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Present: Wood Renton C.J. and De Sampayo A.J.

PUNCHIHAMY *et al.* *v.* PUNCHIHAMY *et al.*

85—D. C. Kurunegala 4,909.

Kandyan law—Kandyan marrying a low-country Sinhalese woman—Offspring not Kandyan.

The children of a marriage between a Kandyan man and a low-country Sinhalese woman are not to be regarded as Kandyans.

THE plaintiffs-respondents brought this action against the defendants-appellants for the recovery of lands marked 1 to 12 in the schedule attached to the plaint.

According to the plaintiffs the original owner of these lands was one Punchirala, a Kandyan, married to one Karonchihamy, a low-country Sinhalese woman, and had by her three children, Ungurala, Menuhamy, and Dingiri Menika.

Punchirala, by deed P1, gifted, in 1882, the first five lands mentioned in the schedule to Karonchihamy, Ungurala, and Menuhamy, and in the same year, by deed P2, conveyed lands 6, 7, 8, and 9 to Dingiri Menika. In respect of the remaining lands Punchirala died intestate.

Punchirala died in 1884, Menuhamy died without issue the same year, Karonchihamy died about 1880, Dingiri Menika died about 1894, and Ungurala died in 1910.

The plaintiffs, who are the children of Dingiri Menika, alleged that Ungurala died without legitimate issue, and claimed all the above-mentioned lands by right of inheritance from their mother Dingiri Menika and their uncle Ungurala.

The defendants claimed to be the legitimate children of Ungurala, and alleged the lands were not the sole property of Punchirala, but of Punchirala and one Malhamy. They further claimed title to the lands by right of prescriptive possession.

The District Judge held that the defendants did not acquire any right to the lands through Ungurala. The defendants appealed.

Bawa, K.C. (with him *A. St. V. Jayewardene, Batuwantudawa,* and *A. L. Wijewardene*), for defendants, appellants.

Anton Bertram, K.C., A.-G. (with him *S. Obeyesekere, C.C.*), as *amicus curiæ.*

The Supreme Court delivered the following judgment, and sent the case back for expert evidence:—

October 9, 1914. WOOD RENTON C.J.—

In my opinion there should be further inquiry in this case in the District Court before we are called upon to decide the important question of law involved in it, namely, whether under the Kandyan

law the issue of a Kandyan man married to a low-country woman is Kandyan. The learned District Judge has stated that the decision of this Court in *Mudiyanse v. Appuhamy* [1] is in conflict with the view expressed by "our Courts in innumerable decisions." I am not myself aware of any such decisions, and I take it that the District Judge is referring to decisions of the District Court, bearing directly or indirectly on the subject, which have not come up in appeal. I hope that when the case comes back to us we shall be furnished with full particulars of these decisions.

I would set aside the decree under appeal and send the case back to the District Court, in order that expert evidence may be adduced on the following points:—

(1) What is the position, according to Kandyan custom, of the children of a low-country Sinhalese woman married to a Kandyan man?

(2) What is the position, according to Kandyan custom, of the children, of a Kandyan woman married (*a*) in *binna* and (*b*) in *diga* to a low-country Sinhalese man?

After this evidence has been recorded the learned District Judge will adjudicate upon the case afresh.

PEREIRA J.—I agree.

DE SAMPAYO A.J.—I agree.

At the second trial the District Judge (G. W. Woodhouse, Esq.) delivered the following judgment:—

The decree in this case was set aside by the Supreme Court in appeal, and the case sent back in order that expert evidence might be adduced on the points stated in the judgment. This Court was directed then to adjudicate upon the case afresh. Three witnesses were called, all of whom are acknowledged to be persons thoroughly conversant with the laws and the customs and manners of the Kandyan Sinhalese. Mr. Modder has practised for thirty-one years in these Courts, and is the author of the standard work on Kandyan law. His evidence is to the effect that "persons born of a Kandyan father and a low-country Sinhalese mother were treated as persons coming under the Kandyan law." As apparently that view of the law was never questioned, of course there would be no direct decisions on the point; but as the witnesses are agreed that such marriages are of common occurrence, chiefly between families living on the border between the Kandyan districts and the maritime provinces, it is disappointing that no concrete instances have been shown where the Courts have decided cases, or dealt with estates, of deceased persons on that footing.

With reference to the other questions put by the Supreme Court, Mr. Modder states that the children of a Kandyan woman married in *binna* to a low-country Sinhalese man would, in respect of their mother's property come under the Kandyan law, and in respect of their father's property come under the Roman-Dutch law.

If the marriage be *diga* the woman forfeits her paternal inheritance, so that the children will inherit only the father's property, and that will be in terms of the Roman-Dutch law. The Hon. Mr. T. B. L. Moonemalle, M.L.C., was the next witness called. He is himself a Kandyan

[1] *(1913) 16 N. L. R. 117.*

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gentleman and the representative of the Kandyans in the Legislative Council. He has not only practised as a proctor of these Courts for the last twenty-five years, but has also collated evidence on the point in issue from leading experts on Kandyan law, and from the leading members of the community, with a view of introducing fresh legislation on the subject, by reason of the decision in *Mudiyanse v. Appuhamy*.[1] He says that "it has always been accepted that in the case of a Kandyan man marrying a low-country woman the wife takes the status of the husband. Their children would take the status of the father, that is to say, come under the Kandyan law." Mr. Moonemalle decides the further question on a consideration of domicile; that is to say, the children of a Kandyan father by a low-country mother living in the Kandyan provinces would be Kandyans, and come under the Kandyan law, no matter whether the marriage was *binna* or *diga*. He refused to discuss their position if the parents left the Kandyan provinces and permanently lived elsewhere.

The next and last witness called was Mr. Palipane, a Kandyan gentleman who is married to a low-country Sinhalese lady, and who has for forty-three years been a Ratemahatmaya in a Kandyan district bordering on the low-country. He agrees with Mr. Modder in his statement of the Kandyan custom on the question proposed by my Lords. Mr. Palipane states that he is aware of no case where the children of a low-country Sinhalese woman married to a Kandyan man were treated as low-country Sinhalese, that is, as coming under the Roman-Dutch law.

On the side of the plaintiffs, on the other hand, we have neither expert evidence to contradict what has been stated by these three gentlemen, nor decisions of cases on the footing that persons such as we are considering come under the Roman-Dutch law.

In my opinion there was no established rule according to Kandyan custom defining the status of the children of Kandyan fathers by low-country mothers. Their status has been nebulous, if I may use the word, just as many questions of law are nebulous until acted upon and crystallized by the Legislature or by the calm and deliberate decision of the Courts. To take an instance: Until the Ordinance No. 14 of 1909 it was thought that a marriage between two Kandyans under the general law was not valid. Again: until *Corea v. Appuhamy* [2] it was thought that co-owners in possession for ten years could prescribe against others not in possession.

In England it was not till 1848 (see *Tulk v. Moxhay* [3]) that persons were aware that negative covenants are binding on each person who acquires the land, unless he is a purchaser for value of the legal estate without notice of the covenants; it was fifty-eight years later that persons became aware that the purchaser was bound, even if he has only constructive notice of the covenants (*Nisbet and Potts Contract, ch. I., 386*).

Hitherto the Courts, if they had anything to do with the question were satisfied to take persons who called themselves Kandyans as Kandyans. That is clearly what the witnesses meant by saying that children of Kandyan fathers and low-country mothers were "treated" as Kandyans.

[1] (1913) 16 *N. L. R. 117.* [2] (1911) 15 *N. L. R. 65.* [3] *2 Ph. 774.*

Now the matter has come up for decision, I think the decision of the Supreme Court which is assailed is a very practical one. It would lead to endless complications if we treated persons as Kandyans under Kandyan law for some purposes at certain times and in certain places, and as low-country Sinhalese under the Roman-Dutch law for other purposes and at other times and in other places.

I see no reason to alter the decision I had arrived at in my former judgment. I hold, therefore, that defendants acquired no share of the lands in claim through Ungurala. I reserve the question as to defendants' right by purchase. The defendants will pay plaintiffs' costs on this issue.

Judgment accordingly; further hearing on June 22, 1915.

The defendants again appealed.

G. Koch, for the defendants, appellants.—The expert evidence called at the second trial unanimously supports the appellants' contention that the issue of a Kandyan man married to a low-country Sinhalese woman have always been treated as Kandyans. The experts differ only on points which are not material to the decision of this case. The decision in *Mudiyanse v. Appuhamy*[1] is not supported by custom.

As the marriage of Ungurala was not registered, his children are illegitimate, and would be entitled to their father's acquired property.

If the case is to be decided on the footing that it is governed by Roman-Dutch law, there is ample proof of a marriage between Ungurala and Unguhamy. Proof of habit and repute is very strong. The entry in the birth register of one of Ungurala's children that the parents were not married only means that their marriage was not registered.

Counsel cited *1 Leem. 76; 15 N. L. R. 501; 4 N. L. R. 8; 2 N. L. R. 322, 352.*

No appearance for respondents.

Cur. adv. vult.

July 23, 1915. Wood Renton C.J.—

This is an action for the recovery of certain lands. According to the plaintiffs, the property originally belonged to Punchirala, a Kandyan, who was married to Karonchihamy, a low-country Sinhalese. Their children were Ungurala, Menuhamy, and Dingiri Menika. The plaintiffs are the children of Dingiri Menika and the nieces of Ungurala, and claim all the lands in suit by inheritance from them. The plaintiffs admitted that Ungurala had lived with a woman Unguhamy, and that the defendants are the children of that union, but denied that Ungurala and Unguhamy were married. The defendants, on the other hand, assert that such a marriage took place, and that they are the legitimate issue of the union. They further alleged that the lands were not the property of

[1] *(1913) 16 N. L. R. 117.*

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Punchirala alone, but belonged to Punchirala and one Malhamy, who has left a son Hetuhamy; but the learned District Judge held against the defendants on this point, and nothing further has been said about it at any subsequent stages in the proceedings. The vitally important issue is whether the defendants are the legitimate children of Ungurala and Unguhamy, and that issue depends on whether the offspring of a union between a Kandyan and low-country Sinhalese are to be regarded as Kandyans. This question came before Pereira J. and myself in the case of *Mudiyanse v. Appuhamy*,[1] and we answered it in the negative. The learned District Judge in the present case followed that decision, but stated that previous to *Mudiyanse v. Appuhamy*[1] "it was accepted law that the issues of a Kandyan man married to a low-country Sinhalese woman were Kandyans ....., and that is how our Courts viewed the matter in innumerable decisions." The learned District Judge further held upon the evidence that the status of Ungurala and Unguhamy depended upon the Roman-Dutch law. He further held upon a consideration of the evidence that they had not been married in fact, and that as the defendants were, therefore, illegitimate, the Roman-Dutch law, to which they were subject, gave them no interest in the father's property. The defendants appealed, and the case came on for argument before my brothers Pereira and De Sampayo and myself on October 8, 1914. It was strongly pressed upon us by counsel for the defendants, with whom the Attorney-General associated himself as *amicus curiæ*, that the decision of this Court in *Mudiyanse v. Appuhamy*[1] was contrary to the Kandyan law, and in view of that contention, and also of the statement by the learned District Judge that there were "innumerable decisions" on the point, we thought it right to direct that the record should be sent back to the District Court for further inquiry and adjudication on the following questions:—

(1) What is the position, according to Kandyan custom, of the children of a low-country Sinhalese woman married to a Kandyan man?

(2) What is the position, according to Kandyan custom, of the children of a Kandyan woman married (*a*) in *binna*, and (*b*) in *diga*, to a low-country Sinhalese man?

This further inquiry and adjudication have now taken place. The defendants called Mr. Frank Modder, author of the well-known and most useful treatise on Kandyan law; the Hon. Mr. Moonemalle, who has been a proctor of the Supreme Court, practising in Kurunegala, for twenty-five years, and has represented the Kandyan community in the Legislative Council for eight years; and Mr. Palipane, Ratemahatmaya of a Kandyan district for forty-three years. No counter evidence was adduced on behalf of the plaintiffs.

[1] *(1913) 16 N. L. R. 117.*

The learned District Judge, while accepting, as I need scarcely say we also are prepared to accept, the testimony of these expert witnesses as entirely trustworthy so far as it goes, came to the conclusion that there was no established rule according to Kandyan custom defining the status of the children of Kandyan fathers by low-country mothers. "I think," he added, "that the decision of the Supreme Court which is asked is a very practical one. It would lead to endless complications if we treat persons as Kandyans under Kandyan law for some purposes at certain times and in certain places, and as low-country Sinhalese under the Roman-Dutch law for other purposes at other times and in other places." He, therefore, affirmed his previous judgment in the plaintiffs' favour, and the defendants again appealed.

The evidence of Mr. Modder, Mr. Moonemalle, and Mr. Palipane shows that they have regarded the issue of marriages between Kandyan and low-country Sinhalese as subject to the Kandyan law. The two former gentlemen say that they have drawn pleadings and conducted cases on that assumption. But in spite of the statement in the previous judgment of the District Court that there were "innumerable decisions" to that effect, and of the fact that the case was sent back in order that evidence of these might be given, not a single concrete case has been cited showing that the question had ever been directly raised in the Kandyan provinces, and that the opinion of the expert witnesses in regard to it had received the sanction of a court of law. But there is a further difficulty. If we are to declare the law on this matter we must declare it as a whole. We must be in a position to lay down principles which will govern not only marriages between Kandyan men and low-country Sinhalese women, but also marriages between Kandyan women and low-country Sinhalese men. It was for this purpose that the second of the two questions above mentioned was embodied in the reference of the present case to the District Court for further inquiry and adjudication. But at this stage in the proceedings, unanimity between the experts comes to an end. The evidence of Mr. Modder is to the following effect:—

> Children of a Kandyan woman married in *binna* to a low-country Sinhalese would come under the Kandyan law in respect of the mother's property, because the husband takes up his residence in his wife's house, and the policy of the Kandyan law is to conserve the property in the family of the original owner. If the marriage be in *diga*, the woman forfeits her paternal inheritance, in the same way as if she married a Kandyan in *diga*.

According to Mr. Moonemalle, a Kandyan woman married in *diga* to a low-country man in the Kandyan provinces would retain her own customary law. The witness declined to express any opinion on the further point as to what her status would be if she left the Kandyan provinces. According to Mr. Palipane, if a Kandyan

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woman marries a low-country man in *binna*, the children would take the status of their father.

It is obvious from these citations that, as the District Judge has observed, the whole question is in a nebulous state. It was pointed out by Pereira J. in *Mudiyanse v. Appuhamy* [1] that it has been held by this Court (see *Manikkan v. Peter* [2]) that low-country Sinhalese are not a different race or nationality from Kandyans, and that there is neither any general rule of law which requires us to hold, nor any authority that would justify us in holding, that the children of marriages between Kandyan men and low-country Sinhalese women are to be regarded as Kandyans. If the law is to be declared in that sense, the task must be accomplished by the Legislature, after taking full account of the different classes of cases for which it will have to provide.

On the question whether or not Ungurala and Unguhamy were legally married, I agree with what has been said by my brother De Sampayo, and concur with the order he has proposed.

DE SAMPAYO A.J.—

The principal question in this case is as to who are the heirs of one Ungurala and are entitled to his property. The defendants are the children of Ungurala by a woman named Unguhamy, but the plaintiffs, who are Ungurala's nieces, deny the defendants' right, and allege that Ungurala and Unguhamy were not legally married, and that therefore the defendants are not entitled to succeed to Ungurala's property. The defendants rest their claim on two grounds: (1) that Ungurala was a Kandyan, and that even if they are his illegitimate children they are his rightful heirs under Kandyan law; and (2) that if Ungurala was not a Kandyan, he was legally married to Unguhamy under the general law. The first of these points has been the subject of much contention. Ungurala was the offspring of a marriage between Punchirala, a Kandyan, and Karonchihamy, a low-country Sinhalese woman, and if the decision in *Mudiyanse v. Appuhamy* [1] governed, Ungurala could not be regarded as a Kandyan. But, under the circumstances mentioned by my Lord the Chief Justice, this Court sent the case back for evidence as to Kandyan law and custom in regard to the status of the children of such mixed marriages. I agree that the evidence called at the further trial is not such as enables us to find any sure principle by which *Mudiyanse v. Appuhamy* [1] can be held to have been wrongly decided, and that, so far as this case is concerned, we should follow that decision, and hold that Ungurala was not a Kandyan, and that consequently the defendants are not Kandyans either, and cannot therefore appeal to the Kandyan law of inheritance in support of their claim to succeed as heirs of Ungurala. This brings us to the second question above mentioned, viz., whether Ungurala was

[1] *(1913) 16 N. L. R. 117.* [2] *(1899) 4 N. L. R. 243.*

lawfully married to Ungulamy. There was no registration of any marriage, but if he was not a Kandyan, his marriage does not depend for its validity on registration, and may be otherwise proved. The evidence in the case leaves no doubt in my mind that Ungurala and Unguhamy were married according to custom, and that they cohabited together as husband and wife, and were reputed as such. The learned District Judge himself was satisfied with that evidence generally, and would have probably given effect to it but for two facts which in his opinion upset the presumption of a valid marriage. It appears that some eight years after Ungurala and Unguhamy had gone through the customary ceremony and had begun to live together as husband and wife, Ungurala gave a notice of marriage under the Kandyan Marriage Ordinance, but did not proceed further. The District Judge regards the circumstances as evidence that the parties themselves had not regarded their association as a marriage. Unguhamy in her evidence says that the failure to proceed further was due to Ungurala having fallen ill, and the matter being thereafter lost sight of. Whether that be true or not, the District Judge has failed to take into account the important fact that the notice of marriage was given in obedience to a general order of the Government Agent that persons whose marriages had not been registered should regularize them by registration. This order, doubtless, was intended to be addressed to Kandyan people only. A notice of marriage given in such circumstances cannot and ought not to be regarded as affecting a marriage which is otherwise good (see D. C. Kandy, No. 16,724, reported in *1 Leembruggen 76*). It may be added that Ungurala continued to live with Unguhamy on the original footing until his death many years after. The other fact which influenced the District Judge is that in the register of birth of one of Ungurala's children the parents are stated to have been "unmarried." But it is clear from the evidence of the registrar, who was called as a witness, that in the Kandyan districts a child of parents whose marriage has not been registered is invariably described as born of unmarried parents. In my opinion the birth register in this instance has very little bearing on the question of the marriage between Ungurala and Unguhamy. On the evidence I hold that the presumption of a valid marriage under the general law has not been displaced. The effect of this finding is that the defendants as legitimate children of Ungurala are entitled to his property, and not the plaintiffs. This disposes of the main issue in the case; but there were certain other issues as to what was the property of Ungurala. In view of his findings on the main issue the District Judge has left undetermined those other issues, and I think the case should go back for the final determination of the remaining questions. I may add that the parties would do well to save further expenses by coming to an agreement on those questions.

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For the above reasons I think the appeal should be allowed, and the case should go back for further proceedings. The defendants should have the costs of this appeal and also the costs of the first trial, but they should pay to the plaintiffs the costs of the proceedings had when the case was remitted by this Court. All other costs in the Court below should be in the discretion of the District Judge.

Case sent back.