Present : Schneider J. and Jayewardene A.J. 1925.

APPUHAMY *v.* GAMARALA.

78—D. C. Kurunegala, 9,606.

Kandyan law—Rights of inheritance—Contest between binna *father and* binna *daughter of* propositus.

Where under the Kandyan law, a woman, the issue of a *binna* marriage, died intestate leaving her surviving her father, and her *binna* husband who was the great great-grandson of a great-granduncle of the deceased.

Held, that the father was the heir to her estate.

The rule stated in *Sawers*, that the father is not the heir of the property of his children born in a *binna* marriage, which they have acquired through their mother—but that the maternal uncles or next of kin on the mother's side are the heirs to such property—should be read with the limitation laid down in *Armour* that the father's right is not lost, where there are only distant maternal relatives, and the child remained under the father's care after the mother's death.

Ran Menika v. Mudalihamy[1] referred to.

THE plaintiff in this action sued for a declaration of title to three lands. The lands originally belonged to one Kapuruhamy from whom they were inherited by his two children Gallerala and Tikiri Etana, and thence through various persons they ultimately devolved on Ran Menika, who died intestate and issueless. The plaintiff who was the *binna* husband of Ran Menika claimed title also as the great-grandson of Tikiri Etana. The defendant is the *binna* married father of Ran Menika. He also claims title on a transfer from one Menik Etana, the widow of Guruhamy, who was a son of Gallerala.

The learned District Judge held in favour of the plaintiff, and the defendant appealed.

Drieberg, K.C. (with him *Amerasekera*), for defendant, appellant.—Plaintiff claims by virtue of the failure of descendants of Ran Menika. It is no doubt a well established rule in Kandyan law that where there is failure the property reverts to the source whence it came. But this rule has a limitation, viz., that it is limited to three generations *Ranhamy v. Pinhamy*.[2]

Menik Etana, the wife of Guruhamy, the son and heir of Gallerala, being alive still would stop any further ascent. The defendant has a deed from Menik Etana, No. 122 dated July 14, 1922. He has therefore superior title.

[1] *(1913) 16 N. L. R. 131.* [2] *1 S. C. C. 3.*

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[SCHNEIDER J.—Menik Etana is entitled to be in possession.]

Yes, she is the point at which the ascent stops (*Pereira's Armour, p. 48, and Modder, p. 606*).

[JAYEWARDENE A.J.—Where the three generations fail it goes to the widower.]

But in this it is a *binna* widower.

[JAYEWARDENE A.J.—But you are claiming for a *binna* father.]

Yes, but the incident of *binna* does not touch him on the question of inheritance from a daughter, but only if it is from his wife. (*Marshall's Judgments, pp. 348 and 349, Pereira's Armour, p. 77.*) *Binna* husband has no claim.

[JAYEWARDENE A.J.—It is not the husband preferred to the father?]

One cannot apply analogy. *Binna* incident is peculiar to Kandyan law. So that defendant has clearly superior title whether viewed as *binna* father of Ran Menika or as transferee of Menik Etana, who clearly had title at the date of her transfer.

Hayley, for respondent.—Claim by father cannot be maintained where property comes through the mother. (*Ran Menika v. Mudalihamy (supra), Appuhamy v. Tikiri Menika.*[1]) The passage at page 77 in *Pereira's Armour* cited by the appellant is subject to the proviso : " If the child had been under the father's care." There is no evidence here that Ran Menika was under the care of her father. On the contr ry she was given up and married.

That being so, the only question is who are the next of kin, and in deciding this, the husband is to be preferred to the father, *Bandi Etana v. Herat Hamy.*[2] The next of kin are the next of kin through whom the property came, and in a case such as this where the direct line is broken a side line ought to be taken. In any event Menik Etana would not succeed to Hitihamy as property is Guruhamy's. There is no proof either that Menik Etana was mother of Hitihamy. Whatever evidence there is on our side shows no right in her, and, therefore, the learned District Judge has come to a correct conclusion.

Drieberg, in reply.—As for the father's care and protection, the Court will always, in the absence of evidence to the contrary, presume that the father did his duty by his child. Further there is evidence that the father lived with Menik Etana and looked after her. It must be presumed that Ran Menika also lived with her great-grandmother Menik Etana.

October 7, 1925. JAYEWARDENE A.J.—

This case raises a question of inheritance under Kandyan law, which is not covered by authority. The lands in dispute belonged to a brother and sister, Gallerala and Tikiri Etana, by inheritance

[1] *(1913) 17 N. L. R. 1.*

[2] *(1915) 1 C. W. R. 29.*

from their father Kapuruhamy. Gallerala died leaving Guruhamy who married Menik Etana. Guruhamy died leaving his widow and a son Hitihamy. Hitihamy died and left a daughter Punchi Menika, who was married to the defendant in *binna*. She too died leaving her surviving her husband, the defendant, and a daughter Ran Menika, who was married to the plaintiff in *binna*. Ran Menika died intestate and without issue. The plaintiff is the great great-grandson of Tikiri Etana, one of the original owners. The contest is between Ran Menika's *binna* married husband, the plaintiff and her *binna* married father, the defendant, who has also obtained a deed of gift for the lands in dispute from Menik Etana, the widow of Guruhamy, dated July 14, 1922. At the date of Ran Menika's death her maternal great-grandmother Menik Etana, her father, and her husband were alive. The learned District Judge said that the question raised in the case was one of great difficulty, and with much hesitation upheld the claim of the plaintiff, as he was a member of the family to whom the lands belonged and had a better right than the defendant, who was an outsider, and whose title was also derived from an outsider.

The plaintiff claims the lands not as the husband of the *propositus* Ran Menika, for he was married to her in *binna*, but as a descendant of the original owner Kapuruhamy. It is contended for the defendant that although married to the mother of the *propositus* in *binna*, he is her heir to the exclusion of the plaintiff who is a very distant relation, being the great great-grandson of a great-granduncle of the *propositus*. If he as father does not exclude the plaintiff, he claims that his transferor, the maternal great-grandmother of the *propositus* was her heir. It is necessary, therefore, to ascertain, so far as the same is material for the purposes of this case, the rule which governs the right of intestate succession to property which a person, the issue of a *binna* connection, had inherited or acquired from the mother, in the absence of direct descendants.

Now as regards the father, Sawers says :—

> " The father is not the heir of the property of his children born in a *binna* marriage, which they have acquired through their mother ; the maternal uncles or next of kin on the mother's side being the heir to such property ; but the father will succeed to such children's property if otherwise acquired." (*Modder's Edition of Sawers' Digest, Chapter 1., s. 50, p. 17.*)

Armour states the law thus :—

> " If the child was the issue of a *binna* marriage, and if, after the death of that child's mother, the father had deserted the child and left it entirely to the care of the mother's family, in that case the father will have no right to the

reversion of any property that belonged to the child; that property will, therefore, at the child's death, devolve on his or her nearest of kin on the mother's side in preference to the father and in preference to the said child's paternal half brother and half sister, it being premised that the father was not also an *ewassa* cousin of the said child's mother.

"But if the child, albeit the issue of a *binna* connection, had remained under the father's care after the mother's demise, in that case the father will be entitled to a reversion of the child's estate in preference to any child's distant maternal relations (mother's granduncle's son for instance) and that whether the father was or was not also an *ewassa* cousin of the said child's mother." (*Pereira's Armour, p. 77.*)

Marshall adopts the law as laid down by Sawers. (*Marshall's Judgments, p. 344.*)

These conflicting views have been considered by this Court in many cases and the rule as laid down by Sawers was adopted by the Collective Court in *Appuhamy v. Dingiri Menika.*[1] This decision has been followed since. (See *Ran Menika v. Mudalihamy* (*supra*) and *Appuhamy v. Tikiri Menika* (*supra*).) Although Lawrie J. in *Dingiri Menika v. Somathani,*[2] doubted the correctness of the rule as laid down by Sawers and thought that Armour ought to be followed in preference to Sawers. However, the rule as laid down by Sawers is too strongly established to be questioned now. But it is possible to give some effect to the rule as stated by Armour in the second paragraph quoted above without unduly restricting the rule as given by Sawers, that is, that the father ought to be preferred to the child's distant maternal relations, such as the mother's granduncle's son. There is nothing in the decided cases to prevent the adoption of such a course. Thus in *Appuhamy v. Dingiri Menika* (*supra*) the maternal grandmother and the mother's uterine half sister were preferred to the father. In *Ran Menika v. Mudalihamy* (*supra*) also the maternal grandmother and in *Appuhamy v. Tikiri Menika* (*supra*), the maternal grandmother and the mother's brother and sister were preferred to the father. In *Ran Menika v. Mudalihamy* (*supra*) Lascelles C.J. dealing with the conflicting views of Sawers and Armour said :—

"As a matter of construction I should have held that it (that is, Armour's opinion) was applicable only to cases where the claimants on the maternal line stood in a more remote degree of relationship to the *propositus* than that of great-aunt."

[1] *(1889) 9 S. C. C. 35.* [2] *(1897) Modder's Kandyan Law, p. 497.*

This construction receives support from the *Niti Niganduwa*, where it is laid down that "if the proprietress dies leaving her father and her maternal grandfather's elder or younger brother or cousin all her property, including all her maternal lands, will devolve on her father." (*Le Mesurier's and Pannebokke's Translation, p. 114.*)

This would apply to a father married in *binna* for whenever there is a difference between the rights of persons married in *diga* and in *binna*, the *Niti Niganduwa* is careful to draw a distinction. It also shows that while a maternal grandfather might himself exclude the father, his brothers and cousins would not. In my opinion, therefore, the rule as stated in Sawers should be read with the limitation laid down in Armour, that a father's right to inherit the property of a child born of a *binna* marriage is not lost when there are only distant maternal relations. As regards the requirement that the father should not have abandoned the child, but should have had the child under his care after the death of the mother, it may fairly be presumed that the father did his duty by his child. There is positive evidence that he lived with his wife's grandmother Menik Etana, and looked after her. With whom could his daughter have lived except with her great-grandmother ? It is not suggested that he abandoned the child or left the village and lived elsewhere. I think it must be held that this requirement has been complied with. In the present case the plaintiff is the great great-grandson of a great-granduncle, and cannot be preferred to the defendant, the father.

A question was also raised with regard to the rights of Menik Etana, the great-grandmother of the *propositus*, who transferred her rights to the defendant. It was contended for the plaintiff that there was no proof that Menik Etana was the mother of Hitihamy, the grandfather of the *propositus*. I find in the record an affidavit by the plaintiff (P3) in which he states that Guruhamy was married to Menikhamy in *diga* and died leaving a son Hitihamy and complains that Menikhamy is proposing to sell her husband's share in the family lands. This was in 1919. This document proves conclusively that Menik Etana *alias* Menikhamy was the great-grandmother of the *propositus*, and not the second wife of Guruhamy. A maternal grandmother under the Kandyan law is only entitled to a life interest in the property of her grandchild inherited from her mother. The right of the maternal great-grandmother cannot be greater than that of the grandmother, so if the latter has only a life interest, the former can also have only a life interest. But in *Ran Menika v. Mudalihamy* (*supra*), the maternal grandmother, it was said, took an absolute interest in her grandchild's property. This appears to be in conflict with the law as

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laid down in *Punchi Menika v. Dingiri Menika* [1], which followed an earlier case reported in (1837), *Morgan's Digest p. 201, s. 542.* (See also *Ran Menika v. Ukku Menika.*[2])

If Menik Etana became entitled to an absolute interest, her deed of gift of July 14, 1922, would vest that right in the defendant, and he would be entitled to the property. If, she had only a life interest the defendant would be the person entitled to the *dominium.*

For these reasons I hold that the defendant's right is superior to that of the plaintiff. The appeal will, therefore, be allowed, and the plaintiff's action dismissed, with costs in both Courts.

SCHNEIDER J.—I agree.

Appeal allowed.