1976 *Present* : **Tennekoon, C. J., Weeraratne, J., and Sharvananda, J.**

R. P. D. GUNASENA and three others, Appellants, *and* R. P. D. UKKU MENIKA and two others, Respondents

S. C. 584/69—D. C. Kurunegala 5727/T

Kandyan Law—Marriage in diga—Forfeiture of rights to the paternal inheritance—Re-acquisition of binna rights by daughter married in diga—Waiver of forfeiture of rights to the paternal inheritance—Kandyan Law Declaration and Amendment Ordinance (Chapter 59).

Prior to the coming into operation of the Kandyan Law Declaration and Amendment Ordinance (Chapter 59) the "re-acquisition of *binna* rights by a daughter who has gone out in *diga* can be established by proving the exercise by such *diga* married daughter of rights in the *mulgedera* or in the paternal property as though there had been no forfeiture, coupled with acquiesence on the part of the father or he being dead, of the brothers in such exercise of rights ; the exercise of rights in the paternal property will include the execution by the *diga* married daughter of deeds of sale, lease or mortgage of paternal property with the knowledge and acquiescence of the father or the brothers and is not confined to the proof of possession of those lands. From such facts a waiver of the forfeiture can be inferred, and for such waiver to be effective it is unnecessary to show that the waiver, or the acquiescence in the exercise by the *diga* married daughter of rights in the paternal properties resulted in the latter altering her position for the worse. This is a part of the rule of estoppel by conduct or representation and is no part of the Kandyan Law relating to waiver by the father or the brothers of the forfeiture that occurs upon a *diga* marriage of rights to the paternal inheritance."

APPEAL from a judgment of the District Court, Kurunegala.

J. W. Subasinghe for the 4th, 5th, 6th and 7th Respondents-Appellants.

C. R. Gooneratne with *J. C. Ratwatte* for the 2nd to 4th Respondents.

Cur. adv. vult.

July 29, 1976. TENNEKOON, C.J.—

The question that arises in this appeal is whether Ukku Menika 2nd respondent, Kiri Menika 3rd respondent, and Dingiri Menika 4th respondent, the three daughters of the deceased Ranhoti Pedi Durayalage Sendiya of Galbodagama, each of whom had been married out in *diga* before Sendiya's death had "reacquired *binna* rights". The learned District Judge held that they had. The appeal is from his judgment.

Sendiya, a Kandyan, died intestate on 24th October, 1962. He left an estate comprising movable and immovable properties. He left behind him his widow Sirimali, 4 sons — Gunadasa the 1st respondent, Gunasena, Wijedasa and Piyadasa (the 1st, 2nd and 3rd appellants), and the 3 daughters earlier referred to.

Upon Sendiya's death the eldest son Gunadasa made an application on 23.1.63 for the grant of Letters of Administration to himself; the widow, the 3 *diga* married daughters and the other three brothers, were named as respondents. In his petition and affidavit, Gunadasa stated that Sendiya died "leaving as his heirs at law and next of kin his children Gunasena, Wijedasa, Piyadasa, Ukku Menika, Kiri Menika, Dingiri Menika and Sirimali his widow". The schedule filed with the application disclosed immovable properties to the value of Rs. 34,557.50 and movables valued at Rs. 395. The respondents to the application appeared in response to the order nisi and made no objection to the status accorded to all the children as heirs to the estate of Sendiya, nor did they seek to qualify the description accorded to daughters as "heirs at law". Letters were granted to Gunadasa, estate duty paid, and final accounts filed. Thereafter, on 20.10.68 the three brothers of Gunadasa and the widow made application for a judicial settlement of accounts of the Administrator. The three *diga* married daughters were named as 2nd, 3rd and 4th respondents to this application. The petitioner stated:

> "Sendiya whose estate is being administered in these proceedings died intestate leaving as his sole heirs his sons—
>
> (i) Gunadasa, the Administrator,
>
> (ii) Gunasena,
>
> (iii) Wijedasa,
>
> (iv) Piyadasa,
>
> who succeeded to the said estate and his widow who became entitled to the life interest in the acquired property. His daughters—
>
> (i) Ukku Menika,
>
> (ii) Kiri Menika,
>
> (iii) Dingiri Menika (also known as Dingu Menika) having been married out in *diga* have forfeited their rights of succession to their father's estate."

The three daughters—the 2nd, 3rd and 4th respondents to this appeal—filed objections pleading, *inter alia*,—

> (*a*) that the male children of the deceased had waived the benefit accruing to them by reason of the *diga* marriages and had treated them as heirs to the estate of their deceased father notwithstanding the *diga* marriages:

(b) that by the rules of waiver and estoppel and by their conduct the male children of the deceased had forfeited their claims to the entire estate and that accordingly the three daughters were entitled to share the said estate along with the male children.

At an inquiry into this contest between the brothers on the one side and the sisters on the other, it transpired that Ukku Menika was married in *diga* to one William on the 11th of July 1935; William was a man from Aragoda. Kiri Menika was married in *diga* to one Sirimali of Ballapana on the 14th of October, 1938. The youngest daughter Dingiri Menika married one James of Aragoda, also in *diga* on the 24th of October 1944. Aragoda and Ballapana are 6 miles and 13 miles distant from Galbodagama where Sendiya resided in *mulgedera*. The marriage certificates in respect of all three marriages were produced and marked through the appellant Goonesena. He was the only witness called by the appellants. His evidence was that the three sisters after marriage took up residence in their husband's homes and exercised no rights in respect of the *mulgedera* or any of Sendiya's properties other than those given to them upon marriage. No evidence whatsoever was called by the three sisters. In this state of the evidence one has to proceed on the basis that neither before Sendiya's death nor thereafter did any one of the sisters do any of those acts which are customarily regarded in Kandyan Law as evidence of readmission of a *diga* married daughter into the father's family; there was for instance no evidence whatsoever to indicate that any of the daughters maintained a close and constant connection with the *mulgedera,* or left a child to be brought up at the *mulgedera* or maintained an intimate association with the pater-familias, or possessed any of the family lands. The case for the three respondent sisters was thus based only on 'waiver' by the brothers of the forfeiture as evidenced in the documents referred to above or in the alternative on 'acquiescence' by them in the sisters' exercising rights in the paternal property as evidenced by the same documents.

In support of their claim that the brothers had waived any forfeiture on the part of the *diga* married sisters and accepted them as heirs and of the plea of estoppel, the respondents relied on the following matters, namely-

(1) The administration proceedings had been conducted on the footing of the averments in the application for Letters of Administration that the daughters are heirs of the deceased Sendiya;

(2) the execution of deeds bearing Nos. 352 of 28. 6. 65, 744 of 26. 2. 67 and 745 of 26. 2. 67 ; and

(3) the admission of the title of the three married daughters made in D. C. Kurunegala, case No. 2128/P.

Deed No. 352 of 28. 6. 65 was a deed by which all the male children and the female children and the widow of the deceased Sendiya joined as vendors to sell to one David, for a sum of Rs. 2,000, a half-share of a land called Kahatagahamullewatte which was one of the lands belonging to Sendiya. The title of the vendors was cited, in the case of the children-male and female-as being " by right of paternal inheritance of Sendiya ", and in the case of the widow, as " by right of marital inheritance from the said Sendiya ".

It would appear from the evidence of Gunasena that the proceeds of this sale were utilised to pay part of the debts of the estate. Gunasena also said that the sisters gave their signatures to this deed because at the time of execution of the deeds the testamentary case was pending and all the children had been made respondents in those proceedings.

In regard to the deeds Nos. 744 and 745 of 26.2.1967 it would appear that final accounts were submitted by the Administrator and were accepted on 28. 2. 1967 by all the respondents in the testamentary case, and on that day they all returned to the office of the Proctor of the Administrator and these two deeds Nos. 744 and 745 were executed on that day. By deed No. 744 all the children, male and female, of Sendiya (except Dingu) and the widow sold to Dingu for a sum of Rs. 500 a 6/14 share of Oliya Ulle Kumbure. Here again the vendors recited their title, in the case of the children, as by right of paternal inheritance from Sendiya, and in the case of the widow as by right of marital inheritance from Sendiya.

By deed No. 745, the three daughters sold to the four brothers 28 lands (ie. all lands of Sendiya that were inventorised except the lands conveyed on deeds No. 352 and 744) for a consideration of Rs. 10,000 of which, according to the Notary's attestation, Rs. 4,000 was acknowledged to have been previously received and three pro-notes for Rs. 2,000 each executed in favour of each of the sisters as balance consideration. In this deed the vendors Ukku Menika, Kiri Menike and Dingu Menike recited their title as by right of paternal inheritance from Sendiya. About 6 months after the execution of these two deeds. Nos. 744 and 745, the three sisters filed action in the District Court of

Kuliyapitiya (D.C. 2716/1) against the brothers for declaration that deed No. 745 was invalid and of no force or avail in law on the ground of duress and undue influence and also claimed restitution on the ground of *laesio enormis ;* in the plaint the daughters set out title to interests in the 28 lands as coming to them by paternal inheritance. In their answer (para. 2), the four brothers stated—

(i) that Sendiya was the owner of the lands referred to in the plaint ; that he died leaving surviving as his sole heirs.
(*a*) his widow Sirimali,
(*b*) his seven children (i.e. 4 brothers and 3 sisters)

who succeeded to the said estate. In the answer the brothers further stated that deed No. 745 was the result of arrangements in the family whereby the daughters and their mother were to transfer to the 4 brothers all their interests and all the immovable properties belonging to the said estate except Oliya Ulle Kumbure for Rs. 10,000. They also referred in their answer to deed No. 744 which was executed as part of the arrangement. The case did not proceed to trial. The proceedings of 23.9.68 read as follows :—

"Of consent, deeds Nos. 745 of 28.2.67 and 744 of 28.2.67 are set aside. Defendants state that the plaintiffs were not entitled to any shares in the lands referred to in the said deeds as all three of the plaintiffs had gone out in diga. Plaintiffs deny that they forfeited any rights in the lands referred to in the said deeds of transfer referred to above. The promissory notes given to the 1st, 2nd and 3rd plaintiffs (the 3 sisters) by the defendants (the brothers) at the time of the execution of the said deed are returned to the defendants. The promissory note given to the 2nd plaintiff by the defendants at the time of the execution of the deed in question has not been brought to court today, but it is agreed that the 2nd plaintiff is not entitled to recover any money on the promissory note. In view of this settlement the plaintiffs move to withdraw this action."

The 4 brothers thus retracted the admission which they had made in para. 2 of their answer and took up the position that the sisters had no claim to any interests in Sendiya's immovable property.

On the 6th of December, 1967, one Etulgalpedige Simon who had become entitled to 1|12 share of a land called Tittawelawatta instituted an action No. 2128 in the District Court of Kurunegala to partition that land ; he named as defendants and co-owners the widow and all the children, male and female of Sendiya.

The land sought to be partitioned is one of the lands that belonged to Sendiya. All the children and the widow filed one answer, all agreeing that they were heirs of Sendiya. The decree in that case allotted to the plaintiff 1/12 share, and awarded to the widow and the 7 children of Sendiya the balance 11|12 shares jointly.

It has been submitted by Counsel for the appellants that these facts are insufficient to establish that the sisters had reacquired *binna* rights. It is contended by him that mere 'waiver' or 'acquiescence' unaccompanied by proof that the sisters had been led to alter their position for the worse is insufficient to establish that they had regained rights over the paternal properties.

It is well recognised in Kandyan Law that a daughter (not being the only daughter) who marries in *diga* forfeits her right to the paternal inheritance. These rights can, however revest in such a diga married daughter in certain circumstances. The earlier cases described this situation as a *regaining of binna rights—see the case of Appuhamy vs. Kirimenika* (1912) 16 N.L.R. 238 *Punchi Menika vs. Appuhamy* (1917) 19 N.L.R. 353 and the cases referred to in those judgments. In these earlier cases the question whether a daughter who had forfeited her rights to the paternal inheritance had regained such rights was tested largely by reference to the maintenance of a connection with the *mulgedera.*

However in the case of *Banda vs. Angurala* (1922) 50 N.L.R. 276 Chief Justice Sir Anton Bertram held that the regaining of *binna* rights may be evidenced by material other than connection with the *mulgedera.* He said (at page 278) :

> " Any forfeiture may be waived by those for whose benefit it takes place. It has been customary in considering whether a forfeiture of *binna* rights has been waived to look at the matter from the point of view of the connection of the daughter in question with the *mulgedera.* But in my opinion there is nothing to show that this is the only test. To use a familiar phrase of the late Lord Bowen. " There is nothing magic about the *mulgedera* ". Where a forfeiture has taken place, it is not the connection with the *mulgedera* which restores the *binna* rights, it is the waiver of the forfeiture, of which connection with the *mulgedera* is the evidence. As was said by Wood Renton C.J. in *Fernando vs. Bandi Silva* (1917) 4 C.W.R. 12 : ' The instances given in the text books on Kandyan Law of the cases in which *binna* rights can be regained are illustrations of a principle and not categories exhaustive in themselves. The rights of the *diga* married daughter to a

share of the inheritance may be set aside by her readmission into the family'. The real question is: Have the brothers waived the forfeiture of their sisters rights ?"

This case was followed in *Appu Naide vs. Heen Menika* (1948) 51 N.L.R. 63. Basnayake, J. (as he then was) with Gratiaen, J. agreeing, after referring to the case of *Banda vs. Angurala* said:

> " It was held by Sir Anton Bertram, Chief Justice that it is open to a brother to waive the forfeiture of the rights of a sister married in *diga*. In that case it was proved by the production of a series of deeds that the *diga* married sisters had dealt with several paternal lands as if they had rights in them. The rule applied in that case has its origin in the Roman Law (Code 1.3.51) according to which every one is at liberty to renounce any benefit to which he is entitled. I prefer to apply to this case the doctrine of 'acquiescence' rather than the associated doctrine of 'waiver' applied by Sir Anton Bertram in the case I have cited. "

In the case of *Punchi Menike vs. Appuhamy* (1917) 19 N.L.R. 358, De Sampayo J. said:

> " The point to be kept in view in all cases, I think, is that the essence of a *diga* marriage is the severance of the daughter from the father's family and her entry into that of the husband, and her consequent forfeiture of any share of the family property; and the principle underlying the acquisition of *binna* rights, as I understand it, is that the daughter is re-admitted into the father's family and restored to her natural rights of inheritance. This of course is not a one-sided process; the father's family must intend or at least recognise the result.'

Upon an examination of these and earlier authorities it would appear that re-acquisition of *binna* rights by a daughter who has gone out in *diga* can be established by proving the exercise by such *diga* married daughter of rights in the *mulgedera* or in the paternal property as though there had been no forfeiture, coupled with acquiescence on the part of the father or he being dead of the brothers in such exercise of rights; the exercise of rights in the paternal property will include the execution by the *diga* married daughter of deeds of sale, lease or mortgage of paternal property with the knowledge and acquiescence of the father or the brothers and is not confined to the proof of possession of those lands. From such facts a waiver of the forfeiture can be inferred and for such waiver to be effective it is unnecessary to show that the waiver, or the acquiescence in the exercise by the *diga* married daughter of rights in the paternal properties resulted in the latter altering her position for the worse. This is a part of the rule of estoppel by conduct or representation and is

no part of the Kandyan Law relating to waiver by the father or the brothers of the forfeiture that occurs upon a *diga* marriage of rights to the paternal inheritance. From the documents that have been proved in this case, it is plain that the appellants have without question—except belatedly—acquiesced in the sisters' exercising rights of disposal over the paternal properties. Deed Nos. 744 and 745 of 28.2.67 were no doubt set aside in D. C. Kurunegala Case No. 2716/L; but they were set aside 'of consent' and not on the ground that the sisters had no title to transfer. Notwithstanding these deeds being set aside, the fact of their execution with the acquiescence of the brothers remains unaffected. These two deeds together with deed No. 352 of 28.6.65 and the pleadings and consent decree in the partition action D. C. Kurunegala Case No. 2128/P can only be explained on the basis that the sisters had reacquired *binna* rights in the paternal properties. The proceedings in the testamentary case also show that until the judicial settlement of accounts the brothers all proceeded on the basis that the sisters were heirs at law of Sendiya not only in respect of the movable properties but also of the immovable properties.

I would accordingly hold that the 2nd respondent Ukku Menika and the 3rd respondent Kiri Menika were heirs of Sendiya. In the case of the 4th respondent Dingiri Menika (Dingu), she having married after the coming into operation of the Kandyan Law (Declaration and Amendment) Ordinance (Cap. 59) cannot be admitted to *binna* rights in view of section 9 (1) of that Ordinance. That section provides *inter alia* that:

> "No conduct after any marriage (whether *binna* or *diga*) of either party to that marriage or any other person shall.... cause or be deemed to cause a person married in *diga* to have the rights of succession of a person married in *binna* or a person married in *binna* to have the rights of succession of a person married in *diga*."

The learned District Judge has held that all three sisters are heirs of the deceased Sendiya and entitled to shares in the immovable properties. While affirming his decision in so far as it concerns the 2nd and 3rd respondent sisters, I would allow the appeal only so far as it concerns the 4th respondent and hold that she the 4th respondent is not entitled to succeed to her deceased father's immovable properties.

There will be no order as to costs in appeal. The order for costs made by the learned District Judge is also set aside.

WEERARATNE, J.—I agree.

SHARVANANDA, J.—I agree.

Appeal partly allowed.