

1949 *Present : Wijeyewardene C.J. and Gunasekera J.*

BANDARA MENIKE, Appellant, and IMBULDENIYA,
Respondent

S. C. 28—D. C. Kandy, 2,040

Kandyan Law—Estate of deceased husband in debt—Minor children—Payment of debts—Right of widow to mortgage property of deceased.

Under the Kandyan law a widow has the right to mortgage the estate of her deceased husband for the payment of his debts.

1 (1910) 13 N. L. R. 259.

APPEAL from a judgment of the District Judge, Kandy.

H. W. Jayewardene, for plaintiff appellant.

N. E. Weerasooria, K.C., with *H. W. Tambiah*, for defendant respondent.

Cur. adv. vult.

June 3, 1949. GUNASEKERA J.—

This is an action for declaration of title to a land. The original owner Kiri Banda died leaving as his heirs his widow Pinchi Menika and four children, one of whom is the plaintiff-appellant. In 1944, the other three children conveyed their interests in the land to the plaintiff. Pinchi Menika died in 1948.

On January 17, 1910, after Kiri Banda's death, Pinchi Menika (who was subject to the Kandyan Law) had mortgaged the land and raised a loan to pay off his debts. The mortgagee's rights ultimately passed to one Silpa, who put the bond in suit and in due course bought the mortgaged property at a sale held in satisfaction of the mortgage decree. His rights devolved on the defendant-respondent in 1935.

It appears to be common ground that the value of Kiri Banda's estate was less than a thousand rupees.

The learned District Judge dismissed the plaintiff's action, holding that Pinchi Menika was entitled to mortgage the land.

At the time of the execution of the mortgage bond Kiri Banda's children were all minors; but two of them were over fourteen years of age, having been born on May 12, 1892, and March 13, 1895, respectively. It is contended for the plaintiff that the mortgage bond could bind only Pinchi Menika's life interest and was ineffective to bind the interests of the children, for the reason that Pinchi Menika had not obtained the consent of the two children who were over the age of fourteen; and that consequently all that passed to Silpa and later to the defendant was only the life interest of Pinchi Menika, who died in 1948.

The basis of this contention is the rule formulated in the following passage in *Sawers' Memoranda and Notes* :—

“ A widow having the administration of her deceased husband's estate may, in the minority of her children from necessity, mortgage the landed property; but it must be clearly to satisfy the most necessary and urgent wants of the family, otherwise the children might not be held liable to pay the debt. But in all cases where the children are grown up to fourteen or fifteen years of age, their consent is necessary to such a mortgage being valid against them and their land ”.

(*Hayley's Sinhalese Laws & Customs, App. I., p. 33*)

What is dealt with in this passage, however, appears to be the extent of the widow's right to mortgage the family property to meet urgent family needs, and not her right to mortgage it to pay the debts of the deceased.

The Kandyan Law imposes on the widow the duty of paying her husband's debts and gives her the right to sell his lands for that purpose : *Appuhamy v. Kirihenaya*¹ ; *S.C. 89—D.C. Badulla, 8,470*². It is argued for the appellant that it does not follow that she has a right to mortgage the property without the children's consent. It is not suggested that while the widow is responsible for the payment of the deceased's debts the children have the right to decide whether she should be permitted to sell his lands for the purpose. It is contended, however, that a mortgage would need their consent because, it is said, other lands of the estate would be liable to be sold for the recovery of any portion of the debt that may be left unsatisfied after the sale of the mortgaged property. It appears to be a sufficient answer to this contention that all the property of the estate would in any event be liable to be sold for the recovery of the deceased's debts, and that under the Kandyan Law the widow is entitled to sell all the lands, if necessary, for the payment of these debts.

The liability of a widow under the Kandyan Law to pay the debts of her deceased husband has been described as that of "a sort of administratrix" : *Supen Chetty v. Kumarihamy*³. In *Britoe v. Moekoetna*⁴, a case reserved for collective decision, the Supreme Court held that "by the settled practice, an administrator is at liberty to alienate, and consequently to encumber, the whole of the estate entrusted to him". Dr. Hayley says (*Sinhalese Laws and Customs, p. 496*) that this decision was followed in several cases in the Kandyan Districts, and he cites the cases of *Murugappa v. Christina*⁵ and *Lokoo Banda v. Medduma Banda*⁶. The former was a case of a mortgage by a widow acting in the capacity of administratrix of her husband's estate and the latter was a case of a sale by an administratrix. Though neither of these cases is directly in point, they appear to support the view that a Kandyan widow, being at liberty as "a sort of administratrix" to alienate the whole of her husband's estate is consequently at liberty to mortgage it for the purpose of paying the deceased's debts. There appears to be no reason in principle for holding that while she has the right to alienate the property she has not the right to mortgage it.

I would dismiss the appeal with costs.

WIEYEWARDENE C.J.—I agree.

Appeal dismissed.

¹ (1896) 2 N. L. R. 155.

² S. C. M. 15. 11. 48.

³ (1905) 3 Bal. 96.

⁴ (1838) *Morg. Dig.* 252.

⁵ (1846) B. & S. 6 ; (1843-55) *Ram.* 65.

⁶ (1862) B. & S. 34.