Present : Wood Renton C.J. and De Sampayo J. 1917.

PUNCHI MENIKE *v.* APPUHAMY *et al.*

414-416—D.C. Ratnapura, 2,076.

Diga *marriage of daughter—Re-acquiring* binna *rights—Prescription among co-owners.*

A daughter married in *diga* can regain, even after her father's death, *binna* rights during the lifetime of her husband and without any divorce from him, or re-marriage in *binna*, by maintaining a close and constant connection with the *mulgedara*.

There may be prescription among co-heirs where there is an overt act of ouster or something equivalent to ouster. But what might be acts of adverse possession against a stranger have, in questions arising between co-heirs, to be regarded from the standpoint of their common ownership.

THE facts are set out in the judgment.

Zoysa, for the appellant in No. 414.

Bawa, K.C., and *W. H. Perera*, for the appellant in Nos. 415 and 416.

R. L. Pereira, for plaintiff, respondent, in all the appeals.

Cur. adv. vult.

January 30, 1917. Wood Renton C.J.—

This is a complicated partition action, the trial of which has proceeded before four different District Judges. The District Judge who actually disposed of it did not himself hear most of the evidence, and a most regrettable delay of about nine months occurred between the close of the trial and the delivery of the judgment.

The lands sought to be partitioned are valued at about Rs. 8,000, and are set out in two schedules to the plaint. The plaintiff claims a one-fifth share of the lands in the first schedule, and a one-sixth share of the lands of the second schedule, by right of inheritance. The property originally belonged to Hamy Lekama, who died fifty or sixty years ago. He left six children, namely, (i) Dingiri Menika, (ii) Hamy, (iii) Punchi Mahatmaya, (iv) Ran Menike, (v) Kiri Menike, and (vi) Punchi Menike, who is the plaintiff. The first defendant is a son of Dingiri Menika, Ran Menike is the second defendant, Punchi Mahatmaya is the third, and the fourth to the eleventh defendants represent Kiri Menike. There are, besides, two added defendants, of whom, the first, Kiri Appuhamy, claims under Punchi Mahatmaya, and the second, Mr. Tennekoon, claims

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under Dingiri Menika, by deeds of transfer which are of comparatively recent date. Hamy, the second son of the original owner of the lands, died intestate and without issue, after having transferred his interests to his bother, Dingiri Menika. One of the main issues raised and contested in the District Court was the question whether Punchi Mahatmaya was a son of Hamy Lekama. The learned District Judge, after hearing evidence on both sides, answered that question in the affirmative, and his decision upon that point was not challenged at the argument of the present appeal. The remaining issues were (i) whether the three daughters of Hamy Lekama, Ran Menike, Kiri Menike, and Punchi Menike, were or were not married in *diga*, and whether, if so, they had thereby forfeited their claim to a share in their father's estate; and (ii) the rights of the added defendants above referred to. The learned District Judge held on the evidence that all three daughters had been married out in *diga*. There is no appeal against this finding by the fourth to the eleventh defendants, who claim under Kiri Menike, and we are, therefore, no longer concerned with that part of the case. But the District Judge also held that, while Punchi Menike had been married out in *diga*, she had re-acquired *binna* rights by subsequently returning to the *mulgedara*, and that neither her brother Dingiri Menika nor her sister Ran Menike had acquired as against her title by prescription to her share of the inheritance. In dealing with this point, the District Judge says incidentally that there can be no question of prescription between co-heirs. That is, of course, too general a statement, which the decision of the Privy Council in *Corea v. Appuhamy*[1] does not support. There may be prescription among co-heirs where we were in the presence of an overt act of ouster or of something equivalent to ouster. But what might be acts of adverse possession against a stranger have, in questions arising between co-heirs, to be regarded from the standpoint of their common ownership. The Kandyan law as to the circumstances in which a woman married in *diga* can regain her interest in the paternal inheritance is somewhat obscure. But it has been interpreted by a long series of local decisions, from which, I think, it would now be unwise to depart. The general rule undoubtedly is that when a woman marries in *diga*, that is to say, when she is given away, and is, according to the terms of the contract, conducted from the family house, or *mulgedara*, and settled in that of her husband, she forfeits her right to inherit any portion of her father's estate. But this forfeiture was an incident, not so much of the marriage, as of the quitting by the daughter of the parental roof to enter another family,[2] and the status which the daughter would have enjoyed if she had been married in *binna*—that is to say, if under the contract her husband had been received by her parents as a member of her family and had come to live with her in the

[1] *(1912) A. C. 230.*

[2] *Kalu v. Howwa Kiri, (1892) 3 C. L. R. 54.*

mulgedara in that capacity—can be acquired in various ways, as clearly recognized as the general rule to which they are exceptions. A *diga* married daughter will regain *binna* rights[1]—

(*a*) By being recalled by the father and re-married in *binna;*

(*b*) By her father, on her return to his house along with her husband, assigning to them and putting them in possession of a part of his house and a specific share of his lands;

(*c*) On her returning home along with her husband and attending on her father, and rendering him assistance until his death;

(*d*) On her coming back and attending on and assisting her father during his last illness, and the father on his deathbed expressing his will that she should have a share of his lands.

The question at issue in the present case is whether a wife married in *diga* can regain, even after her father's death, *binna* rights during the lifetime of her husband, and without any divorce from him or re-marriage in *binna*, by maintaining a close and constant connection with the *mulgedara*, and, in particular, by leaving one or more children of the *diga* marriage to be brought up, or herself bringing them up, there. The learned District Judge has answered this question in the affirmative, and, in my opinion, has done so rightly, both on principle and on authority. A daughter married in *diga* forfeits her interest in her paternal inheritance, not by virtue of that marriage, but because it involves a severance of her connection with her father's house. If that connection is re-established on its original basis, if the *diga* married wife is once more received into the family as a daughter, it is only reasonable that she should enjoy a daughter's rights of inheritance. So much for the principle underlying the problem that has to be solved. We come now to the authorities. There is no express statement in any of the text books on Kandyan law adverse to the ruling of the District Judge on the legal issue above mentioned. The only judicial decision of that character is to be found in the recent case of *Simon v. Dingiri*,[2] in which it was held that, where a Kandyan woman, who was married out in *diga*, ten or fifteen years afterwards returned to the *mulgedara* subsequent to the death of her father and married a second time in *binna*, she did not acquire any rights to the paternal property. In that case, however, the attention of the Court was not apparently directed to the trend of a strong current of judicial authority running in the contrary direction, and impliedly recognized in the case of *Dingiri Menika v. Appuhamy*,[3] which *Simon v. Dingiri*[2] purported to follow. It is argued, however, in the first place, that the instances given in the text books on Kandyan law of the circumstances in which a *diga* married daughter can recover *binna* rights are definitive and not merely illustrative; and, in the second place, that, if the ruling of the District Judge in this case were affirmed,

[1] See *Modder's Kandyan Law, 2nd ed., pp. 460 et seq.*

[2] *(1916) 3 Ceylon W. R. 55.*

[3] *(1915) 4 Bal. N. C. 66.*

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the general principle that a *diga* married daughter forfeits her share in the paternal inheritance would be abrogated altogether, since she could set aside the forfeiture at her own pleasure by periodical visits to her father's house. I will deal with each of these points briefly in turn. It must be remembered that the ancient standard text books on the Kandyan law consist for the most part of reports of, or comments upon, particular decisions, rather than legal treatises in the modern sense of the term. But in point of fact, as I will show in a moment, authority is not wanting even in these text books for the proposition of law involved in the decision of the District Judge upon this point. As regards the argument *ab inconvenienti*, it is obvious that the question whether a *diga* married daughter has regained *binna* rights must always be one of fact, and the Court would have in each case to consider whether the evidence affirmatively proved that she had been received back into her father's family as a daughter.

I pass now to the judicial decisions, apart from *Simon v. Dingiri*,[1] to which I have already alluded. The earliest authority is the *Madewelletenne case*,[2] decided as far back as 1834. Much turns upon this decision, and I propose, therefore, to cite the report of it in full. "A father dying about 1814 left six pellas of land, and on his deathbed gave a talpot to his son, the defendant, telling him to support his mother, to whom he gave two other talpots, and who took the produce of one of the pellas till her death, which happened about 1826; from that time the defendant, her son, took the produce of this pella as well as of the other five. The present action was brought for a share of the land by a daughter who had been married in *diga*, but who, it appeared, had frequently resided at her father's house, where several of her children were born; it further appeared that she and her children were in a state of destitution. The talpots given to the mother were not to be found. In his answer the defendant stated with great particularity the divisions made by his father of his lands, alleging all those which he now possessed had been bestowed on him by his father, and that his sister, the plaintiff, had forfeited those which had been given to her for non-performance of Government services, but of his he offered no proof. The assessors in the original Court were of opinion that the plaintiff, in consideration of (her) distressed circumstances, was entitled to the pella which (her) mother had enjoyed; the Judicial Agent, that she was only entitled to support for her life; but on reference to the Court of the Judicial Commissioners (this being before the new Charter came into operation), that Court decreed that she was not entitled to anything. On appeal to the Supreme Court, it was decreed that the plaintiff be put into possession of the pella possessed by her mother till her death. The Supreme Court adopted the opinion of the assessors in the Court of Madewelletenne

[1] *(1916) 3 Ceylon W. R. 55.*

[2] *(1834) Marshall's Judgments 329.*

for the following reasons: 'Independently of the state of destitution in which it appears that the plaintiff now is, and which of itself would entitle her to some assistance from the estate of her deceased parents. It appears that, though she married in *diga*, she always kept up a close connection with her father's house, in which, indeed, three of her children were born. Another reason is, that the defendant, although he undertook to assert in his answer that the plaintiffs had received a share of the parental lands which he even specifically described, yet has not shown that she did receive any part thereof. Again, it appears that the father, on his deathbed, gave one talpot to the defendant, and two others to his wife; what has become of these two latter *olas* does not appear. But it is not improbable that one of them may have been intended for the plaintiff, more especially considering the frequency of her visits to the parental residence.' ''

It seems to me to be reasonably clear from the mere language of this report that at least one of the grounds on which the plaintiff's right to the pella to which she was declared entitled was upheld by the Supreme Court was the fact that, in spite of her *diga* marriage, she had maintained a close connection with her father's house, in which, indeed, three of her children were born, and that the *ratio decidendi* was that by so doing she had a right to share as a daughter in his inheritance. The *Madewelletenne case*[1] has been consistently interpreted by the Courts in that sense. Pereira cites it in his Collection[2] as an authority for the following proposition:—"A marriage in *diga* does not divest the wife of her inheritance where she has always kept up a close connection with her father's house; and this independently of the state of destitution in which she may be, and which of itself would entitle her to some assistance from the estate of her deceased parents."

In the case of *Dingiri Amma v. Ukku Banda*,[3] Pereira J. also quotes it as an authority, and it has been adopted in the same sense by a Bench of two Judges in *Appuhamy v. Kiri Menika*,[4] in which all the previous relevant decisions are reviewed. There is nothing in the earlier cases that conflicts with the interpretation put by the Supreme Court on the *Madewelletenne case*[1] in this series of authorities, and in my opinion the rule thus laid down should now be adhered to.

My brother De Sampayo has analysed the evidence as to the position of the plaintiff in the present case, and it is, therefore, unnecessary for me to deal with it. I entirely agree with the conclusions at which he has arrived on that point, and on the only remaining issue as to whether the evidence of prescriptive possession is sufficient to displace the plaintiff's right to share in her father's inheritance.

I would dismiss the appeal with costs, subject to the modification mentioned by my brother.

[1] *(1834) Marshall's Judgments 329.*
[2] *Volume II., p. 173.*
[3] *(1905) 1 Bal. 193.*
[4] *(1912) 16 N. L. R. 238.*

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The principal question raised in all these appeals is whether the plaintiff, who is a daughter of Hamy Lekama of Muduwe, deceased, is entitled to share the father's inheritance with her brothers, the third defendant and Dingiri Menika, the father of the first defendant. According to her marriage certificate she was married in *diga* to Pinhamy of Pelmadulla in the year 1874, and in my opinion her attempt to prove by oral evidence that she was in fact married in *binna* has failed. But she, in the second place, maintains, and the District Judge has found in her favour, that she subsequently regained *binna* rights. As regards the law bearing on this point, the passages in the text books as to the circumstances in which *binna* rights can be regained are not very clear, and are capable of being interpreted either as giving instances or as stating conditions, but these passages and the judicial decisions have been considered in *Appuhamy v. Kiri Menika.*[1] There a daughter had, after her father's death, been married out in *diga*, but one of her children was left in the *mulgedara* and was brought up by her mother, and she herself had kept up a close and constant connection with the *mulgedara*, and it was decided that in these circumstances she re-acquired the status of a *binna* married daughter and was entitled to inherit the father's property. Mr. Bawa, for the first defendant-appellant, invited us to review that decision on the ground that the Kandyan law recognized the rights of a *diga* married daughter to paternal inheritance only in such special cases as those mentioned at pages 66 and 67 of *Armour's Kandyan Law*. This point was considered in *Appuhamy v. Kiri Menika,*[1] and I think it desirable in the somewhat doubtful state of authorities to adhere to that decision as a correct exposition of the law on this subject. It is true that, as pointed out by Mr. Bawa, " keeping up a close and constant connection with the father's family " is something indefinite, and oral evidence of it is calculated to introduce an element of uncertainty into the title of other members of the family. But this uncertainty is no greater than in the case where the question is whether the marriage itself was in *binna* or *diga*, or in those other cases where it is allowed a *diga* married daughter may, under certain circumstances, re-acquire *binna* rights. The point to be kept in view in all cases, I think, is that the essence of a *diga* marriage is the severance of the daughter from the father's family and her entry into that of the husband, and her consequent forfeiture of any share in the family property, and the principle underlying the acquisition of *binna* rights, as I understand it, is that the daughter is re-admitted into the father's family and restored to her natural rights of inheritance. This, of course, is not a one-sided process; the father's family must intend, or at least recognize, the result. The

[1] *(1912) 16 N. L. R. 238.*

question accordingly in this case is whether the facts proved are sufficient to establish the plaintiff's restoration to her original position as a daughter of the house of Hamy Lekama. It appears that she was very young when Hamy Lekama died, and was given in marriage to Pinhamy by her mother and brothers in 1874. She returned to the family house at Muduwe for her confinement, probably about a year or two after the marriage, and there her son Punchi Mahatmaya was born. She appears to have had no other children. Punchi Mahatmaya, from the time of his birth, continued to be in the *mulgedara*, he married in 1900, and conducted his wife there, and all his four children were born and live there. The plaintiff herself lived with the husband at Pelmadulla only for about four or five years and returned to the *mulgedara*, and never went back again. She appears to have quarrelled with the husband, who took another wife and had children by her. There was no formal divorce, but the circumstances indicate that the separation between husband and wife, which must have taken place shortly before 1880, was permanent and final. At that time the plaintiff's brother Dingiri Menika was living in the family house, which was on Nindawatta, and the plaintiff was admitted into and occupied a part of the house. Afterwards Dingiri Menika built for himself a house on another land and took up his abode there, leaving the plaintiff and her son to occupy the whole family house. The old house soon came down, and another was rebuilt by the plaintiff on the same site, and has since been occupied by her and her son alone. That this was not a mere exercise of charity on the part of Dingiri Menika and the other heirs of Hamy Lekama but a recognition of resumption of her position as a member of her father's family is sufficiently shown by several other circumstances. There were altogether six children of Hamy Lekama, three sons and three daughters. In 1881 and 1882, Hamy, one of the sons, disposed of one-sixth share of some of the family lands to Dingiri Menika. If the daughters had no right to them, his share should have been one-third, and not one-sixth. It is true that two of plaintiff's sisters were also married in *diga*, but at the same time it is material to note that the plaintiff herself was taken into account in the calculation of Hamy's share. In 1908 the plaintiff and her sister, the second defendant, gave a mortgage of some lands. The shares so mortgaged are not reconcilable with the case of either party but the mortgage, which was usufructuary, is an act in exercise of the right of ownership. Dingiri Menika died some seven years ago, and the first defendant, his son, purported to lease the entirety of some lands, and that led to an action in 1911 by the second defendant against the first defendant. To that action the present plaintiff was made a party defendant, and she put in an answer claiming a share by paternal inheritance. The first defendant eventually compromised the case by transferring certain lands to the second

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defendant, plaintiff in that action. As regards possession, it appears that Dingiri Menika, who was the eldest son, generally possessed the family lands, but, as the learned District Judge remarks, it does not follow that he was not doing so on behalf of the whole family, especially in view of the fact that the other sons, who were undoubtedly entitled to shares, did not interfere with him either. The evidence indicates that the plaintiff not only occupied the family house on Nindawatta, but enjoyed a share of the produce, and as regards the fields, of which there are many, the first defendant himself says that his father Dingiri Menika used to give plaintiff paddy.

The facts which I have briefly summarized show, first, that plaintiff, notwithstanding her original *diga* marriage, was re-admitted into, or with the consent of her brothers resumed her position in, Hamy Lekama's family and regained her rights of paternal inheritance; and, secondly, that Dingiri Menika and those claiming under him have not acquired title to her share of the family property by prescriptive possession. The appellants in the District Court maintained that the third defendant, Punchi Mahatmaya, was not a son of Hamy Lekama, and was not entitled to any share. This point was not seriously pressed in appeal, and even if it were, it would not be possible in view of the evidence to sustain it. I think the District Judge's allotment of shares to the several parties is right. It appears, however, that the first defendant and his father Dingiri Menika and the added defendants who claim under the first defendant have made certain improvements on some of the lands. The interlocutory decree includes no order with regard to these improvements, nor is the evidence sufficiently directed to that point. I think that before the partition is proceeded with some further inquiry should be made as to improvements, and the interlocutory decree should, if necessary, be amended.

Subject to the above direction, I would dismiss the appeal with costs.

Appeal dismissed.