1937 *Present :* **Hearne J. and Fernando A.J.**

NATCHIAPPA CHETTIAR *v.* PESONAHAMY.

279—D. C. Kegalla, 10,784.

Kandyan law—Marriage of low-country Sinhalese with Kandyan woman in binna*—Issue subject to Kandyan law—Death of issue intestate—Parent's right of inheritance—Ordinances Nos. 3 of 1870 and 14 of 1907—Ordinance, No. 23 of 1917, ss. 2 and 4.*

Where a low-country Sinhalese was married in *binna* to a Kandyan woman and the marriage was registered under the Marriage Registration Ordinance, No. 19 of 1907,—

Held, that under section 2 of Ordinance No. 23 of 1917, the issue of such marriage was subject to Kandyan law and that the mother succeeded to the property of such intestate issue to the exclusion of the father.

Held further, that sub-section (2) of section 4 of Ordinance No. 23 of 1917 does not require that a marriage which was to have the effect provided for in section 2 should be registered under Ordinance No. 3 of 1870.

The statement of objects and reasons published with a draft Ordinance may be considered in construing the Ordinance.

THIS was an action instituted by the plaintiff to have it declared that one-eighth share of the land in dispute was liable to be seized and sold in execution of a decree against one Podisingho, a low-country Sinhalese man who was married to the defendant, a Kandyan woman.

The defendant and her son Podiappu purchased a half share of the land. Podiappu died unmarried and leaving no issue. The question was whether his share devolved on his mother alone according to the Kandyan law or on his father and mother according to the Roman-Dutch law.

The learned District Judge held that the defendant's marriage with Podisingho was a *binna* marriage and that Podiappu was subject to the Kandyan law.

C. Nagalingam, for plaintiff, appellant.—The question here resolves into what the issue is deemed to be in a case where a low-country Sinhalese man marries a Kandyan woman. If the issue is held to be non-Kandyan, his property would on his death intestate devolve upon his father and mother ; but if Kandyan, would according to Kandyan law devolve on his mother only to the exclusion of the father.

Vide *Punchihamy v. Punchihamy* [1] where Wood Renton C.J. remarked that the whole question was in a nebulous state. The legislature then steps in and Ordinance No. 23 of 1917 is passed to declare the law applicable to the issue of marriages.

Section 4 (2) of this Ordinance has to be read with section 2. The question as to *binna* or *diga* marriage has to be determined at the date of the marriage. The law does not contemplate the difference between a *diga* and a *binna* marriage, where the marriage is registered under Ordinance No. 19 of 1907.

Section 2 (*b*) conserves the rights even of those married under the Ordinance of 1907. In the case of those who could have married under

[1] *(1915) 1 C. W. R. 35.*

the Ordinance of 1870, but who nevertheless got married under the Ordinance of 1907, their rights have vanished. Section 2 (*b*) (ii.) defines the rights of the parents and not of the issue.

Here the property is not inherited by the child, but purchased in the child's name. The section does not provide for cases where property is derived from the issue of a party.

If section 2 does not apply, the son is not a Kandyan. Would Ordinance No. 3 of 1870 have enabled a non-Kandyan to get married under Kandyan law ? Vide *Sophia Hamine v. Appuhamy* [1] where it was held that the Ordinance No. 3 of 1870 was applicable to Kandyans and not to low-country Sinhalese resident in the Kandyan provinces.

The District Judge, instead of framing an issue as to whether the son was a Kandyan or not, asks the question : Is the defendant subject to Kandyan law or not ?

The term " binna marriage " applies where both parties are Kandyans. (*Vide* section 3 (2) (*a*) of 14 1909 *re* the presumptions created by the Ordinance.)

Section 4 (2) of Ordinance No. 23 of 1917 enables a party to marry under the Kandyan Marriage Ordinance, although he is not a Kandyan. Till 1909, it was doubtful whether parties, both of whom were Kandyans could get married under the general law.

E. A. P. Wijeratne, for defendant, respondent.—In the absence of a definition of the term " Kandyan " in the Royal Proclamation of May 31, 1816, Kandyan law was made applicable to everybody resident in the Kandyan provinces. Vide *Kershaw v. Kershaw and Nicholl* [2]. The husband was a Scotsman (the parties were from Scotland), and the wife who was domiciled in the Kandyan provinces was held to be subject to the Kandyan law. Later the application of the law was restricted to the Sinhalese. Vide *Wijesinghe v. Wijesinghe* [3] where it was held that it was applicable only to Kandyan Sinhalese within the Kandyan provinces and therefore a low-country Sinhalese, though settled in the Kandyan provinces, was not governed by the Kandyan law. There was no attempt to give a definition to the term. Vide *Kapuruhamy v. Appuhamy* [4] where a child of a low country Sinhalese man who had become permanently settled in the District of Kandy and had married a Kandyan woman under the Kandyan Marriage law was held not to be Kandyan and was governed by the Roman-Dutch law. Vide *Mudiyanse v. Appuhamy* [5].

The Kandyan law is a personal law, and it has been held that where one of the parents was not a Kandyan the issue would not be Kandyans. Thus in spite of Ordinance No. 3 of 1870, Kandyans got married under the general law of 1907. Although such marriages took place, two separate sets of consequences flowed from them, *e.g.*, a dissolution of the marriage would be by a Court of law according to rules of Roman-Dutch law—*contra* in Kandyan law, one year's separation and on application for cancellation of the marriage would be sufficient—but their rights as Kandyans continue.

In an inquiry as to the nature of the marriage and as to the parties to it, and as to why this new Ordinance was introduced, we shall have to go

[1] *(1922) 23 N. L. R. 353 (F. B.)*
[2] *(1862) Ram. 157.*
[3] *(1891) 9 S. C. C. 199.*
[4] *(1916) 13 N. L. R. 321.*
[5] *(1913) 16 N. L. R. 117.*

back to the discussions in the Sessional Papers, &c., into the history of the enactment. The Ordinance was introduced to define the rights of the issue of a marriage. Vide *Kuma v. Banda.*[1]

Definition of the term "Kandyan". The preamble of Ordinance No. 13 of 1859 makes it clear that the term was applicable to a particular class of people.

In section 4 of Ordinance No. 3 of 1870, the word "marriage" means a marriage between residents in Kandyan provinces. Europeans and Burghers were excluded earlier, but no mention is made of other Sinhalese in the Ordinance. For the meaning of the word "resident", *vide* judgment of de Sampayo J. in *Sophia Hamine v. Appuhamy*[2].

Section 9 of Ordinance No. 3 of 1870 refers to those governed by the laws, institutions in force among the Kandyans. Section 3 of Ordinance No. 14 of 1909 applies only to marriages of Kandyans, *i.e.*, of those who might lawfully have contracted a marriage under the amended Ordinance No. 3 of 1870. Both parties should be Kandyans.

Vide section 4 (2) of Ordinance No. 23 of 1917. For purposes of Ordinances 1870 and 1907, the reference is to the parties to the "*marriages*" and not to marriage; in Kandyan parties, those who would otherwise be able to be married under Ordinance of 1870.

[FERNANDO A.J.—A person who is not entitled shall be deemed to have been entitled. That is the purpose of the section.]

If the marriage was not registered under Ordinance No. 3 of 1870, Kandyan law does not apply. But vide *Ran Banda v. Kawamma*[3]. The *raison detre* of the authority is the Ordinance of 1917. There must be a marriage in *binna* to enable a child to come under Kandyan law:—(1) A Kandyan man resident in the Kandyan provinces and married to a low-country woman, or (2) a low-country man living in *binna* with a Kandyan woman. A *binna* father inherits nothing from a child. Here the District Judge has found that the man lived in *binna.*

[FERNANDO A.J.—To be recognized at law, must a *binna* marriage be registered under Ordinance No. 3 of 1870 ?]

Where two Kandyans marry under the General Marriage Ordinance, it is a question of evidence as to whether the marriage is in *binna* or in *diga.*

Nagalingam, in reply.—The arguments of the respondent support my contention as regards the Ordinance of 1917. If not for section 2 (*b*) of Ordinance No. 14 of 1909, parties both of whom were Kandyans and married under 1907 Ordinance would be in the situation that Kandyan law would not apply to them. Section 2 (*b*) retains to them the rights to succession under the Kandyan law.

Kandyans could marry under Ordinance No. 3 of 1870. The preamble to Ordinance No. 14 of 1909 removes doubts as regards their validity "Kandyans" have married under the General Marriage Ordinance of 1907.

The words of Ordinance No. 3 of 1870 are imperative. So marriages under the Ordinance of 1907 are not valid according to the Ordinance of 1870. What are the rights of Kandyans married under the 1907 Ordinance ? Section 2 (*b*) of Ordinance No. 14 of 1909 provided for the rights

[1] *(1920) 21 N. L. R. 294 (F.B.).*
[2] *(1922) 23 N. L. R. 353 (F.B.) at 359.*
[3] *6 C. L. Rec. 41.*

of inheritance, &c., of a person married under the Ordinance of 1907 not under the Ordinance of 1870. The 1909 Ordinance does not declare a law ; it enacts a law ; it enacts certain provisions and introduces new provisions. The language used is "shall not be deemed to be invalid". The Courts have not declared that Kandyans could get married under either Ordinance ; if not for section 2 (*b*) of the Ordinance of 1909. Kandyans married under the Ordinance of 1907 cannot succeed under Kandyan law. Otherwise they would fall under the general law.

Section 4 of Ordinance No. 3 of 1870 refers to marriages where both parties are Kandyans, and the Ordinance No. 23 of 1917 cannot apply unless both parties were Kandyans. *Vide* section 2 (*a*) "Parties to the marriages". But for section 4 (2) of Ordinance No. 23 of 1917, the Ordinance would be very wide. If section 2 (*a*) were to be construed alone, Kandyans could get married under any Ordinance or in any locality, and their children would be Kandyans. But section 4 (2) must be read with reference to section 2—"to contract marriages under amended Kandyan Marriage Ordinance". Section 4 limits to a particular form of marriage. If the parties are married under 1870 Ordinance, the consequences are according to Kandyan law, but not so if married under another Ordinance.

[FERNANDO A.J.—Where a low-country person marries a Kandyan under the Ordinance of 1870, then the 1909 Ordinance deems them to be married according to Kandyan law.]

Section 2 (2) would deal with the only class to which section 4 would apply, *i.e.*, when both parties are Kandyans.

[FERNANDO A.J.—Section 2 applies equally to people married under the Ordinance of 1907 or under 3 of 1870. The question then is whether section 2 is limited by section 4 (2).]

Ordinance No. 3 of 1870 was the only Ordinance whereby Kandyans could have got married. Otherwise the union was unlawful. *Semble*—Tamils married outside the *Thesawalamai*. Where there is a special Ordinance as regards their own marriages, they could not be permitted to marry under the general law.

Section 3 of Ordinance No. 19 of 1907 does not prevent Kandyans from getting, married under this Ordinance, the 1909 Ordinance was passed to enable them to marry thereafter, and as regards earlier marriages it stated that they shall not be deemed to be invalid. It enables Kandyans (who must get married under Ordinance No. 3 of 1870) to get married under the General Marriage Ordinance and it preserves their rights under the Kandyan law.

In the case of a *binna* husband he had no security in the wife's house, whereas under the Ordinance of 1907 there is no fear of his being turned out by the father-in-law. Where the marriage was in *binna*, the husband's consent was not needed for its dissolution, while mutual consent was necessary for the dissolution of a *diga* marriage. But under these Ordinances the capacity to contract a marriage and the grounds of its dissolution were regulated by the general law of the land.

The term *binna* cannot arise where the marriage is between a Kandyan and a non-Kandyan. If you remove section 4 of Ordinance No. 14 of 1909 Kandyans cannot get married under the general law. Section 2 cannot apply if they are persons not entitled to marry under the Kandyan

law. Construing section 2 (*a*) alone any marriage between a Kandyan and non-Kandyan would result in the issue being Kandyan. Section 4 would otherwise catch up all future marriages, but here it is a limitation on section 2. The limitation is to confine the class of persons to those who can be deemed to have married under Ordinance No. 3 of 1870.

Cur. adv. vult.

September 17, 1937. FERNANDO A.J.—

There is no dispute with regard to the facts of this case. The defendant in this action and her son, Podiappu, together purchased a half share of the land in dispute so that each of them became entitled to one-fourth. The son Podiappu died unmarried and leaving no issue, and the question is whether his rights devolved on his mother alone according to the Kandyan law, or on his mother and his father Podisingho according to the law of inheritance that applies to low-country Sinhalese. The plaintiff seeks to have it declared that one-eighth share of the land is liable to be seized and sold under a decree in favour of the plaintiff against Podisingho, on the footing that this share devolved on him as father of Podiappu.

Admittedly the defendant is a Kandyan, whereas her husband Podisingho was a low-country Sinhalese. These two were married under the Marriage Registration Ordinance, No. 19 of 1907.

The case for the respondent is that the defendant was married in *binna*, and that the issue of that marriage, namely, the deceased Podiappu was himself governed by the Kandyan law under the provisions of Ordinance No. 23 of 1917. Section 2, sub-section (*b*) of that section, provides that the issue of a marriage contracted in *binna* between a woman subject to the Kandyan law and domiciled in the Kandyan province and a man not subject to the Kandyan law shall be deemed to be, and at all times to have been persons subject to Kandyan law. The learned District Judge accepted this contention and held that the defendant's marriage with Podisingho was a *binna* marriage and that Podiappu was therefore subject to Kandyan law. The Proctor for the plaintiff admitted that on that finding Podiappu's mother, the defendant, would succeed to the property of Podiappu to the exclusion of his father Podisingho.

Counsel for the appellant conceeds that if section 2 of Ordinance No. 23 of 1917 stood alone, then this appeal must fail. He contends, however, that the effect of section 2 (*b*) is limited by sub-section 4 (2). That sub-section is in these terms: "For the purpose of the Amended Kandyan Marriage Ordinance, 1870, and the Kandyan Marriages (Removal of Doubts) Ordinance, 1909, the parties to the marriages referred to in section 2 of this Ordinance shall be deemed to be and at all times to have been persons lawfully entitled to contract marriages under the said first-mentioned Ordinance." In view of this sub-section, Counsel for the appellant argued that the marriage of a woman subject to Kandyan law and a man not subject to Kandyan law to come within section 2 of the Ordinance must be a marriage contracted by the parties under Ordinance No. 3 of 1870. Now Ordinance No. 23 of 1917 was, as it expressly states, enacted in order to declare the law applicable to the issue of marriages between persons subject to the Kandyan law, and persons not so subject. Ordinance No. 3 of 1870 in section 4 provides that the word "marriage",

within the meaning of that Ordinance shall mean a marriage contracted by and between residents in the Kandyan provinces, and the position would appear to be that a marriage under that Ordinance can only be contracted between two persons who are both residents in the Kandyan provinces. If then Ordinance No. 3 of 1870 is applicable to Kandyans alone and to marriages between two parties who are both Kandyans, and if Ordinance No. 23 of 1917 was to declare the law applicable to the issue of a marriage between a Kandyan and a party who was not a Kandyan, then Ordinance No. 23 of 1917 could not possibly refer to, or deal with marriages contracted or to be contracted under Ordinance No. 3 of 1870. It must be remembered however, that it had been held by this Court that persons who were Kandyans and subject to Kandyan law could contract a valid marriage either under Ordinance No. 3 of 1870 or under the Marriage Registration Ordinance of 1907, see *Sophia Hamine v. Hendrick*[1] and Ordinance No. 14 of 1909 had been enacted in view of this decision and in order to remove doubts as to the validity of marriages between Kandyans registered under the Marriage Registration Ordinance of 1907. Section 2 of that Ordinance enacted that it shall not be unlawful (in the future) to solemnize or to register any marriage under the provisions of the Ordinance of 1907, merely because the parties thereto are or were Kandyans. Ordinance No. 23 of 1917, does not expressly refer to marriages under the Ordinance of 1907, but it does refer to the Removal of Doubts Ordinance of 1909. A Kandyan as such could contract a valid marriage either under Ordinance No. 3 of 1870 if the other party was also a Kandyan, or under Ordinance No. 19 of 1907 whether the other party was a Kandyan or not, and it was never questioned that a person who was not a Kandyan could contract a valid marriage under the Ordinance of 1907.

In view of this legal position, it becomes necessary now to consider the effect of section 4, sub-section (2), of Ordinance No. 23 of 1917. As Bertram C.J. said in *Kuma v. Banda*[2], "It is settled by a series of weighty authorities that for the purpose of construing an Ordinance, where the meaning of it is doubtful and even where a doubt is suggested, though not entertained, it is legitimate to inquire into its history". He referred to *Heydon's case*[3], *Stradling v. Morgan*[4], and a number of other authorities and finally quoted from the judgment of Jessel M.R. (*Holmes v. Guy*[5]):—

> "The Court is not to be oblivious . . . . of the history of law and legislation. Although the Court is not at liberty to construe an Act of Parliament by the motives which influenced the legislature, yet when the history of law and legislation tells the Court what the object of the legislature was, the Court is to see whether the terms of the section are such as fairly carry out that object and no other, and to read the section with a view of finding out what it means, and not with a view to extending it to something that was not intended. (He then referred to the judgment of Lord Halsbury in the *Solio case*," and in view of that judgment he held that) "it is legitimate for us to refer to official correspondence as well . . . . as to matters of ordinary public knowledge".

[1] *4 Cey. Law Rec. 90.*
[2] *21 N. L. R. 294.*
[3] *(1584) 3 Coke 7.*
[4] *(1560) 1 Plowd. 201 ; 75 E. R. 305.*
[5] *(1876) 5 Ch. D. 901 at 905.*
[6] *(1898) A. C. 576.*

In view of this judgment in *Kuma v. Banda* (*supra*) it cannot be doubted that we are entitled to consider the Statement of Objects and Reasons which was published along with the draft Ordinance No. 23 of 1917[1]. There is special reference in that statement to the provisions of section 4, sub-section (2), and the statement sets out that these provisions

> "are intended to set at rest any question which may arise as to registration of marriages of the description referred to. Only marriages contracted according to the laws, institutions and customs in force amongst the Kandyans between residents in the Kandyan provinces may in any case be contracted and registered under the Amended Kandyan Ordinance, 1870. It might be questioned" the statement proceeds, "whether marriages of the description with which the Ordinance deals, come within this category," and the reference obviously is to marriages between Kandyans and non-Kandyans which are affected by section 2.
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> "In any case it is believed that many such marriages have been registered under the Amended Kandyan Marriage Ordinance, 1870. It may also be questioned whether the Kandyan Marriages Removal of Doubts Ordinance, 1909, embraces such marriages inasmuch as it only applies to marriages which may lawfully have been contracted under the Amended Kandyan Marriage Ordinance, 1870. In these circumstances, it is thought expedient to declare that the parties to the Marriages with which the Ordinance is concerned are *lawfully* entitled, and have at all times been lawfully entitled to contract marriages under the Amended Kandyan Marriage Ordinance, 1870."

What then was the intention of the legislature in enacting section 4, sub-section (2), as far as that sub-section applies to the question now before us? The answer seems to me obvious. Ordinance No. 23 of 1917 proposed by section 2 to declare the status of the issue of marriages contracted between a man subject to Kandyan law and a woman not subject to Kandyan law, as well as marriages contracted in *binna* between a woman subject to Kandyan law and a man not subject to that law, and section 4, sub-section (2), was enacted to set at rest any question which may arise as to the registration of the marriages referred to in section 2. The effect of section 2 was only confined to the issue of a marriage contracted by certain persons, and obviously such a marriage must be a valid marriage recognized by law. When it became necessary to apply section 2 to the issue of a union between a Kandyan and a non-Kandyan the question would naturally arise whether such a union constituted a marriage, and incidently whether such a union or marriage could have been registered under Ordinance No. 3 of 1870. That question might again depend on the capacity of the parties to contract a marriage, and if the marriage had been registered under Ordinance No. 3 of 1870 that question might be answered against the validity of the marriage inasmuch as Ordinance No. 3 of 1870, as the statement of objects and reasons itself sets out, would only apply to marriages contracted between residents in the Kandyan provinces. For these reasons section 4, sub-section (2), was intended to declare that the parties to the marriages which are referred to in section 2 and which had been registered under Ordinance No. 3 of 1870 were deemed to be lawfully entitled, and to have at all times been lawfully entitled to contract marriages under that Ordinance. Ordinance No. 14

[1] *Gazette No. 6,857 pt. 2 of March 2, 1917, p. 155 at 157.*

of 1909 only declared valid such marriages between Kandyans as had been registered under the Ordinance of 1907, so that once section 4, sub-section (2), came into operation, the legislature had by two separate enactments declared that marriages between Kandyans and non-Kandyans whether contracted under Ordinance No. 3 of 1870 or of 1907 shall be valid marriages if the provisions of those Ordinances had been complied with, and that for the purposes of those marriages, the parties thereto shall be deemed to have been parties who were legally entitled to enter into those marriages.

Counsel for the appellant, argues, however, that sub-section (2) of section 4 of Ordinance No. 23 of 1917 only declares valid such marriages as are contracted under Ordinance No. 3 of 1870 by enabling the non-Kandyan party to enter into such a contract of marriage. This is no doubt correct because as the statement of objects and reasons shows that was the only doubt which the legislature had in view. The legislature did consider the effect of Ordinance No. 14 of 1909 and while it realized the obvious effect of that Ordinance, namely, to declare valid any marriage to which a Kandyan was a party which had been registered under Ordinance No. 19 of 1907, it still considered the possibility of a doubt arising as to whether that Ordinance also validated a marriage contracted by a person who was subject to Kandyan law with a non-Kandyan which marriage had been registered under Ordinance No. 3 of 1870. It is clear, however, that it was never intended by the provisions of section 4, sub-section (2), to require that in future a marriage which was to have the effect provided for in section 2 should be registered under Ordinance No. 3 of 1870. For these reasons I think the contention for the appellant must fail.

Counsel for the appellant also argued that a marriage in *binna* could only be contracted under Ordinance No. 3 of 1870. It is no doubt true that in a marriage under that Ordinance, the Registrar is required by section 20 to ask the parties the several particulars required to be registered including the nature of the marriage, whether contracted in *diga* or *binna*. Section 4, however, does not limit the marriage contracted in *binna* referred to in section 2 to a marriage contracted under Ordinance No. 3 of 1870. On the contrary it provides that the expression, "marriage contracted in *binna*" shall include any marriage contracted in such circumstances that if both parties were subject to Kandyan law, such marriage would be a *binna* marriage. In other words, the Ordinance had in view the fact that men who were not subject to Kandyan law had contracted marriages with Kandyan women in such circumstances as would constitute a *binna* marriage if both parties had been Kandyans. The question then whether the marriage was in *binna* or not would depend not on the declaration of the parties to the Registrar, but on the circumstances of the marriage, and such circumstances could be proved by oral or other evidence. The learned District Judge has held in this instance that the marriage between Podisingho and the defendant was a *binna* marriage, and I see no reason to disagree with that finding.

The appeal has, therefore, failed on all points, and is dismissed with costs.

HEARNE J.—I agree.

Appeal dismissed.