Present: Bertram C.J. and Ennis J.

1922.

MAMPITIYA *v.* WEGODAPELA *et al.*

293—D. C. Kandy, 27,829.

Kandyan law—Registered diga *marriage—Bride continuing to live in* mulgedera*—No forfeiture of rights to paternal property—Meaning of "best evidence."*

A Kandyan woman whose marriage was registered as a *diga* marriage, but who continued to live in the *mulgedera*, was held not to have forfeited her rights in the paternal estate.

BERTRAM C.J.—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. 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 . . . . "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."

"A *diga* marriage ceremony does not of itself work a forfeiture irrespective of the subsequent action of the parties."

ENNIS J.—The forfeiture of the bride's rights in the paternal estate turns on the question of fact, whether the bride left the paternal home in accordance with the contract. In the absence of evidence there would be a presumption that the terms of the contract relating to residence had been carried out, but I see no good reason for excluding oral testimony relating to the carrying out of this term of the contract, which was not a matter of fact occurring at the time of the contract.

THE facts are set out in the judgment of the Chief Justice.

Bawa, K.C. (with him *E. W. Jayawardene* and *Amarasekera*), for the appellants.

H. J. C. Pereira, K.C. (with him *Samarawickreme*), for the respondents.

June 20, 1922. BERTRAM C.J.—

The question at issue in this case is whether the daughter of a Kandyan family, who had married in *diga*, has in fact incurred the forfeiture, which such a marriage admittedly implies.

The bride's family, which was one of some position, resided near Kandy. That of the husband, which, though respectable, was one of less standing and less substance, was settled near Matale.

1922.

BERTRAM C.J.

Mampitiya v. Wegodapela

The lady's father was dead, and the head of her house was her brother, the present plaintiff. The bridegroom was, at the time, a pupil at Trinity College, Kandy.

The marriage is registered as a *diga* marriage. Both parties gave notice of the marriage on this footing. Both, in the presence of witnesses, signed the register in which the marriage was formally declared to be in *diga*. But the learned District Judge, upon a conflict of evidence, has found in effect that the bride was never in fact formally conducted to her husband's house; that she continues to live in the *mulgedera*, where her first two children were born and brought up; that she did not go to her husband's home, except, possibly for a visit, during the early days of her married life, and also for a few months at a later date, during a period in which there was a family estrangement, and in which her third child was born at her husband's old home. During this absence the other children of the marriage remained with the wife's family. Apart from this, though her husband was from time to time living away from her in the discharge of minor official duties, she lived first at the *mulgedera* of the family, subsequently at a neighbouring *walauwa* purchased by her brother, and afterwards again at the *mulgedera*, and (apart from the period of estrangement above referred to) she never at any time cut herself off from the family circles.

The learned Judge's finding would no doubt have carried more conviction, if the evidence of the husband had been supported by that of the wife. But the wife, who was of all persons best qualified to tell the story, was not called. The learned Judge, however, had to decide upon the material before him. He had ample grounds for the conclusion to which he came, and I do not think that we should be justified in questioning, nor am I myself disposed to question, its correctness.

As to the nature of the marriage now in question, there can be no doubt. A marriage is a consensual contract. If there is any question as to whether any particular marriage has a particular character, that is a question of the intention of the parties. The registration, signed by both parties, declares it to be a marriage in *diga*. Section 39 of the Amended Kandyan Marriage Ordinance (No. 3 of 1870) enacts that the entry in the register shall be the " best evidence " of the marriage contracted and of the other facts stated therein. The expression " best evidence " is used in the sense which belongs to it in English law. It is of the essence of " best evidence " according to English law that it excludes all evidence of an inferior character. The intention of the parties must, therefore, be ascertained by reference to the marriage register.

We have, however, to consider the effect of the cases in which it has been decided, or observed, that the register is not necessarily conclusive. Those cases are as follows:—*Ukku v. Kiribanda*,[1]

[1] *(1902) 6 N. L. R. 104.*

Ram Etana v. Nekappu,[1] *Dingiri Hamy v. Mudali Hamy*,[2] *Sinno v. Appuhamy*,[3] *Kiri Banda v. Silva*,[4] *Dullewe v. Dullewe*.[5] Two of those cases, namely, *Ram Etana v. Nekappu* and *Dullewe v. Dullewe* (*supra*), were merely cases of *obiter dicta*, as the register was in the result treated as correct. The others were all cases in which the registered marriage took place many years after the original marriage ceremonial, and where it seems to have been suggested that the parties, for reasons of their own, had misrepresented the character of their legal union.

As I understand the effect of the enactments and the cases, it is 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.

No question of this sort arises here. The plaintiff does not challenge the register; he insists on it. As to the parties to the marriage, their status and education preclude any idea that they did not fully understand the effect of their own proceedings.

We start, therefore, with the conclusion that the marriage actually celebrated, according to the intention of the parties (and those connected with them), was a *diga* marriage. The question, therefore, arises: Does the mere celebration of such a marriage of itself work a forfeiture, or is it necessary for this purpose that the bride should leave the house of her parents and settle in that of her husband?

This is an important question. Singularly enough there appears to be no direct authority on the point. I can find no case which is certainly a case of a daughter formally married in *diga*, who from the inception of the marriage continued to live in the *mulgedara*, and who was held (or not held) to have thereby retained her rights of inheritance.

But there are certain *obiter dicta* bearing on the point, which are of the highest weight and importance. These *dicta* are as follows:—

(*a*) Per Lawrie J. in *Kalu v. Howwa Kiri* [6] at page 55:—

> "The Ordinance now gives privileges to those who register their marriages, and especially to their children; but the law as to the rights of daughters married in *binna* or in *diga* has not been changed, and the old disability still attaches to the act of being conducted from a father's house by a man and the going with him to live as his wife in his house."

[1] *(1911) 14 N. L. R. 289.*
[2] *(1912) 16 N. L. R. 61.*
[3] *(1913) 1 Bal. N. C. 80.*
[4] *(1913) 1 Bal. N. C. 83.*
[5] *(1913) 1 Bal. N. C. 85.*
[6] *(1892) 2 C. L. R. 54.*

1922.

BERTRAM C.J.

Mampitiya v. Wegodapela

(*b*) Per De Sampayo J. in *Menikhamy v. Appuhamy* [1] cited in *Modder's Kandyan Law, p. 431*:—

"It is 'the going out in *diga*' that works the forfeiture; that is to say, the woman should be conducted by or go out to live with a man as his wife. (*Kalu v. Howwa Kiri* (*supra*)) . . . . But the forfeiture under the Kandyan law was not based upon any circumstance of disgrace to the family, but rather upon the primitive idea of severance of family ties involved in a woman going out, and becoming as it were, a member of the husband's family. The principle is never to admit a forfeiture unless the law is very clear on the point."

(*c*) Per Wood Renton C.J. in *Punchi Menike v. Appuhamy* [2] at page 354:—

"The general rule undoubtedly is that when a woman marries in *diga*, that is to say, when she is given away, and is, according to the terms of the contract, conducted from the family house, or *mulgedera*, and settled in that of her husband, she forfeits her right to inherit any portion of her father's estate. But this forfeiture was an incident, not so much of the marriage, as of the quitting by the daughter of the parental roof to enter another family."

(*d*) Per De Sampayo J. (*Ibid., p. 358*):—

"The point to be kept in view in all cases, I think, is that the essence of a *diga* marriage is the severance of the daughter from the father's family, and her entry into that of her husband and her consequent forfeiture of any share in the family property."

Both these last two *dicta* are cited and re-affirmed by Wood Renton C.J. in *Fernando v. Bandi Silva*.[3] Such weighty and considered pronouncements by such eminent authorities, though delivered *obiter*, can hardly fail to be decisive. 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.

This view of the law is confirmed by two circumstances. The first is this: If a woman, without any legal marriage, leaves her *mulgedera* and settles in the home of a man, in a relationship of the

[1] *(1913) C. R. Ratnapura, 12,653.* [2] *(1917) 19 N. L. R. 353.*
[3] *(1917) 4 C. W. R. 9.*

same nature as a *diga* marriage, she thereby forfeits her right of inheritance. (See *Modder, p. 244, Kalu v. Howwa Kiri (supra)*); and the other cases cited under the same paragraph.) The second is, the circumstance that if a woman, duly married in *binna* subsequently without any formal ceremony, or change in the registration, leaves her *mulgedera* and settles in the home of her husband, this of itself works a forfeiture. (See *Modder, p. 247*, and the *Madawalatenna Case, Marshall, p. 329.*) It is also significant that if a daughter goes out in *diga* of her own accord, that is to say, without being given away by any member of her family, the forfeiture is none the less affected. (See *Meera Saibo v. Punchirala* [1] and *Ram Etana v. Nekappu (supra).*) Forfeiture may, therefore, arise irrespective of any formal marriage ceremony.

Mr. Bawa feels the force of these considerations, and endeavours to meet it by the suggestion that though a severance from the *mulgedera* itself works a forfeiture, yet, since the introduction of the registration of marriages, an alternative method of effecting the same result has been thereby introduced, and that now registration of a *diga* marriage of itself also works a forfeiture. This contention is not supported by authority, and is in conflict with the view of the law laid down in the authoritative *dicta* above cited.

We have also the analogy of the numerous cases where it has been held that if a daughter, under the requisite conditions, is received back in the *mulgedera*, or re-establishes a close connection with the *mulgedera*, she may regain her *binna* rights. (See *Punchi Menika v. Appuhamy* and *Fernando v. Bandi Silva (supra).*) If, under certain circumstances after celebrating and consummating a *diga* marriage, she may regain *binna* rights, surely a *fortiori* under appropriate conditions she may also retain them. Indeed, in one particular class of case, a *retainer* of *binna* rights has been allowed. It is where a wife married in *binna*, subsequently goes away to her husband's house in *diga*, but leaves behind her a child of the marriage in the *mulgedera*. This is held sufficient to preserve her *binna* rights. (See *the Madawalatenna Case (supra).*) Indeed, there are two cases in which a woman formally married out in *diga* retained from the beginning her rights of inheritance, simply by leaving in the *mulgedera* a child, who was the offspring of a former union. This union was in the one case illegitimate, in the other a previous *binna* marriage. (See *Ukku v. Pingo* [2] and *Tikiri Kumarihamy v. Loku Menika.*[3]) These two cases are, indeed, decisive that a *diga* marriage ceremony does not of itself work a forfeiture irrespective of the subsequent action of the parties.

With regard to the facts in the present case, the parties do not appear to have been conscious of the effect of their acts or omissions. The status of the wife never seems to have come into question.

[1] *(1910) 13 N. L. R. 176.*
[2] *(1907) 1 L. L. R. 53.*
[3] *(1875) Ram. 1872–76. p. 106.*

1922.

BERTRAM C.J.

Mampitiya v. Wegodapela

Some of the acts and letters of her husband, as Mr. Bawa truly says, are not such as we would expect from a husband who considered himself settled in his wife's household in *binna*. It is not till quite recently that the couple woke to the idea that they had *binna* rights, and, as a result of this discovery, they have sold the wife's share in the ancestral *walauwa*, inherited by her brother, to a Colombo proctor. This is from the family point of view an unfortunate situation, but the fact remains that no effective step was ever taken to bring about a forfeiture of the wife's interest.

I am of opinion, therefore, that the decision of the learned District Judge was right, and that the appeal should be dismissed, with costs.

ENNIS J.—

In this case the plaintiff claimed a declaration of title to certain land against his sister, the second defendant, and her husband, the first defendant. The land originally belonged to one Loku Kumarihamy who, in 1863, gifted it to her son Tikiri Banda. Tikiri Banda died in 1886, leaving a widow, a son (the plaintiff), and two daughters, the second defendant and another. The plaintiff claims title on the ground that the second defendant was married in *diga*.

There were only two issues in the case:—

1. Was the second defendant married in *diga*?
2. If so, did she thereby forfeit her rights to succeed to her father's estate?

It appears that the defendants were married on June 3, 1904. They severally gave notice of marriage (P 15, P 16), in which each declared that the marriage was to be in *diga*, and the register of marriages sets out that the marriage was in *diga*.

Section 39 of the Amended Kandyan Marriage Ordinance, No. 3 of 1870, enacts that:—

> "The entry . . . . . in the register of marriages . . . . shall be the best evidence of the marriage contracted . . . . . and of the other facts stated therein. If it does not appear in the register whether the marriage was contracted in *binna* or in *diga*, such marriage shall be presumed to have been contracted in *diga* until the contrary is shown."

At the time of the enactment of the Ordinance, the English Law of Evidence was in force under the Ordinance No. 3 of 1846, and section 39 of the Ordinance No. 3 of 1870 was not affected by the Evidence Ordinance, No. 14 of 1895. The effect of the English rule, that the best evidence must be produced, was the exclusion of oral evidence where documentary evidence could be produced.

In the present case there can be no doubt that the parties intended to enter into a *diga* marriage, and did contract a *diga* marriage at the time the entry in the register was made, and, in my opinion,

the register must be conclusive of that fact, but the question still remains as to whether the bride thereby forfeited her rights of her father's estate.

In a series of cases, where a question of forfeiture was involved, evidence has been allowed to show that a marriage described in the register as a *binna* marriage was in fact a *diga* marriage. On examination these cases all appear to be cases in which the ceremony of marriage, according to Kandyan custom, was gone through many years before the registration of the marriage between the parties was made under the Ordinance No. 3 of 1870. In the later cases the authority of the earlier ones was followed with diffidence, and in the case of *Dingirihamy v. Mudalihamy*,[1] I myself adopted the view that such evidence should be allowed.

Modder in his book on *Kandyan Law* (*2nd ed., 229*) speaks of a *diga* marriage in the following terms:—

> " A marriage in *diga* is when a woman is given away, and is, according to the terms of the contract, removed from her parent's abode, and is settled in the house of her husband; "

and *binna* marriage:—

> " A marriage in *binna* is when the bridegroom is received into the house of the bride, and, according to certain stipulations, abides therein. "

From this it would seem that the definitions include not only the contract of marriage between the parties, but the subsequent carrying out of the terms of the contract relating to residence. The Amended Kandyan Marriage Ordinance, 1870, made the validity of the marriage turn on the contract only, and section 39 by declaring that the entries in the register should be the " best evidence " of the marriage contracted, and of the other facts stated therein cannot mean that the entries should be conclusive in matters of fact not existing at the time of the entry. Now it has been held by De Sampayo J. in the case of *Menikhamy v. Appuhamy* [2] (C.R. Ratnapura, 12,653) 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 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 the contract, which was not a matter of fact occurring at the time of the contract.

On the question of fact I see no reason to interfere with the finding of the learned Judge that the second defendant had not severed her connection with the *mulgedera*, although it would have been more satisfactory if the second defendant had given evidence. In the circumstances it would seem that there was a valid contract

[1] *(1912) 16 N. L. R. 61.*

[2] *S. C. C. Mins. June 10, 1913.*

1922.

ENNIS J.

Mampitiya v. Wegodapela

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 to the residence of the defendants in the *mulgedera* must be inferred. In the circumstances the bride retained her rights of inheritance in her father's estate.

I would dismiss the appeal, with costs.

Appeal dismissed.