1957 *Present :* Sansoni, J., and L. W. de Silva, A.J.

H. P. JAMES, Appellant, *and* R. MEDDUMA KUMARIHAMY, Respondent

S. C. 381–382—D. C. Kegalle, 8,773/L

Kandyan Law—Diga marriage—Is marriage certificate sufficient proof?—Burden of proof—Forfeiture of paternal inheritance—Evidence Ordinance (Cap. 11), s. 114—Amended Kandyan Marriage Ordinance, No. 3 of 1870.

In cases governed by the Amended Kandyan Marriage Ordinance of 1870 the production of a diga marriage certificate is of itself sufficient to prove not only that the wife was married in diga but also that she forfeited her paternal inheritance ; the burden thereafter shifts to her, or to those claiming through her, to prove that the subsequent conduct of the parties was such that no forfeiture in fact took place.

Co-owners—Prescriptive possession as between them.

A person who buys a share of a land and enters into possession of that share as a co-owner, and thereafter purports to buy shares totalling to unity, cannot, by forming a secret intention as to the character of his possession, acquire prescriptive title to the entire land by possessing the whole land.

Costs—Courts Ordinance (Cap. 6), s. 72—Civil Procedure Code, s. 211.

The plaintiff brought this action in the District Court claiming a declaration of title to 4/5 share of a land. He was in fact entitled to 1/25 share only, which could have been recovered in the Court of Requests. The defendant, however, denied that the plaintiff had any share at all in the land.

Held, that in the circumstances the provisions of section 72 of the Courts Ordinance, read with section 211 of the Civil Procedure Code, did not disentitle the Court from awarding costs to the plaintiff in the lowest class in the District Court scale.

APPEAL from a judgment of the District Court, Kegalle.

Sir Lalita Rajapakse, Q.C., with *J. N. Fernandopulle*, for the plaintiff-appellant in No. 381 and the plaintiff-respondent in No. 382.

H. W. Jayewardene, Q.C., with *C. R. Gunaratne* and *B. S. C. Ratwatte*, for the defendant-respondent in No. 381 and the defendant-appellant in No. 382.

Cur. adv. vult.

July 4, 1957. SANSONI, J.—

The land in dispute in this action formerly belonged to Appuhamy Korala who by deed P1 of 1857 conveyed it to his only daughter Dingiri Menike, her two binna husbands Loku Banda and Medduma Banda, and their two sons Dingiri Banda and Punchi Banda. Loku Banda, Medduma Banda and Dingiri Menike died leaving 5 children, namely, Dingiri Banda and Punchi Banda already mentioned and 3 daughters, Bandara Menike, Dingiri Amma and Tikiri Kumarihamy.

The plaintiff brought this action claiming a declaration of title to 4/5 share of the land on the footing that Dingiri Amma inherited the shares of all her brothers and sisters except Punchi Banda, and that on Dingiri Amma's death her surviving daughter Ran Menike by deed P2 of 1950 sold that 4/5 share to the plaintiff. The plaintiff complained that the defendant was in wrongful possession of her share. In her answer the defendant pleaded that Dingiri Amma had gone out in diga and forfeited her right to inherit any share of this land. The defendant further pleaded that on a series of deeds two outsiders, Walgama Tikiri Banda and Rupasinghe Tikiri Banda, became entitled to the shares of Dingiri Amma's brothers and sisters. These deeds are Fiscal's conveyance D1 of 1888 purporting to transfer the right, title and interest of Dingiri Banda and Punchi Banda in 4/5 share of the land to Walgama Tikiri Banda, deed D4 of 1889 executed by Bandara Menike in favour of Walgama Tikiri Banda for a 1/6 share which she claimed by paternal inheritance, and deed D3 of 1888 executed by Tikiri Kumarihamy in favour of both Walgama and Rupasinghe Tikiri Banda for a 1/5 share which she claimed by paternal and maternal inheritance. The share of Dingiri Amma was not purchased by either of them at any time, and as I have already pointed out it is her share that the plaintiff claims.

It is not necessary to give details of the subsequent deeds executed by the co-owners Walgama and Rupasinghe Tikiri Banda, but in 1910 the defendant purported to buy an undivided 1/2 share from Rupasinghe Tikiri Banda on deed D6, and in 1918 the defendant's husband (through whom the defendant claims) purported to buy 41/120 share of the land from two of the successors in the title of Walgama Tikiri Banda. It is admitted in the answer and in the evidence led for the defendant that there is a share outstanding in certain other successors in title of Walgama Tikiri Banda, and that those co-owners take their share of the produce of the land. The position therefore is that the defendant does not claim to be the sole owner of the land either by prescription or on paper. The defendant does, however, contest the plaintiff's right to any share of the land on two grounds :—(1) on the ground that Dingiri Amma by her diga marriage forfeited her right to inherit any share of the land, and (2) on the ground that the defendant has acquired a prescriptive title to the share which the plaintiff claims.

After trial the learned District Judge held that although the marriage certificate of Dingiri Amma proved that she was married in diga to one Punchi Banda in 1872, she did not forfeit her paternal inheritance because there was no evidence that she left the mulgedera. He also held that the defendant's possession of the land was that of a co-owner who had not prescribed against the plaintiff. In the result he held that the plaintiff was entitled to an undivided 3/25 share of the land and damages at Rs. 30 a year. He ordered the plaintiff to pay the defendant the costs of the action, on the ground that the plaintiff had succeeded in proving title only to a small fraction of the share claimed by him. The plaintiff has appealed only on the question of costs, but the defendant has filed an appeal contesting the plaintiff's right to any share of the land.

With regard to the question of forfeiture, it was urged for the defendant that the production of the marriage certificate of Dingiri Amma (D 2) containing the entry that the marriage was in diga was sufficient proof that Dingiri Amma forfeited her right to the paternal inheritance. Reliance was placed on *Mampitiya v. Wegodapola* [1] where it was held that "as between or as against the parties, or their representatives in interest, the register of the marriage is conclusive of the intention with which the marriage was celebrated, unless the case is shown to be one of mistake or fraud, or can otherwise be brought within the equitable exceptions of section 92 of the Evidence Ordinance". This case was followed in *Seneviratne v. Halangoda* [2] and in *Chelliah v. Kuttapitiya Tea and Rubber Co.* [3].

Now in this case neither party is seeking to contradict the register; but while the defendant-respondent insists that the entry in the register is sufficient to bring about the forfeiture, the plaintiff-appellant insists that there should be other evidence, oral or documentary, to prove that Dingiri Amma left the mulgedera and settled in her husband's home. In considering this question in the light of the decided cases, I think it is very important to bear in mind the facts of those cases. One is otherwise apt to pick out dicta from the judgments and give them an interpretation which can be quite inaccurate and even misleading, when they are isolated from the facts with which the judges were dealing.

With regard to *Mampitiya v. Wegodapola* [1] it is essential to remember that although the husband and wife there were married in diga, evidence was led of their subsequent conduct which proved that the bride was never conducted to her husband's home. The crucial issue that arose out of that state of things was whether the registration of the marriage in diga automatically and instantly worked a forfeiture, which no amount of evidence of subsequent conduct could affect. It was contended that even where a diga marriage wife remains in the mulgedera she nevertheless forfeits her right to inherit from her father, but this contention was rejected by Bertram C. J. It is true that throughout his judgment the learned Chief Justice stresses the part played in the matter of forfeiture by the departure of the bride from the mulgedera, but we must remember that he was doing so in a case where evidence had been led to prove that the bride had not left the mulgedera. On page 132 he says—"I think, therefore, that we must take it to be the law that what works the forfeiture is not the ceremony but the severance. No doubt by contracting a marriage in diga in which the bride's family participated, the parties bound themselves to each other and the family that the bride should be conducted in accordance with custom, and should settle in the home of her husband. *But if this, for whatever reason, was not done and if* with the acquiescence of her family, the bride remained in the mulgedera, then the forfeiture was never consummated". In the same case Ennis J. said: "Now it has been held by de Sampayo J. in the case of *Menikhamy v. Appuhamy* that the forfeiture of the bride's rights in the paternal estate turns on the question of fact, whether the bride left the parental home in accordance with the contract. *In*

[1] *(1922) 24 N. L. R. 129.* [2] *(1921) 22 N. L. R. 472.*

[3] *(1932) 34 N. L. R. 89.*

the absence of evidence there would be a presumption that the terms of the contract relating to residence had been carried out, but I can see no good reason for excluding oral testimony relating to the carrying out of this term of contract, which was not a matter of fact occurring at the time of the contract ". After saying that, on the question of fact, he saw no reason to interfere with the finding that the wife had not severed her connection with the mulgedera, the learned Judge went on to say: " In the circumstances it would seem that there was a valid contract of marriage in diga, but the term of the contract relating to residence was not carried out. *From the facts as found* a tacit consent by the plaintiff (the bride's brother) to the residence of the defendants (the bride and the bride-groom) in the mulgedera must be inferred. In the circumstances the bride retained her rights of inheritance in her father's estate".

Two months later the case of *Seneviratne v. Halangoda* [1] was decided. There too oral evidence was led as to the conduct of the parties after a diga marriage had been registered, and in the course of his judgment de Sampayo J. expressed the view that *such evidence* may lead to the result that notwithstanding her diga marriage, the bride had preserved or regained her binna rights. The learned Judge then said: " The only consequence of a diga married daughter preserving or subsequently acquiring binna rights is that the forfeiture of the rights of paternal inheritance does not take place, but she inherits as though she was married in binna ". I consider this case to be further authority for the view that, on production of the certificate of registration of marriage in diga, the court must in law draw the inference that the bride left the mulgedera and forfeited her paternal inheritance in accordance with the contract, unless the contrary is proved by the party who denies that the forfeiture took place. This may be proved by facts which the court would recognize as sufficient to rebut the inference. The certificate raises what Lord Denning has termed a " compelling presumption " which would give rise to a separate issue on which the legal burden is on the other party to prove that there was no forfeiture. See the article " Presumptions and Burdens " in The Law Quarterly Review, vol. 61 page 379.

I would finally refer to the judgment of Garvin S. P. J. in *Chelliah v. Kuttapitiya Tea and Rubber Co.* [2]. In that case the diga marriage certificate was produced, but the evidence of the husband proved that he and his wife continued to live after marriage in the wife's father's house. A daughter was born, and in his judgment Garvin S.P.J. makes it clear that the daughter was bound by the marriage register and could only claim to inherit from her maternal grandfather " upon proof that though the marriage contracted by her parents was a marriage in diga, her mother did not in fact leave the roof of her parents, that there was no severance from the family and consequently no forfeiture of rights, or upon proof that if a forfeiture ever took place her mother reacquired the rights of a binna married daughter ". The learned Judge upon a consideration of the evidence on these matters came to the conclusion that the wife was fully vested with rights of inheritance and did in fact inherit her father's property, which at her death passed to her daughter.

[1] *(1921) 22 N. L. R. 472.* [2] *(1932) 34 N. L. R. 89.*

I therefore have no hesitation in holding, on the strength of these authorities, that in cases governed by the Amended Kandyan Marriage Ordinance of 1870 the production of a diga marriage certificate is of itself sufficient to prove not only that the wife was married in diga but also that she forfeited her paternal inheritance ; the burden thereafter shifts to her, or to those claiming through her, to prove that the subsequent conduct of the parties was such that no forfeiture in fact took place. In the result I hold that Dingiri Amma forfeited her right to inherit from her father Appuhamy Korala. It is conceded, however, that she was entitled in any event to inherit from her mother Dingiri Menike ; therefore Dingiri Amma on her death was entitled to 1/25 share of this land and this share has passed to the plaintiff.

On the question of prescription, Dingiri Amma and her successors in title were always co-owners, as the learned trial Judge has pointed out. He has held also that the major portion of the land was lying fallow till 1943 when it was aswedduмised at the instance of the defendant. But it was contended for the defendant that as she and her husband had bought shares in this land at different times, and those shares when added up cover the entire land, prescription would run in favour of the defendant and her husband from 1918, which is the year in which the last deed was obtained. I reject this submission as being without substance. The defendant and her husband entered as co-owners and they could not by forming a secret intention as to the character of their possession acquire prescriptive title to the entire land even if they did possess the whole land. It is obvious that the principle that a stranger who had purported to purchase the entire land from a co-owner, and entered into possession of that land in the belief that he was sole owner, can prescribe to it, does not apply here. It must also be remembered that the defendant admits in her answer, and her chief witness admitted in his evidence, that a 1/10 share has always been regarded as outstanding in another co-owner of this land who appropriates his share of the produce. The plea of prescription put forward by the defendant fails.

I would therefore set aside the decree appealed against and direct that a decree be entered declaring the plaintiff entitled to an undivided 1/25 share of the land in dispute and possession thereof, and damages at Rs. 10 a year from the date of action. In regard to costs, the plaintiff has partially succeeded although he has been found to have unduly exaggerated his claim. But the defendant denied that the plaintiff had any share at all in the land, and she has failed in this contention. In appeal too the defendant's counsel argued that the plaintiff had no share in the land ; to support that position, he pressed the issue of prescription on behalf of his client. I consider that the learned Judge was wrong in ordering the plaintiff to pay the defendant the costs of this action in spite of the plaintiff having partially succeeded. In all the circumstances, I would award the plaintiff his costs in both courts in the lowest class in the District Court scale.

L. W. de SILVA, A.J.—

I agree with my brother and refer to two points raised during the argument. The marriage certificate of Dingiri Amma in the year 1872 proves

that hers was a diga marriage. No evidence was led at the trial that she had severed her connection with the mulgedera. The nature of the marriage and the intention of the parties are common cause. The plaintiff's counsel contended that it was obligatory on the defendant to prove further that Dingiri Amma after her diga marriage had left the mulgedera and thus forfeited her right to the paternal property. The argument was that the right to a paternal inheritance under the Kandyan Law cannot in the circumstances be taken away by a mere entry in the marriage register.

So far as I am able to gather from the reported cases, the problem does not seem to have arisen in this way. Those cases proceeded on the footing that a daughter married in diga forfeits her interest in her paternal inheritance, not by virtue of the marriage, but because it involves a severance of her connection with her father's house, vide *Punchi Menike v. Appuhamy et al.* [1]. The question here is whether it is sufficient for the defendant to prove only the intention. I am of the opinion that it is sufficient, for this is a case to which Section 114 of the Evidence Ordinance (Cap. 11) applies :

> " The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case. "

In the absence of evidence to the contrary, we are entitled to presume that, according to the terms of the marriage contract, the common course of natural events followed consistent with the ordinary habits of Kandyan society, resulting in a severance of the diga married woman from her father's house. This involved a forfeiture of her right to the paternal inheritance. I should add that, by the Ordinance No. 3 of 1846, the Law of Evidence in Ceylon was the English Law when the Amended Kandyan Marriage Ordinance No. 3 of 1870 was enacted. The provisions of section 114 of the Evidence Ordinance, which is a later enactment, conform to the English Law in force at the material point of time.

The learned District Judge has ordered the plaintiff to pay the costs of the action " as he has succeeded only to a small fraction of the interests claimed by him. " Learned counsel for the defendant relied on section 72 of the Courts Ordinance (Cap. 6) and argued that the plaintiff was not entitled to costs as a matter of right and the order was therefore justified. This is not a good ground for depriving the plaintiff of costs since the section is as follows :—

> " If any action or suit shall be commenced in any District Court for any debt or demand which might have been recovered in some Court of Requests, the plaintiff or plaintiffs in any such action or suit shall not by reason of any judgment for him or them, or otherwise, have or be entitled to any costs whatever, but it shall be competent for the Judge to make such order as to costs as justice may require. "

[1] *(1917) 19 N. L. R. 353 at 355.*

In my opinion the justice of the case required that the plaintiff, who was the successful party though only partially, should have been awarded some costs. It is true that the interests to which the plaintiff is entitled could have been recovered in the Court of Requests. The merits in controversy involved a claim to the entire land by the defendant who sought to absorb it for herself on a plea of prescription which failed. It is apparent that she put the plaintiff to unnecessary expense and compelled him into litigation. Section 72 of the Courts Ordinance as well as section 211 of the Civil Procedure Code confers on the Court a discretionary power with regard to the award of costs, but the exercise of the discretion has to be made upon reasonable and just grounds.

Appeal No. 381 partly allowed.