

1932

Present : Dalton J.

RANHAMI *et al.* v. KIRIHAMI *et al.*

43—C. R. Kurunegala, 5,705.

Kandyan Law—Binna-married daughter—Leaving mulgedera after father's death—No forfeiture.

Under the Kandyan Law a binna-married daughter does not forfeit her share in the paternal inheritance by leaving the mulgedera after her father's death.

A PPEAL from a judgment of the Commissioner of Requests, Kurunegala.

F. J. Soertsz, for plaintiffs, appellants.

September 23, 1932. DALTON J.—

The plaintiffs brought this action for a declaration of title to an undivided $\frac{3}{8}$ part of two lands Hitinawatta and Kongahakumbura. Upon the issue framed in the case their claims depended upon their being able to establish that one Ukku Menika had never forfeited her rights in the lands in question. Plaintiffs had purchased this $\frac{3}{8}$ share from descendants of Ukku Menika, who, although married in binna, had, according to the defence, subsequently forfeited her rights by severance from the *mulgedera*.

The trial Judge found on this issue in favour of the defendants, and accordingly dismissed plaintiffs' action. From this order they appeal.

The original owner of the land was Hetuhamy, Ukku Menika being one of his children by his first marriage. It is not disputed that Hetuhamy during his lifetime divided these lands between the children of his two marriages, Ukku Menika and Appuhamy, her brother being allotted the western half of Hitinawatta and the northern half of Kongahakumbura, and the children of the second marriage the remaining portions. It is proved that Ukku Menika was married in binna to Manilhamy, a man of Manahettiya, a mile or two away from her own village. For five years she lived at her mulgedera, but after her father's death she went to live at her husband's village, where she remained until her death about fifteen years later. During those fifteen years, however, the first defendant admits she and her children used to visit her native place ten or twelve times a year. The plaintiffs' case is that those visits were for the purpose of obtaining her share of produce from the lands, and keeping up her connection with the mulgedera. The first defendant, son of her brother Appuhamy, however, denies that she ever came to get any produce nor did she ever visit them on the occasions she came to the village. He explains the visits by stating that she used to live on these occasions at the Ganaratchi's house where one of her children was living, owing to a quarrel between Manilhamy

and Appuhamy. These visits to her village are not referred to by the trial Judge in his Judgment. On the question of her taking the produce, however, although he describes the evidence of both sides as of the usual indecisive character, he comes to no definite conclusion but merely states that he finds that of the plaintiffs as less credible. With the evidence of the plaintiffs who produced deeds to show that Appuhamy, the defendants, and one of their sisters had donated and mortgaged shares of part of one of the lands in dispute, the trial Judge does not deal. If it be presumed they were in these deeds dealing with the whole of their interest in the land in question, the fact that they only dealt with interests in $\frac{1}{4}$ of the land, would support plaintiffs' case, that Ukku Menika retained her rights in the other quarter, she and her brother Appuhamy having received half of the land on the division by her father already referred to. Although this evidence was given by the plaintiffs for the purpose of suggesting that Appuhamy and the defendants recognized Ukku Menika's interests in the lands, no attempt was made by plaintiffs to ask the first defendant if he could explain these deeds on any other basis. In the absence of any evidence on the point one would not be prepared to assume that the parties were dealing with the whole of their interests in the deeds produced. This and one or two other matters might well have been further elucidated in the lower Court.

There is no doubt as to Ukku Menika's binna marriage. She did not leave the mulgedera, where she resided for five years, until after her father's death. When her paternal inheritance therefore devolved upon her, there is no question that the binna marriage still subsisted. This is not the case of a daughter married in binna quitting her parents' house and going out to live in diga, before her parents' death, as referred to by Sawers. (*Digest p. 3; Modder's Kandyan Law, p. 451.*) The onus of proving that Ukku Menika forfeited her rights in the lands inherited from her father lies upon the defendants. I have not had the benefit of hearing counsel on their behalf, as they have not appeared in the appeal. It seems to me, however, they have not discharged the onus which lies upon them. The District Judge, in support of his conclusion that Ukku Menika forfeited her rights to her father's land, relies on the three cases cited by Modder in his *Kandyan Law at p. 442, s. 247*. The first case is the case from Sawers, p. 3, to which I have already referred. The second case is one of a binna-married daughter who is childless going out in diga after her father's death. The authority states under these circumstances she would have no "permanent" right to any portion of her father's landed property, but it is not stated what her rights would be if she had children. The third case is that of a binna marriage where there are children, and husband and wife leave the residence of the wife's father apparently during the father's lifetime without leaving a child behind. None of these cases is applicable here.

The second case above cited from Modder, upon which the trial Judge relies, is taken from *Armour's Kandyan Law, p. 60*. Part only of section 9 of Armour is quoted by Modder. That section deals with the rights of children married in binna to their father's estate. After referring to Sawers where he deals with a daughter married in binna

who leaves her father's house during his lifetime to go and live in digā. Armour continues :—

“ But the binna daughter will not forfeit her interests in her father's estate by quitting her father's house subsequent to his demise, and although she then went and settled in digā she will not be debarred from participating with her brother and sister in their father's estate. And in the event of her death, if she left issue, a son for instance born during the period of her binna coverture, that son will succeed to her share of the said estate. And although the said binna daughter's son had quitted his maternal grandfather's house and settled elsewhere in binna, he will not thereby forfeit to his maternal uncle that share of his maternal grandfather's estate which he was entitled to in right of his mother ”.

Applying the law there set out, Ukku Menika would not forfeit her interests in her father's estate under the circumstances I have set out. That is the only issue that has to be answered. The further circumstances not denied by the defendants, the frequent visits by Ukku Menika to her village after her father's death, the leaving of one of her children in her village although not in the mulgedera (for reasons which defendants explain), and the deeds by Appuhamy and the defendants to which I have already referred, all to my mind, further support plaintiffs' case that there was no severance on the facts apart from the law.

The defendants have failed to show that Ukku Menika forfeited her right to a share of her father's estate by abandonment of the mulgedera, and therefore the issue should have been answered in the negative.

The appeal is allowed, and the decree dismissing plaintiffs' action is set aside. They are declared entitled to an undivided $\frac{2}{3}$ share of the lands set out in the schedule to the plaint. They are entitled to costs of suit and costs of this appeal.

Appeal allowed.