

1948 Present: Wijeyewardene S.P.J. and Windham J.

SELLAPPU, Appellant, and PUNCHI BANDA, Respondent.

S.C. 138—D. C. Kandy, 1,641.

Kandyan Law—Deega marriage—Proof of—Failure to produce marriage certificate—Presumption as to deega nature of marriage—Rebuttal—Kandyan Marriage Ordinance (Cap. 96), s. 36.

The matter in dispute was whether a Kandyan marriage was contracted in *deega*. No marriage certificate was produced at the trial. The evidence led, however, was sufficiently strong even to displace a presumption arising under section 36 of the Kandyan Marriage Ordinance.

Held, that the marriage could not be declared to have been contracted in *deega*.

APPEAL from a judgment of the District Judge, Kandy.

C. E. S. Perera, with *M. Hussain*, for the defendant, appellant.

S. R. Wijayatilake, for the plaintiff, respondent.

Cur. adv. vult.

April 5, 1948. WIJEYWARDENE S.P.J.—

This is an action for the partition of a paddy field, Narangete Cumbura, originally owned by one Kalu Hamy. Kalu Hamy was married to Nethi Hamy and had by her two daughters Ukku Hamy and Dingiri Hamy. Nethi Hamy died thirty years ago and then Kalu Hamy married Ukku Amma. Ukku Amma died about ten years ago and Kalu Hamy, some years before that.

The plaintiff stated that Kalu Hamy died leaving as his heirs, the two daughters, Ukku Hamy and Dingiri Hamy. It did not contain any allegation about these daughters or either of them being married in *Deega*. According to the plaintiff, Ukku Hamy gifted her half share to the defendant by D 1 of 1944, while Dingiri Hamy sold her half share by P 4 of 1940 to Loku Banda who conveyed the same by P 5 of 1943 to Cader Saibo who, in turn, sold it to the plaintiff, two months later, by P 6 of 1943.

The defendant pleaded in his answer specifically that Dingiri Hamy was married in *Deega* and thereby forfeited all rights to her parental inheritance. He pleaded further that his wife Ukku Hamy, the sole heir of her father, became entitled to the entirety of the field which she gifted to him by D 1.

At the trial the plaintiff took up the position for the first time that both Ukku Hamy and Dingiri Hamy were married in Deega and that, therefore, on the death of Kalu Hamy each of them became entitled to a half share of the field. The matter in dispute between the parties was formulated in the issue, "Did Ukku Hamy go out in Deega?"

The District Judge held in favour of the plaintiff. He appears to have been influenced by the evidence of Dingiri Banda, the Village Headman, and by the deed P 9. I think that the evidence of Dingiri Banda has been accepted by the Judge without close examination and the Judge has misdirected himself with regard to P 9.

The defendant did not produce at the trial the marriage certificate of Ukku Hamy. That may be partly due to the fact that the plaint contained no allegation suggesting that the plaintiff's case was that Ukku Hamy was married in Deega. Ukku Hamy gave evidence and stated that she was married in Binna about forty years ago and lived with her husband in her Mulgedera at Bomure after her marriage. She said that Dingiri Hamy left her Mulgedera after her marriage and lived in her husband's house at Gadaldeniya, twenty-eight miles from Bomure. The birth certificates P 8, P 7 and D 2 show that Ukku Hamy had three children born at her at Bomure in 1903, 1906 and 1910. The defendant called another witness, Hearth Hamy, a man of sixty years, who said that he knew that Ukku Hamy continued to live in the Mulgedera after her marriage. The plaintiff sought to discount his evidence by eliciting the fact that he was dismissed from the office of Vel Vidane for illicit possession of fermented toddy.

Dingiri Hamy and Dingiri Banda, the Village Headman of Bomure, gave evidence for the plaintiff. Dingiri Hamy is the younger sister of Ukku Hamy and must have been a girl of ten years or less at the time of Ukku Hamy's marriage. She stated that Ukku Hamy left the Mulgedera after her marriage. Being constrained to admit that Ukku Hamy and her husband lived in Bomure in view of the documents P 7, P 8 and D 2, she said that though Ukku Hamy lived in Bomure it was not in the Mulgedera but in another house about two miles away from the Mulgedera. She admitted however that Ukku Hamy came to the Mulgedera after the death of the mother, Nethi Hamy, "in order to look after" Kalu Hamy.

The witness Dingiri Banda, who gave his age as forty-six years was prepared to say that "the defendant did not live in the Mulgedera with Ukku Hamy after the marriage" but in a separate house in Bomure fifty fathoms away from the Mulgedera. Considering that Ukku Hamy married over forty years ago very little credence could be given to this evidence. He admitted at one stage that he did "not know when Ukku Hamy married". He admitted further that Ukku Hamy was now living in the Mulgedera but explained it by saying that Ukku Hamy came back to the Mulgedera after Kalu Hamy's death about eighteen years ago. It will be noticed that he contradicts Dingiri Hamy about the time that Ukku Hamy returned to the Mulgedera.

I shall consider now the bond P 9 which the District Judge thought showed that Ukku Hamy "was fully a ware of the fact that she and her sister Dingiri Hamy inherited a half share each of their father

Kalu Hamy's properties". Ukku Hamy executed the bond P 9 in 1940 hypothecating the following properties which she said were possessed by her "by right of inheritance from (her) father Kalu Hamy":

- (a) undivided $\frac{1}{2}$ share of Uda Asweddume Wagala ;
- (b) undivided $\frac{1}{2}$ share of Uda Asweddume Gederagawa Cumbura ;
- (c) undivided $\frac{1}{2}$ share of Narangete Cumbura.

The property (c) is not the property sought to be partitioned. The District Judge appears to have looked at the description of the shares in the properties (a) and (b) mortgaged by P 9 and deduced therefrom the inference that Ukku Hamy mortgaged only a half share as the other half share belonged to Dingiri Hamy. By a similar process of reasoning the Judge may have deduced the inference that Ukku Hamy mortgaged a $\frac{1}{4}$ share of the property (c) as the other $\frac{3}{4}$ shares belonged to *three* sisters. The whole fallacy of that kind of reasoning lies in the fact that the District Judge had no evidence before him as to the extent of the interests which Kalu Hamy had in the mortgaged properties.

The plaintiff and his witnesses also stressed the fact that Ukku Hamy quarrelled with her stepmother, Ukku Amma. Ukku Hamy admitted that there was unpleasantness between her and Ukku Amma and added that nevertheless they continued to live in the same house. I fail to see why the evidence of these quarrels was led by the plaintiff. It is not the case of the plaintiff that Ukku Hamy severed her relations with the Mulgedera owing to these quarrels. Both Dingiri Hamy and her witness state that these quarrels took place when the two ladies were living in two separate houses. The evidence of these quarrels seems to me to support the defendant's case, as it is more likely for two females to quarrel when they are living under the same roof.

The evidence led for the defence appears to me to be sufficiently strong even to displace a presumption arising under section 36 of the Kandyan Marriage Ordinance. The oral evidence of Ukku Hamy and Herath Hamy receives support from the documents P 8, P 7 and D 2 and the fact of her residence in the Mulgedera for a number of years. I am not impressed by the attempt made by the plaintiff to explain P 8, P 7 and D 2 by locating Ukku Hamy in another house at Bomure away from the Mulgedera. Dingiri Hamy gives the distance between the two houses as two miles while the witness Dingiri Banda, thinks it is only fifty fathoms. Confronted with the fact that Ukku Hamy had been in occupation of the Mulgedera the plaintiff seeks to explain it by saying that Ukku Hamy came back to the Mulgedera many years after her marriage. But the two witnesses of the plaintiff give two different versions as to the occasion on which she returned.

For the reasons given by me I would allow the appeal and direct decree to be entered dismissing the plaintiff's action with costs here and in the Court below.

WINDHAM J.—I agree.

Appeal allowed.