1967 *Present :* **Samerawickrame, J., and Tennekoon, J.**

H. LYDIYA, Appellant, *and* I. P. KIRIUKKUWA and five others, Respondents

S.C. 398/65—D.C. Kegalle, 1906/T

Kandyan law—Illegitimate son—Death intestate and issueless—Devolution of his acquired property—Respective shares of his wife and the legitimate children of his deceased mother—Kandyan Law Declaration and Amendment Ordinance, s. 11.

Under the Kandyan Law, where, after his mother has predeceased him, an illegitimate son dies intestate and issueless, leaving him surviving his wife and no relations other than the legitimate children of his mother, the dominium in respect of his acquired property devolves on his mother's legitimate children, and his wife is entitled only to a life interest in such property.

APPEAL from a judgment of the District Court, Kegalle.

H. W. Jayewardene, Q.C., with *B. J. Fernando* and *L. C. Seneviratne*, for Appellant.

C. R. Gunaratne, for Respondents.

Cur. adv. vult.

October 1, 1967. TENNEKOON, J.—

The contest in this case is in regard to the acquired property of one Sedara who died in 1955, and whose estate is being administered in D.C. Kegalla Testamentary Case No. 1906/T.

Sedara was the illegitimate son of one Siri born of an association with one Appuwa. After Appuwa's death, Siri was either married to, or was the mistress of, one Dingiriya. The respondents are the children of that union. Siri died in 1942.

Sedara having died issueless his acquired property is now claimed on the one hand by the appellant who is the widow of Sedara, and on the other by the respondents who concede to the appellant only a right to life interest in such property.

The learned District Judge having held, in the first place, that the respondents were the legitimate children of Siri and Dingiriya went on to hold that where an illegitimate person (being a man) dies leaving him surviving a spouse and no relations other than the legitimate children of his mother, the Kandyan Law Declaration and Amendment Ordinance contains no provision for the resolution of the question of devolution of title to his acquired property, and that the question must accordingly be resolved under the general Kandyan Law ; applying that law he came to the conclusion that the wife was entitled only to a life interest and that the respondents being, as he held, legitimate children of Siri succeeded to the dominium.

Mr. H. W. Jayewardene, Queen's Counsel appearing for the appellant, while accepting the learned District Judge's opinion that the answer to the question of succession that arose in this case had to be resolved by reference to the general Kandyan Law, submitted that the law on the question is to be found formulated in a decision of this court made in 1904 in the case of *Tittewelle Sangi v. Tittewelle Mohotta* [1] which followed an earlier case of *Punchirale et al. v. Punchi Menika* [2]. These two cases certainly are authority for the proposition that under the general Kandyan Law where a man died leaving him surviving a spouse, she would have an absolute *lathimi* right to the acquired property of her deceased husband to the exclusion of any "relations" more distantly connected to the deceased than parents, full brothers and sisters and their children.

[1] *(1903) 6 N. L. R. 201.*

[2] *(1879) 2 S. C. C. 44.*

Mr. Jayewardene's submission was that the respondents were, whether they were the legitimate or illegitimate children of Siri, excluded by this rule.

Mr. Guneratne for the respondents while submitting that the 6 N. L. R. case was not in accord with the general Kandyan Law—and in this he is supported very strongly by Hayley—Laws and Customs of the Sinhalese (1923) at pages 365-366—contended that the learned District Judge was wrong in holding that the Kandyan Law Declaration and Amendment Ordinance did not apply. He referred us to the provisions of section 11 thereof which, he submitted, dealt fully with the case of a man dying intestate after 1938 leaving a spouse surviving. This section provides (*inter alia*) that the surviving spouse shall be entitled (i.e. absolutely) to the acquired property of the deceased intestate only if the deceased left him surviving *no other heirs*. I agree with Mr. Guneratne's submission that the effect of section 11 is to declare (while amending in certain respects) the law relating to the rights of a widow to the immovable property of her deceased husband ; in particular having regard to the wording of section 11 (1) (*d*)—

> " in the event of the deceased leaving him surviving no other heir, the surviving spouse shall succeed to all his property both paraveni and acquired "—

it is now no longer possible to found a right in the widow to full dominium upon the general Kandyan Law which gave her that right not in the somewhat extreme event of there being no other heirs of the deceased but in the more generous circumstance of there being no relations of a given proximity to the deceased. The words " no other heir " must, in the context in which they appear, be taken to signify that the test to be applied is : if the widow is left out of the reckoning, would there be any heir, however remote, to succeed to the property ? If there is such an heir the wife would have a life estate only, and she would succeed to the full dominium only in the absence of any such heir.

The question that then remains is : are the respondents heirs of the deceased Sedera ? Sedera himself is an illegitimate son of his mother. While it is accepted Kandyan Law that a father cannot succeed to the acquired property of his illegitimate child there is nothing to suggest that a mother cannot succeed to the acquired property of her illegitimate son. The difficulty however is that Siri predeceased Sedera ; can any heirship be established between Siri's illegitimate son and Siri's lawful heirs *by representation ?*

I am relieved of duty of searching for an answer to this question in the texts of writers on Kandyan Law because this Court has at least in two cases answered this question in the affirmative.

In the case of *Banda v. Banda*[1] the facts were : The defendant transferred certain property to his illegitimate son Kirimudiyanse who

[1] *(1916) 19 N. L. R. 126.*

died unmarried and issueless. Kirimudiyanse's mother had predeceased him ; administration having been taken to his estate, the property was sold to the plaintiff by three daughters of his mother by a different father. In deciding that the plaintiffs had good title and the defendant none, de Sampayo, J. said : " Kirimudiyanse's mother if alive would of course have been his heir and *in her default I think his half sisters were his heirs*".

A similar problem arose in the case of *Kuma v. Banda* [1]. One Kiri Banda died intestate in 1919. His parents were the defendant and one Kiri Menike who married each other in 1886 according to customary rites but had not registered their marriage under the then prevailing Kandyan Marriage Ordinance 3 of 1870. Kiri Menike predeceased Kiri Banda and her nearest relative was one Ranhamy, a half-brother on the mother's side. The plaintiff was a daughter of Ranhamy who was dead. She claimed the property of Kiri Banda as his sole heiress, while the defendant alleged that he was the heir of his illegitimate son Kiri Banda. A Full Bench, while holding that the defendant could not as father succeed to the acquired property of his illegitimate son, had no difficulty in upholding plaintiff's claim as heir of the deceased Kiri Banda *through his deceased mother whose illegitimate son he was.* Applying the principle adopted in these two cases I hold that the children of Siri by her husband Dingiriya are (having regard to what is said hereafter on the question of their legitimacy), heirs of Sedera, and accordingly they succeed to his acquired property subject to a life interest in the petitioner.

In regard to the question of the legitimacy of the respondents it was urged for the first time in appeal that, although ordinarily the production of the certificates of birth of the respondents (in which Siri and Dingiriya are referred to as parents and as married) may have been relevant evidence to establish a marriage between Siri and Dingiriya by reason of the provisions of section 35 of the Evidence Ordinance, in the present case such evidence must be excluded ; it was submitted that this was the effect of the provisions of sections 8 and 36 of the Kandyan Marriage Ordinance 3 of 1870 which are substantially to the following effect :—

Section 8 : No marriage contracted after 1870 is valid unless registered in manner and form as provided in the Ordinance ; and

Section 36 : An entry in a book kept under this Ordinance shall be the best evidence of the marriage so contracted.

It has been held that the expression " best evidence " in section 36 is used in the sense it is used in English Law and it thus excludes all evidence of an inferior character. See *Mampitiya v. Wegodapela* [2] and *Seneviratne v. Halangoda* [3].

An examination of the proceedings in the lower court indicates that the question whether the marriage between Siri and Dingiriya was only a customary marriage or was one contracted under the General Marriage

[1] *(1920) 21 N. L. R. 294.*

[2] *(1922) 24 N. L. R. 129.*

[3] *(1921) 22 N. L. R. 472.*

Ordinance then in force or one contracted under the Kandyan Marriage Ordinance 3 of 1870 was never in issue. There were no formal issues raised at the inquiry below ; there is nothing in the recorded submissions of counsel or in the judgment of the learned District Judge to indicate that the parties were at issue as to whether the marriage could be held to be valid unless it was contracted under the Kandyan Marriage Ordinance 3 of 1870 and a certified entry of such marriage produced. Mr. Jayewardene himself concedes that, while there was the Kandyan Marriage Ordinance in operation at the time, there was nothing in the law to prevent Siri and Dingiriya from having contracted a valid marriage under the General Marriage Ordinance then in operation. Under that law there was no *best evidence* rule. In all the circumstances I think it would be unjust to the respondents to permit such a point to be raised for the first time in appeal. I would accordingly affirm the finding of the learned District Judge that the respondents are the legitimate children of Siri and Dingiriya.

The appeal accordingly fails and is dismissed with costs.

SAMERAWICKRAME, J.—I agree.

Appeal dismissed.