

1945 Present: Keuneman S.P.J. and Canekeratne J.

UKKU BANDA *et al.*, Appellants, and UKKU BANDA,
Respondent.

4—D. C. (Inty.) Kegalla, 3,008.

Kandyan law—Inheritance—Death of married woman—Succession to acquired property—Equal rights of brothers and sisters.

Where a Kandyan married woman died intestate and issueless leaving a brother and two sisters, and her father, mother and husband had predeceased her—

Held, that her acquired property passed to her brother and sisters equally.

A PPEAL from a judgment of the District Judge of Kegalla.

The question for decision was whether when a Kandyan married woman dies intestate and issueless, her father, mother and sister having predeceased her, her acquired property passes to her brothers only or to her brothers and sisters equally.

H. V. Perera, K.C. (with him *E. A. P. Wijeyeratne*), for the third and fourth defendants, appellants.—The question for decision is whether when a Kandyan woman dies intestate leaving a brother and sisters of the whole blood they all succeed equally to her *acquired* property or whether the brother excludes the sisters. The latter view was taken by the trial Judge who purported to follow the case of *Menikhamy v. Suddana*¹. But that case dealt only with succession to a male; whereas in this case the question is one of succession to a female. This case would be governed by *Sawer p. 17*; although this passage occurs in the chapter on movables, it appears from a note made by Sawer himself lower down that the same rules applied to landed property. In the case of *Menikhamy v. Suddana* (*supra*) Maartensz A.J., after quoting *Sawer 13 and 17*, expressly states (at p. 271): “The important difference is that sisters inherit equally with brothers”.

[KEUNEMAN S.P.J.—*Sawer 17* appears to deal with the case of an unmarried woman dying intestate. In this case the deceased was married.]

Sawer was dealing with a specific case. But there is no difference in principle. The rule of succession is the same, subject to any claim a *diga* married widower may have. See Kandyan Law Commission Report (Sessional Paper XXIV. of 1935, p. 30, paras 238–243).

N. Nadarajah, K.C. (with him *N. E. Weerasooria, K.C.* and *E. S. Amerasinghe*), for the plaintiff, respondent.—In this case the two sisters of the deceased intestate, under whom the appellants claim, had been given out in *diga*. They thereby forfeited their right, in favour of their brother, to succeed to any share of their sister's estate.

¹ (1926) 28 N. L. R. 266.

Sawer p. 13 sets out generally the rule of succession both to a male and a female. Sawer 17 relates to movables and deals with the estate of an unmarried woman only. And in this passage there is a parenthetical clause which provides that "if there be but one such brother the whole goes to him, if there are several brothers they shall share equally". Counsel cited *Mudalihami v. Bandirala*¹; *Dullewe v. Dullewe*²; *Dingiri Menika v. Appuhamy*³.

H. V. Perera, K.C., in reply.—Whether the sisters were married in *binna* or in *diga* does not affect the question.

Cur. adv. vult.

October 31, 1946. KEUNEMAN S.P.J.—

The only matter argued in this appeal relates to a question of inheritance under the Kandyan law. K. M. Kirihamy, Vel Vidane, the original owner of the premises with which we are concerned, gifted the premises by P 2 of 1872 to his wife Ukku Menika, his daughter Punchi Menika who was married in *binna*, and his son Appuhamy. Kirihamy had two other daughters, Dingiri Menika and Ran Menika, who were married in *diga* and dowried. Punchi Menika died issueless, and the matter for our decision is whether the one-third share which she obtained under deed P 2 passed to her brother Appuhamy alone or to Appuhamy and the two sisters Dingiri Menika and Ran Menika.

The District Judge decided that Appuhamy alone inherited this share, and the third and the fourth defendants appeal from that finding.

Mr. Perera depends upon the following passage from Sawer's Digest of Kandyan Law—at page 17—under Chapter 2 relating to Succession to Movable Property :—

"An unmarried daughter acquiring property and dying intestate, her property goes to her mother; failing the mother, to the father; and failing the father, to her brothers and sisters of the whole blood—if there be but one such brother the whole goes to him, if there are several brothers they shall share equally; failing brothers and sisters of the whole blood, to the brothers and sisters uterine of the half blood"

(*N.B.*—We are not concerned with the further steps in the devolution of the property on failure of these heirs.)

"The assessors unanimously state that the mother is the heiress to the acquired property, of all kinds, of her children dying unmarried and without issue, and that the same is entirely at her disposal. But should she die intestate, the property would go to the brothers and sisters of the whole blood equally, and failing them to brothers and sisters of the half blood uterine.

"The assessors are of opinion that land as well as movable property, acquired by an unmarried woman dying intestate without issue, would follow the above rules of succession; but *parveny* property would go to the nearest male relations only on that side of the house from which she inherited."

¹ (1898) 3 N. L. R. 209.

² (1911) 5 Leader L. R. 39.

³ (1900) 6 N. L. R. 133.

I may add that we are not concerned with the Note in Sawer which reveals a difference of opinion among the Chiefs—for that difference relates to the later steps in the devolution of property with which we are not dealing; that is, on the failure of the classes of heirs we have mentioned.

In the present case there is no dispute that the property was the acquired property of Pūnchi Menika, and the problem is not complicated by any claim on behalf of her father or her mother or her husband, and we can act upon the footing that these persons had predeceased Pūnchi Menika.

Mr. Nadarajah for the respondent had stressed the fact that the passage cited expressly applies to an *unmarried* woman. But I do not think that a different order of succession applies in the case of the death of a married woman intestate and issueless, whether the woman was married in *binna* or *diga*, subject to any claim which may be available to the husband of the woman. No authority on the precise point we have to determine has been cited to us, but I think the passage quoted can also be applied to the case of a married woman. The passage appears to apply to the case of succession to females.

Mr. Nadarajah also draws attention to the phrase “if there be but one such brother the whole goes to him, if there are several brothers they shall share equally” and argues that this is an indication that the brother or brothers are preferred to the sister or sisters. I do not think there is substance in this argument. The previous words “failing the father to the brothers and sisters of the whole blood” are clear words indicating that both brothers and sisters of the whole blood are to succeed, and no distinction is made between sisters married in *binna* and sisters married in *diga*.

The intention is made clearer by Sawer's Note at the end of the paragraph—“but Mullegama Disave . . . are of opinion that brothers and sisters of the whole blood share equally their deceased sister's property . . . The Chiefs now all concur in this opinion that the sexes should share equally up to paternal uncles and aunts.” Then the following words are added—“Child dying intestate, acquired property goes—

- (1) to the mother
- (2) to the father
- (3) brothers and sisters of the whole blood.”

It is also to be noticed that in the case of the mother acquiring property from the children and thereafter dying intestate, the acquired property goes to “the brothers and sisters of the whole blood equally.” I do not think that the word “brother” excludes sister in the phrase mentioned by Mr. Nadarajah. The distinction drawn with regard to “*parveny* property” also strengthens that view.

Our attention has been drawn to the fact that a different rule of succession applies to the case of a male dying intestate and issueless and leaving brothers and sisters. In that case it has been held that the

brothers are to be preferred to the sisters ; see *Dingiri Menika v. Appuhamy* ¹; *Dullewe v. Dullewe* ²; and *Menikhamy v. Suddana* ³. I may say that the point was decided, not without hesitation, and a sharp distinction was drawn between succession to a brother and succession to a sister. In fact the passage on which Mr. Perera depends was cited in opposition to the argument which was eventually maintained. I have examined the passage on which the decision in these cases was made (Sawer p. 13). Sawer first dealt with the rights of the father and the mother respectively in the property of " a person dying childless ". The rule enunciated in this connection applied to both males and females. But the latter part of the passage related to the rights of brothers and sisters " in their deceased brother's acquired property ", and in this it is quite clear that Sawer was dealing with the case of a Kandyan man dying intestate and issueless. From the language used by Sawer in this respect it was inferred that where a man died leaving brothers and sisters, the brothers were to be preferred to the sisters whether married in *binna* or in *diga*. I do not think this passage in Sawer has any application to the present case.

The argument on behalf of the third and fourth defendants must prevail, and I accordingly set aside the judgment appealed from. The shares to which the parties are entitled on this footing are not in dispute. I declare the parties entitled to the following shares :

Plaintiff— $\frac{8}{18}$ share
 first and second defendants— $\frac{1}{18}$ share
 third defendant— $\frac{4}{18}$ share
 4th defendant— $\frac{4}{18}$ share
 fifth defendant— $\frac{1}{18}$ share

The appellants are entitled to the costs of appeal against the plaintiff, but the plaintiff is entitled to half the costs of partition *pro rata*. The order of the District Judge as regards the plantations and the house will stand. Interlocutory decree for partition will be entered accordingly.

CANEKERATNE J.—I agree.

Judgment set aside.
