1948 *Present :* **Jayetileke S.P.J. and Canekeratne J.**

EMI NONA *et al.*, Appellants, *and* SUMANAPALA *et al.*, Respondents.

S. C. 4—D. C. (Inty.) Avissawella, 272.

Kandyan Law—Marriage—Woman conducted to husband's house—Diga—Reacquisition of binna rights—Nature of evidence required.

Where a Kandyan woman after marriage is conducted to her husband's house and lives there, the marriage is one in *diga*. Evidence that thereafter she visited her parents from time to time and stayed for some time with them, that she went to her parents' house for her confinement and attended on her father during his last illness is insufficient to establish a re-acquisition of *binna* rights.

APPEAL from a judgment of the District Judge, Avissawella.

H. V. Perera, K.C., with *E. B. Wikramanayake*, for the 1st and 5th respondents, appellants.

N. E. Weerasooria, K.C., with *U. A. Jayasundere* and *S. E. J. Fernando*, for the 2nd and 4th petitioners, respondents.

Cur. adv. vult.

June 2, 1948. JAYETILEKE S.P.J.—

Two questions arise for decision in this case. (1) Whether the 2nd and 3rd respondents were married in *diga*. (2) If so, whether they re-acquired *binna* rights.

Both respondents were married under the Marriage Registration Ordinance (Cap. 95) and the certificates of marriage are of no assistance as to whether they intended to marry in *diga* or in *binna*.

Armour in his well-known book on Kandyan Law says at p. 5 :

" The word *diga* from *di*, root *da*, to give, is, according to some scholars, a derivative from dirga, long, the bride being sent away to a distance, that is to her husband's house. The conducting of a wife to, and the living in the husband's house or in any family residence of his, or if he does not own a house and lands, the taking her as his wife and the conducting away from her family to a place of lodging constitutes a *diga* marriage. The predominant idea is the departure or removal from the family or ancestral home. This is of the same nature as marriages among Europeans and is the more common of the two marriages. A plurality of daughters in a family necessitates this mode of marriage with regard to the majority of them, the common property being too limited in extent to be enjoyed by a numerous family. The marriage of the daughters and their departure from the ancestral residence generally operate a forfeiture of the inheritance and thereby reduce the number of the shareholders."

In *Kalu v. Kiri Howwa*[1] Lawrie J. said :—

" The law as to rights of daughters married in *binna* or in *diga* has not been changed, and the old disability still attaches to the act of

[1] *(1892) 2 C. L. Rep. at p. 55.*

being conducted from a father's house by a man and in going with him to live as his wife in his house ".

In *Menikhamy v. Appuhamy* [1] de Sampayo J. said :—

" It is ' the going out in diga ' that works the forfeiture ; that is to say the woman should be conducted by or go out to live with a man as his wife . . . . But the forfeiture under the Kadyan law was not based upon any circumstance of disgrace to the family, but rather upon the primitive idea of severance of family ties involved in a woman going out, and becoming as it were, a member of the husband's family ".

In *Punchi Menika v. Appuhamy* [2] Wood Renton J. said :—

" 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 mulgedera, 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 mush of the marriage, as of the quitting by the daughter of the parental roof to enter another family ".

and de Sampayo J. said :—

" 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 her husband and the consequent forfeiture of any share in the family property ".

The evidence in this case shows that both respondents were conducted to the houses of their husbands soon after they were married and they lived there. The first question must, therefore, be answered in the affirmative.

The circumstances under which a *diga* married daughter can regain *binna* rights are not clearly stated in the text books on Kandyan law.

Modder [3] says that a *diga* married daughter will regain *binna* rights—

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

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

(*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 this deathbed expressing his will that she should have a share of his lands.

In *Fernando v. Bandi Silva* [4] Wood Renton C. J. said that the instances given in the text books of the cases in which *binna* rights can be regained are illustrations of a principle and not categories exhaustive in themselves. The underlying principle is thus stated by Wood Renton J. in *Punchi Menika v. Appuhamy* (*supra*).

" A daughter married in diga forfeits her interest in her paternal inheritance not by virtue of that marriage but because it involves a

[1] *C. R. Ratnapura 12653, S. C. Minutes of June 10, 1913.*
[2] *(1917) 19 N. L. R. 353.*
[3] *Modder (Kandyan Law 2nd Ed. pp. 460–465).*
[4] *(1917) 4 C. W. R. 9.*

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 ".

The evidence shows that the 2nd respondent visited her parents from time to time and stayed for some time with them, that she went to her parents' house for her confinements and that she attended on her father during his last illness. The 3rd respondent married about two months before the father's death. She did not give evidence as to what she did to regain the rights she had lost by her marriage. She relied entirely on the evidence of the 2nd respondent. That evidence shows that she stayed in her husband's house and occasionally visited her parents. It seems to me that the evidence is quite inadequate to re-establish the connection that was severed by the *diga* marriages of the 2nd and 3rd respondents. In the lower court the 2nd and 3rd respondents raised an issue of estoppel which Mr. Weerasooria, very properly, did not press before us. For the reasons given by me I would set aside the judgment of the District Judge and dismiss the application of the 2nd and 3rd respondents. I think that in view of the fact that the appellants had all along treated the 2nd and 3rd respondents as co-heirs, the parties should bear their own costs in both courts.

CANEKERATNE J. —I agree.

Appeal allowed.