

1922

*Present : Bertram C.J.*K. A. BANDA, Appellant, and ANGURALA *et al.*, Respondents

S. C. 234—C. R. Kegalla, 16,342

*Kandyan Law—Diga marriage—Forfeiture of rights—Waiver of forfeiture—Execution of series of deeds on footing of rights by other members of family—Re-acquisition.*

Where, in Kandyan Law, a forfeiture has taken place by reason of a *diga* marriage, it is not connection with the *mulgedera* which restores the *binna* rights. It is a waiver of the forfeiture of which the connection with the *mulgedera* is evidence. The execution of a series of deeds for a number of years by other members of the family on the footing that a *diga* married lady still possessed rights would be sufficient evidence of such waiver.

APPEAL from a judgment of the Commissioner of Requests, Kegalla.

*E. W. Jayawardene*, with *L. H. de Alwis*, for the appellant.

*Allan Drieberg*, K.C., with *C. Batuwantudawe*, for the respondents

February 1, 1922. BERTRAM C.J.—

The question to be decided in this case relates to the rights of inheritance of two daughters belonging to a Kandyan family who are married out in *diga* and claim, nevertheless, to possess *binna* rights. They are the daughters of one Punchi Appuhamy who died many years ago. His whole family consisted of two sons, Mudiyanse, the 3rd defendant, Angurala, the 1st defendant, a third son who is dead, and of the two daughters in question, Dingiri Mahatmaya and Punchi Mahatmaya. As I have said, these daughters married out in *diga*. Dingiri Mahatmaya married one Dingiri Appuhamy, went to live with him in his village, Gasnawa, and is still there. The matrimonial history of the other daughter, Punchi Mahatmaya, is uncertain. Her original husband is said to be dead, and she is said to have married twice subsequently. Whether these marriages were registered does not appear, but there can be no question

that at her original marriage she left the *mulgedera* and went to live in that of her husband. The action is a partition action. Plaintiff, who originates it, is not a member of the family but is a cousin of Dingiri Mahatmaya's husband and has bought in various interests of members of the family.

A recital of these facts would seem to suggest conclusively that the partition must be conducted on the supposition that Dingiri Mahatmaya and Punchi Mahatmaya had lost all rights of inheritance from their father, Punchi Appuhamy, unless it can be shown that in some way they regained *binna* rights, and the question for determination is whether they have done so. In all previous cases the question for the recovery of *binna* rights has always appeared to turn upon something done in connection with the *mulgedera*, such as a resumption of residence there; the cultivation of the paternal lands held in connection with it; the leaving of a child in the *mulgedera* or the maintenance of a close connection with the *mulgedera*. But in this case nothing of the sort is suggested. The claim to *binna* rights, however, in this case is based upon circumstances of a very significant and unequivocal character which I will proceed to examine.

Notwithstanding the *diga* marriages of these two daughters, their brothers Mudiyanse and Angurala for many years past have executed a series of deeds clearly based upon the supposition that their sisters retained rights in the paternal inheritance. The first of these deeds was a lease for 10 years executed on September 9, 1907 (2 D<sup>1</sup>). The lessors were the two brothers, the two sisters, their mother Ran Menika, and Ukku Menika, the widow of the deceased brother. They are all described as of Tulhiriya, the village in which the *mulgedera* was situated, and the deed recites, with reference to the daughters, that they had a title by paternal and fraternal inheritance. The lessee was one Sulanchi Appuhamy. In the following year 1908, by 2 D<sup>2</sup> the two brothers and sisters together with Ukku Menika, described as residing at Tulhiriya, sold certain other paternal lands to one Don Telenis, a Police Vidhan. In 1912 the number of deeds which were executed on the supposition that the two daughters retained their rights of inheritance was no less than seven. Three of these, 2 D<sup>3</sup>, 2 D<sup>4</sup>, and 2 D<sup>7</sup>, were executed on the same day, and like the rest were all based upon the same common supposition. Some of these have a very specific significance. Thus, in 2 D<sup>3</sup> executed on March 25, 1912, the two sisters for valuable consideration transferred a half share in certain paternal lands to one of the brothers, Angurala. It is difficult to understand why this brother should buy from his sisters land which they had already forfeited unless in some way they were being treated as having regained *binna* rights. Similarly by 2 D<sup>4</sup>, executed on the same day, one of the brothers, Angurala, joined with one of the sisters in selling a half share of another paternal land to the other sister and her husband. Further under the series of deeds, 2 D<sup>7</sup>, 2 D<sup>8</sup>, and 2 D<sup>9</sup>, a stranger, Punchi Banda, proceeded to get in all the interests of the two brothers and the two sisters in another paternal land. He first by 2 D<sup>9</sup> on January 22, 1912, bought in the interests of Angurala, which is described as one-fourth. He then by 2 D<sup>7</sup> on March 25, 1912, bought in the interests of the two sisters described as a half,

and finally four months later by 2 D<sup>12</sup>, one of the brothers, Angurala, joined with one of the sisters, Dingiri Mahatmaya, in conveying a half share of another land to Maddama Sulanchi, the lessee under the lease of 1907 (2 D<sup>1</sup>). It is impossible not to be impressed by this series of transactions. They seem only to have one meaning, but the story does not stop there.

In 1913, by 2 D<sup>2</sup>, Mudiyanse, one of the brothers, sold one-fourth of this land to a stranger Fonseka, a proceeding which, taken in conjunction with the deeds of the previous year, clearly implies a recognition of his sisters' rights. In August 1915 by 2 D<sup>10</sup>, Punchi Mahatmaya, one of the sisters, executed a mortgage of her share in another paternal land, describing it as one-fourth, and as hers by inheritance. But in 1915 an incident occurs. Sulanchi Appuhamy, the lessee of the lease of 1907 (2 D<sup>1</sup>), brought an action on his lease against the lessors, who it will be seen, include both of the two brothers and both of the two sisters. For the first time on February 23, 1916, the two brothers in their answer which is filed in that case, challenged the rights of their two sisters who had executed the lease with them. See para. 3 (2 D<sup>16</sup>): "The 1st and 2nd defendants alone are entitled to the rent of the said land, the other defendants, who are women, having forfeited the inheritance". It would seem that this treacherous plea was suggested to them by their legal advisers in the action, but no definite attempt was made to sustain it. The action was settled on the terms that the money recovered should be divided among the defendants in equal shares, but the two brothers and Ukku Menika reserved the right to raise the question of the *diga* marriages of the 3rd and 4th defendants. Two years later, on November 2, 1918, by 2 D<sup>5</sup>, the two sisters still purported to maintain their *binna* rights and conveyed a share of this land and their other paternal lands to Ratnaike Appuhamy, the second defendant in the present partition action, which was launched on September 9, 1919.

It may be interesting to note the residences of the two sisters as described in this series of deeds. In the deeds of 1907 and 1908 they are both described as residing at Tulhiriya, the *mulgedera* village. In the deeds of 1912 the description varies. In the deeds executed in March the two sisters are described as residing at Ambagala and Gasnawa, the villages of their husbands. In the deeds of June and December they are described as both of Tulhiriya. In 2 D<sup>10</sup> of August 18, 1915, Punchi Mahatmaya describes herself as of her husband's village. In 2 D<sup>6</sup> of November 2, 1918, both sisters describe themselves as of their husbands' villages. In connection with these references to residence at Tulhiriya it should be noted that Dingiri Mahatmaya is said by one of the witnesses to have lived for ten or twelve years in a house built by her husband on another of the paternal lands at Tulhiriya. This circumstance may explain these residences so far as Dingiri Mahatmaya is concerned.

The question now arises: What is the effect of this very remarkable series of documents? The point at issue is the forfeiture of certain rights of inheritance. Any forfeiture may be waived by those in whose benefit it takes place. It has been customary in considering whether a forfeiture

of *binna* rights has been waived to look at the matter from the point of view of the connection of the daughter in question with the *mulgedera*. But in my opinion there is nothing to show that this is the only test. To use a favourite phrase of the late Lord Bowen, "There is nothing magic about the *mulgedera*". Where a forfeiture has taken place it is not the connection with the *mulgedera* which restores the *binna* rights, it is the waiver of the forfeiture, of which the connection with the *mulgedera* is the evidence. As was said by Wood Renton C. J. in *Fernando v. Bandi Silva*<sup>1</sup> "The instances given in the text books on Kandyan Law of the cases in which *binna* rights can be regained are illustrations of a principle and not categories exhaustive in themselves. The underlying principle is that the forfeiture by a marriage in *diga* of the rights of the *diga* married daughter to a share of the inheritance, may be set aside by her readmission into the family". The real question is : Have the brothers waived the forfeiture of their sisters' rights ? It seems to me there can be only one answer to this question. On any other supposition the series of deeds above recited would be absolutely unintelligible.

Mr. E. W. Jayawardene, who strongly contests this conclusion nevertheless submits that a distinction is to be drawn between the cases of the two sisters, Dingiri Mahatmaya who had only one husband, and is still living with that husband in her paternal village, and of Punchi Mahatmaya who had a more varied matrimonial career. With regard to Dingiri Mahatmaya, if an effective waiver of forfeiture took place, she retains all the rights she acquired by that waiver. The case of Punchi Mahatmaya is said to be different. Her original husband, according to her marriage certificate, was Mapa Hamillage Siyalis Appuhamy. He is said to have died soon after the marriage and she is said to have returned to the *mulgedera*. It is stated that she is now living with her third husband at Ambawella, seven miles from Tulhiriya. But in all the deeds of 1912 she is described as living at Ambagala. Apparently this is the same as Ambawella. She was still there in 1918 (2 D<sup>5</sup>). The evidence of plaintiff with regard to her is as follows : "She lives at Ambawella, seven miles from Tulhiriya. She is living with her third husband there. She has been there for 12 years. Prior to that she lived at Alauwa with her second husband. Alauwa is three miles from Tulhiriya"—marginal page 35. Mr. Jayawardene suggested that, even if we assumed that a waiver of the forfeiture took place on her first marriage, there would be a fresh forfeiture on her subsequent marriage, and he would appear to assume that her final marriage took place at a recent date. Here he is clearly mistaken. Punchi Mahatmaya is said to have lived in the village where she is at present for twelve years. In 1912 she was living at Ambagala. This is clearly the same as Ambawella. If in 1912 a waiver of the forfeiture had definitely taken place, nothing has since happened to disentitle her to the effect of that waiver, and I think no distinction can be drawn between the cases of the two sisters.

The learned Commissioner's judgment is very concise. He simply says that he is satisfied "from the long string of deeds produced that the girls, though they were given out in *diga*, still held these property

<sup>1</sup> (1917) 4 C.W.R. p. 12.

rights in the paternal estate and those rights were long recognised by the family. I therefore hold that they did not lose their rights to the estate although their marriages were registered as *diga*”. For the reasons I have explained, I agree with the conclusion of the learned Commissioner and dismiss the appeal with costs.

*Appeal dismissed.*

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