

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

*In the matter of an Application for
Leave to Appeal against the
judgment of the Provincial High
Court of the North Western
Province (exercising its Civil
Appellate Jurisdiction) holden at
Kurunegala, Article 128 of the
Constitution of the Democratic
Socialist Republic of Sri Lanka read
with Section 5C (1) of the High court
of the Provinces (Special
Provisions) (Amendment) Act No.
54 of 2006*

SC APPEAL NO. 55/2016

SC/HCCA/LA/ No. 326/2013
HCCA (Kurunegala): NWP/HCCA/
KUR/88/2003/F
D.C. Kuliypitiya No: 11938/P

1. Wickramasinghe Mudiyansele
Podimenike.
2. Wickramasinghe Mudiyansele
Menikhamy.
3. Wickramasinghe Mudiyansele
Dolimenika.

All of Hanthihawa, Halmillawewa.

PLAINTIFFS

-VS-

1. Wickramasinghe Mudiyansele
Peiris Singho.
2. Wickramasinghe Mudiyansele
Podinona
3. Wickramasinghe Mudiyansele
Kirimenika
4. Wickramasinghe Mudiyansele
Piyadasa

5. Wickramasinghe Mudiyansele
Jinadasa
6. Wickramasinghe Mudiyansele
Dingirimenika
7. Wasala Mudiyansele Rosalin
Nona.

All of Hanthihawa, Halmillawewa.

DEFENDANTS

AND BETWEEN

2. Wickramasinghe Mudiyansele
Menikhamy.
3. Wickramasinghe Mudiyansele
Dolimenika.

All of Hanthihawa, Halmillawewa.

2ND AND 3RD PLAINTIFFS - APPELLANTS

-VS-

1. Wickramasinghe Mudiyansele
Podimenike. (**Deceased**)
- 1A. Rajapaksha Mudiyansele
Dassanayake

Both of Hanthihawa,
Halmillawewa

SUBSTITUTED 1ST PLAINTIFF- RESPONDENT

1. Wickramasinghe Mudiyansele
Peiris Singho (**Deceased**).

- 1A. Wasala Mudiyanse Lage Rosalin Nona
2. Wickramasinghe Mudiyanse Lage Podinona
3. Wickramasinghe Mudiyanse Lage Kirimenika
4. Wickramasinghe Mudiyanse Lage Piyadasa
5. Wickramasinghe Mudiyanse Lage Jinadasa (**Deceased**)
- 5A. Gajanayake Mudiyanse Lage Indrani Gajanayake
6. Wickramasinghe Mudiyanse Lage Dingirimenika
7. Wasala Mudiyanse Lage Rosalin Nona.

All of Hanthihawa, Halmillawewa.

DEFENDANTS - RESPONDENTS

AND NOW BETWEEN

1. Wickramasinghe Mudiyanse Lage Peiris Singho (**Deceased**).
- 1A. Wasala Mudiyanse Lage Rosalin Nona (**Deceased**)
- 1B. Wickramasinghe Mudiyanse Lage Gnanalatha
- 1C. Wickramasinghe Mudiyanse Lage Rathnalatha Wickramasinghe
- 1D. Wickramasinghe Mudiyanse Lage Karunasena Wickramasinghe
- 1E. Wickramasinghe Mudiyanse Lage Pathmalatha Wickramasinghe

- 1F. Wickramasinghe Mudiyansele
Chandralatha Wickramasinghe
- 1G. Wickramasinghe Mudiyansele
Swarnalatha Wickramasinghe
- 1H. Wickramasinghe Mudiyansele
Karunathilake Wickramasinghe
- 1I. Wickramasinghe Mudiyansele
Bandula Kumara Wickramasinghe

All of Hanthihawa, Halmillawewa.

**SUBSTITUTED 1B-1I DEFENDANTS –
RESPONDENTS – APPELLANTS**

- 7. Wasala Mudiyansele Rosalin
Nona. (**Deceased**)
- 7A. Wickramasinghe Mudiyansele
Gnanalatha
- 7B. Wickramasinghe Mudiyansele
Rathnalatha Wickramasinghe
- 7C. Wickramasinghe Mudiyansele
Karunasena Wickramasinghe
- 7D. Wickramasinghe Mudiyansele
Pathmalatha Wickramasinghe
- 7E. Wickramasinghe Mudiyansele
Chandralatha Wickramasinghe
- 7F. Wickramasinghe Mudiyansele
Swarnalatha Wickramasinghe
- 7G. Wickramasinghe Mudiyansele
Karunathilake Wickramasinghe
- 7H. Wickramasinghe Mudiyansele
Bandula Kumara Wickramasinghe

All of Hanthihawa, Halmillawewa.

**SUBSTITUTED 7A-7H DEFENDANTS –
RESPONDENTS – APPELLANTS**

-VS-

2. Wickramasinghe Mudiyansele
Menikhamy.
3. Wickramasinghe Mudiyansele
Dolimenika (**Deceased**)

Both of Hanthihawa, Halmillawewa

- 3A. Rajapaksha Mudiyansele
Jayalath
Egoda Rakupola, Ilukhena,
Udubaddawa.
- 3B. Rajapaksha Mudiyansele
Kusuma Rajapaksha
Hanthihawa, Halmillawewa,
Panduwasnuwara.
- 3C. Rajapaksha Mudiyansele
Gamini Lalith Rajapaksha
Hanthihawa, Halmillawewa,
Panduwasnuwara.
- 3D. Rajapaksha Mudiyansele
Ashoka Rajapaksha
Egoda Rakupola, Ilukhena,
Udubaddawa.
- 3E. Jayakody Arachchige Sarath
Kumara Jayakody
Hanthihawa, Halmillawewa,
Panduwasnuwara.

**2nd AND SUBSTITUTED 3A-3E PLAINTIFFS
– APPELLANTS - RESPONDENTS**

1. Wickramasinghe Mudiyansele
Podimenike. (**Deceased**)
- 1A. Rajapaksha Mudiyansele
Dassanayake
Both of Hanthihawa,
Halmillawewa

**SUBSTITUTED 1ST PLAINTIFF –
RESPONDENTS- RESPONDENTS**

2. Wickramasinghe Mudiyansele
Podinona
3. Wickramasinghe Mudiyansele
Kirimenika
4. Wickramasinghe Mudiyansele
Piyadasa
5. Wickramasinghe Mudiyansele
Jinadasa (**Deceased**)
- 5A. Gajanayake Mudiyansele
Indrani Gajanayake
6. Wickramasinghe Mudiyansele
Dingirimenika

All of Hanthihawa, Halmillawewa.

**2ND – 6TH DEFENDANTS – RESPONDENTS
- RESPONDENTS**

BEFORE : L.T.B. DEHIDENIYA, J.
P. PADMAN SURASENA, J.
S. THURAIRAJA, PC, J.

COUNSEL : Lakshman Perera, PC, with Thishya Weragoda, Ms. Shalini Fernando and MS. Piyumi Wickramage for the 1A and 7th Defendants – Respondents- Appellants
M.C. Jayaratne, PC, with M.D.J. Bandara and Nishani Hettiarachchi for the 3E Substituted Plaintiffs– Appellants - Respondent.

ARGUED ON: 29th September 2020.

WRITTEN SUBMISSIONS: Written Submissions for 1A and 7th Defendants– Respondent – Appellant filed on 17/05/2016
Written Submissions for 2A and 3A-3E Substituted Plaintiffs – Appellants- Respondents filed on 08/10/2018

DECIDED ON: 29th September 2021.

S. THURAIRAJA, PC, J.

I find it pertinent to first establish the facts of this case. Wickramasinghe Mudiyansele Podimenike, Wickramasinghe Mudiyansele Menikhamy and Wickramasinghe Mudiyansele Dolimenika i.e. Plaintiffs – Appellants – Respondents (hereinafter sometimes referred to as the Plaintiffs – Respondents.) instituted partition action by plaint dated 1st July 1998 against Wickramasinghe Mudiyansele Peiris Singho, Wickramasinghe Mudiyansele Podinona, Wickramasinghe Mudiyansele Kirimenika, Wickramasinghe Mudiyansele Piyadasa, Wickramasinghe Mudiyansele Jinadasa, Wickramasinghe Mudiyansele Dingirimenika i.e. 1st – 6th Defendants – Respondents – Respondents (hereinafter referred to as the 1st – 6th Defendants – Respondents) and Wasala Mudiyansele Rosalin Nona i.e. 7th

Defendant – Respondent – Appellant (hereinafter referred to as the 7th Defendant – Appellant). In their Pleint the Plaintiffs – Respondents averred *inter alia* that the original owner of the land which was sought to be partitioned was one named Wickramasinghe Mudiyanseleage Yahapathhamy who was a person subject to the Kandyan Law and the land was a Paraveni (ancestral) land. Upon his death his children, namely 1st Plaintiff – Respondent, 2nd Plaintiff – Respondent, 3rd Plaintiff – Respondent, 1st Defendant – Respondent, 2nd Defendant – Respondent and Ukkubanda (deceased father of the 4th – 6th Defendants inherited the land in equal share subject to the life interest of his widow Ranmenika.

Ranmenika passed away in 1992. Thereafter the Plaintiffs instituted an action to partition the land in the District Court. The 1st and 2nd Defendant – Respondents filed a joint statement of claim dated 25/07/2000 admitting that Wickramasinghe Mudiyanseleage Yahapathhamy was a person who was subject to the Kandyan Law. However, they claimed that the Plaintiff – Respondents and the 2nd Defendant – Respondent are daughters who married in Diga during the lifetime of their father and have as such forfeited their right to succession to the paraveni property. They also claimed that Yahapathhamy was not the original owner of the land in question and that the 1st Defendant – Respondent had prescribed to the land and therefore he sought a dismissal of the Plaintiff – Respondent’s action.

The 1A and 7th Defendant – Appellant being the wife of the 1st Defendant – Respondent filed her own statement of claims stating that the 1st Defendant had by Deed of Gift transferred the rights to the land in suit to her and therefore sought a dismissal of the Plaintiff – Respondent’s action. The matter then proceeded to trial. The 3rd Plaintiff – Respondent gave evidence and stated that the 4 daughters of the deceased namely the Plaintiff – Respondents and the 2nd Defendant – Respondent went out in Diga marriage prior to the death of the deceased. She also stated that she returned to the Mahagedara (Ancestral home also referred to as “Mulgedara”) in

1972 with her 4 children after the death of her husband and has remained there since. However, the 1A and 7th Defendant – Appellant provided that the 3rd Plaintiff – Respondent had not adduced any evidence as to how her forfeited rights to succession were revived and re-admitted to the household upon the return to the Mahagedara in 1972.

Having considered the following the learned District Court judge held that the 1st to 3rd Plaintiffs have entered into valid marriages prior to the death of Yahapathhamy in 1973 and the mere return by the Diga married 3rd Plaintiff to the Mahagedara upon the death of her husband does not entitle her to claim rights as a Binna married daughter. Being aggrieved by this judgment the 2nd and 3rd Plaintiff – Respondents preferred an appeal in terms of Section 754(1) of the Civil Procedure Code to the Court of Appeal. Upon the promulgation of the High Court of the Provinces (Special Provisions) (Amendment) Act no. 54 of 2006, said appeal was heard by the Provincial High Court of the North Western Province holden at Kurunegala.

The primary issue that was to be determined by the High Court was the issue of whether the 3rd Plaintiff – Respondent who had gotten married under the General Marriage Ordinance on 28/03/1957 and who had subsequently returned to the Mahagedara after her husband's death in 1972 had acquired the rights of a Binna married daughter. The High Court judge came to the conclusion that there is no evidence to show that the 1st and 2nd Plaintiff ever came back within the paternal power to make them heirs of Yahapathhamy. It was also held that the 2nd Defendant – Respondent had disclaimed any rights in the case itself. The High Court Judge held that the heirs of Yahapathhamy for the land that was sought to be partitioned were the 3rd Plaintiff – Respondent, 1st Defendant – Respondent and the children of Ukkubanda and that they should inherit an undivided 1/3rd each from the land that was sought to be partitioned, thus the appeal of the Plaintiffs – Respondents was allowed.

Being aggrieved by this decision the 1A and 7th Defendant – Appellant an appeal to this court to have the decision of the High Court set aside. Leave to appeal was granted under (b), (d) and (e) of paragraph 18 of the Petition dated 13th August 2013. These questions of law have been reproduced for ease of reference.

(18.)

b. the learned provincial high court judge has erred in law by coming to the conclusion that Yahapathhamy;

- i. Had readmitted Dolimenika as a binna married daughter by allowing her to possess the land comprising of the mulgedara 7-8 years prior to his death.*
- ii. Could, in law, re-admit Dolimenika as a binna married daughter 7-8 years prior to his death during the subsistence of her diga marriage in contravention of Section 9(1) of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938.*

d. the learned Provincial High Court Judge has erred in law by coming to the conclusion that Yahapathhamy could, in law, grant rights in relation to immovable property, to the 3rd Plaintiff, in contravention of Section 2 of the Prevention of Frauds Ordinance No. 7 of 1840

e. the learned Provincial High Court Judge has erred in law by misapplying the burden of proof required in proving that Dolimenika had in fact regained binna rights.

After considering the available material I find that the decisive factor in this matter is the issue with regards to the 3rd Plaintiff – Respondent’s marriage. Namely whether it was in fact readmitted as a Binna marriage as the High Court had done in its judgment.

After perusing the material before us, it is apparent that the daughter was given in marriage under the General Marriage Ordinance in the year 1957 and after her husband's death in 1972 after approximately 15 years of marriage she was allowed to live with her parents in her Mulgedara and continued to do so until her father's death. Her claim is that upon coming back to her Mulgedara she acquired the rights of a woman under the Binna marriage.

For purposes of clarity, I will first differentiate a Diga marriage from a Binna marriage. Marriage in Diga and Binna are the two methods of marriage under the Kandyan Law. A Diga marriage according to the Kandyan law is when a woman is given away and is settled in the home of her husband, which is the more common of the two types of marriages. A Binna marriage is one where the bridegroom is received into the house of the bride and according to certain stipulations abides there permanently. This type of marriage would more commonly occur where the bride is an heiress or a daughter of a wealthy family in which there are few sons. The type of marriage entered into directly effects the succession to property. A Diga married daughter does not typically succeed to the property of her father. Whereas a Binna married daughter retains her to succession after the marriage. Hence one of the most pressing issues in this case is whether the 3rd Plaintiff had reacquired the rights of a Binna married daughter when she returned to her Mulgedara after the demise of her husband.

It is also notable that the 3rd Plaintiff – Respondent was married under the provisions of the General Marriages Ordinance. The general practice in relation to marriages registered under the General Marriages Ordinance is that where an entry as to the nature of the marriage is absent, the presumption is that the marriage is a Diga marriage. This was discussed in the case of ***Lewis Singho v Kusumawathie and others*** **2003 (2) SLR 128**. In this case Dissanayake, J stated as follows;

Applying the above principles where a party who is governed by the Marriage and Divorce (Kandyan) Act contracts a marriage under the Marriage Registration

Ordinance, in the absence of an entry in the certificate of marriage with regard to the nature of the so marriage contracted the presumption recognised under section 28(1) of the Marriage and Divorce (Kandyan) Act would be applicable and such a marriage would be presumed to have been one of Diga until the contrary is proved.

*Thus since in the certificate of marriage of Enso Nona (V1) which is one issued under the General Marriages Ordinance, **where an entry with regard to the nature of marriage is absent, the presumption is that the marriage is Diga and not Binna.***

(Emphasis added)

Fredrick Austin Haley in his book *A Treaties on the laws and customs of the Sinhalese* also wrote about this presumption. In page 195 of this book, it has been stated that in the absence of an entry in the register specifying its nature, the marriage is presumed to be a Diga one until the contrary is proved. This is also referenced in the aforementioned judgment by Justice Dissanayake. Thus it is presumed that the marriage of the 3rd Plaintiff – Respondent is a Diga marriage. It is also vital to note that the 3rd Plaintiff – Respondent when asked in cross examination whether she and the 2nd Plaintiff – Respondent went in Diga marriage, had replied in the affirmative.

Thus, it is apparent that for the 3rd – Plaintiff Respondent to succeed to her father's property, her Diga marriage should have converted into a Binna marriage as Diga married daughters have no right to their father's property. Section 9 (1) of the Kandyan Law Declaration and Amendment Ordinance sets out the nature of these two types of marriages. It states as follows;

Section 9

(1) A marriage contracted after the commencement of this Ordinance in binna or in diga shall be and until dissolved shall continue to be, for all purposes of the law

*governing the succession to the estates of deceased persons, a binna or a diga marriage, as the case may be, and shall have full effect as such ; **and no change after any such marriage in the residence of either party to that marriage and no conduct after any such marriage of either party to that marriage or of any other person shall convert or be deemed to convert a binna marriage into a diga marriage or a diga marriage into a binna marriage or cause or be deemed to cause a person married in diga to have the rights of succession of a person married in binna, or a person married in binna to have the rights of succession of a person married in diga.***

(Emphasis added)

However there have been certain circumstances where daughters who have been married in Diga have acquired certain Binna rights. In Armour's Grammar of the Kandyan Law by Joseph Martinus Perera these circumstances have been established. A few of these circumstances are, where a Diga married daughter is recalled by her father and remained in the father's house until his demise, and if after she was married, she was married in Binna, and if the son lived away from his father's house settled in Binna in his wife's village, then the daughter and the son will inherit equal shares of the father's estate. Another instance is where the Diga married daughter returns destitute. In those circumstances she will be entitled to maintenance. However, in this matter it does not seem that the 3rd Plaintiff – Respondent had acted in a manner in which her Diga rights had converted into Binna rights. Although there has been a change of residence this does not necessarily confer the rights of a Binna married daughter on a Diga married one. In Sawers' Digest of Kandyan Law (page 2) the change in the nature of these marriages is discussed.

*Daughters, while they remain in their father's house, have a temporary joint interest with their brothers in the landed property of their parents; **but this they lose when given out in what is called a deega marriage, either by their***

parents or brothers, after the death of the parents. It is, however, reserved for the daughters, **in the event of their being divorced from their deega husbands, or becoming widows destitute of the means of support, that they have a right to return to the house of their parents and there to have lodging and support and clothing from their parents estate;** but the children born to a deega husband have no right of inheritance in the estate of their mother's parents

(Emphasis added)

This principle was discussed extensively in the case of **Jayasinghe v Kiribindu and Others 1997 (2) SLR 1**. In this case it was stated as follows;

"There is no dispute that Kiribindu, the plaintiff-respondent, never left her parental home and lived in it before and after the death of her father. However, was she allowed to settle in binna in the mulgedera? Living in the mulgedera (or on ancestral properties e.g. see D.C. Kurunegala 19107 (1873) Ill Grenier 115; Dingiri Amma v. Ukku Amma, having a binna connection: cf Gonigoda v. Dunuwlla, cf also Doratiyawe v. Ukku Banda Korale, did not automatically confer rights of inheritance on a daughter who had been married in diga. Her rights would depend on whether her residence could be regarded as a settlement in binna in the house or property of the father. Whether there was a settlement in binna would depend on the establishment of that fact established by the evidence in a particular case. In Re Mahara Ratemahatmaya, where a man lived for some years in the family house of a woman with the intention of forming a marital connection, it was held by Rowe, C.J. and Morgan J. that, unless there be some substantial proof to the contrary arising from a proved disparity of rank or other legal obstacle, that would amount to a marriage in binna.

On the other hand, as we have seen, if a daughter who had gone out in diga be divorced, or left a widow, or ill-treated or reduced to penury by her husband's

misfortune or bad conduct, she is entitled, on returning to her parents, to live with them and be supported.

However, although there was residence, that alone did not confer the rights of a binna married daughter on such a person.

(Emphasis added)

In this case it was further stated;

“undoubtedly the place of residence is an important indicator of the character of a marriage. Ordinarily, in the absence of contrary evidence we ought to be entitled to presume that the common course of usual events consistent with the ordinary practices of Kandyan Society followed. And so, a woman who after marriage lived in her mulgedara with her husband maybe supposed to have been settled in binna. On the other hand, it would be expected that a woman married in diga would have been led away from her parental home. It was a symbolic manifestation of the departure of the woman to join another family and bear children who will belong to a different genes.

Such a person would live in her husband’s home or upon the property of her new family. However, if it was agreed that the marriage was a diga marriage, it would be a diga marriage, irrespective of the fact that the bride took up residence in her father’s house...the determination of the character is, perhaps unfortunately, but nevertheless, somewhat more complex than seeking a response to the simple question: where did she live?”

Taking the aforementioned into consideration I find that the marriage of the 3rd Plaintiff – Respondent had not been converted into a Binna marriage. Furthermore, the burden of proof in proving against the presumption of a Diga marriage lies with the person who claims that she comes under a Binna marriage. The 3rd Plaintiff – Respondent has not provided this court with sufficient material to rebut the presumption of a Diga marriage nor has there been any material produced to prove

that she had returned to the Mulgedara under any of the circumstances mentioned above that may confer on her any of the rights a Binna daughter might have.

Taking the aforementioned into consideration I answer the 1A and 7th Defendant – Appellant questions of law affirmatively.

On careful analysis of the material that was produced before the high court I am of the view that the judgment given in NP/HCCA/KUR/88/2003 is erroneous and thus I am inclined to allow the appeal of the 1A and 7th Defendant – Appellant.

Appeal allowed

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA, J.

I agree

JUDGE OF THE SUPREME COURT