1933 *Present:* **Garvin A.C.J., Dalton and Drieberg JJ.**

MOHAMADU *v.* DINGIRI MENIKE *et al.*

321—D. C. Kurunegala, 13,495.

Kandyan law—Forfeiture of rights—Adultery of woman with man of lower caste.

There is no rule of Kandyan law under which a woman, who during the subsistence of a valid marriage commits adultery with a man of a lower caste, forfeits her rights to ancestral property.

THIS was an action brought by the plaintiff to vindicate title to one-sixth share of a land, which belonged originally to two persons, viz., Kaurala and Kirihamy. The interests of Kirihamy devolved at his death on three children, Ran Menike, Dingiri Menike the first defendant, and Kiri Menike. Ran Menike was married in binna to one Appuhamy in 1921 and a son was born to them in 1922. The plaintiff claimed a one-sixth share by right of purchase from Ran Menike upon a deed of conveyance No. 987 of April 29, 1927, the defendant resisted his claim on the ground that Ran Menike had forfeited her rights by having contracted a disgraceful union and leaving the mulgedara. The learned District Judge upheld the plea.

Navaratnam (with him *Aluvihare*), for plaintiff, appellant.—British rule makes no distinction of caste. (Section 7 of the Charter.) A woman forming a temporary union and going out does not lose her rights (*Menikhamy v. Appuhamy*[1]). The moment the father dies his unmarried daughter has a vested interest. It could be defeated only by her going out in diga. The reason is that a diga-married daughter gets a dowry as compensation. When she marries in binna her rights become perfected and crystallized (*Siripaly v. Kirihamy*[2]). If she is childless and subsequently marries in diga she forfeits her rights, but it does not follow that she had no rights. A conveyance by her before going out in diga would be valid. In this case there is no diga connection. The woman 's binna husband is still alive.

Counsel also cited *Ranhamy v. Kirihamy*[3], *Niti Nighanduwa, pp. 19, 35, and 61 ; Armour 59 and 60 ; Sawer 3 ; Modder 255 and 256 ; and Hayley 376.*

Weerasooria (with him *E. B. Wikramanayake*), for defendants respondents.—Bandi Etana is in fact living with Horatala with whom she eloped. It is not a casual connection such as is dealt with in *5 Bal. 38.* Forfeiture does not depend upon the legality of the connection (*Komale v. Duraya*[4]). There need not be a vaid marriage. What creates the forfeiture is the abandonment of the Mulgedera[5]. In any case she would be penalized by forfeiture in favour of her child. (*Hayley 372; Modder 471 to 477; Sawer 38.*)

Cur. adv. vult.

[1] *5 Bal. Notes of Cases 38.*
[2] *4 C. W. R. 187.*
[3] *27 N. L. R. 52.*
[4] *34 N. L. R. 379.*
[5] *3 Bal. 122.*

December 20, 1933. GARVIN A.C.J.—

This is an appeal by the plaintiff whose action to vindicate title to an undivided one-sixth share of the land called Mailagahamulawatte was dismissed with costs. The land once belonged in equal shares to Kaurala and Kirihamy. This dispute does not touch the half share which belonged to Kaurala. The interests of Kirihamy with which alone we are concerned devolved at his death upon his four children—Ran Menike *alias* Bandi Etana, Sowwa, Dingiri Menike the first defendant, and Kiri Menike. Sowwa died intestate and without issue and his interests passed to his three sisters each of whom thereupon became entitled to one-sixth of the land. Kiri Menike sold her share to one Herathamy in 1916, and in 1918 the second defendant purchased it from Herathamy. The first and second defendants who are wife and husband thus became entitled to two-sixths, the remaining one-sixth being vested in Ran Menike *alias* Bandi Etana. On July 25, 1921, Ran Menike was married in binna to one Appuhamy and a son was born to them in 1922. The plaintiff claimed a one-sixth share by right of purchase from the said Bandi Etana upon a deed of conveyance No. 987 of April 29, 1924. The defendants sought to repel his claim on the plea that Bandi Etana "had no right in law to sell any share of the said property, having forfeited her rights to do so by contracting a disgraceful union and leaving the mulgedera". Bandi Etana deserted her husband and child and has since been living in adultery with one Horatala, a man of the Duraya caste. There is a conflict of evidence as to when this desertion took place. The learned District Judge has found that Bandi Etana left her husband and son very shortly before the execution of the deed in plaintiff's favour and not shortly thereafter as the plaintiff contended. There is evidence to support this finding and it cannot be disturbed.

The question for us is whether the learned District Judge was right in point of law in holding that Bandi Etana who had a vested right to a sixth share of these premises had forfeited these rights at the time of the execution of the transfer in favour of the plaintiff by "conduct which brought disgrace" on her family.

The disgraceful conduct referred to is her association with a man of lower caste. It is to be gathered that in ancient times the Kandyans viewed with the utmost abhorrence any intimate relationship between persons of different caste. "The marriage of a man with a woman of a superior caste to himself is prohibited; and even carnal conversation between the sexes of different castes is penal, especially the connexion of a higher caste woman with a lower caste man"—*Sawyer's Digest. Chapter VII., section 19.* When a woman degraded herself, by having connexion with a man of lower caste than her own, her criminality casts a stain on her family, which formerly could only be obliterated by the family putting her to death, but this they could not do without permission from the King; however, in late reigns this extremity was avoided, the King taking the woman to himself as a slave and sending her to one of the Royal villages as such, and in one instance, the King ordered it to be published that the woman had been sent to Bintenne to be put to death, when it was however known that she in fact was only sent there as a slave"—*Sawyer's Digest, Chapter VII., section 21.*

Apart from their historical interest these passages are of little value. A change of sentiment is apparent in the last of these excerpts and it would, I think, be correct to say that at no time within approximately the last century have marriages between persons of different castes been prohibited or irregular carnal relationship between them penalized. " If parties of different caste are clearly proved to have agreed to marry, by the usual wedding ceremonies having preceded their union, or other clear and positive proof of their intentions to marry, the Court would not then declare such a marriage to be null and void, as being prohibited by any Kandyan custom now prevailing or in force, when all legal disabilities for caste are virtually abrogated and obsolete in the Colony."—*Per* CARR J., *March 2, 1848; Austin's Reports, Part III., p. 236.*

The only trace of civil disabilities attached to such relationships is the forfeiture of rights in the case of a woman who becomes the wife of a man of inferior caste—*vide Perera's Armour, Chapter IV., section 8, p. 55.* We have not been referred to any case in modern times in which this rule of forfeiture has been recognized as part of the living law. But even if it be so regarded, a forfeiture will only be admitted where the rule is clear and in a case which falls strictly within the rule.

Bandi Etana was married in binna to Appuhamy and the misconduct ascribed to her took place during the subsistence of that marriage. She did not and could not contract another marriage or even enter into a relationship with another man which under the Kandyan customary law would have been regarded as a marriage, during the subsistence of her marriage with Appuhamy.

This case cannot therefore be brought within the rule of forfeiture in *Armour;* nor is there any rule of forfeiture which penalizes a woman who during the subsistence of a valid marriage commits adultery with a man of interior caste.

It was somewhat faintly urged that this was a case in which Bandi Etana might be held to have been divested of her rights by going out in diga. The main difference between a binna and diga marriage is that while in the former the daughter remained in her parental home as a member of her father's family, in the latter the daughter left her father's house and separated herself from her family. The latter was as honourable a state as the former. The forfeiture of rights in the case of a diga marriage attached " to the act of being conducted from a father's house by a man and the going with him to live as his wife in his house."—Lawrie J. in *Kalu v. Howwa Kiri*[1]. It is impossible to say of a woman who during the subsistence of a valid marriage deserts her husband for another man—especially when as in this case her marriage has not yet been dissolved—that she has gone out in diga.

If Bandi Etana is to be penalized at all it must be for her misconduct, but there does not appear to be any rule of Kandyan law which penalizes such misconduct with forfeiture of rights. Her rights in and to a one-sixth share of these premises passed to the plaintiff upon the execution of the conveyance No. 987 of April 29, 1924, and are now vested in him.

The learned District Judge has quoted with approval certain passages from Mr. F. A. Hayley's book on Kandyan law in which the author

[1] *2 C. L. R. 54.*

expresses the opinion that a binna-married daughter if she has children is only entitled to a life estate in the property she inherits from her father, the fee simple being vested in her children. Bandi Etana has a son by her binna husband. He is not a party to this proceeding and we are not called upon therefore to express any opinion on the point.

Bandi Etana's rights whether they amounted to full dominion or only to a life estate have not been lost by forfeiture and are now vested in the plaintiff. The defendants have failed in their plea that Bandi Etana's rights ceased by reason of forfeiture, and the plaintiff is entitled as the transferee of Bandi Etana's rights to the decree he claims.

The appeal is accordingly allowed. Judgment will be entered for the plaintiff as prayed for save as to damages which will be assessed at the agreed rate of Rs. 20 per year.

The appellant will also have his costs both here and below.

DALTON J.—I agree.

DRIEBERG J.—I agree.

Appeal allowed.