

1926.

Present: Schneider A.C.J. and Maartensz A.J.

CAROLIS SILVA v. KIRI BANDA *et al.*

113—D. C. Kurunegala, 8,745.

*Kandyan law—Diga marriage—Independent estate of each parent—  
Right of daughter, married in diga, to inherit mother's property.*

Where Kandyan parents have separate estates, a daughter married in *diga* is entitled to succeed to her mother's property equally with her brother.

**A** PPEAL from a judgment of the District Judge of Kurunegala.

Soertsz, for plaintiff, appellant.

H. V. Perera, for defendant, respondents.

November 18, 1926. MAARTENSZ A.J.—

This is an action for the partition of a land called Galahitiyawehena which admittedly belonged to one Kirimenika.

Kirimenika died leaving as heirs Appuhamy, who was succeeded by his children, the first and second defendants and a daughter, Ukkuhamy, from whom the plaintiff derives title. Another son Punchirala left no issue.

It was admitted (1) that Ukkuhamy was married in *diga*; (2) that Ukkuhamy's father had a separate estate of his own; (3) that Kirimenika was married in *binna* on her father's property; and (4) that Kirimenika was entitled to the land sought to be partitioned, through her father.

The question argued in appeal was whether on these admissions Ukkuhamy forfeited her right to inherit her mother's property acquired by inheritance from her father.

The learned District Judge answered this question in the affirmative, and the plaintiff appeals.

In the case of *Kiriwante v. Ganetirala*,<sup>1</sup> plaintiff (a Kandyan woman married in *diga*) claimed a share equally with her brothers in certain lands which belonged to her mother's estate. Plaintiff's parents had each a separate estate, and only a third share of the lands claimed had come to her mother from her parental ancestors.

<sup>1</sup> (1896) 2 N. L. R. 92.

It was held by Lawrie J. (Withers J. concurring) that in the uncertainty of the law on the subject and the conflicting state of the authorities plaintiff should not be deprived of the share she claimed of her inheritance. This ruling was followed by Shaw J. in the case of *Ukku Banda v. Jayasekera*.<sup>1</sup>

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The decided cases favour the appellant's contention that the question should have been answered in the negative, and according to the rule laid down by Modder and Sawyer these cases have been rightly decided.

Modder in his *Principles of Kandyan Law* lays down without qualification that a daughter's *diga* marriage does not work a forfeiture of the maternal estate when the parents had each an independent estate. This statement of the law is in accordance with the view expressed by Sawyer on page 16, section 46 (*Mr. Earl Modder's Ed.*), thus:—

- “ 1. The same customs regulate the succession to the mother's as to the father's estate.
- “ 2. Daughters, having brothers, have no superior interests of inheritance in their mother's landed estate to what they have in their father's estate, with this exception, however, that, where both the parents have each an independent estate, the daughters whether married in *diga* or otherwise have *paraveni* rights to equal shares with their brothers in their mother's estate.”

Armour, however, at page 80 (*Perera's Ed.*) says:—

- “ If the mother left a daughter married out in *diga* and a son, the latter will inherit the land derived from his mother's paternal ancestors to the exclusion of his *diga* married sister ”

but qualifies this general rule on page 81, where both parents have independent estates in the following statement:—

- “ If the father's house and landed estate are distant or distinct from the mother's house and estate then the marriage of a daughter in *binna* in the mother's house is considered a *diga* marriage in respect of the father's house and estate, and *vice versa*, but although in some cases by being married off in *diga* away from the houses of both the parents a daughter may lose the right to inherit a share of her mother's landed estate, yet if she were married and settled in *binna* in her father's house she will not lose her right, and accordingly in the event of the parents dying intestate their lands will devolve in equal shares to their son or sons and to the said daughter.”

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Hayley examining Sawyer's statement of the law says:—

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“ To return now to the passages, set out above for comment, and to discuss Sawyer's second statement first, it will be noticed that it is in itself somewhat curiously worded. The excepting clause really constitutes the rule, and the whole can only mean that *diga* married daughters are excluded from their mother's estate when the father has no property. And this possession of property by the father has, in modern cases, been made the criterion, the *diga* married daughters being allowed to succeed to their mother if the father has any property of his own. But if the father has no property and therefore necessarily no house of his own, and the wife has an estate the marriage is almost certain to have been a *binna* marriage, so that, consciously or unconsciously, Sawyer was not only stating the rule that, in succession to a *binna* married woman, *diga* married daughters will be excluded if there are other children.”

I am of opinion that Mr. Hayley's argument that Sawyer's statement refers only to a mother who has married in *diga* is not conclusive. To be conclusive, the converse must be true, namely, where a man and his wife both have property, the marriage must necessarily be a *diga* marriage on the part of the wife. But this is not so, for a man by marrying away from his father's house does not forfeit his right to inheritance from his father, and he may have property though married in his wife's house. The law is definitely stated by Sawyer without qualification, and in the absence of a clear rule to the contrary I am of opinion that in the case of maternal inheritance it is immaterial whether the mother married in *binna* or in *diga*.

I allow the appeal with costs and remit the case to the District Court for further trial. The plaintiff will be entitled to the costs of contention.

SCHNEIDER A.C.J.—I agree.

*Appeal allowed.*