Present: Schneider and Garvin JJ. 1922.

SENEVIRATNE *v.* HALANGODA *et al.*

228—D. C. Kandy, 27,718.

Kandyan law—Diga *marriage—Wife dying issueless—Husband does not acquire any portion of wife's landed property acquired before marriage—Wife dying leaving children—Husband's rights*—Binna *widower excluded from rights to landed estate of deceased wife.*

Where a Kandyan wife married in *diga* dies issueless, the husband does not inherit any portion of the wife's landed property acquired before marriage.

"Inherited property reverts to the source from which it was inherited where there is no issue."

When a woman married in *diga* dies leaving issue, her husband takes a life interest in her landed property, which on his death will go to her children, or, if they have all died without issue, to their next of kin in their mother's family. In the above case if there be no issue, her husband will take only such landed property as he and his deceased wife acquired during coverture, the rest of the property passing to her parents and next of kin.

A *binna* widower is completely excluded from any rights to the landed estate of his deceased wife.

THE facts are set out in the judgment. (See also *22 N. L. R. 472* for judgment of the Supreme Court on the first appeal in this case.)

Drieberg, K.C. (with him *Hayley* and *Navaratnam*), for appellant.

H. J. C. Pereira, K.C. (with him *Canakaratna*), for respondents.

Cur. adv. vult.

February 13, 1923. GARVIN J.—

This appeal raises a question of Kandyan law of considerable difficulty. The facts of the case are simple. Tikiri Kumarihamy, by a deed dated August 5, 1899, gifted the land, which is the subject of this action, to Wilmot Illangakoon and Lilawathi Panabokke, in consideration of their marriage which was about to take place. They were married in *diga* on September 21, 1899. Lilawathi Panabokke died intestate and without issue on July 18, 1901. On July 15, 1919, Illangakoon transferred a half share of this land to the plaintiff, on the footing that he was his deceased wife's heir. The defendant claims this half share, his submission being that Lilawathi's heir was her mother, who by last will bequeathed the share to him.

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The question for determination is whether the husband is the heir at law to his wife's landed property acquired before marriage, it being premised that the marriage was in *diga*, and that the wife left no children.

The District Judge has affirmed the right of the husband to this property, and bases his conclusion on a certain passage in *Sawers' memoranda on the Kandyan Law*, which is reproduced in *Modder's edition at page 11, section 31.* Since it is upon this passage learned counsel for the respondent also relied, I propose to proceed to consider it at once.

The passage as it appears in an original manuscript signed by Mr. Sawers, recently acquired by Mr. F. A. Hayley, runs as follows: "The husband is heir to his wife's landed property, which will at his demise go to his heirs, but in the event of the wife having left a son, and the father contracting a second marriage and having issue of the second bed, in this case, on the death of the father, the son of the first bed would inherit the whole of his mother's estate, with a moiety of his father's estate, while the children of the second bed would inherit the other moiety of the latter estate, but in the event of the first bed dying without issue, the children of the second bed would only inherit the moiety which descended to him of his father's estate, while his mother's estate would revert to his mother's family."

The asterisk against the word "heirs" in the second line refers to a marginal note which runs as follows: *Note.*—"This is the opinion of Doloswela Dissave of Saffragam, but the chiefs of the Udaratta are unanimously of opinion that the husband is not the heir to the wife's landed *paraveni* estate, which she inherited from her parents, nor of her acquired landed property; the moment the wife dies, the husband loses all interest in his wife's estate, which, if she left no issue, reverts to her parents or their heirs. Though the wife is entitled to the entire possession of her deceased husband's estate, so long as she continues single and remains in his house, the husband must quit his wife's estate the moment of her demise."

It is, I think, clear that Pereira J. was led into the error of ascribing to Sawers only the words: "The above is the opinion of Doloswela Dissave of Saffragam," and the rest of the note to Chief Justice Marshall by a mistake in punctuation in the note, as the same is printed in *Marshall's judgments.* If any part of the "note" is ascribed to Sawers, the whole must be, for there is no doubt that the whole of this note like numerous others appearing in *Sawers* was made contemporaneously.

What is the correct interpretation of Sawers' words? What he says is that a widower is heir to his deceased wife's landed property "which will at his demise" go to his heirs. The absence of words, such as "if he dies intestate," which occur frequently in *Sawers' memoranda*, and the presence of the words "which will at his

demise go to his heirs," imply that the estate which the husband takes is not absolute; it is a life estate with the reversion to his heirs.

Two paragraphs lower down Sawers says: " A wife dying intestate leaving a son who inherits her property, and that son dying without issue, the father has only a life interest in the property which the son derived or inherited from or through his mother; at the father's death, such property goes to the son's uterine brothers or sisters if he have any, and failing them, to the son's nearest heirs in his mother's family." (*Modder, p. 12, section 33.*)

So that the real heir to the deceased wife's landed property is her son, on whose death without issue the property passes to his heirs on his mother's side, subject to the husband's life interest.

So that when Sawers in the first passage talks of the widower as the " heir," and later of the son " inheriting the whole of his mother's estate " on the father's death, he is, I think, referring to the husband as heir to the life estate and the " whole of his mother's estate " in the sense of the reversionary interest, plus the immediate enjoyment thereof.

It is contended, however, that the passage first quoted means that when there is no son by the first bed, the husband takes an absolute title. Sawers does not say that on the death of a woman intestate and without issue her landed property goes to her husband.

The suggested interpretation does not give effect to the words " which will at his demise go to his heirs." The words which follow the words " heirs " appears to be in the nature of the explanation of the words heirs, as the heirs by the first marriage and not heirs by a second marriage.

A mother, who is the heir of a son, who dies without issue and takes his property, even the *paraveni* property of her deceased husband with full rights of proposition, takes only a life interest in her husband's estate.

It seems inconceivable that a widower who is only permitted a sort of life estate by courtesy in his deceased wife's landed property when there is a son born to the marriage with reversion to the son, or should the son die without issue to his son's nearest heirs on his mother's side, should be in a better position when there are no children born to the marriage and take the whole of his wife's landed estate to the exclusion of those who would have been heirs in expectancy if a son had been born to the marriage.

Sawers himself lays down as a rule of inheritance to property that: " A person dying childless, having parents and brothers, the property which the deceased may have had from his or her parents, reverts to them reciprocally (if from the father to the father, if from the mother to the mother) as does his acquired property, whether land, cattle, or goods to his parents." (*Modder, p. 16, section 48.*)

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That inherited property reverts to the source from which it was inherited where there is no issue is one of the fundamental principles of the Kandyan law.

Under these circumstances, if it was intended to lay down a rule of succession so antagonistic to these principles and unanimously denied by all the Udaratta chiefs, it is fair to assume that it would have been unambiguously stated. Moreover, it seems difficult to believe that the Doloswela Dissave would have claimed for the husband an absolute right to the estate of his wife who dies childless; but it is not difficult to believe that he did assert that a widower should have a life interest in his deceased wife's estate similar to the life interest in her deceased husband's estate which is allowed to a widow. Whether or no such a life interest was granted to a widower under the Kandyan law would seem to have formed the subject of the disputation between the chiefs.

But even supposing that upon a correct interpretation of the language used by Sawers, all that the widower takes is a life interest, there remains a difficulty occasioned by the designation of the reversionaries as "his heirs," unless the words which follow can be regarded as an explanation of what is meant by "his heirs," *i.e.*, when there are children of two beds, his sons by his deceased wife and not the children of the second bed, and when the sons die without issue, the next of kin in the mother's family. The case of there being no heirs is not expressly dealt with. The passage contemplates the existence of heirs in the sense indicated. This, I think, is the correct interpretation of the passage.

If there were no children by the first marriage, then so far as the law is to be gathered from Sawers, the husband takes nothing in accordance with the rule that "a person dying childless having parents or brother . . . . the property which the deceased may have had from his or her parents reverts to them reciprocally . . . . . , &c." (*Modder, p. 16, section 48.*)

The only interpretation of the passage under consideration consistent with what Sawers himself has laid down in his memoranda is that a widower takes a life interest in his deceased wife's estate where there is issue of the marriage. It seems to me quite impossible to make anything more of the passage, or to rely upon it with any confidence as an authority for the proposition that the widower takes the property absolutely where the wife died without issue.

The passage is full of difficulties. When read with the second of the passage quoted—that which gives the husband a life interest in the property inherited from his mother by a son who dies childless —it is at least clear that a widower does take a life interest in the landed property of his deceased wife if she left issue of the marriage. It is possible to read the first passage in this sense, and I think it should be so read.

Before I leave this point I would observe that Sawers is, I think, referring in this passage to a *diga* marriage. He does not seem to regard a *binna* married woman as heir to her father's estate. I note that in his very first rule of inheritance he says of *binna* married daughters: " These, or *rather their children*, have the same right to a share of their father's lands as their brothers." (*Modder, p. 1, section 1.*)

Later he says: " The father is not the heir of the property of his children born in a *binna* marriage, which they have acquired through their marriage. " (*Modder, p. 17, section 50.*)

His view would seem to be that the children of a *binna* marriage are themselves in a sense the heirs to their grandparents' landed property.

So much for Sawers. The only other contemporary writer is Mr. Armour, an Englishman, who is referred to by Mr. Sawers as " The Secretary of the Judicial Court, who is certainly the only person qualified for the task, " the task of translating into Sinhalese Sir John D'Oyly's sketch and his own memoranda.

In his grammar of Kandyan law, page 29, Armour expresses the view that the children are the heirs to their mother's landed property, and only admits the husband to the reversion on failure of children, full-sisters, uncles, aunts, and adopted children.

The grammar at page 29 proceeds as follows: " If the wife die intestate, leaving a grandchild, the issue of her son who had died before her, that grandchild will inherit her landed property to the exclusion of the widower, although he were the said child's paternal grandfather.

" If the deceased wife's mother survive, she, the mother, will be entitled to all the property that had belonged in right of inheritance and as dowry to the deceased daughter, whose husband, the widower, will be entitled to such property *only*, as himself and his deceased wife had acquired by purchase or other means during the coverture, it being premised that the deceased wife left no issue. "

There is no question that Armour is here dealing with the landed estate. He says so expressly, and proceeds immediately thereafter to deal with the rules of inheritance to the " goods " of a *diga* married woman.

In his *Treatise on the Kandyan Law* Perera affirms the last of the two paragraphs above quoted from *Armour* in terms. (*Perera. section 34. p. 29.*)

It is in this passage alone that there is to be found any express recognition of the rights of a widower to any part of his deceased wife's landed property, viz., to the property acquired during coverture. Armour's words, though general, must, I think, be applied only to the case of a *diga* marriage, as there are other passages in his " Grammar " which indicate that where the marriage is in *binna*, the husband vacates his wife's estate immediately.

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Armour does not expressly admit the widower's right to a life interest in the landed property of his deceased wife who left issue. But the following passages appear in *Perera's Treatise:* (*a*) "The widower has no right to dispose of his wife's landed estate to the prejudice of her heirs at law (her adopted son or his sisters's son, for instance.) (*Perera, p. 29, section 34.*) (*b*) "Therefore, although the widower had possession of his deceased wife's *paraveni* land for many years since her demise, he will not have thereby acquired a prescriptive title to the same, and any gift or bequest which he shall make thereof will not be valid." (*Perera, p. 29, section 34.*)

This seems to assume the existence of a life interest in the widower, though the point is not specially dealt with.

The position which results from an examination of the works of these text writers may be summarized thus:

When a woman married in *diga* dies leaving issue, her husband takes a life interest in her landed property, which on his death will go to her children, or, if they have all died without issue, to their next of kin in their mother's family.

In he above case if there be no issue, her husband will take only such landed property as he and his deceased wife acquired during coverture, the rest of the property passing to her parents and next of kin.

So much for the text writers. I shall pass now to the law as laid down in the judgment of this Court.

In the case of *Dingirihamy v. Menika* [1] it was held that a widower has "no right of life rent in the *paraveni* lands of his deceased wife." It does not appear whether the marriage was in *binna* or in *diga*, but there was issue of the marriage. If it was in *binna*, the decision is in accordance with the view expressed by Sawers. If, on the other hand, the marriage was in *diga*, it is to the extent of the *paraveni* lands of a wife a denial of Sawers' claim of a life interest for the widower.

It is, of course, clear from the commentaries that a *binna* widower takes no interest in his deceased wife's landed property. This proposition has been approved by this Court. In the case of *Tikiri Banda v. Appuhamy*, [2] De Sampayo J. said: "Now it appears to be well settled law that a *binna* widower has no interest in his deceased wife's landed property whether ancestral or acquired," and I note that it is recorded in the judgment of Dias J. in *Naide Appu v. Pallingurala* [3] that: "It was admitted at the bar that a *binna* husband had no interest at all in his wife's property whether ancestral or acquired."

Thus, a *binna* widower is completely excluded from any rights to the landed estate of his deceased wife.

[1] *2 C. L. R. 76.*

[2] *(1914) 18 N. L. R. 105.*

[3] *2 S. C. C. 176.*

How far has this Court recognized any rights in the *diga* widower to the acquired property of his deceased wife? In *Tikiri Banda v. Appuhamy* (*supra*) it was held that where there was issue of the marriage, he took a life interest in landed property acquired during coverture.

And in *Naide Appu v. Pallingurala* (*supra*) a case decided in 1879, the Court was called upon to pronounce upon the rival claims of a *diga* widower and his deceased wife's sisters to landed property acquired during coverture. It was held that the widower's claim was the better, and entitled to prevail.

This judgment proceeded mainly upon the differences between *binna* and *diga* marriages, and a consideration of the obligations of the parties to such marriages and the conclusion in favour of the widower arrived at by the Court was supported by a reference to a passage in *Armour* which states that the "goods" which the wife acquired during her *diga* coverture will remain to the husband.

The District Judge argues that the words "goods" in the passage from *Armour* means movable and not landed property, and contends that the judgment must then be read as an interpretation of the passage from *Sawers* in the sense that the widower takes an absolute estate in all the deceased *diga* wife's acquired landed property without distinction. It is true that there is a passing reference to Sawers in the judgment of Dias J., but it is quite clear that rightly or wrongly both Dias J. and Cayley C.J. rested their judgments on the passage from *Armour*.

But in so far as the conclusions arrived at by those Judges need the support of text writers, I think there is ample support to be found in the passages from *Armour's Grammar, p. 29*, quoted by me earlier.

This at least is clear to me that if a *diga* widower's claim to any part of his deceased wife's estate where she dies without issue is to be admitted at all, it can only be admitted on the authority of the writings of Armour and Perera and the case of *Naide Appu v. Pallingurala* (*supra*), and only to the extent that it has been therein admitted. Viewing the passage in *Sawers* in the light most favourable to the respondent, its meaning is too uncertain to justify its acceptance as an authority for the proposition he is seeking to maintain.

The landed property, which is the subject of this action, is in the nature of dowry. It is not property acquired during coverture, and does not fall within the class of acquired property which according to Armour the husband takes.

For these reasons the judgment of the District Judge must be set aside. The appeal is allowed, with costs.

SCHNEIDER J.—I agree.

Set aside.