Re Estate of PUNCHIRALA, Deceased.

D. C., Kandy, 1,839 (Testamentary).

DINGIRI MENIKA *et al.*, Petitioners,

v.

APPUHAMY, Respondent.

1900. *November 15.* *and* 1901. *January 15.*

Kandyan Law—Succession to acquired property of intestate—Uterine half-brother of intestate—Right of uterine half-sisters, married in diga, *to succeed jointly with their half-brother.*

Per curiam (with some hesitation), where a Kandyan died intestate and without issue the lands acquired by him devolve on his uterine half-brother, to the exclusion of his uterine half-sisters who had married in *diga*.

THE petitioners alleged in their petition that the respondent, as administrator of the estate of the deceased Punchirala, filed a final account on the footing that he was the sole heir of the intestate, ignoring the rights of the first and second petitioners as the uterine sisters of the intestate, and the third and fourth petitioners as the children of another of his uterine sisters. They prayed that the respondent be compelled to make a judicial settlement upon the footing that the petitioners are entitled to three-fourth shares, and the respondent to the remaining one-fourth share.

The District Judge (Mr. J. H. de Saram) dismissed their petition by the following judgment:—

"The first and second petitioners are the *diga* married sisters of the respondent, the administrator. The third and fourth petitioners are the nephews of the respondent. Their mother was also married in *diga*. The respondent is the uterine half-brother of the intestate.

"The question is whether he is the sole heir of the intestate, or whether the petitioners succeed to the estate jointly with him. I understand that the bulk of the property was the intestate's acquired property. The point involved in the case is whether the rule of forfeiture consequent on a *diga* marriage is recognized as between uterine half-brothers and sisters of a person dying intestate. That rule is recognized as between a full-brother and sister. Armour lays it down thus on page 43:—

"'If a man died without issue and intestate, leaving a sister married out in *diga* and a brother, the latter will succeed to the

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deceased's share of the paternal *paraveni* lands, to the exclusion of the *diga* married sister, whether the said sister had been so married away previous to the demise of their father or subsequently.'

"It appears to me that there can be no difference between the full-brothers and sisters of an intestate and his half-brothers and sisters *inter se*. The case cited for the petitioners (D. C., Kandy, 4,054, *Austin*, *19*) is distinguishable from the present, because there the competitors for the inheritance stood to each other in the relation of the half-blood only, while here they are all of the full-blood among themselves, though of the half-blood in relation to the intestate. The Supreme Court there pointed out that, if the plaintiff had a brother or sister married in *binna* of the full blood, they would have taken the inheritance to the exclusion of the plaintiff. It is true the question there was the inheritance of the common parent, while here it is of the half-brother, but I do not think this makes any difference in principle. The property, whether ancestral or acquired, stands on the same footing in respect of forfeiture.

"I am of opinion that the petitioners have no right to inherit any share of the intestate's property. I dismiss their petition with costs."

The petitioners appealed. The case was argued on 1st May, 1900.

Van Langenberg appeared for appellant.

Bawa, for respondent.

23rd May, 1900. Lawrie, J., and Moncreiff, J., directed the District Judge to ascertain whether one Kiri Menika, who appeared in the testamentary proceedings, alleging herself to be the widow of Punchirala, claimed any part of his estate, and for this purpose the record was remitted to the Court below, with the following observations of Lawrie, J.:—

"This appeal raises interesting and difficult points in Kandyan Law, on which I should have liked to have heard more argument, and to have had more time to consider it than is possible now, on the eve of going home for a few months.

"I am not sure of the authority of the passage quoted by the learned District Judge from page 43 of *Armour*. I have not been able to find that passage either in the oirginal *Armour* or in the *Niti Niganduwa*, part of which Armour translated. It does not seem to be consistent with other statements of Kandyan Law. Indeed, Mr. Bawa, in supporting the judgment, relied mainly on a passage at page 13 of Sawer's *Digest*. That and a passage in *Armour* seem to show that, in the distribution of the acquired

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property of an unmarried childless man, traces of a preference of males over females are unknown to other parts of the Kandyan Law.

"An issue was framed whether Kiri Menika and the intestate were married, but that issue was never tried. Her claim must be disposed of before the competition betwen the appellant and respondent can be decided. The case is remitted."

The District Judge examined Kiri Menika, who deposed that she was not legally married to Punchirala and did not claim any share of the estate as his widow.

The District Judge found accordingly.

In returning the case to the Supreme Court he explained:—

"The passage quoted by me from page 43 of Perera's *Armour* appears on page 57 of Armour's translation of the *Niti Nigan-duwa*. There is another passage in page 59 of the same translation which supports the respondent's position: 'A man having died without issue and intestate, the landed property which he had acquired or obtained by gift will devolve to his brother's son, to the exclusion of his sister's son.'"

The appeal came on for re-hearing on the 15th November, 1900.

Van Langenberg, for appellant.

Bawa, for respondent.

Cur. adv. vult.

15th January, 1901. LAWRIE, J.—

The learned District Judge has excluded from a share in the inheritance of Punchirala his half-sisters married in *diga*.

In his first judgment he held that a woman by her *diga* marriage forfeited the right of succession to all property which her brother had acquired.

I am by no means sure that the law is so, and I doubt whether the forfeiture created by a *diga* marriage extends further than to the father's estate, and even with regard to his estate the tendency ever was to relax the law and to admit the *diga* married daughter.

I am not aware of any decision of our Court which excluded *diga* married women from inheriting from other relations than the fathers.

Mr. Justice Withers and I held in D. C., Kandy, 8,185, that a *diga* married woman inherited her mother's property equally with her brother and her sisters married in *binna*. (*2 N. L. R. 92*).

At the first argument in appeal I understood Mr. Bawa to support the judgment excluding these half-sisters, not because they were married in *diga*, but because, in the case of a man who dies

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intestate, without issue and without surviving parents, his acquired property goes to his male, to the exclusion of his female, relatives of the same degree.

Sawer says, page 13: "Ultimately (after the parents' death) it is divided among the brothers of the whole blood of the deceased equally, or their sons, according to what would have been their father's share; but failing brothers' sons, it goes to the sisters of whole-blood or their sons; and failing them, to the brothers of the half-blood uterine and their children; failing them, to sisters of the half-blood uterine and their children; and failing brothers and sisters of the half-blood uterine and their children, the property goes to the half-brothers of the father's side and their children, and then to the half-sisters by the father's side and their children."

It is clear that Sawer expressly prefers males to females in the same degree, brothers to sisters, half-brothers to half-sisters, &c.

It is difficult to reconcile that with the sentence with which he commences, that "the sisters have only the same degree of interest in their deceased brother's acquired property as they have in their deceased parent's estate," for that interest was equal in the case of inheritance of sons and *binna* married daughters, whereas I understand Sawer to say that of property acquired by brothers, *binna* married daughters get nothing, if there be surviving brothers. The rule as to the exclusion of sisters if there be brothers, or the exclusion of nieces if there be nephews, is supported by Armour (Perera's *Armour*, *p.* 46), quoted by the learned District Judge.

But this is at variance with the law, as stated by Sawer, with regard to property acquired by a woman. He says (p. 17): "An unmarried daughter acquiring property and dying intestate, her property goes to her mother; failing the mother, to the father and failing the father, to her brothers and sisters of the whole-blood; and if there be but one such brother, the whole goes to him; if there are several brothers, they share equally; failing brothers and sisters of the whole-blood, to the brothers and sisters uterine of the half-blood; and failing them, to the brothers and sisters of the half-blood by the father's side," &c.

I am not sure that the preference for males over females in succession to acquired property is good Kandyan Law, but it is expressly stated to be so by Sawer, and the authority of that very passage was recently accepted by the Chief Justice in C. R., Matale, 1,763 (*3 N. L. R. 209*).

With some hesitation, I agree to affirm.

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The passage in *Sawer, p. 13,* on which the decision of the rights of half-brothers and sisters in their deceased half-brother's acquired property rests, has a misprint in the third line—" his other parents " should be " his or her parents."

It does not seem to be quoted or treated as a whole in Perera's *Armour* and the passage which the learned District Judge cites (page 56) from Perera's *Armour, p. 43,* relates to the exclusion of a *diga* married sister from sharing in competition with her full brother in their brother's *paraveni* property. Indeed, all that section 19 of ch. III. of *Armour* relates to inheritance to *paraveni* property only, and does not appear to me to be an expansion or illustration of the principles of that passage in *Sawer,* which is chiefly enunciatory with respect to acquired property. The only illustration of it seems to be the second paragraph in section 19, page 46, of *Armour,* although no authority is cited for that passage.

The principle of exclusion for *diga* marriage as to *paraveni* would seem to enter into consideration *quâ* acquired property, since Sawer says the sisters have " only the same degree of interest in their deceased brother's acquired property that they [would] have in their deceased parent's estate," and I suppose that capabilities of all sisters and half-sisters to inherit mentioned in the rest of the passage must be limited to those who have not been married in *diga.* The specific application of the doctrine which is evolved and regulated by the consideration of two things, (1) degrees in consanguinity and (2) sex, is so minutely stated by Sawer that, however exceptional it may be, I must conclude it had been well ascertained.

I would, therefore, affirm with costs.