Present : Wood Renton J. and Grenier J.

June 2, 1911

RAN ETANA *et al.* *v.* NEKAPPU *et al.*

139—*D. C. Kegalla*, 2,506.

Kandyan law—Woman marrying in "diga" after death of parents—Forfeiture of right to paternal property—Marriage in "diga" pending an action for declaration of title by woman—Objections taken during trial—Counsel must get Judge to note them.

It is the duty of the brothers, after the death of their parents, to give their sister in marriage, whether in *bina* or in *diga* ; but there is nothing to prevent a woman from voluntarily contracting either kind of marriage ; where she contracts a *diga* marriage voluntarily, she forfeits her rights to the paternal inheritance.

Where during the pendency of an action for declaration of title by a Kandyan woman for her paternal property she contracted a marriage in *diga*,—

Held, that she had ceased to be the heir to any part of her father's estate, and that she could not claim a declaration of title to her paternal property.

It is the duty of a pleader, when taking a substantial objection in the course of a trial, to ask the Court to note his objection and the Court's decision thereon, instead of making use of the petition of appeal for reference to the matter.

THE facts are set out in the judgment.

H. A. Jayewardene, for the appellants.—After the death of the father, the brothers cannot compel a sister to marry in *diga* and thus deprive her of her right to a share of the paternal inheritance.

Even if the second plaintiff had married in *diga* after the institution of the action she would not lose her rights. The Judge has no right to base his judgment on anything that happened after the institution of the action. Plaintiffs' claim must be determined according to her rights at the date of the institution of the action. *Silva v. Nona Hamine*,[1] *Ponnama v. Weerasuriya*.[2]

A. St. V. Jayewardene, for the respondents.—After the death of the father it is the duty of the brothers to bring about the marriage of the sisters, though they could not force the sisters against their wish. But in this case the marriage was not forced on the plaintiff. The question whether a daughter marries of her own accord or not does not affect the question of forfeiture. *Meera Saibo v. Punchirala*.[3]

[1] *(1906) 10 N. L. R. 44.* [2] *(1908) 11 N. L. R. 217.*
[3] *(1910) 13 N. L. R. 176 (at page 178).*

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As the plaintiff divested herself of her right to a share of the paternal inheritance by her marriage during the pendency of the action, she is not entitled to a decree. See *Eliashamy v. Punchi Banda*,[1] 1 *Nathan s.* 593.

Cur. adv. vult.

June 2, 1911. WOOD RENTON J.—

I sympathize with the regret with which the learned District Judge came to the conclusion that the second plaintiff-appellant is not entitled to judgment in her favour for the share that she claims in the land in suit. She was admittedly married after the date of action brought, and the District Judge has found as a fact that she was married in *diga*. I have come with reluctance to the conclusion on that point he is right. The marriage certificate which was put in evidence (D 2) expressly describes the marriage as having been in *diga*. Of course that fact is not conclusive, for we find in the certificate (D 1) of the marriage of the second plaintiff-appellant's sister, Ran Etana, a similar description given of a marriage, which the District Judge has held, and I have no doubt rightly held, on the evidence, not to have been a *diga* marriage. Still, the certificate is an element in the case. As regards Ran Etana, the evidence showed that she had at first lived with her husband in the " mulgedara," and that she went to live with him in his own house later on because the defendants-respondents would not allow her to stay in the parental house. The second plaintiff-appellant was also compelled to leave the parental house, but she was not married at the date when she did so, and, as the learned District Judge says, she was in no way compelled by the respondents to marry. In view of the decision of Van Langenberg J., concurred in by Hutchinson C.J., in *Meera Saibo v. Punchirala*,[2] I do not think that the mere fact that the second plaintiff-appellant was not given out in marriage by the respondents, or for that matter by any of her relatives, will prevent the marriage from being a *diga* one. It is not necessary in this case to consider the question raised by Mr. Hector Jayewardene, counsel for the second plaintiff-appellant, as to whether or not a brother can deprive his sister of her share in her father's estate by giving her out in marriage in *diga* against her will.

There remains only the question whether the fact that the marriage in *diga* took place after the present action was brought can alter the situation in the second plaintiff's favour. On that point, I think, we are bound by the decision of the majority of the Court in *Eliashamy v. Punchi Banda*.[1] The facts in the present case stand thus. The second plaintiff-appellant had the right to claim a declaration of title at the date of action brought. By her own voluntary act in marrying out in *diga* she divested herself of that right before the

[1] *(1911) 14 N. L. R. 113.*

[2] *(1910) 13 N. L. R. 176.*

date of the trial. She has ceased, therefore, to be the heir of any part of her father's estate, and cannot now claim from a court of law a declaration that she is so.

I desire to call attention to the statement in paragraph 3 of the petition of appeal, that the appellant's proctor had objected to the issue as to a *diga* marriage being raised, but that " unfortunately " the objection had not been recorded. Points of this kind are continually being taken in petitions of appeal, and a good deal of delay in disposing of appeals is caused by the necessity which so often arises of sending the record back to the court of first instance for the observations of the judges of trial on the point. I very much doubt whether in many cases those so-called objections are formally taken and pressed upon the attention of the judge of first instance. I feel quite sure that there is no judge in the Island who would fail to make a note of any serious objection taken before him to the acceptance of the new issue and of his own ruling thereon. I am not disposed, speaking for myself, to view with favour allegations of the kind that I am referring to just now, unless they specifically state that the objection was formally pressed upon the Court, and that the judge was asked to note and give a decision in regard to it. The respondent's counsel did not press his statement of objections to the decree in favour of Ran Etana, when it was pointed out to him that she was not a party to this appeal. I would dismiss the appeal with costs.

GRENIER J.—

I was strongly inclined at the argument to hold that the second plaintiff had not contracted a *diga* marriage, because if her evidence was true, the defendants were in possession of the " mulgedara," and she was obliged to go with her husband to Talawala. She need not, of course, have married at all, and it is certainly creditable to her that she should have contracted a marriage instead of adopting an irregular course of life, for which her brothers would have been primarily responsible. As I understand the Kandyan law, it is the duty of the brothers, after the death of their parents, to give their sister in marriage, whether in *bina* or in *diga* ; but there is nothing to prevent a woman from voluntarily contracting either kind of marriage. This is what the second plaintiff appears to have done. There is no evidence of any physical force or compulsion having been employed to bring about her marriage ; and the register (D 2) shows that she was married in *diga*, the residence of the parties being given as Talawala, Udattawa. The register is not conclusive evidence by any means of the kind of marriage contracted, but there is sufficient in the second plaintiff's evidence to show that she contracted a *diga* marriage, although under very exceptional circumstances. I agree to dismiss the appeal.

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I would wish to add that I entirely agree with the observations of my brother in regard to the statement in paragraph 3 of the petition of appeal. I think it is the duty of a pleader, when taking a substantial objection in the course of a trial, to ask the Court to note his objection and the Court's decision thereon, instead of making use of the petition of appeal for reference to the matter.

Appeal dismissed.