1921.

Present: De Sampayo J. and Schneider A.J.

SENEVIRATNA *v.* HALANGODA *et al.*

390—D. C. Kandy, 27,718.

Diga *married daughter acquiring status of* binna *married daughter—Rights of inheritance by husband—"Best evidence" of marriage—Ordinance No. 19 of 1907, s. 39—Ordinance No. 3 of 1870, s. 39.*

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*. It does not alter the character of the marriage itself. The *diga* marriage remains a *diga* marriage so far as other results of such a marriage are concerned. The husband does not cease to be a *diga* married husband and begin to be a *binna* married husband.

A *diga* married husband is entitled to inherit from his wife, even though she may have acquired subsequent to marriage, the status of a *binna* married daughter.

The expression "best evidence" of marriage in section 39 of the Kandyan Marriage Ordinance, No. 3 of 1870, and in section 39 of the General Marriage Registration Ordinance, No. 19 of 1907, explained.

THE facts appear from the judgment.

Samarawickreme (with him *J. S. Jayawardene*), for plaintiff, appellant.

E. W. Jayawardene (with him *Ameresekera*), for defendant, respondents.

August 24, 1921. DE SAMPAYO J.—

This case raises what appears to be a new point in the Kandyan law, and though there is no express authority one way or the other, I think there is very little doubt as to how the question should be

answered. The subject of the action is a small piece of chena land called Ganawelahena, which originally belonged to Unambuwe Tikiri Kumarihamy, who, by deed dated August 5, 1899, gifted it, together with a number of other lands, to Wilmot Illangkoon and Lilavati Panabokke in contemplation of their marriage. The donees married each other on September 21, 1899. The marriage was duly registered, and was in the register described as a *diga* marriage. Lilavati Panabokke died on July 18, 1900, leaving no children. The gift was both to Wilmot Illangkoon and Lilavati Panabokke in equal shares, and was subject to the condition that they should not alienate the property, but should only possess it during their lives, and that on their death the same should devolve upon their children, if any, and, in default of children, upon "their respective heirs according to their legal rights." Wilmot Illangkoon sold to some third party the half share derived by him under the deed of gift, and no question arises in this case as regards that half share. But by deed dated July 15, 1919, Wilmot Illangkoon purported to sell to the plaintiff Lilavati Panabokke's half share, on the footing that he was the legal heir of his deceased wife, and was entitled to that half share in terms of the deed of gift. This is the title which the plaintiff seeks to vindicate in this action. The defendants contend that the marriage, though registered as a *diga* marriage, was, in fact, *binna* marriage; that, as *binna* married husband, Wilmot Illangkoon had no right of inheritance; and that Lilavati Panabokke's heir was her mother, under whose will the first defendant claims title to the land as against the plaintiff. The District Judge accordingly formulated two issues at the trial, namely: (1) Was Lilavati married in *diga;* and (2), if so, who were her heirs in respect of the disputed property?

The question whether the character of a Kandyan marriage can be proved by oral evidence to be other than that stated in the register was recently considered by the Chief Justice and Ennis J. in *Mampitiya v. Wegodapola*[1] (D. C. Kandy, 27,829). The learned Judges have held that, in section 39 of the Kandyan Marriage Ordinance, No. 3 of 1870, which declares that the entry in the register shall be "the best evidence" of the marriage and of the other facts stated therein, and that if it does not appear in the register whether the marriage was in *binna* or *diga*, such marriage shall be presumed to have been contracted in *diga* until the contrary is proved, the expression "best evidence" is used in the English law sense, and excludes all evidence of an inferior character. I certainly accept this ruling with regard to the Kandyan Marriage Ordinance, because under section 11 of the Ordinance registration is the only valid form of marriage for Kandyans, and, further, because section 39 itself indicates the exceptional case in which oral evidence may be admitted. But I do not think that this

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interpretation can be extended to other enactments, such as the General Marriage Registration Ordinance, No. 19 of 1907, in section 39 (1) of which the same expression "best evidence" occurs. In the above case, however, the Chief Justice considered the effect of previous decisions as regards proof of a *diga* or *binna* marriage, and stated the result in his view to be as follows: "As between or as against the parties or their respective 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. Persons not parties, however, are not bound by the register, but are entitled to show that the true character of the marriage was not in fact such as it is represented to be."

Even this modified rule appears to me to be applicable to the present case, because the question is practically one which is between the representatives in interest of the parties.

Assuming, however, that oral evidence is admissible in the circumstances of this case, I think that the actual evidence falls far short of what should be expected if the entry in the register is to be contradicted. The only witnesses are Wilmot Illangkoon himself, on behalf of the plaintiff, and T. B. Panabokke, a brother of Lilavati Panabokke, on behalf of the defendants. Before I refer to that evidence, it may be convenient to mention the facts relating to the families concerned. Wilmot Illangkoon is the son of Illangkoon Ratemahatmaya, and was left an orphan when he was four years of age. He was brought up by and resided with his maternal uncle George Dunuville at Unambuwe, which may be said to have been his Mulgedara, and he was still there when he married. His wife lived up to the time of the marriage with her father, the late Mr. T. B. Panabokke, Member of the Legislative Council, at the Mulgedara at Elpitiya. The donor, Tikiri Kumarihamy, was the childless aunt of both Wilmot Illangkoon and Lilavati Panabokke, and it was she who arranged the marriage between them and gifted the above property as a marriage settlement. She lived at Kirinde Walawwa. The evidence of Wilmot Illangkoon as regards the movements of himself and his wife after the marriage is contradictory. In his examination-in-chief he said definitely: "I conducted my wife to George Dunuville's, where we remained over a month. Then we went to Kirinde Walawwa, where I remained till the time came for Lilavati's confinement. For that she went to her mother's at Elpitiya . . . . She died at confinement on July 18, 1900, ten months after marriage." This evidence shows that Lilavati Panabokke was, immediately after the marriage, conducted to her husband's Mulgedara, and quite supports the marriage register when it stated the character of the marriage to be *diga*. In cross-examination, however, he said: "The last five

months she spent at Elpitiya—no, the last four months—also the first month after our marriage." Again: "We were at Kirinde about four months and a month at Dunuville's. After our marriage we were a month at Elpitiya."

This is not, in any case, very satisfactory evidence. The witness for the defence, T. B. Panabokke, was a school boy at the time of his sister's marriage, but his evidence, to which the learned District Judge appears to attach some importance, is to the effect that Wilmot Illangkoon was the elder Panabokke's clerk and secretary, and was all the time at Elpitiya with his wife, certainly since December, 1899. This last date corresponds more or less with the time when she came to her mother's at Elpitiya for her confinement.

The District Judge's finding was that "Lilavati had maintained such a connection with her Mulgedara subsequent to her marriage as to have acquired the status of a *binna* married daughter." This, in other words, means that Lilavati, notwithstanding her *diga* marriage, had preserved or regained her *binna* rights. The question of law arising in the case is whether, on the footing of the District Judge's finding, her husband Wilmot Illangkoon was her heir? 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*. It does not alter the character of the marriage itself. The *diga* marriage remains a *diga* marriage so far as other results of such a marriage are concerned. The husband does not cease to be a *diga* married husband and begin to be a *binna* married husband. To apply this to the present case, Wilmot Illangkoon was and always continued to be the *diga* married husband of Lilavati Panabokke, and as it must be conceded that, if he were so, he would inherit from her, the plaintiff's claim, so far as the point under discussion is concerned, is entitled to succeed. Mr. E. W. Jayawardene has, however, drawn our attention to *Tikiri Banda v. Appuhamy*[1] and the authorities therein cited, from which it appears that a *diga* married husband inherits only to a limited extent, especially when there are children, and a distinction also arises when the property is *paraveni* and not acquired property. These matters appear to me to require consideration by the District Judge, as possibly further facts may be necessary for their elucidation.

In my opinion the judgment under appeal should be set aside, and the case sent back for furtner proceedings. The plaintiff is entitled to the costs of appeal. The costs in the Court below should abide the final result.

SCHNEIDER A.J.—I agree.

Sent back.

[1] *(1914) 18 N. L. R. 105.*