

LEWIS SINGHO
v
KUSUMAWATHIE AND OTHERS

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
C.A NO. 390/91 (F)
D.C. KURUNEGALA 1375/L
FEBRUARY 8, 2002 AND
APRIL 29, 2002

Marriage and Divorce (Kandyan) Act, sections 3(2) and 28(1) – Marriage of Kandyan under the Marriage Registration Ordinance – Is it a Diga marriage? Presumption

The District Court held that there was no affirmative proof that the deceased plaintiff's mother Enso Nona married in *Diga* and therefore she was entitled to succeed to her father.

It was contended that Enso Nona married in *Diga*, and thereby forfeited rights to succeed to her father.

Held:

- (i) Enso Nona's marriage certificate had been issued not under the provisions of the Marriage and Divorce (Kandyan) Act but under the Marriage Registration Ordinance.
- (ii) Section 3(2) of the Marriage and Divorce (Kandyan) Act provides a marriage between a person subject to Kandyan Law solemnized and registered under the Marriage Registration Ordinance shall not affect the rights of such persons to succeed to property under the Kandyan Law.
- (iii) Since the certificate of marriage of Enso Nona which is one issued under the General Marriages Ordinance, where an entry with regard to the nature of marriage is absent, the presumption is that the marriage is *Diga* and not *Binna*.
- (iv) Therefore it is manifest that Enso Nona would not have inherited anything at all from her father.

APPEAL from the judgment of the District Court of Kurunegala.

Case referred to:

1. *Sophie Hamine v Appuhamy* – 23 NLR 353 at 357

M.R.de Silva for 1st defendant-appellant

J.C. Boange for substituted plaintiffs-respondents

Cur.adv.vult.

June 28, 2002

DISSANAYAKE, J.

The deceased plaintiff instituted this action seeking declaration of title to 1/28th share of the land morefully described in the schedule to the amended plaint, ejectment of the 1st defendant-appellant therefrom and for damages. 01

The 1st defendant-appellant by his answer filed whilst denying the averments in the amended plaint prayed for dismissal of the deceased plaintiff's action.

At the conclusion of the trial that proceeded on thirteen issues the learned District Judge by his judgment dated 23.08.1991, entered judgment for the deceased-plaintiff declaring him entitled to an unspecified undivided share only and refused the other reliefs claimed in the amended plaint. 10

The deceased plaintiff preferred this appeal from the aforesaid judgment of the learned District Judge.

In the argument of the appeal before this Court learned counsel for the 1st defendant-appellant contended that the learned District Judge misdirected himself in entering judgment for the deceased-plaintiff holding that he was entitled to an undivided share.

The above contention of learned counsel for the 1st defendant-appellant is based on the argument that the finding by the learned District Judge that there was no affirmative proof that the deceased plaintiff's mother Enso Nona married in *Diga* and therefore she was entitled to succeed to her father Dingiriappu who was the original owner of the premises in suit, was erroneous. 20

At the commencement of the trial the fact that Dingiriappu was the original owner of the premises in suit was submitted by the parties.

The crucial issue before this Court is whether the deceased plaintiff's mother Enso Nona married in *Diga* and thereby did she forfeit her rights to succeed to her father Dingiriappu. 30

The deceased plaintiff in her evidence was emphatic that here mother Enso Nona and father Davith Singho married in *Diga* and went to live at Deekiriwewa.

One factor relied on by the learned District Judge in coming to the finding that Enso Nona did not marry in *Diga* is that the marriage certificate (V1) had been issued not under provisions of the Marriage and Divorce (Kandyan) Act but under the Marriage Registration Ordinance. Therefore he was of the view that her marriage was one contracted under the General Marriages Ordinance and as such she was not married in *Diga*, despite the fact that she was a person governed by the Marriage and Divorce (Kandyan) Act. 40

It is interesting to note that section 3(2) of the Marriage and Divorce (Kandyan) Act provides that a marriage between persons subject to Kandyan Law, solemnized and registered under the Marriage Registration Ordinance shall not affect the rights of such persons or of persons claiming rights through them to succeed to property under the Kandyan law.

It has been held on *Sophie Hamine v Appuhamy*¹, that the special Kandyan Marriage law and the general law of Ceylon with regard to marriage run concurrently and alternatively in the Kandyan Province. 50

Generally recourse is had to the entry made in the marriage certificate of a marriage contracted by parties under the Marriages and Divorce (Kandyan) Act to find out whether a party married in *Diga* or *Binna*.

Section 28(1) of the Marriage and Divorce (Kandyan) Act lays down that the registration of a Kandyan Marriage shall be the best evidence before all courts in which it may be necessary to give evidence of the marriage. It lays down further that where the marriage 60

registration entry made under section 23(3) constitutes such registration does not indicate whether the marriage was contracted in *Binna* or *Diga*, the marriage shall be presumed to have been contracted in *Diga* until the contrary is proved.

When a party who governed by the Marriage and Divorce (Kandyan) Act contracts a marriage under the Marriage Registration Ordinance, in the absence of provisions to enter the nature of the marriage contracted in the certificate of marriage, in the Marriage Registration Ordinance, such particulars are not entered in the certificate of marriage. 70

It is of relevance to observe that Fredric Austin Hayley in his book on "A treaties on The Laws and Customs of the Sinhalese" at page 195 has stated "In the absence of an entry in the register specifying its nature, the marriage is presumed to be a *Diga* one, until the contrary is proved."

Applying the above principles where a party who is governed by the Marriage and Divorce (Kandyan) Act contracts a marriage under the Marriage Registration Ordinance, in the absence of an entry in the certificate of marriage with regard to the nature of the marriage contracted the presumption recognised under section 28(1) of the Marriage and Divorce (Kandyan) Act would be applicable and such a marriage would be presumed to have been one of *Diga* until the contrary is proved. 80

Thus since in the certificate of marriage of Enso Nona (V1) which is one issued under the General Marriages Ordinance, where an entry with regard to the nature of marriage is absent, the presumption is that the marriage is *Diga* and not *Binna*.

There was no evidence led to the contrary. On the other hand the deceased plaintiff conceded in her evidence that Enso Nona married in *Diga*. 90

Therefore it is manifest that Enso Nona would not have inherited anything at all from her father Dingiriappu.

It is interesting to note that the learned District Judge in answering issue No. 12 has stated that despite the fact that it appeared that the 1st defendant-appellant has been in long and continued possession of the corpus the possession of the 1st

defendant-appellant was also the possession of the other co-owners and did not amount to adverse possession, on the basis of the fact that the deceased-plaintiff is also a co-owner.

100

The above finding of the learned District Judge was based on his purported finding that the deceased plaintiff's mother Enso Nona inherited from her father Dingiriappu.

Now that it is manifest that Enso Nona having married in *Diga* forfeited her right to inherit from her father Dingiriappu the deceased plaintiff is not a co-owner. The deceased plaintiff in her evidence admitted the long and continued possession of the 1st defendant-appellant of the corpus.

Thus this long and continued possession by the 1st defendant-appellant will amount to prescriptive possession of the corpus by the 1st defendant-appellant, as against the deceased plaintiff who was not a co-owner. Therefore the learned District Judge was in error when he entered judgment for the deceased plaintiff declaring him entitled to an undivided share.

I set aside the judgment of the learned District Judge dated 23.08.1991.

The appeal of the defendant-appellant is allowed with costs.

SOMAWANSA, J. - I agree.

Appeal allowed.