1947 *Present :* **Nagalingam A.J.**

KALU, Petitioner, *and* T. H. SILVA *et al.*, Respondents.

S. C. Petition No. 849.

Minor—Custody of illegitimate child—Rights of maternal grandmother and father in Kandyan Law and Roman-Dutch Law—Habeas Corpus.

In the absence of authority in the Kandyan law which would enable the grandmother to claim preference over the father of an illegitimate child in regard to its custody—

Held, that the Roman-Dutch law was applicable and that, accordingly, the father of the illegitimate child had no right to the custody of the child as against the grandmother on the maternal side.

APPLICATION for a writ of *Habeas Corpus* asking for the custody of a Kandyan illegitimate child.

S. R. Wijayatilake, for the petitioner.

L. A. Rajapakse, K.C. (with him *B. Senaratne*), for the 1st respondent.

February 5, 1947. NAGALINGAM A.J.—

Having heard counsel I see no reason to differ from the view taken by the learned Magistrate in making his recommendation to this Court. Mr. Rajapakse contended that there was nothing in the Kandyan law which would enable the grandmother to claim preference over the father of an illegitimate child in regard to its custody. Mr. Wijayatilake too was unable to cite any Kandyan authority on the point. If this position be correct, the Roman-Dutch law as being the common law of the land would be applicable and under the Roman-Dutch Law the father of an illegitimate child certainly has no right as against the grandmother on the maternal side.

The learned Magistrate, I find, has passed certain strictures in regard to the conduct of the first respondent, Silva. Having given my best consideration to the question, notwithstanding the able arguments of learned counsel, I cannot bring myself to dissociate from the observations which the learned Magistrate I think has quite properly made.

I direct that the minor be restored to the custody of the petitioner. Let the papers be forwarded to the Magistrate, Matale, for necessary action and report.

Application allowed.

1947 *Present :* **Wijeyewardene and Jayetileke JJ.**

RAM MENIKA, Appellant, *and* KIRI BANDA, Respondent.

425—D. C. Kegalla, 3,243.

Registration of birth—Illegitimate child—Registrar's omission to insert name of father—In what circumstances justifiable—Births and Deaths Registration Ordinance (Cap. 94), s. 16.

Kandyan Law—Child whose parents' marriage is not registered—Status of illegitimacy—Child born in adultery—Inheritance.

Where the father of an illegitimate child goes alone, unaccompanied by the child's mother, to give information about the birth of the child, the Registrar would be justified, under section 16 of the Births and Deaths Registration Ordinance, in omitting to insert the name of the informant as that of the father of the child.

A child of Kandyan parents whose marriage is not registered is deemed to be an illegitimate child.

Under the Kandyan law, prior to the Kandyan Law Declaration and Amendment Ordinance, a child born in adultery was entitled to a child's share of the acquired property of his father even if the father left some legitimate children.

APPEAL from a judgment of the District Judge of Kegalla.

C. R. Guneratne, for the plaintiff, appellant.

E. A. P. Wijeyeratne, for the defendant, respondent.

Cur. adv. vult.

May 23, 1947. WIJEYEWARDENE, J.—

The plaintiff instituted this action in March, 1944, for declaration of title to an undivided 1/24th share of three allotments of land. He alleged—

(*a*) that Kirihamy was the original owner of an undivided 1/6th share,

(*b*) that Kirihamy died leaving two children, the defendant and another, by the first bed and two children, Dingiri Banda and another, by the second bed, and that each of those children became entitled to an undivided 1/24th share,

(*c*) that Dinigri Banda conveyed his 1/24th share to her by deed P1 of May 14, 1943.

The defendant filed answer in June, 1944, admitting the allegations (*a*) and (*b*) and putting plaintiff to the proof of the execution of P1. Moreover, he claimed to be the owner of the undivided 1/24th share in question under a deed P2 of February 10, 1944, executed by Dingiri Banda in his favour.

When the case came up for trial in October, 1944, it was brought to the notice of the Court that Dingiri Banda had instituted action No. 3541 in the District Court of Kegalla in September, 1944, against the plaintiff for setting aside the deed P1 on the ground that he was a minor at the time he executed that deed. The present action was, thereupon, taken

off the trial roll pending the decision in D. C., Kegalla, 3,541. That latter action was ultimately dismissed in May, 1945. The defendant in the present case filed an amended answer in March, 1945, denying that Dingiri Banda was "the lawful heir of Kirihamy". In July, 1945, the parties went to trial and only the following issue was framed with regard to the material point in dispute :—"Was Dingiri Banda a child of Kirihamy?"

The evidence given in support of the plaintiff's case was that Kirihamy had two children including the defendant by a woman Ukku Menika who died about 30 years ago. Kirihamy then lived with another Ukku Menika who died childless about twenty years ago. Kirihamy lived also with a third woman Tikiri Menika by whom he had as children Dingiri Banda and four others, three of whom died young. Kirihamy died about fifteen years ago and Tikiri Menika, about six years ago. Tikiri Menika and her children lived in Kirihamy's mulgedera and, in fact, Dingiri Banda was living there even in 1945. Tikiri Menika and her children took their proportionate share of the produce from Kirihamy's lands after Kirihamy's death until about 1944.

While admitting that Tikiri Menika, was living in Kirihamy's house and that Dingiri Banda and his brothers were born in that house, the defendant stated that Kirihamy did not "take" Tikiri Menika and said "I knew Dingiri Banda was not a child of Kirihamy". There is no doubt that he was in a position to know—so far as anyone could claim to have any certain knowledge on such a question—about the paternity of Dingiri Banda, as he was about fourteen or fifteen years at the time Dingiri Banda was born and was living in the same house as Kirihamy and Tikiri Menika. He did not choose to explain how, when he had such knowledge, he came to make the admission in his answer of June, 1944, that Dingiri Banda was a child of Kirihamy. I am not prepared to attach any weight to the evidence given by the defendant.

It is, however, argued on behalf of the defence that the birth certificate D1 of Dingiri Banda obtained by the defendant in August, 1944, entitled the defendant to ask the Court to decide in his favour the issue in question. That certificate shows that Kirihamy, as "occupier of the premises where the child was born", gave information of the birth of Dingiri Banda to the Registrar and mentioned Tikiri Menika as the mother of the child. The birth certificate does not give the father's name and it is contended that the only legitimate inference that could be drawn from that omission is that Kirihamy who was the informant did not claim to be the father of Dingiri Banda. I am unable to accept that contention as sound. If Dingiri Banda was a child of Kirihamy, he must have been an illegitimate child as the evidence in the case including D1 shows that Kirihamy had failed to register his marriage with Tikiri Menika (*Vide Kuma v. Banda*[1]). Now section 16 of the Births and Deaths Registration Ordinance enacts that "the Registrar shall not enter in the Register the name of any person as the father of such (illegitimate) child, unless at the joint request of the mother and of the person acknowledging himself to be the father of such child . . . . and the person acknowledging himself

[1] *(1920) 21 New Law Reports 294.*

to be the father shall sign the register together with the mother . . . ." The omission, therefore, by the Registrar to insert the name of Kirihamy as the father of Dingiri Banda in D1 could easily be explained by the fact that Kirihamy alone appears to have gone to the Regstrar to give the information about the birth of Dingiri Banda. The case of *de Silva v. Weerappa Chettiar* [1] cited by defendant's Counsel has no application to the facts of this case.

On the evidence in the case I have no hesitation in answering the issue in the affirmative.

Dingiri Banda's right to a share of the estate of Kirihamy would not be governed by the Kandyan Law Declaration and Amendment Ordinance, as Kirihamy died before that Ordinance came into operation. Dingiri Banda, though born in adultery, would, therefore, be entitled to a child's share of the acquired property of Kirihamy even if Kirihamy left some legitimate children (*vide* Hayley, Sinhalese Laws and Customs, page 390, and *Punchirala v. Perera* [2]). The defendant's Counsel submitted that the case should be sent back for the District Judge to ascertain whether the property in question was not Paraveni property. I am unable to accede to this suggestion as the defendant went to trial on the footing that the plaintiff would be entitled to succeed in her claim if the issue in question was answered in the affirmative.

I set aside the decree of the District Court and direct judgment to be entered as set out in clause 1 of the prayer in the plaint. The plaintiff is entitled to Rs. 15 as damages up to July 9, 1945, and further damages at Rs. 10 a year from that date until she is given quiet possession. The plaintiff is also entitled to costs here and in the District Court.

JAYATILEKE J.—I agree.

Appeal allowed.