Present: Mr. Justice Wendt.

UKKUHAMY *v.* BALA ETANA *et al.*

C. R., Kandy, 15,862.

Kandyan law—Devolution of property of deceased Kandyan man—Contest between mother and brothers and sisters—Preferent right of mother.

Where a Kandyan dies unmarried, intestate, and without issue, his acquired immovable property devolves on his mother (the father being dead) in preference to his (deceased's) brothers and sisters.

APPEAL by the defendants from a judgment of the Commissioner of Requests, Kandy. The facts are fully set out in the judgment.

R. L. Perera, for the defendants, appellants.

E. H. Prins, for the plaintiff, respondent.

Cur. adv. vult.

May 26, 1908. WENDT J.—

The only question left by the parties to the Commissioner at the trial was whether the acquired immovable property of a Kandyan man dying unmarried and without issue is inherited by his brothers and sisters as the plaintiff contended, or by his mother (the father

being dead) as contended by defendants. The mother, who is now dead, has conveyed the land to the defendants, who are two of her daughters, sisters of the *propositus*. The plaintiff claims to be another sister, and apparently holds a conveyance from a fourth sister. The learned Commissioner held that the mother took a usufruct only in the lands, and that that usufruct having now been determined by her death, defendants could have no title to the lands; that is to say, presumably no title under their mother's conveyance. There is nothing to show why they should not inherit jointly with their sister, the plaintiff.

It is recorded by the Commissioner that plaintiff's proctor relied on *Bungappu v. Obias Appuhamy*,[1] and defendant's proctor on *Ukkurala v. Tillekeratne*,[2] but neither of those cases embodies an authoritative decision. In the former it was not denied that the *dominium* in the intestate's acquired lands had passed to his brothers and sister, and the contest was, whether the mother had only an inalienable right to maintenance, or a life interest which she could convey to another. The mother was living and had conveyed all her interest to the defendant, who claimed that, in the partition that the Court was making, the life interest should be allotted to him. In *Ukkurala v. Tillekeratne* the only question submitted to the Court was whether the property in question should be regarded as the paraveni or the acquired property of the intestate owner, it being expressly admitted that in the latter case it passed to the mother in preference to the brothers and sisters. The Court was not asked to decide, and it expressly refrained from deciding, what was the nature of the right acquired by the mother. The only other case to which counsel directed my attention was that of *Punchirala v. Dingiri Menica*,[3] where the question was, whether the mother was sole heiress to the paraveni lands of her child who had died unmarried and without issue, as against the father's sister, there having been no brothers or sisters of the intestate. Lawrie J. (Dias A.C.J. concurring) held that the mother was sole heiress, and he quoted with approval the judgment of the Judicial Commissioner's Court in a case decided on September 7, 1824, in these terms: " The chiefs after due deliberation gave it as their unanimous and unqualified opinion that a mother is the heir of her only fatherless child dying without issue, however the property the child dies actually possessed of may have been acquired, whether it shall have been the paraveni property of the child's father or accrued to the child in any other way, and that to the exclusion of the child's father's family. " It appears to have been contended in the case of *Punchirala v. Dingiri Menika*, upon the strength of the passage in *Sawers' Digest, p. 8.*, repeated by Sir Charles Marshall, p. 338, paragraph 79, that the mother's interest was only a qualified right of life rent in her child's

[1] *(1901) 2 Browne 286.* [2] *(1882) 5 S. C. C. 46.*
[3] *(1888) 8 S. C. C. 135.*

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property, but Lawrie J. expressed the opinion that Sawers was in that passage dealing with the case of a mother's rights when her deceased child had left full brothers and sisters; that is to say, a case like the one now before me. Mr. Justice Lawrie then proceeded to lay it down as clear law from the *Niti Nighanduwa* and Armour that the mother was sole heiress of her child, but that if the child left a full brother or sister, he or she was entitled to the deceased's share of his paternal paraveni land in preference to the mother. I do not hesitate to accept the authority of Sir Archibald Lawrie, and if the present were a case of paraveni property, that would conclude the matter. The question is, whether a different rule of succession applies in the case of acquired property. The passage at page 15 of the *Niti Nighanduwa*, in stating that the mother " inherits the property " of her children, does not make it clear whether or not the absence of brothers and sisters is contemplated, while the passage at page 105, by giving the paraveni lands to the mother, implies that brothers or sisters do not exist. The passage at page 113 expressly postulates the absence of brothers and sisters, and in those circumstances allots even the paraveni lands to the mother. Those passages then may be taken to declare that, when there is no brother or sister, the acquired property devolves on the mother. The passage on page 8 of *Sawers* (Campbell's edition) deals with the case in which all the degrees of relationship are represented. In that case the heirs to the deceased's landed property (no distinction is made as to paraveni or acquired) are said to be first the father, or if the father be dead, the mother, but this for a life interest only; next the brother or brothers and their sons; and next the sister or sister's sons. But at page 17 *Sawers* states: " the assessors unanimously state that the mother is the heiress to the acquired property of all kinds of her children dying unmarried and without issue, and that the same is entirely at her disposal, but should she die intestate, the property would go to the brothers and sisters of the whole blood equally. " That is a clear and unequivocal statement. *Armour* (original edition, pp. 16 and 130; Perera's edition, 85) states the law to be that the mother is sole heiress to her child who had survived his father and died without issue, and left no full brother or sister, in respect of every description of property. " But, " he continues, " if the deceased child left a full brother or sister, that brother or sister will be entitled to the deceased's share of his or her paternal paraveni land in preference to the mother. " Nothing is said in that event about acquired property. The language therefore clearly implies that in respect of that class of property, the mother's rights would remain as previously stated. The point is, however, put beyond doubt by a later passage in *Armour* (original edition, 131; Perera's edition, 87), which is in these words: " If a man died without issue and intestate, that portion of his landed property which had belonged to him independently of his father, for instance, lands which devolved to

him from his adoptive father, and lands which he had received as a gift from his maternal uncle, will devolve absolutely to his mother in preference to his brother and sister, subject nevertheless to his widow's claims thereon." That refers to acquired property, and declares the mother's right in preference to that of brothers and sisters. Again, *Armour* (original edition, 132; Perera's 88): "The mother is heiress to the acquired property of all kinds left by her child who died unmarried and without issue and intestate, and such property will be entirely at her disposal."

As to the extent of the mother's interest in the acquired property, we have, in the first place, the *Niti Nighanduwa's* statements that the mother will "inherit" and that the property will "devolve" on her. Strictly interpreted these terms import acquisition of the *dominium*. In the next place, we have Sawers' dictum that the mother "is the heiress to the acquired property of all kinds, and the same is entirely at her disposal," followed by Armour's implied statement that "the mother is sole heiress," and his express declaration that acquired lands "will devolve absolutely to the mother." Those passages are unequivocal. Lastly, we have in apparent conflict with these, Sawers' general statement (page 8) that the mother's is 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," which, I agree with Lawrie J. in thinking, refers to paraveni property, when there are brothers and sisters; and Sawers' statement at page 13 that the property which a man dying childless, but leaving parents and brothers and sisters, had had from his parents, reverts to them reciprocally, and "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 ..... ultimately it is divided among the brothers of the whole blood equally ....." This statement of the law is not adopted by the later writer, Armour, but Sir Charles Marshall takes it over almost verbatim (page 344, section 96), and without comment, although at page 338 he notes the contradiction between the passages at pages 8 and 17 of *Sawers*. Indeed, his purpose was not to present to the reader a consistent body of Kandyan law, but rather (as he states at page 366 of his "judgments") to collate the best authorities which these two gentlemen (Sir John D'Oyley and Mr. Sawers), with all their advantages of situation, were able to obtain on the various points of inquiry submitted by them; they may safely be consulted, unless and until they are controverted. It is only by controversy that erroneous position will be set right and doubtful points decided, and the best way to invite controversy on such points is to give the utmost possible publicity to the notes, which at present form the only ground on which discussion can be maintained.

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If there be a conflict between the authorities as to the claims of the mother and of the brothers and sisters, I think I ought to give the preference to the mother, as the nearer relation in blood. The instance in which she is postponed to the brothers and sisters is where the principle operates of inherited lands reverting to the source whence they came. That principle, of course, does not affect " acquired " lands.

I decide in favour of the mother, and hold that she inherited absolutely and exclusively the acquired lands of the deceased Sellappu. It follows that the lands passed by her conveyance to the defendants, and that plaintiff's action must be dismissed.

The appeal is therefore allowed, and plaintiff's action dismissed, with costs in both Courts.

Appeal allowed.