1942 *Present :* **Moseley S.P.J. and de Kretser J.**

DUNUWEERA *v.* MUTTUWA *et al.*

41—D. C. Kandy, 5,229 (Testy.).

Kandyan Law—Diga-married woman—Acquired property—Right of surviving husband to inherit—Failure of issue.

Where a Kandyan woman married in *diga* dies without issue, the surviving husband succeeds to her acquired property in preference to her brothers and sisters.

***Seneviratne v. Halangoda* (24 N. L. R. 257), distinguished.**

APPEAL from an order of the District Judge of Kandy.

One Kuda Ridee, a *diga*-married Kandyan woman, died issueless in 1935, and her estate is being administered in this case by the petitioner, her husband. She has also left two brothers and a sister.

When Kuda Ridee was five years old her father had gifted certain lands to her. He died in 1912 and she married in 1922.

The question was, who was entitled to her acquired property. The case was argued on the footing that the lands gifted to her were her acquired property. The learned District Judge held that the respondents were the heirs to Kuda Ridee's acquired property.

N. E. Weeraşooria, K.C. (with him *S. R. Wijayatilake*), for petitioner, appellant.—The question that arises for determination is whether the widower being married in *diga* succeeds as an heir of his deceased wife to the properties gifted to the deceased by her father before her marriage in preference to his deceased wife's brothers and sister.

Property gifted to a person is classed among "acquired" property as opposed to *paraveni* or ancestral property.

Sawers, in his memoranda reproduced by Hayley in his *Sinhalese Laws and Customs, Appendix I, page 12*, states categorically and without any qualification that the husband is heir to his wife's landed property which will at his demise go to his heirs. *Sawers* is here dealing with the case of *diga*-married spouses and of acquired property. No distinction is drawn between property acquired before marriage and during coverture. In *Naide Appu v. Palingurala*[1], Dias J. states that the oldest authority bearing upon the point is to be found in *Sawers' Digest* where *Sawers'* lays down in general terms that the husband is her to her landed property. He proceeds to say: "On a careful review of all the authorities upon the subject, I am of opinion that a *diga* husband is the heir and is entitled to succeed to the acquired property of the deceased wife". Cayley C.J., in the same case, says: "It seems quite clear from *Armour* that a *diga* husband inherits his wife's acquired 'goods' if she dies without issue. What *Armour* meant by the word 'goods' may be doubtful, but I am disposed to think that, in this expression, he intended to include all kinds of property. If not, it is difficult to understand why he has left altogether untouched the important question of the devolution of

[1] *(1879) 2 S. C. C. 176.*

land in cases of this kind. In any case, it is difficult to see why a different principle should be applied to the devolution of acquired lands from that which governs the devolution of other description of acquired property". In this case, although the subject-matter of the dispute was property acquired during coverture, it was not a material factor which prompted the decision of the case. The law was laid down generally that a *diga* husband was his wife's heir to the exclusion of her sisters, so far as relates to her acquired property, whether real or personal. Middleton J., in *Appuhamy v. Hudu Banda* [1] at 244, accepts this view as correct when he says: "According to *2 S. C. C., p. 176-7* a *diga* husband inherits his issueless wife's acquired property" and he too does not seek to differentiate between property acquired before and after marriage. Sampayo and Pereira JJ., in *Tikiri Banda v. Appuhamy* [2], discuss the judgments of Cayley C.J. and Dias J., and they too think that the proposition laid down refers to "acquired property" in general and is not restricted to only property acquired during coverture. Modder in his *Principles of Kandyan Law*, while discussing the rights of a *diga*-married widower, comes to the same conclusion when he sums up in an article (204) *at page 347 2nd edition*) : "A *diga* widower succeeds to all the acquired property of his wife, dying intestate and without issue, in preference to her brothers and sisters". It might be argued that Garvin J., in *Seneviratne v. Halangoda* [3], had taken a different view when he held that property, in the nature of a dowry left by a deceased *diga*-married woman, who died intestate, devolves on the heirs of the mother of the deceased in preference to the widower. Garvin J's reasoning in that case is on a different basis. There he was concerned with the dowry of the deceased and he quoted *Armour* as his authority for taking the view that the widower is not entitled to succeed to such property. He refers to *Naide Appu v. Palingurala* (*supra*) and *Tikiri Banda v. Appuhamy* (*supra*) and attempts to read into them a distinction between property acquired before and during coverture, although those cases did not seek to draw this distinction. There are no grounds for this very artificial distinction. The essence of a *diga* marriage is that the woman severs her connections with her family and joins her husband."

It would appear that a *diga*-married woman is under greater obligations to her husband than a *binna* married woman, and this may probably account for the distinction, if any distinction there be, between the rights of *binna* and *diga* husbands with regard to their wifes' property.

In *Kalu v. Lami* [4], Layard C.J. discusses this distinction between property acquired before and after marriage and, having referred to a judgment of the Full Court reported in *Ramanathan's Reports (1861), p. 112*, dismisses it as artificial and foreign when considering the rights of a widow. There is, therefore, no reason why this capricious distinction should be maintained in the case of a widower when it nullies the effect of a marriage in *diga*.

[DE KRETSER J.—in *Seneviratne v. Halangoda* (*supra*) Garvin J. was inquiring into the claims of *the mother of the deceased.*]

[1] *(1903) 7 N. L. R. 242.*
[2] *18 N. L. R. 105 (F.B.) p 108-110.*
[3] *(1922) 24 N. L. R. 257.*
[4] *(1905) 11 N. L. R. 222*

N. E. Weerasooria, K.C.—That is so. In this case the claimants are the brothers and a sister of the deceased. Garvin J's judgment, even if correct, would not apply to a case like this, where the respondents are claiming in their own right as collaterals and not through the mother of the deceased.

H. V. Perera, K.C. (with him *M. T. de S. Amerasekere, K.C.*, and *R. N. Ilangakoon*), for the respondent.—The question is whether it is the brothers and sisters of a deceased Kandyan woman or her *diga*-married husband that is entitled to succeed *ab intestato*. It was held in *Seneviratne v. Halangoda* (*supra*) that where a Kandyan woman died intestate and issueless her *diga*-married husband was not entitled to succeed to the property because it had been acquired before coverture. In this case too we have the elements of *diga* marriage, death issueless and intestate and property acquired before coverture. The appellant is clearly not entitled to succeed as the facts are indistinguishable. The attempt to distinguish Garvin J's decision on the ground that the property there was dowry property is fallacious. From Garvin J's own statement as to the point he was determining, it is clear that what was important for him was not the property being dowry property but its acquisition before coverture. He only once refers to the fact that the property was dowry, but significantly only for the purpose of drawing the inference therefrom that the property was acquired before coverture. That the *ratio decidendi* has for all these years been understood by Kandyans themselves to have been the acquisition before coverture is shown by the *1935 Report of the Kandyan Law Amendment Commission* which states the principle laid down by Garvin J. It is clear that it accepted the case as correctly laying down the Kandyan law. Otherwise, it would have recommended legislative action. Counsel also cited *Hayley, p. 462.* Even the appellant at the trial endeavoured to fall outside the principle laid down in the case by showing that the property, in this case, unlike the property in that, had been acquired after coverture. Though conceding that the gift to his wife was made a long while prior to her marriage and to a girl merely five years of age, evidence was lead, calculated to prove an intention on the part of the donor to postpone the operation of the gift till after marriage. *Sawers'* statement that the *diga*-married widower is heir to his wife's estate must be read subject to certain qualifications as pointed out by Garvin J. Else certain absurdities result. The statements in the various commentators on the customary law are vague. We have, however, an authoritative and unambiguous interpretation by the Supreme Court of the law. During the last twenty years innummerable dealings have taken place on the basis of that decision. Even if this Court thought that another interpretation of the commentators was possible, it should, as presently constituted, follow the decision of Garvin J. as the facts in the present case are absolutely indistinguishable in principle. The only other proper course would be to refer the point to a fuller Bench.

N. E. Weerasooria, K.C. (*in reply*).—*Seneviratne v. Halangoda* (*supra*) does not cover the facts in the present case.

Sawers is the best authority on Kandyan Law. *Armour's* opinion has not the same weight as *Sawers*, for he was not a judge but only an

interpreter. *Sawers,* "whose long experience and extensive acquaintance", in the words of Marshall, "with the laws and customs of the interior of the Island, and the care which he seems to have taken in procuring the best native opinion on these subjects, and in collecting them when they differ, give a weight and value to the collection, so far as it goes, which no learning merely legal, and unassisted by local observation and practice, can lay claim to"—vide *Modder 2nd Ed., XLV.*

His memoranda are not mere random jottings. There is a scheme in his presentation of the law and his notes show that his memoranda are not mere comments but succinct expressions of the laws and customs at the time.

If this appeal is allowed your Lordship's Court will only be upholding the view taken by Cayley C.J. and Dias J. in *Naide Appu v. Palingurala* (*supra*) and later approved of by Middleton J. in *Appuhamy v. Hudu Banda* (*supra*) and Sampayo J. and Perera J. in *Tikiri Banda v. Appuhamy* (*supra*). This proposition recognised by judicial authority, commentators and text book writers, is only the natural consequence of a marriage in *diga.*

Cur. adv. vult.

September 9, 1942. DE KRETSER J.—

The deceased, Kuda Ridee, died in 1935 issueless, and her estate is being administered in this case by her husband, the petitioner. She also left two brothers and a sister, one of them being the third defendant-respondent. When Kuda Ridee was five years old her father had gifted to her the lands numbered 1 to 5 in the inventory. He died in 1912, and she was married in 1922. The case was argued on the footing that the lands gifted to her were her *acquired property.* This is the correct position, in view of a number of decisions of this Court, the latest of which is *Lebbe v. Banda*[1]. In that case it was sought to impress on the property gifted the quality it had before the gift of being *paraveni* property. Drieberg J. said: " . . . . our Courts have in questions of inheritance always regarded *paraveni* property as meaning ancestral property which has descended by inheritance, property derived by any other source of title or by any other means being regarded as *acquired* property."

Mr. Perera, for the respondent, limited the question in this case to one point, namely, whether the husband, where the marriage was in *diga* and where the wife died issueless, had any rights in property acquired by his wife before coverture, and he relied on the judgment of this Court in *Seneviratne v. Halangoda* (*supra*).

The authority of *Sawers* has always stood high and there is repeated testimony to this fact in our law reports. I do not think, however, that it has been sufficiently realised that *Sawers' Memoranda* were not merely the work of a diligent scholar but were compiled under the express instructions of the Government.

Anybody examining the archives will find that, shortly after the British occupation, Sir Alexander Johnstone, Chief Justice, either undertook or was commissioned by the Council to collect the customary laws of the Island. Instructions were accordingly sent out to Government

[1] *31 N. L. R. 28.*

officials, and it was in this way that the compilation known as *Thesavalamai* was discovered and the *Mohammedan Code of 1806* compiled. Similar instructions had been sent out regarding the Kandyan Law, and as a result *D'Oyly* made some Notes, reference to which will be found in the "*Decisions of the Supreme Court*" collected by Perera. *Turnour*, the Government Agent of Sabaragamuwa, also collected some information which will be found in *Modder's* Copy of *Sawers' Digest* published in 1921.

In Hayley's *Singhalese Laws and Customs* will be found *Sawers'* official letter to the Chief Secretary, dated December 30, 1826. *Armour*, Secretary to the Judicial Commissioners' Court, attempted to carry on what *Sawers* began. *Sawers* was the Judicial Commissioner and took voluminous evidence before he compiled his Memoranda. His work bears evidence not only of his diligence and knowledge of the country but also of the methodical manner in which he approached his subject. His arrangement of subjects has not been recognised frequently.

At the argument, section 31 was relied on by Counsel for the appellant. In that section *Sawers* says that "the husband is heir to his wife's landed property, which will at his demise go to his heirs". This is an unqualified statement and I see no reason why it should be qualified. It clearly applies only to property acquired during a marriage in *diga*, for in section 3 *Sawers* had already stated that a daughter married in *diga* loses her rights in the landed property of her parents, and in subsequent sections he had dealt with the daughter married in *binna*. Since the *diga*-married daughter lost her rights to the *paraveni* lands, *Sawers'* statement must apply only to landed property which she had otherwise acquired. It is now too late to consider the question whether *Sawers* would not have said that ancestral property given by way of dowry or apportioned by a parent at a division of his property still retained the quality of *paraveni* land. Nowhere has either *Sawers* or *Armour* dealt with that specific question.

The statement in section 31 that the property will at the husband's demise go to his heirs need not necessarily mean that he had only an estate for life. *Sawers* was dealing with the question of *inheritance*, and there would be nothing to inherit if the husband dealt with the property. Probably he is here indicating what happens to the property at the husband's death, making it clear that the property goes to the husband's heirs and not to the heirs of the wife. There is, however, one instance in which the voice of the dead wife speaks and that is where the husband contracts a second marriage. We are not, however, concerned with the case where issue was left.

In section 31, *Sawers* makes no distinction between property acquired before coverture and property acquired during coverture. It was rather assumed during the argument that he had no such distinction before his mind at any time. I doubt if this is correct, for when he comes to deal with succession to Movable Property (in the next chapter) he clearly makes the distinction in section 7: movable property received by the wife from her parents reverts to her family when she dies without issue, "but the husband inherits all the property acquired during the coverture, *but that only.*" Seeing that *Sawers* makes that distinction so emphatically, it seems hardly likely that he would not have made a similar

distinction regarding immovable property, if such a distinction existed. In this section (7) he assumes that before marriage a woman would acquire property only from her parents. He uses the words "all the property", and unless one bears in mind that the chapter deals with *movables* one might be inclined to apply it to immovables also.

Section 31 of chapter 1 came up for consideration so far back as 1879 in the case of *Naide Appu v. Palingurala (supra)*. There the property in question was property acquired after the marriage, but there is nothing in the judgments of the Court to indicate that it was limiting its judgment to that class of property only. The passage in *Sawers* is referred to and *Armour* is invoked in a passage where he speaks of "goods". A decision in *Austin's Reports* was also considered. The Court did not note that *Sawers* was dealing separately with movable and immovable property. Dias J. arrived at the conclusion that on a careful review of all the authorities a *diga* husband was heir to the acquired property of his deceased wife. Cayley C.J. was doubtful as to what *Armour* meant by the word "goods" but in view of the fact that *Armour* had left untouched the question of the devolution of land was inclined to think that the word "goods" included property of all kinds.

Another possible explanation, of course, is that *Armour* did not sort out his notes as carefully as *Sawers* had done. But, in fact, *Armour* did deal with the devolution of land. In Sinhalese there would be no confusion between the words for *movable* and for *immovable* property. In the copy of *Armour's Grammar*, which is in the Judge's Library, *Armour* himself gives the words. It is also difficult to believe that a person having a knowledge of the English language, as *Armour* doubtless had, would use the word "goods" to describe immovable property.

In the case reported in *Austin's Reports* (p. 66) the District Judge has relied on the passage in *Sawers* at page 16 (i.e. *section 7 of chapter 2 of Modder's Edition*) and quite clearly had failed to realise that that passage applied to *movable property*. Cayley C.J. saw no reason why there should be a different principle governing the two types of acquired property.

In the edition I referred to, *Armour* quotes within inverted commas (at p. 26) *Sawers'* statement that "a wife dying intestate, leaving a husband and children, her peculiar property of all descriptions goes to her children and not to her husband". As I have already stated, this passage applied only to *movable* property. *Sawers'* use of the word "peculiar" is striking. Lower down on the same page *Armour* refers to landed property. Dealing with "goods" received from her parents as dowry, he states that this "will remain to her husband, and her brother will have no right to the said goods". The brother would have no right also to the goods acquired during her *diga* coverture even on the ground of a bequest from his sister. But if the deceased wife's mother survived, she would be entitled to all the property that belonged by right of inheritance and as dowry to the deceased daughter, the husband being limited to the property acquired during the coverture. Even, therefore, if we accept the authority of *Armour*, we must accept the interpretation either that "goods" included landed property or that it did not. If it did, he expressly states that the goods received from her parents will

remain to the husband to the exclusion of her brother. In this case, therefore, where no parent survives, the husband would be entitled to the property. If the expression "goods" did *not* include landed property, then the statement in *Sawers* remains uncontradicted.

In the case of the widow surviving, it has been held that she is entitled to a life interest in her husband's property. In *Kalu v. Lami*[1], decided in 1905, it was sought to limit her right to property acquired during coverture. This contention was repelled and has not been raised since. In *Tikiri Banda v. Appuhamy*[2], where the *diga*-married wife died leaving her husband and children, the husband claimed a life interest. A Bench of Three Judges held that he was entitled to what he claimed, this conclusion being arrived at on different grounds. In that case, the property had been acquired during coverture: Pereira J. mentions the fact. He referred to *Naide Appu v. Palingurala* (*supra*) and confined that ruling to the case of a wife dying without issue, quoting without disapproval *Modder's Art. 204* to the effect that a *diga*-married widower succeeds to all the acquired property of his wife dying intestate and without issue, in preference to her brothers and sisters. He followed a recent decision of *Saduwa v. Siri*[3], giving the husband a life-interest where there was issue. He drew no distinction between property acquired before and after coverture. Shaw J. thought that some operation should be given to the paragraph in *Sawers*, cited before them, and that the recent decision was equitable. De Sampayo A.J. did not think the reasoning in *Naide Appu v. Palingurala* (*supra*) was restricted to the case of a wife dying without issue nor that it was any authority for the proposition that the husband was not entitled even to a life-interest. He thought it possible that *Sawers* (at p. 8) meant to give the husband a life-interest where there were children of the marriage, for he had stated that on the death of the husband the property would go to his son by his deceased wife. *Naide Appu v. Palingurala* (*supra*) still retained its authority in the case of a wife dying without issue.

In 1922 came the case of *Seneviratne v. Halangoda*[4], in which Garvin A.J. wrote the judgment. The case had come up before this Court previously (vide *22 N. L. R. 472*). It appeared that the wife, notwithstanding her *diga* marriage, had maintained such a connection with her *mulgedera* as to have preserved or regained her *binna* rights. The Court held that, nevertheless, the husband did not cease to be a *diga*-married husband. De Sampayo A.J. said that if he were so it must be conceded that he would inherit from his wife, but in view of the ruling in *Tikiri Banda v. Appuhamy* (*supra*) it was thought desirable to send the case back for further proceedings. When the case came before this Court the second time, the question for determination was stated by Garvin A.J. to be whether the husband was the heir-at-law to his wife's landed property acquired before marriage when she died without issue, having been married in *diga*. That is the question now before us, and we would naturally wish to follow the decision in *Seneviratne v. Halangoda* (*supra*) if possible. But in that case the property had been given by way of dowry about six weeks before marriage and the fact that it was

[1] *11 N. L. R. 222.*
[2] *18 N. L. R. 105.*
[3] *Bal. 18.*
[4] *24 N. L. R. 257.*

dowry was the deciding factor evidently. On the first appeal, the case was sent back apparently to ascertain to what extent, if any, the husband's right was limited. If the Court thought he would have no right since the property had been acquired before marriage then it was unnecessary to send the case back. It emerges, therefore, that the distinction between property acquired before and after marriage was either not urged at all before the Court or, if it was, it was not recognised.

The reasoning of Garvin A.J. is not easy to follow in parts. In particular, he often appears to treat the wife's *paraveni* lands and her acquired lands on the same footing. He does not seem to have recognised any arrangement of subjects by *Sawers*. He quotes *Sawers* two paragraphs further on (section 33) and draws the conclusion that the wife's heir to her landed property is her son. But *Sawers* had just previously stated that the *husband* was the heir to her landed property, clearly meaning—as I have shown earlier—her *acquired property*. It is hardly likely that he would contradict himself so soon after. He was dealing with specific cases on which he had taken evidence, just as *Armour* was later. Having dealt with the rights of husband and wife to inherit from each other, he next turns to the question of inheritance by parents from children.

Sawers then goes on to deal with the case of a mother inheriting from her children (section 32). He first takes the case of the husband's *paraveni* property and says that the mother inherits such property from her children, stating what would happen if she dies intestate. Presumably, the mother inherits such property from her children if they died without issue. He had previously stated that inherited or *paraveni* property would go to a deceased person's children, and one cannot suppose that in the case of married sons and daughters who had children those children would be excluded by the brothers and sisters of a deceased son or daughter.

Having then dealt with the case of a surviving *mother*, he goes on to deal with the case of a surviving *father*, starting with the premise that the son had already inherited his mother's property and died without issue. Such property would be the mother's *paraveni* property, her "peculiar property"—to use *Sawers'* own words as regards movable property. In such a case, says *Sawers*, the father would have only a life-interest.

There is, therefore, no conflict between sections 31 and 33, and when in section 33 *Sawers* gives only a life-interest, using that very expression, he must be understood to mean, in section 31, that the husband had absolute title to his wife's landed property. The expression "heir to" clearly had a definite meaning for him, as is evident from section 32, where the mother is given absolute title to her children's property inherited from their father.

I do not think the next conclusion reached by Garvin A.J. from a passage in *Sawers* dealing with the case of a person dying childless leaving parents and brothers is sound. In that case no surviving wife or husband is mentioned. The rule merely lays down what would happen should a person leave neither a spouse nor children but only parents and brothers. Garvin A.J. then turns to *Armour, p. 26* (which would be in the copy I am using,) and quotes two instances given by *Armour*,

neither of which has any application to the case now before us. *Armour* takes for his premise that the married woman left no near relatives and in such a case gives the husband a right of reversion to her estate, adding that that would include even her *paraveni* or ancestral lands. Garvin A.J. thought there was no question that *Armour* was dealing with the landed estates of the married woman but in my humble opinion there does exist a very real question and it seems to me clear that *Armour* was dealing only with *movable property*.

According to *Modder*, in his introduction to his work on Kandyan Law, *Armour's* contributions were published in 1842 in a paper called the *Ceylon Miscellany*. It was, therefore, put into print, and it will be noted that there is a line drawn across the top of the page (26), indicating presumbly that *Armour* was now passing on to a different subject. He begins the new chapter (if I may so call it) with the quotation from *Sawers*, relating to *movable property*. That movable property, if it is her "peculiar property", goes first to her children, and it is only when there are no other near relatives of hers that it goes to her husband. It appears to have struck *Armour* at this point that the same rule applied to her *paraveni* lands.

Earlier—at page 18—*Armour* had dealt with the case of the *man* dying intestate and had said that his widow and children were his immediate heirs, adding within brackets "to the movable property". He then dealt in a separate section with the man's landed property. Passing now (at page 26) to the case of the *woman* dying intestate, he again starts with the movable property.

Turning next to a consideration of the case law, Garvin A. J. seems to have experienced needless difficulty regarding the case of *Dingirihamy v. Menika*[1]. Whether the marriage was in *binna* or *diga* the husband would not have any rights in the *paraveni* lands of his deceased wife. I do not propose to examine his remarks with regard to other cases.

The conclusion reached by Garvin A.J. was that the landed property in the case he was dealing with was in the nature of dowry, that it was not property acquired during coverture and did not fall within the class of property which, according to *Armour*, a husband takes. He has taken *Armour's* statement at page 26 that the surviving mother was entitled to such property as her daughter has obtained *as dowry*. In *Seneviratne v. Halangoda* (*supra*), it was the mother who contested the husband's claim. Interpreting as he did the passage in *Armour* to refer to landed property he had authority for the conclusion he arrived at.

But the facts of the present case are different. There is no surviving mother and the property is not in the nature of dowry. Without disturbing, therefore, the authority of *Seneviratne v. Halangoda* one is free to arrive at an independent conclusion in this case. I see no reason for drawing any distinction between property acquired before and property acquired after coverture. No such distinction is allowed with regard to a wife and I cannot see why it should be allowed with regard to a husband.

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

As regards landed property, the only distinction known to Kandyan Law was between *paraveni* and *acquired* property. Decisions of this Court have grouped under the head of *acquired property* even ancestral property which came by way of gift. As regards movable property the Kandyan Law recognised a distinction between property acquired before and after coverture but even then the husband inherited where there was no issue. I see no reason why a different principle should apply to landed property and find no difficulty in holding that where there is no issue the surviving husband is entitled to his wife's acquired property.

The judgment of the lower Court is set aside, and the case will go back for the District Judge to proceed on the conclusion just stated. The appellant is entitled to his costs in both Courts.

MOSELEY S.P.J.—I agree.

Appeal allowed.