

1963

*Present: Sansoni, J., and H. N. G. Fernando, J.*

G. A. JOHN SINGHO, Appellant, and S. S. HERATH  
MUDIYANSELAGE APPUHAMY, Respondent

*S. C. 343/61—D. C. Nuwara Eliya, 4212*

*Kandyan law—Binna marriage—Quantum of evidence—Production of marriage certificate—Effect on burden of proof.*

In a binna marriage under Kandyan law it is not essential that the husband and wife should live in the wife's mulgedera. It is sufficient if they live in a house which is close to the mulgedera.

H, a Kandyan woman, who married in binna on the 8th June 1917, lived with her husband a short distance away (about two chains) from her father's mulgedera, but most probably on the same land as that on which the mulgedera stood. When, owing to fear of a landslide, they moved in 1925 to another village, the father and daughter lived in two houses which they built on one land.

*Held*, that it could not be contended that H went out in diga and forfeited her rights to the paternal inheritance.

*Held further*, that the production of a binna certificate creates a presumption that the marriage was binna and shifts the burden of proof to the party who denies it.

**A**PPEAL from a judgment of the District Court, Nuwara Eliya.

*E. A. G. de Silva*, with *M. Underwood*, for the plaintiff-appellant.

*B. C. F. Jayaratne*, for the defendant-respondent.

*Cur. adv. vult.*

November 14, 1963. SANSONI, J.—

The two fields in dispute in this action formerly belonged to a Kandyan named Herath Mudiyanseelage Ukku Banda. He died in 1939 leaving two children, a daughter Heenmenika, who was born in 1902, and a son Appuhamy (the defendant) who was born in 1916.

Heenmenika married Tunpelegedera Punchirala in binna on the 6th June 1917 and died in 1940 leaving three children, Bisomenika, Punchi Banda and Kumarihamy. The last two sold their interests in the two fields to the plaintiff by deed P4 of 1954.

The plaintiff brought this action for a declaration of title to an undivided half share of each of the two fields, ejectment and damages.

The defendant pleaded that Heenmenika inherited nothing from her father because she "quitted the mulgedera at her marriage to go and live in diga with her husband." He claimed the entirety of the fields as his father's sole heir, and by prescriptive possession.

The real question in dispute between the parties is whether Heenmenika went out in diga and forfeited her rights to the paternal inheritance. The marriage certificate of Heenmenika and Punchirala, which was marked at the commencement of the trial, showed that the parties married in binna: the burden of proving the forfeiture was therefore correctly placed on the defendant. Since he was born in 1916 and the marriage took place in 1917, he was obviously unable to speak to what happened at or about the time of the marriage. But he said that Heenmenika from 1917 to 1925 lived in her husband's house at Palugama, which is the village in which her father's mulgedera was, about two chains away from the mulgedera. During that time her father lived in his mulgedera. About 1925 the villagers of Palugama moved to another village called Udawela because they feared a landslide. Ukku Banda built a house for himself on a land called Tennehenagederawatte in Udawela, while Punchirala built another house on the same land and lived in it with Heenmenika.

The only other witness called for the defendant who seemed to know anything about this marriage was Tennegedera Ukku Banda, who gave his age as 60 years and would therefore have been about 17 years old when Heenmenika married. He said that after Heenmenika married Punchirala they went to reside in a house in Palugama adjoining the house in which he lived. Under cross-examination he said that his house and Ukku Banda's house were adjoining houses, and the house to which Punchirala came with his wife was really one room of the witness' house. He explained that by "adjoining" he meant that Ukku Banda's house and his house were two chains apart. When asked by what right Punchirala came to live in a room of his house, the witness said that Ukku Banda's wife owned some shares in it. The witness said that at Udawela, Ukku Banda and Punchirala lived in two houses which they built on one land.

The evidence called by the defendant showed that Heenmenika and her husband after their marriage lived a short distance away from her father's mulgedera, but most probably on the same land as that on which the mulgedera stood. It has also been proved that although the husband Punchirala was a man of Yompane, which is about one mile from Palugama, he and Heenmenika never went to live in Yompane.

Did Heenmenika forfeit her paternal inheritance? No case exactly in point seems to have been reported, but Mr. Hayley in his book on Kandyan Law at page 193 speaking of the binna marriage says "In modern times it is usually entered into only when the bride is an heiress. The husband is brought to the house of the wife or her relations, the essential factor being his residence on property belonging to the wife's family, not necessarily that of her father". He cites in support, the case of *Gonigoda v. Dunuwila* decided in 1827 and referred to in Appendix II, page 70. There is also the case of *Doretugawe v. Ukku Banda Korale*<sup>1</sup>, where the husband and wife lived in a house built close to her father's house and belonging to her. The fact that the husband

<sup>1</sup>(1909) 1 *Current Law Reports*, 259.

and wife did not live in the wife's mulgedera did not prevent the marriage being in binna. What happened after the villagers of Palugama went to Udawela confirms the view that the binna marriage never lost that character, for Punchirala and Heenmenika built a house on her father's residing land at Udawela and lived there. The marriage certificate raised, as I said in *James v. Medduma Kumarihamy*<sup>1</sup>, a "compelling presumption", and the defendant has failed to rebut it.

No question of prescription arises since the defendant and Heenmenika were co-owners, and her children continued to be co-owners with the defendant after her death.

The Plaintiff is thus entitled to a 1/3 share of the fields in dispute and to possession of that share, but not to ejectment of the defendant who is a co-owner. Damages were agreed on at Rs. 160 a year for 3 pelas on the basis that the Plaintiff was entitled to 1/2 share of each field: since he is only entitled to 1/3 share, he will receive damages at Rs. 105 a year from 9th November, 1954, until he obtains possession of his share. He will also be entitled to his costs in both Courts.

H. N. G. FERNANDO, J.—I agree.

*Appeal allowed.*

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