, and there are children by a former marriage, the widow's life interest extends only to a part, and, presumably, to one-half, of such acquired property."

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Ennis J. drew attention to what he described as the "inchoate character of the Kandyan law of intestate succession," and considered that where there was no *paraveni* property, out of which the children of the first marriage could be maintained, Kandyan law would probably recognize that some suitable provision ought, on general equitable grounds, to be made by the widow out of the acquired property. The District Judge had in effect made an allowance to the children of the first marriage of one-half the income of the acquired lands, and Ennis J. observed: "the allowance made by the learned Judge does not seem to be inequitable."

We might then take one of two courses:—

(*a*) We might rule that the option of the widow to possess the acquired lands only arises when the facts substantially admit of such an option. Where the income from the *paraveni* lands is Rs. 8, and the income from the acquired lands nearly Rs. 1,500, it might be considered absurd to allow such an option. We might, therefore, say that in such a case the general rule laid down by Sawers applies to acquired property just as it applies to *paraveni* property, and that the first respondent is consequently entitled immediately to one-half of the whole property, both *paraveni* and acquired, subject to an equitable allowance in the event of it proving that the remaining one-half was insufficient for the maintenance of the widow and her own children.

(*b*) We might, on the other hand, adopt the solution suggested by Ennis J., and hold that the principles of Kandyan law are not to be considered as rigid and technical, but as elastic and subject to equitable adjustment on human considerations. We might, therefore, hold that the right of the widow to a life interest in the acquired property must be subject to a suitable contribution to the maintenance of the children of the first marriage, where the allowance for their maintenance out of the *paraveni* property is obviously insufficient.

There are undoubtedly several passages in the authorities on Kandyan law which support the principle on which Ennis J. bases his judgment. It is undoubtedly the case that in determining rights of succession Kandyan law looks not only at the relationship of the heirs, but also at the circumstances in which they are placed. De Sampayo J.'s way of putting the matter has, however, the advantage of a certain definiteness. The present case cannot really be distinguished from a case in which there is no *paraveni* property at all. I would, therefore, rule that the first respondent is entitled to a one-half share of the whole property, both *paraveni* and acquired, and both movable and immovable, subject to any

equitable claim that may be made by the widow on behalf of herself and her children. I would, therefore, remit the case to the learned District Judge, so that, after such further inquiry as he may think necessary, he may make an appropriate order based on this point of view. The learned Judge in making this order is, I think, entitled to take into account the present circumstances of the widow and the expenses to which she is put in the maintenance of her family. He should also bear in mind the fact that even the one-half share which is presumptively to be assigned to the widow will not be wholly hers, but that, on her children coming of age, they will be entitled to demand their own share out of this one-half.

The first respondent is himself a minor, but his stepmother is not his natural guardian. (See *Hayley's Sinhalese Laws and Customs, p. 211.*) There is no actual necessity for a guardian to be appointed, and I see no reason why he should not enter at once into his inheritance.

I would therefore allow the appeal with costs, and remit the case to the learned District Judge for the purpose above explained.

GARVIN J.—I agree.

Appeal allowed.