

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Case No. 601/97 (F)

D.C. Kurunegala Case No.2124/P

4. Gunaseeli Wanasinghe Rajapakse
5. Shreemathie Wanasinghe Rajapakse
6. Kalyani Wanasinghe Rajapakse
7. Ashoka Bandu Wanasinghe  
Rajapakse (Deceased)
- 7A. Bharatha Sachintha Panduka  
Rajapakse
8. Chandrasena Wanasinghe Rajapakse
9. Jayasheeli Wanasinghe Rajapakse
10. Mahindadasa Wanasinghe  
Rajapakse (Deceased)
- 10A. Gunaseeli Wanasinghe Rajapakse
11. Indumathie Wanasinghe Rajapakse
12. Dharmarathne Wanasinghe  
Rajapakse
13. Wanasinghe Devage Podinona  
(Deceased)
- 13A. Gunaseeli Wanasinghe Rajapakse  
All of Anhandiya

**Defendants-Appellants**

Hatana Devage Vimalawathie Rajapakse  
Pataleeya, Anhandiya.

**Plaintiff- Respondent**

1. D.B. Rajapakse, Anhandiya (Deceased)
2. R.D. Harishchandra Rajapakse
3. R.D. Lakshman Rajapakse Both of Ambakote
14. R.D. Punyasoma Rajapakse
15. R.D. Jayantha Rajapakse
16. R.D. Wasantha Rajapakse
17. R.D. Dammika Rajapakse
18. R.D. Gunawardena Rajapakse
19. R.D. Amitha Rajapakse

**Defendants- Respondents**

**Before:** M.M.A. Gaffoor J.

Janak De Silva J.

**Counsel:** K.G. Jinasena for 4<sup>th</sup> to 13<sup>th</sup> Defendants-Appellants

Asela Rekawa with Amila Perera and Dineshi Nanayakkara for Plaintiff-Respondent

Buddhika Serasinghe for 1A Defendant-Respondent

**Written Submissions tendered on:**

4<sup>th</sup> to 13<sup>th</sup> Defendants-Appellants on 20<sup>th</sup> January 2014

Plaintiff-Respondent on 20<sup>th</sup> January 2015 and 15<sup>th</sup> December 2017

**Argued on:** 30<sup>th</sup> November 2017

**Decided on:** 19<sup>th</sup> February 2018

**Janak De Silva J.**

The plaintiffs-respondent (Plaintiff) filed the above action in the District Court of Kurunegala seeking to partition the land called Aswadduma Kumbura situated at Madagama in the district of Kurunegala one paddy amunum sowing in extent.

The Plaintiff claimed that one D.R.D. Pina was the original owner of the corpus. Pina sold the corpus to one D.R.D. Handuna and Kiriya by deed no. 18674 dated 1905.08.29 (ඔ.2). Handuna's ½ share devolved on Pushpadeva whose rights devolved upon his death on the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants-Respondents (2<sup>nd</sup> and 3<sup>rd</sup> Defendants). Kiriya had three children, two boys and one girl, namely D.B. Rajapakse (1<sup>st</sup> Defendant-Respondent), D.M. Rajapakse and Sawwani. Although Sawwani contracted a *diga* marriage before 1939, she regained her *binna* rights as she continued to live in the *mulgedera* from that day. Upon the death of Kiriya, his rights devolved upon D.B. Rajapakse (1<sup>st</sup> Defendant-Respondent), D.M. Rajapakse and the Plaintiff, daughter of Sawwani who predeceased Kiriya. The Plaintiff further claimed that after the death of Kiriya, the Plaintiff, D.B. Rajapakse (1<sup>st</sup> Defendant-Respondent) and D.M. Rajapakse possessed in common the property of Kiriya and thereby D.B. Rajapakse (1<sup>st</sup> Defendant-Respondent) and D.M. Rajapakse waived the forfeiture, if any, arising from Sawwani contracting a *diga* marriage. That was the pedigree set up by the Plaintiff.

Accordingly, the Plaintiff claimed that the parties were entitled to the following shares of the corpus:

Plaintiff	undivided 1/6
1 <sup>st</sup> Defendant	undivided 1/6
2 <sup>nd</sup> and 3 <sup>rd</sup> Defendants	undivided 3/6
4 <sup>th</sup> to 10 <sup>th</sup> Defendants	undivided 1/6

The 1<sup>st</sup> Defendant-Respondent (1<sup>st</sup> Defendant) denied that Sawwani regained her *binna* rights. He claimed that the Defendants had acquired prescriptive title to the corpus in addition to their inherited rights. Accordingly, it was claimed that the parties were entitled to the following shares of the corpus:

1 <sup>st</sup> Defendant	undivided 1/4
2 <sup>nd</sup> and 3 <sup>rd</sup> Defendants	undivided 2/4
4 <sup>th</sup> to 10 <sup>th</sup> Defendants	undivided 1/4

The 2<sup>nd</sup>, 3<sup>rd</sup> and 13<sup>th</sup> to 18<sup>th</sup> Defendants claimed that the undivided ½ share of the corpus held by Handuna went to his son Pushpadeva and upon his death to his children 2<sup>nd</sup>, 3<sup>rd</sup> and 13<sup>th</sup> to 18<sup>th</sup> Defendants. They also claimed prescriptive title.

The 4<sup>th</sup> to 13<sup>th</sup> Defendants-Appellants (Appellants) denied that the Plaintiff owned any share of the corpus and asserted that her mother Sawwani had contracted a *diga* marriage and thereby forfeited any right of succession to paternal property.

After trial, the learned District Judge of Kurunegala held that the mother of the Plaintiff Sawwani had regained her *binna* rights and that the parties were entitled to the following shares in the corpus:

Plaintiff	undivided 1/6
1 <sup>st</sup> Defendant	undivided 1/6
2 <sup>nd</sup> , 3 <sup>rd</sup> and 14 <sup>th</sup> to 19 <sup>th</sup> Defendants	undivided 3/6
4 <sup>th</sup> to 13 <sup>th</sup> Defendants	undivided 1/6

The Appellants have preferred this appeal against the said judgement of the learned District Judge of Kurunegala dated 7<sup>th</sup> July 1997.

The only question that arises for consideration in this case is whether Sawwani regained her *binna* rights after having contracted a *diga* marriage. That question must be answered by reference to customary Kandyan Law as section 9(1) of the Kandyan Law (Declaration Amendment) Ordinance No. 39 does not apply as the parents of the Plaintiff contracted their marriage on 2<sup>nd</sup> August 1929 (ඔ.1) prior to the commencement of the said Ordinance. By virtue of this section, after the commencement of the said Ordinance, for purposes governing succession, a *diga* marriage cannot be converted into a *binna* marriage and *vice versa*.

It is an admitted fact that Sawwani contracted a *diga* marriage. The word *diga* from *di*, root *da*, to give, is, according to some scholars, a derivative from *dirga*, long, the bride being sent away to a distance, that is to her husband's house. The conducting of a wife to, and the living in the husband's house or in any family residence of his, or if he does not own a house and lands, the taking her as his wife and the conducting away from her family to a place of lodging constitutes a *diga* marriage. The predominant idea is the departure or removal from the family or ancestral home.<sup>1</sup>

The authorities unite in stating that under Kandyan Law when a woman (not being the only child) marries in *diga* she forfeits her rights to inherit any portion of her father's estate.<sup>2</sup> This forfeiture is an incident of the daughter quitting the parental roof to enter another family.

The important issue for this Court to consider is the circumstances in which a *diga* married daughter can regain *binna* rights. The Plaintiff submits that since Sawwani returned to the *mulgedera* and lived there until her death and the fact that she was re-admitted to the *paternus familia* is itself proof that Sawwani re-acquired *binna* rights. However, the Appellants submit that it must also be shown that there was a waiver of the forfeiture by the family including the brothers.

The circumstances under which a *diga* married daughter can regain *binna* rights is not without ambiguities. Modder<sup>3</sup> states that a *diga* married daughter will regain *binna* rights

- (a) By being recalled by the father and re-married in *binna*;
- (b) By her father, on her return to his house along with her husband, assigning to them and putting them in possession of a part of his house and a specific share of his lands;
- (c) On her returning home along with her husband and attending on her father, and rendering him assistance until his death;
- (d) On her coming back and attending on and assisting her father during his last illness, and the father on his deathbed expressing his will that she should have a share of his lands.

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<sup>1</sup> Armour, *Kandyan Law*, p. 5

<sup>2</sup> *Punchi Menike v. Appuhamy et al* (19 N.L.R. 353); *Gunasena et al v. Ukku Menika et al* (78 N.L.R. 529)

<sup>3</sup> Modder's *Kandyan Law*, 2<sup>nd</sup> ed., 460

Early decisions show that our Courts focused on whether the daughter who had forfeited her rights had regained such rights by maintaining a connection with the *mulgedara*.<sup>4</sup> In *Emi Nona et al v. Sumanapala et al*<sup>5</sup> Court held that evidence that a *diga* married daughter visited her parents from time to time and stayed for some time with them, that she went to her parent's house for confinement and attended on her father during his last illness is insufficient to establish a re-acquisition of *binna* rights.

However later cases have held that it must also be shown that there was a waiver of the *diga* married daughter's forfeiture by the father and brothers.<sup>6</sup> In *Dingiri Amma v. Ratnatilaka et al*<sup>7</sup> it was held that a *diga* married daughter cannot re-acquire *binna* rights unless it is shown that she was not only received back at the *mulgedera* by her father and those who were entitled to the inheritance but also that they acquiesced in her re-acquiring *binna* rights and agreed to share the inheritance.

In *Gunasena et al v. Ukku Menika et al*<sup>8</sup> after an exhaustive analysis of the authorities Tennakoon C.J. identified the test to be applied as follows:

**"...it would appear that re-acquisition of binna rights by a daughter who has gone out in diga can be established by proving the exercise by such diga married daughter of rights in the mulgedera or in the paternal property as though there had been no forfeiture, coupled with acquiescence on the part of the father or he being dead of the brothers in such exercise of rights."**<sup>9</sup>(emphasis added)

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<sup>4</sup> *Appuhamy v. Kiri Menika* (16 N.L.R. 238); *Punchi Menika v. Appuhamy* (19 N.L.R. 353)

<sup>5</sup> 49 N.L.R. 440

<sup>6</sup> *Banda v. Angurala* (50 N.L.R. 276); *Fernando v. Bandi Silva* (4 C.W.R. 12); *Appu Naide v. Heen Menika* (51 N.L.R. 63)

<sup>7</sup> 64 N.L.R. 163

<sup>8</sup> 78 N.L.R. 529

<sup>9</sup> *Ibid.* 535

I have set out the correct legal position of the circumstances under which a *diga* married daughter can regain *binna* rights. I will now consider whether the learned District Judge was correct in concluding that the mother of the Plaintiff Sawwani had regained her *binna* rights on the facts of this case.

The time at which Sawwani, the mother of the Plaintiff, should have regained her *binna* rights is the time of the death of her father Kiriya as it is only then that the question of intestate succession has actually to be considered.<sup>10</sup>

The Plaintiff testified to the following salient facts. The Plaintiffs parents got married in August 1929 (Appeal Brief page 82). The Plaintiff was born on 7<sup>th</sup> September 1930 (භූ.3). She was born in the *mulgedara* at Pataliya as Sawwani had come to the parental home for the confinement (Appeal brief page 87). Sawwani died in January 1931 (Appeal Brief page 78) and the Plaintiff was looked after by Kiriya, his wife Rathee (mother of Sawwani) and the uncles D.M. Rajapakse and D.B. Rajapakse, brothers of Sawwani (Appeal brief page 75). Kiriya died somewhere in 1940 (Appeal Brief page 75). The Plaintiff continued to reside in the *mulgedara* after her marriage to Gunapala (Appeal brief page 75) (භූ.4 to භූ.9). D.M. Rajapakse and D.B. Rajapakse later constructed separate houses and moved out of the *mulgedara* (Appeal brief page 75). The Plaintiff was given possession of the paddy land called Pihilianga by D.M. Rajapakse but after his death his children did not give it to her (Appeal brief page 76). Plaintiff did not possess Aswadduma Kumbura the corpus in this case (Appeal brief pages 75 and 76).

Under cross examination the Plaintiff admitted that the brothers of her mother Sawwani did not accept that Sawwani had obtained *binna* rights (Appeal Brief page 83). Plaintiff also admitted that she had obtained rights to her father's (Theththuwa) property on the basis of her mother's *diga* marriage (Appeal Brief page 84 and 87). She accepted that her father and mother were not given *binna* rights (Appeal Brief page 76).

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<sup>10</sup> *A.G. Menika & others v. N.D. William* [(1983) Vol. I Part III B.A.S.L. Law Journal 113]

The learned District Judge adverted to the admitted fact that the Plaintiff was from birth residing in the *mulgedera* and brought up there and held that this by itself was sufficient for Sawwani to have regained *binna* rights to her father's property. However, remaining in or returning to the *mulgedera* does not necessarily result in a retention or re-acquisition of rights. If a *diga* married woman is remarried in *binna* or readmitted into her father's family by a *binna* settlement clearly showing that a *binna* connection was intended, she regains the rights of a *binna* married daughter to inherit her intestate father's properties.<sup>11</sup>

The learned District Judge appears to have approached the question of re-acquisition of *binna* rights purely from the exercise of rights in the *mulgedara*. However as pointed out earlier the Supreme Court in *Gunasena et al v. Ukku Menika et al*<sup>12</sup> held that there was another requirement namely acquiescence on the part of the father or he being dead of the brothers in such exercise of rights. Hence the learned District Judge erred in applying the relevant test. However, no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.<sup>13</sup> Therefore, even if the learned District Judge erred in applying the correct test, if it is evident on a close examination of the totality of the evidence that the learned District Judge was correct in pronouncing judgment in favour of the Plaintiff, there is no prejudice to the substantial rights of the parties or occasioned a failure of justice and the judgment of the learned District Judge should not be disturbed.<sup>14</sup>

In deciding whether the brothers of Sawwani acquiesced in her exercising rights in the *mulgedera* the vital evidence is that the Plaintiff having being born in the *mulgedera* continued to occupy it at the time of Kiriya's death in 1940 and was still occupying it at the time she testified. Thus, she continued to occupy the *mulgedera* for 65 years. Furthermore, it was her unchallenged evidence that her uncles D.M. Rajapakse and D.B. Rajapakse were also residing in the *mulgedera* for some time but later constructed separate houses and moved out leaving the Plaintiff to occupy it.

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<sup>11</sup> *Jayasinghe v. Kiribindu and others* [(1997) 2 Sri.L.R. 1]

<sup>12</sup> 78 N.L.R. 529

<sup>13</sup> Proviso to Article 138(1) of the Constitution

<sup>14</sup> *Victor and Another v. Cyril De Silva* (1998) 1 Sri.L.R. 41



Plaintiff was given possession of the paddy land called Pihilianga by D.M. Rajapakse which was part of Kiriya's estate. The above facts in my view clearly indicates that there was acquiescence on the part of Kiriya and the brothers of Sawwani in Sawwani and through her, the Plaintiff, exercising rights in the *mulgedera*. Tennakoon C.J. in *Gunasena et al v. Ukku Menika et al*<sup>15</sup> held that Kandyan Law customarily identified the following acts as evidence of readmission of a *diga* married daughter into the father's family:

- (a) maintaining a close and constant connection with the *mulgedera*; or
- (b) left a child to be brought up at the *mulgedera*; or
- (c) maintained an intimate association with the paterfamilias, or
- (d) possessed any of the family lands.<sup>16</sup>

The evidence in this case establishes all four of these acts as well as acquiescence on the part of the family in Sawwani and the Plaintiff exercising rights in the *mulgedera*.

The Appellants submitted that the Plaintiff had in D.C. Kurunegala 5648/T claimed property rights in her father's property and obtained her mother's *diga* rights and that there are no authorities to establish that a person can benefit under both *diga* and *binna* rights. The answer to this point is the following statement by Thamotheram J. in *Ranhetidewayalage Rana v. Ranhetidewayalage Kiribindu*<sup>17</sup>:

"The only consequence of a *diga* married daughter preserving or subsequently acquiring *binna* rights is that the forfeiture of the rights of paternal inheritance does not take place, but she inherits as though she was married in *binna*. It does not alter the character of the marriage itself. The *diga* marriage remains a *diga* marriage so far as other results of such marriage are concerned. The husband does not cease to be a *diga* married husband and begin to be a *binna* married husband."

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<sup>15</sup> 78 N.L.R. 529

<sup>16</sup> *Ibid.* 531

<sup>17</sup> 79(II) N.L.R. 73

For the foregoing reasons, I see no reason to interfere with the judgement of the learned District Judge of Kurunegala dated 7<sup>th</sup> July 1997.

Hence the appeal is dismissed with costs.

Judge of the Court of Appeal

**M.M.A. Gaffoor J.**

I agree.

Judge of the Court of Appeal