

1970

*Present : Sirimane, J., and Wijayatilake, J.***E. D. PINA, Appellant, and I. L. AHAMADU LEBBE, Respondent***S.C. 183/67 (Inty.)—D. C. Kuliyaipitiya, 1337/P**Kandyan law prior to 1939—Diga connections by daughter without valid marriage—Forfeiture of her rights to the paternal estate—Kandyan Law Declaration Ordinance (Cap. 59), s. 9 (2).*

Under the Kandyan law prior to 1939, a daughter who went out in *Diga* forfeited her rights to her paternal estate even if there was no valid registered marriage between her and the man or men with whom she had *Diga* connections.

APPPEAL from an order of the District Court, Kuliyaipitiya.*T. B. Dissanayake, with Sepala Munasinghe, for the 1st defendant-appellant.**Walter Wimalachandra, with T. B. Dillimuni, for the plaintiff-respondent.**Cur. adv. vult.*

May 6, 1970. SIRIMANE, J.—

The only question in this case is whether one Hapu went out in Diga and forfeited her rights to the paternal estate.

She was one of the three children of the original owner Unga, and the plaintiff having purchased one-third share from her in 1963 on Deed P 2, filed this partition action a few months later.

Unga died on 30.8.38, before the Kandyan Law Declaration Ordinance (Chapter 59) came into force. It was therefore not necessary to prove a valid marriage as required by section 9 (2) of that Ordinance, between Hapu and the man or men with whom she had Diga connections.

In *Kalu v. Howwa Kiri*¹ it was held that the exclusion of a Diga married daughter from a share of her father's property attaches to a daughter who goes out in Diga, even though the marriage is invalid by reason of its non-registration under the provisions of Ordinance 3 of 1870.

In *Komale v. Duraya and another*² where the facts were very similar to those in the present case, Wendt J., following the decision in *Kalu's case*, held that under the Kandyan Law a woman who "goes out in Diga" would not be entitled to claim a share of her paternal inheritance although she may not contract a legal marriage.

The principle underlying the rule of forfeiture is that by reason of her association with a man, the woman has quitted her family home (See *Wickramasinghe v. Kiri Malli*³), and that in consequence of such association there is a severance of the daughter from the father's family.

Hapu's own evidence in this case was that she was given away to Aruma by her father and that she lived in Aruma's house for about a year. Thereafter, she became the mistress of one Menika, until she left him after a few months, and returned to her father's house where she lived with one Mitiya for some unspecified period; but left her father's house again during her father's lifetime to live with one Podi Singho in the latter's village. She has ten children by him now, and still lives with him in his village.

I think the decision in *Menikhamy v. Appuhamy*⁴ relied on by the plaintiff-respondent, can be easily distinguished. In that case the woman left her father's house to be employed as a domestic servant. Some two or three years after that she lived with a man as his mistress. Wood Renton J. said,

"It is the going out in Diga that works the forfeiture; that is to say the woman should be conducted or go out to live with a man as his wife. *Kalu v. Howwa Kiri*, 2 C.L.R. 54. Now, the plaintiff did not leave her home with any such intention. She left for the purpose of employment in the first instance, and her subsequent relations with the Tamil man did not in my opinion constitute a case in going out in Diga."

¹ (1892) 2 Ceylon Law Reports 54.

³ (1954) 55 N. L. R. 382.

² (1907) 3 Balasingham's Reports 122.

⁴ (1913) 5 Balasingham's Notes of Cases 38.

The 2nd child of the original owner, one Kiriya, left two children, Menika and the 3rd defendant. In 1956, on P1, Menika conveyed to the 2nd defendant a 1/4 share of the land, i.e., on the footing that Hapu had gone out in Diga. This same person had earlier, in 1952, sold a similar share of another land of which Unga was the original owner, on the same basis.

Hapu admitted that she never had any possession of this land, which is planted in coconut.

The evidence favours the inference that Hapu went out in Diga. The plaintiff's purchase on P2 of a 1/3 share of this land and two others for a sum of Rs. 2,000 of which only Rs. 230 was paid in the presence of the Notary, appears to have been a speculative one.

I am of the view that no title passed to the plaintiff on P2, and his action must be dismissed with costs both here and below.

WIJAYATILAKE, J.—I agree.

Appeal allowed.