Present: Mr. Justice Wood Renton.

Aug. 19, 1910

KAPURUHAMY *et al. v.* APPUHAMY *et al.*

C. R., Kurunegala, 17,990.

Low-country Sinhalese man permanently settled in the Kandyan district and married to a Kandyan woman—children not Kandyans.

A child of a Low-country Sinhalese man, who had become permanently settled in the District of Kandy and had married a Kandyan woman under the Kandyan Marriage Law was held not to be a Kandyan.

THE facts are set out in the judgment of Wood Renton J.

A. St. V. Jayewardene, for appellant.—The learned Commissioner's judgment is contrary to the general and natural rule that the nationality of the father decides that of the offspring.

2. From the earliest years of British rule Proclamations and Ordinances show that a well-marked distinction was always recognized between Kandyan and all other inhabitants, and it is only those who can strictly be called Kandyans who can claim to be governed by the Kandyan Law, the conservation of which was assured them—the Adigars, &c., being assured of this at the earliest conferences between the British and the Kandyans. (Proclamations cited.)

3. The case law on the subject is also in favour of the appellant, *Kershaw's case*[1] having been over-ruled by *Robertson's case*.[2] Further, the decision in *Wijesinghe v. Wijesinghe* [3] is a Full Court authority directly in point. See also *Narayanee v. Muttuswamy*.[4]

Vernon Grenier, for respondent.—The special circumstances of the present case distinguish it from those cited.

With regard to the Proclamation relied on, it is submitted that the conferences which preceded them were not held for the purpose of determining whether Kandyan Law should be retained, or whom it should in the future govern. It was the change of *régime* that was declared by them, and the declaration that Kandyan Law would continue to be administered was naturally addressed to the Kandyan people, who alone were interested in the retention of that law.

As pointed out in *Kershaw's case*, later Proclamations did no more than curtail the jurisdiction of the Kandyan Adigars by making non-Kandyans subject to the jurisdiction of British officers, but

[1] *Ram. 60-62, 157.*
[2] *(1886) 8 S. C. C. 36.*
[3] *(1891) 9 S. C. C. 199.*
[4] *(1894) 3 S. C. R. 125.*

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the same kind of law continued to be administered till Ordinance No. 5 of 1852, which made no alteration in the law with regard to other " natives, " and was not followed by any other repealing enactment.

Perera's Collection, pp. 186, 207, is more in point than any case cited by the appellant, and even so late as 1881 *Welayden v. Arunasalam*[1] recognized that Kandyan Law applied to other natives than Kandyans. In *Robertson's case* a purely " European " test was applied, and that case cannot be regarded as an authority in the present circumstances. In *Wijesinghe's case* the Judges were not unanimous as to their grounds of judgment, and the facts of that case are distinguishable, mere residence of Low-country Sinhalese in a so-called Kandyan district being relied on as ground for application of Kandyan Law. In *Narayanee v. Muttuswamy* it was not a point for decision whether Tamils could marry under the Kandyan Marriage Registration Ordinance.

Manikkam v. Peter[2] recognized that Kandyan and Low-country Sinhalese were not of different race or nationality, and there is therefore no anomaly in applying the Kandyan Law to the present case, as the father of the minor himself, it is submitted, had been absorbed into the Kandyan population by marriage under the Ordinance, particularly as Kandyan causes of divorce, &c., recognized by the Ordinance would apply to his case.

There being no law written or unwritten in point, natural equity should be resorted to.

A. St. V. Jayewardene, in reply.

Cur. adv. vult.

August 19, 1910. Wood Renton J.—

My judgment in this case has been unavoidably delayed by absence on circuit and by the necessity of obtaining access to a certain official paper. The respondents sue the appellants upon a mortgage bond No. 3,381, dated November 16, 1906, alleged to have been executed by one Brampi for a sum of Rs. 50. The mortgage was a usufructuary one. The first defendant-appellant is the legal representative of Brampi, the second and third are subsequent purchasers of the mortgaged premises. The first defendant-appellant pleaded, and formal proof has been adduced in the case, that Brampi was a minor at the date of the alleged execution of the mortgage bond. If he was a Kandyan, and if the case is to be decided according to Kandyan Law, the mortgage would only be voidable at his option, and if he died without having taken steps to avoid it, it would be building on his legal representative and on any party claiming through him. On the other hand, if the Roman-Dutch Law applied, the bond would have been void, unless the money had been borrowed for the purpose of trading, or the loan

[1] *(1881) 4 S. C. C. 37.*

[2] *(1899) 4 N. L. R. 243.*

could be brought under the head of necessaries. It was agreed at the hearing of the case between the parties that if the Commissioner of Requests held that the Roman-Dutch Law applied, evidence would be led on both sides as to the circumstances under which and the purposes for which the loan was made, and that the Court should consider whether, in point of law, it is competent for third parties to set up a plea of minority. The Commissioner of Requests held, however, that Brampi was a Kandyan, and that therefore, the bond in question was no longer voidable under Kandyan Law, and he gave judgment in favour of the plaintiffs-respondents. From that judgment this appeal is brought. The decision of the Commissioner is based on the following admissions of parties:—

" (1) That the father of the minor was Appuhamy, the defendant in this case.

" (2) That his father was Niculas Appu, a low-country man.

" (3) That Appuhamy settled in the Kandyan district, and was married here to a Kandyan woman under the Kandyan Ordinance.

" (4) That Punchappuhamy *alias* Brampi, the mortgagor, was the issue of that marriage, and is living in the Kandyan district."

On these admissions the learned Commissioner of Requests held, in effect, that, inasmuch as Kandyan and Low-country Sinhalese *belong to the same race, a Low-country* Sinhalese man who has become permanently settled in the District of Kandy, and has married a Kandyan woman under the Kandyan Marriage Law, is himself to all intents and purposes a Kandyan. After careful consideration, and after an examination of all the authorities cited by Mr. A. St. V. Jayewardene in support of the appeal, and by Mr. Vernon Grenier on the other side, I have come to the conclusion that the decision of the learned Commissioner of Requests cannot be upheld. I do not propose to examine the authorities cited by Mr. Jayewardene here in detail. They fall under two classes: in the first place, various enactments (for example, Proclamation of March 2, 1815, sections 7, 8, 9, 13, 34, 39, and 51; Proclamation of January 24, 1822, sections 3 and 5) relating to the administration of justice in the then Province of Kandy, and drawing a distinction between the law applicable to Kandyans and that governing other natives who might happen to be resident in that Province; and in the second place, certain decisions of the Supreme Court, to which I will refer immediately.

I do not find in any of the enactments above mentioned any definition of the term " Kandyan," or any express provision excluding a Low-country Sinhalese man who has taken up his permanent residence in the District of Kandy and has married there under Kandyan Marriage Law from its purview. In addition to the authorities cited at the argument, I have obtained from the Colonial Secretary's Office a copy of the " Instructions to the Second or

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Judicial Commissioner in respect to Jurisdiction over native of the Maritime Povinces, or other native Foreigners or Europeans not in His Majesty's or the Honourable Company's Military Service,'' which are referred to in *Ram. 1822—33, Appendix, p. 256,* but they throw no further light upon the question. There can be no doubt, however, but that in these enactments a distinction is drawn between Kandyans and the other native races of the country. Under these circumstances we must refer to the judicial decisions.

In the case of *Williams v. Robertson*[1] it was held by the Full Court, over-ruling the decision in *Kershaw's case,*[2] that it is not possible for Europeans or Eurasians settled in the Kandyan territory to acquire a Kandyan domicil, as distinguished from a Ceylon domicil. That case, however, throws no light on the position of Low-country Sinhalese, and a similar criticism might be offered on the case of *Narayanee v. Muttuswamy,*[3] in which it was held that the marriages of immigrant Tamils resident in the Kandyan Provinces are not governed by Kandyan Law. In *Wijesinghe v. Wijesinghe,*[4] however, a Sinhalese native of the Maritime Provinces and a Buddhist had settled at Ambepussa in the Four Korales, and had there in 1843 married before the District Judge a Sinhalese Buddhist from the low-country. He acquired land at Ambepusssa, and resided there continuously in an official capacity till his death. In a question whether the succession to his land was to be governed by Kandyan or by Roman-Dutch Law, the Full Court held that the Roman-Dutch Law must be applied. It was argued by Mr. Vernon Grenier, however, that each of the Judges came to that conclusion on a different ground. Burnside C.J. held that as Ambepussa was included in the low-country, effect must be given to the Roman-Dutch Law as the *lex loci rei sitæ;* Clarence J. said that the Kandyan Law did not amount to a distinct *lex loci rei sitæ;* while it was only Dias J. who had formally held that the Kandyan Law did not apply to the case of a Low-country Sinhalese who had settled in the Kandyan Provinces. I am unable to adopt this view of the scope of the decision. If the report of the case is carefully considered, it will be seen that Clarence J. and Dias J. do in substance decide the case on the same ground. As regards Clarence J., this is clear, I think, from the following passage in his judgment:

"It cannot be maintained that what has been conserved as 'Kandyan Law' amounted to a distinct *lex rei sitæ* governing absolutely the devolution of land, like, for instance, gavelkind land in Kent. All we know is that a certain section of the community within the Kandyan Provinces, viz., the Kandyan Sinhalese, were allowed to retain their own customary law. Wijesinghe and his wife, being Sinhalese from another part of the Island not within

[1] *(1886) 8 S. C. C. 36.*
[2] *(1862) Ram. 1860-1862, 157.*
[3] *(1894) 3 S. C. R. 125.*
[4] *(1891) 9 S. C. C. 199.*

the Kandyan Provinces, came and settled in Ambepussa, and there Wijesinghe acquired this land. It is impossible to hold that their descendants thereby became subject to incidents of what is called Kandyan Law, so that, for instance, daughters leaving the parents' house in marriage forfeit their inheritance as *diga* married daughters."

As to the view of Dias J. there can be no controversy. Moreover, it is evident that Burnside C.J. took the same view:—

"Now the owner of this land was not a Kandyan, he and his wife were low-country people, who had lived all their lives in the low-country, and they could not by any means be included in the class of persons to whom the Proclamation applied."

It seems to me that *Wijesinghe v. Wijesinghe* is an authority directly applicable to the present case, and that I am bound to follow it. It is unnecessary for me to consider the decision of Withers J. in *Manikkam v. Peter*[1] further than to say that it turned on the construction of section 2 of Ordinance No. 15 of 1876. The decision of the Full Court in *Wijesinghe v. Wijesinghe* is, I think, binding upon me.

I set aside the decree under appeal and send the case back for trial on evidence in the Court of Requests. The appellent is entitled to the costs of the appeal. The costs of the original proceedings and of the subsequent proceedings will be costs in the cause.

Appeal allowed.

[1] *(1899) 4 N. L. R. 243.*