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Present: Dalton J. and Maartensz A.J.

MENIKHAMY *v.* SUDDANA *et al.*

238—D. C. Kurunegala, 9,696.

Kandyan law—Acquired property—Inheritance—Preferential right of brothers over sisters.

Where a Kandyan died without issue leaving him surviving two brothers and two sisters.

Held, that the brothers were entitled to his acquired property to the exclusion of the sisters.

Dullewe v. Dullewe et al.[1] followed.

ACTION for declaration of title to 7/16th share of a land called Kudapelessahena, the original owner of which was one Dingira, who died leaving him surviving two sisters Saru and Tikirathi, and two brothers Suddana, 1st defendant, and Kira. By

[1] *5 Leader L. R. 39.*

purchase the plaintiff became entitled to 7/16th of the half share of the two sisters. The 2nd defendant acquired the interest of the brother Kira. The defendants contended that the property, being acquired property, was inherited by the brothers to the exclusion of the sisters. The learned District Judge dismissed the plaintiff's action.

H. V. Perera, for plaintiffs, appellant.

Weerasooriya, for defendant, respondent.

December 17, 1926. DALTON J.—

This appeal raises an interesting question as to succession under Kandyan law.

The plaintiff sought to obtain a declaration of title to an undivided 7/16th share of a land called Kudapelessahena. The parties are agreed that one Wattuwa Dingira was the original owner, the dispute being as to what is the law of succession applicable in the following circumstances. Dingira died leaving surviving him his two sisters Saru and Tikirathi, and Suddana and Kira two brothers. The case for the plaintiff is that these four were his heirs, and as such entitled to a 1/4th share of the land each. By purchase the plaintiff became entitled to 7/16th of the half share of the two sisters, by deed No. 32,513 of September 19, 1922. The brother Suddana is the 1st defendant, and Kira the 2nd defendant, obtained by purchase the interest of the second brother Kira. The defendants, however, say that the two sisters inherited nothing of their deceased brother's estate, the whole being divided between the two surviving brothers Suddana and Kira. It is admitted that the property is acquired property, but the parties are not agreed as to whether Saru and Tikirathi were married in *binna*, or in *diga;* plaintiff says they were both married in *binna*, but defendants deny this. Should it have been necessary to have this decided to come to a decision in the matter, the case must have gone back for evidence and a finding on the point. No evidence at all was led in the case, the question of law to be answered by the trial Judge being set out as follows:—

> " Did the 1st defendant and his brother Kira become solely entitled to the land, or did they and their two sisters become entitled to a quarter share each? "

The learned Judge held that this question was answered in favour of the defendants by the decision of this Court in *Loku Banda Dullewe v. David Walter Dullewe and others* (*supra*), which decision was binding upon him. He therefore dismissed plaintiff's action. Plaintiff now appeals to this Court. For the appellant Mr. Perera

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has argued that, so far as any previous case in this Court cannot be distinguished from this case, the decision has proceeded upon a misapprehension of the Kandyan Law of Succession as set out by Sawers and Armour.

In the case followed by the learned trial Judge it was held that where a Kandyan died, without issue, leaving surviving him two brothers and two sisters, the sisters were not heirs to the acquired property of the deceased. There is no reference in the judgment as to the kind of marriage the sisters had contracted or whether they were married at all. The Court seems to have regarded that point as immaterial. They purported to follow an earlier decision *Dingiri Menika v. Appuhámy* [1] where it was held, but so far as Lawrie J. was concerned with some hesitation, that where a Kandyan died intestate and without issue the lands acquired by him devolved on his uterine half-brother, to the exclusion of his uterine half-sisters who had married in *diga*. It appears from the report of that case that the trial Judge had held that the woman by her *diga* marriage had forfeited the rights of succession to any property that her brother had acquired, but the argument on appeal was not based upon the existence of the *diga* marriage. It was urged that, according to Sawers, in such a case the males were preferred to the females, and on that ground the sisters, whether married in *binna* or in *diga*, could not succeed. It was upon this ground also that the Court affirmed the trial Judge's decision, pointing out that the opinion expressed by Sawers (Sawers' Memoranda, page 13), was accepted in *Mudalihami v. Bandirala*. [2]

It is this alleged preference of males that is now questioned, and Mr. Perera has put before the Court the views on that point expressed by Mr. Hayley in his *Sinhalese Laws and Customs*. At page 336 and the subsequent pages of that work it is sought to show that the views of the Court and authorities in the cases I have cited were based upon a misapprehension as to Sawers' meaning. There is no doubt, from a logical point of view, and perhaps from an equitable point also, Mr. Hayley's theory is an attractive one, but it is based, so it seems to me, upon an assumption that Sawers meant something which he certainly has not expressed in words. I am far from satisfied that one is justified, especially at this point of time after the matter has been fully considered and the opposite view adopted over a period of very many years, in making those assumptions to bring the law into conformity with what one thinks it might properly be. It is not easy in every case to gather the principle underlying the various cases which Sawers and Armour set forth, and as the argument in this case has shown it is not easy to reconcile the passages in Sawers to which we have been referred. This reconciliation has, however, been attempted in the past and

[1] *6 N. L. R. 133.*

[2] *3 N. L. R. 209.*

the result is set out by Modder (*The Principles of Kandyan Law*) at page 617, after a detailed examination of the rights of ascendants and collaterals, in the following way:—

> "The general rule which governs the law of devolution of inherited property is that descendants failing, the property goes to the source whence it came, so that property which came from or through the father reverts to the heirs on the part of the father, and property which came from or through the mother reverts to the heirs on the part of the mother. This rule is further qualified by the principle that when the line of descent is broken, inherited property goes over to the next nearest line issuing from the common ancestral roof tree. In regard to acquired property there is no definite system laid down by the jurists, but the tendency is to give preference to the maternal over the paternal line and to elect males before females in the same degree."

This view has been adopted by the Courts over a very long period in the past, and until it be held to be wrong by a higher Court, I am not prepared to take a contrary view.

For these reasons, I think, the decision of the trial Judge was correct, and I would therefore dismiss this appeal with costs.

MAARTENSZ A.J.—

The plaintiffs in this action sued the defendants for declaration of title to 7/16ths of a land called Kudapelessahena. The land belonged to Wattuwa Dingira who died leaving as heirs his sisters Saru and Tikirathi, and two brothers Suddana, the 1st defendant, and Kira. Kira's son has sold his interest to the 2nd defendant. Saru died leaving as heirs a child Punchi and two grandchildren, Ganitha and Ukku. Tikirathi died leaving as heirs an only son Dingira who, with Punchi and Ukku, sold 7/16ths to plaintiff by deed No. 32,513 dated September 19, 1922. At the trial it was admitted that Kudapelessahena was the acquired property of Wattuwa Dingira, and it was contended that according to Kandyan law the brothers of a person dying intestate inherit before the sisters the acquired property of the deceased.

The learned District Judge upheld this contention and dismissed plaintiff's action, and he appeals.

The principle followed by the District Judge is in accordance with the decided cases. In *Dingiri Menika v. Appuhamy* (*supra*) this Court held with some hesitation on the authority of a passage in *Sawer's Kandyan Law*, page 13, that where a Kandyan died intestate and without issue the lands acquired by him devolve on his uterine

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half-brother to the exclusion of his uterine half-sisters. This decision was followed in the case of *Loku Banda Dullewe v. David Walter Dullewe et al.* (*supra*) where the contest was between a brother and sister.

We were asked to reconsider these decisions in view of the passage in the *Niti-Nighanduwa* at page 97, which is as follows:—

> "If the landed proprietor dies leaving a brother and a sister, and the sister is unmarried or married in *binna*, all the lands of the deceased, including his paternal lands, will be equally divided, and the brother and sister will inherit each one half. But if the sister is married in *diga* the brother will inherit the paternal lands of the deceased."

And the opinion expressed by Mr. Hayley in his book on *Sinhalese Laws and Customs* at pages 426-427 that brothers and sisters are in the same position as regards succession. The general rule is stated by Sawer at page 8 as follows:—

> "Failing immediate descendants, that is, issue of his own body by a wife of his own or higher caste, a man's next heir to his landed property (reserving the widow's life interest) is his father, or if the father be demised, the mother, but this for a life interest only, or on the same condition as she holds her deceased husband's estate which is merely in trust for her children, next the brother or brothers and their sons, but failing brothers and their sons, his sisters or sister's son succeeds."

At page 13 he draws a distinction between *paraveni* and acquired property and says—

> "A person dying childless, having parents and brothers and sisters, the property which the deceased may have had from his or her parents reverts to them reciprocally (if from the father to the father, if from the mother to the mother) as does his acquired property whether land, cattle, or goods to his parents ; but his parents have only the usufruct of the acquired property, they cannot dispose of it by sale, gift, or bequest ; it must devolve on the brothers and sisters, the latter having only the same degree of interest in their deceased brother's acquired property, that they have in their deceased parent's estate ; ultimately it is divided among the brothers of the whole-blood of the deceased equally ; or their sons according to what would have been their father's share ; but failing brothers' sons it goes to the sisters of whole-blood or their sons ; and failing them to the brothers of the half-blood uterine and their children ; failing them to sisters of the half-blood

uterine and their children; and failing brothers and sisters of the half-blood uterine and their children, the property goes to the brothers of the half-blood by the father's side and their children; next to the half-sisters by the father's side and their children; and failing them to his mother's sister, and next to cousins called brothers and sisters on the mother's side, that is to say, the mother's sister's children; and failing them to the mother's brothers and their children, and failing them to the father's brothers and their children; and failing them to the father's sisters and their children. ''

This passage is reproduced in Thompson's *Institutes*, Vol. II., page 648, with slight variations. The most important is that the words " who . . . . have " are substituted for the words " the latter having. "

At page 17 Sawer sets out the devolution of the acquired property of a woman who dies intestate without issue thus:

" An unmarried daughter acquiring property and dying intestate her property goes to her mother; failing the mother to the father; and failing the father to her brothers and sisters of the whole-blood—if there be but one such brother the whole goes to him; if there are several brothers they shall share equally; failing brothers and sisters of the whole-blood to the brothers and sisters uterine of the half-blood; and failing them to the brothers and sisters of the half-blood by the father's side; and failing them to the maternal uncle; failing him to the maternal aunt; and failing the maternal aunt to the maternal grandmother; and failing her to the maternal grandfather; and failing him to the paternal uncle; and failing him to the paternal aunt ; failing the paternal aunt to the paternal grandfather; and failing him to the paternal grandmother; failing the paternal grandmother to the maternal uncle's sons and daughters; and failing them to the maternal aunt's sons and daughters or grandsons and granddaughters; and failing them to the paternal uncle's sons and daughters or grandsons and granddaughters; and failing them to the paternal aunt's sons and daughters, or grandsons and granddaughters. ''

Here where the brothers and sisters of the whole and half-blood fail, the male relatives on the mother's side are preferred to the female relatives of equal degree of consanguinity.

The important difference is that sisters inherit equally with brothers.

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It was contended that the statements are inconsistent and that there is nothing in the Kandyan law to justify the preference of males over females.

Mr. Hayley at page 338 of his work on *Sinhalese Laws and Customs* sets out the devolution of title in the form of a table and expresses the opinion that Sawer was referring to sisters married in *diga*. His arguments in support of this opinion are very attractive, but after careful consideration I am unable to accept them, for I see no reason why Sawer should not have mentioned it if he was writing of *diga* married daughters. Armour at page 46 (Perera's edition), dealing with the inheritance by brothers and their children and sisters, draws a distinction between *diga* and *binna* married sisters in the inheritance of paternal *paraveni* land, but in the case of acquired property he says the property will devolve on the deceased's brother's son in preference and to the exclusion of the deceased's sister's son.

The case of *Dingiri Menika v. Appuhamy* (*supra*) construed the passage on page 13 as applying to *binna* and *diga* married sisters, and I have no doubt has been followed ever since in the distribution of the property of a man dying intestate leaving brothers and sisters as heirs, and I am not prepared to dissent from that construction in the absence of any rule which states definitely that *binna* married sisters inherit equally with brothers.

I would accordingly dismiss this appeal with costs.

Appeal dismissed.