1912.

Present: Lascelles C.J. and Wood Renton J.

APPUHAMY *v.* KIRI MENIKA *et al.*

269—D. C. Ratnapura, 1,948.

Kandyan law—Kandyan woman married out in diga *keeping a close connection with the* mulgedara*—Rights to paternal inheritance.*

R, a Kandyan woman, who was married out in *diga*, went to live with her husband about two miles away from the *mulgedara*. One of their children was left in the *mulgedara* and brought up by her grandmother; and R, though married in *diga*, kept up a constant and close connection with the *mulgedara*.

Held, that in the circumstances R did not, by reason of her *diga* marriage, forfeit her right to the paternal inheritance.

THE facts appear from the judgment.

G. Koch, for plaintiff, appellant.

Cooray, for defendants, respondents.

Gooneratne, for intervenients, respondents.

The following authorities were cited at the argument:—*Niti Nighanduwa 64-66, Pereira's Armour 64, Ukku v. Pingo,*[1] *Dingiri Amma v. Ukku Banda,*[2] *Tikiri Kumarihamy v. Loku Menika,*[3] *Marshall's Judgments 329.*

Cur. adv. vult.

[1] *1 Leader L. R. 53.*
[2] *1 Bal. 193.*
[3] *Ram. 1872-76, 106.*

December 4, 1912. LASCELLES C.J.—

The facts which gave rise to the present appeal may be shortly stated as follows:—

One Siriwardenehami died possessed of an undivided one-third share in the land Acharigewatta. He had three sons, namely, the plaintiff and two others, who died without issue, and two daughters, namely, Ram Menika, the second defendant, the wife of the first defendant, and Kiri Menika, the mother of the two minor intervenients. The plaintiff claimed the entirety of the undivided one-third share on the ground of prescriptive occupation, but on appeal his claim to the whole share was not pressed. It is clearly untenable. The footing on which the appeal was argued was that the learned District Judge was wrong in holding (1) that a valid title passed by the deed No. 28,742 of November 24, 1897, by which the plaintiff purported to convey (*inter alia*) an undivided one-sixth share in the land in question to his mother Dingiri Menika; and (2) that Ram Menika, the second defendant, did not forfeit her share in the paternal inheritance by reason of her *diga* marriage.

With regard to the first ground of appeal, the plaintiff contended that the deed was never intended to pass title; that it was executed because influential persons were pressing the plaintiff to sell the lands to them; that no consideration passed for the lands; and that since the execution of the deed the plaintiff has been in possession. The plaintiff's case in short is that he conveyed the land to his mother in trust for himself. The learned District Judge has rejected the plaintiff's version; mainly on the ground that the plaintiff could not produce the original of the deed, and gave an explanation for his failure to do so, which the Judge refuse to accept, namely, that the deed had been devoured by rats or white ants. The Judge also relied on the fact that in the deed the vendor expressly acknowledges the receipt of the consideration of Rs. 300. I am not disposed to disagree with this finding. A grantor who seeks to invalidate his own deed or to prove that the transfer was in trust for himself cannot expect to succeed unless he is armed with stronger evidence than is now produced by the plaintiff. The fact that the plaintiff subsequently succeeded in obtaining a certificate of quiet possession from the Crown, ignoring his mother's interest, does not, in my opinion, advance his case; for such a certificate is not positive evidence of the title of the person to whom it is given; it is merely a formal statement that the Crown has no claim to the land.

The second ground of appeal raises a somewhat doubtful question of Kandyan law. The Judge found, and I accept his findings, that Ram Menika was married out in *diga* to the first defendant; that she went to live with her husband at Mundakotuwa, about two miles from the *mulgedara;* that one of their children, Dingiri Menika, was left in the *mulgedara* and brought up by her grandmother; that Ram Menika, though married in *diga*, kept up a constant and close

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connection with the *mulgedara*, which, as I have said, was close to her husband's home. The question is whether the District Judge is right in holding that, in these circumstances, Ram Menika did not, by reason of her *diga* marriage, forfeit her right to the paternal inheritance.

In *Ukku v. Pingo* [1] a somewhat similar question arose. The plaintiff's mother, after her parents' death, contracted a *diga* marriage with a man of another village. The District Judge found that if the plaintiff accompanied her husband at all to her husband's home, which the District Judge considered doubtful, she returned soon afterwards and continued to live at the *mulgedara* and enjoyed a share of the profits of the ancestral lands. Wendt J., who delivered the judgment of the Court, considered that the fact of the plaintiff's remaining in the *mulgedara* and sharing the produce of the land prevented the attachment of the forfeiture. This decision is based on the passage in *Sawer*, reproduced on page 329 of *Marshall's Judgments*, where the fact of one of the children of the marriage remaining in the ancestral house is stated to give rise to an exception to the general rule, that a daughter married in *bina* and then going to live in *diga* with her husband forfeits her right to inherit any share in her parents' estate.

It is to be noticed that in *Ukku v. Pingo* [1] the case was that of a daughter who had originally married in *diga*, whilst the case in *Sawer* was that of a daughter who, after having married in *bina*, afterwards left the *mulgedara* to live in *diga* with her husband. But the Court does not appear to have attached any importance to this distinction. " The mere residence of the grandchild," Wendt J. observed, " is regarded as keeping alive her mother's membership in the family."

The case in *Dingiri Amma v. Ukku Banda* [2] was one in which there appears to have been room for doubt as to the character of the marriage. The plaintiff, after her marriage, lived with her husband in the *mulgedara*, then, after the registration of the marriage, both husband and wife lived sometimes at the *mulgedara* and sometimes at the husband's house, and later the husband and wife lived in a house built by the latter in the same garden as the *mulgedara*. In these circumstances, Pereira J. held, on the authority of D. C. Kurunegala, 19,107, reported in *Modder 66*, that, even if the plaintiff were married in *diga*, she had acquired *bina* rights. D. C. Kurunegala, 19,107, was decided on appeal on the ground that it was substantially a case where a *diga* married daughter returned with her husband to her father's house and was given a *bina* settlement.

In *Tikiri Kumarihamy v. Loku Menika* [3] a passage from *Solomons' Manual of Kandyan Law* is cited with approval, to the effect that a *bina* married daughter who left her parents to marry in *diga*

[1] *1 Leader L. R. 53.* [2] *1 Bal. 193.*

[3] *Ram. 1872-76, 106.*

forfeited for herself and her children all right to inherit, " unless she left one or more children of the *bina* marriage at her parents' house."

But it appears that the same principle is applicable to the case where the daughter originally contracted a *diga* marriage. In the case cited as No. 590, Madawalatenna, reported in *Marshall's Judgments* 329, one of the grounds at any rate on which the Supreme Court supported the opinion of the assessors was that, although the plaintiff was married in *diga*, she always kept up a close connection with her father's house, in which three of her children were born.

On the whole, and with some hesitation, I have come to the conclusion that, on the facts found by the District Judge, the case falls within the principle of the authorities which I have cited, and I would dismiss the appeal with costs.

Wood Renton J.—

I have had the advantage of reading, and I concur with, the judgment of my Lord the Chief Justice. I desire to add a word only with reference to the point of Kandyan law raised by the appeal.

The evidence justifies the finding of the District Judge that, in spite of her *diga* marriage, Ram Menika kept up a close and constant connection with her father's house. The Madawalatenna case, reported by *Marshall 329-331*, and dated as far back as 1834, shows that under such circumstances a woman married out in *diga* may regain her rights of inheritance, even although, as in the present case, her father was dead at the time of her *diga* marriage and she was not subsequently married in *bina*. In the Madawalatenna case it was expressly held that the recovery of such rights of inheritance was not dependent upon any need, in which the daughter married in *diga* might stand, of maintenance. Both in *Marshall (p. 329, para. 57)* and elsewhere (*Tikiri Kumarihamy v. Loku Menika* [1]) there are rulings to the effect that a daughter, (*a*) originally married in *bina*, subsequently leaving her parents' house and going to live with her husband in *diga*, and yet keeping up a close connection with the *mulgedara*, or (*b*) originally married in *diga*, and subsequently returning to her parents' house and being re-married in *bina*, may preserve her rights to any share in her parents' estate. But an original marriage or a re-marriage in *bina* seems to be not a condition of the applicability of the general rule laid down in the Madawalatenna case, but merely evidence of the closeness of the original, or the resumed, connection with the parents' household, which enables the married daughter's rights of inheritance to be preserved.

Appeal dismissed.

[1] *(1875) Ram. 1872-76, 106.*