1948 *Present :* **Basnayake and Gratiaen JJ.**

APPU NAIDE, Appellant, *and* HEEN MENIKA *et al.*, Respondents

S. C. 53—D. C. Badulla, 8,142

Kandyan law—Daughters married in deega*—No re-acquisition of* binna *rights—Lands possessed in common by daughters also—Acquiescence.*

Where a Kandyan permits his sisters, in spite of their marriage in *deega*, to possess their share of the land for a long period of time, he has acquiesced in their right and cannot be permitted to deny it.

APPEAL from a judgment of the District Judge, Badulla.

Cyril E. S. Perera, for plaintiff appellant.

N. Kumarasingham, for defendants respondents.

Cur. adv. vult.

September 13, 1948. BASNAYAKE J.—

This is an action instituted by the plaintiff-appellant (hereinafter referred to as the plaintiff), one D. M. Appu Naide, against the defendant-respondents (hereinafter referred to as the defendants), Samarakoon Mudiyanselage Heen Menika and Samarakoon Mudiyanselage Hudu Menika, two sisters who were married in *deega*. The plaintiff asks that he be declared entitled to $\frac{2}{3}$rds of a field called Uda-arawa of three pelas paddy sowing extent, that the defendants be ejected therefrom, and for damages. The plaintiff claims title to the land on deed No. 725 of September 9, 1943 (P 3), by which he purchased a $\frac{2}{3}$ share of the land in dispute and the entirety of another land called Willarawatta from the brother of the defendants, one Samarakoon Mudiyanselage Kiri Banda.

The defendants deny plaintiff's title and state that on the death of their father, the original owner of the land, they and their brother, the plaintiff's vendor, in pursuance of an arrangement among themselves, possessed and enjoyed their father's lands in equal shares. The defendants also claim to be entitled to the subject-matter of the action by virtue of prescriptive possession.

The case went to trial on the following issues :—

(1) Was Kiri Banda, son of Appuhamy, the sole owner of the land described in the plaint ?

(2) Did defendants 1 and 2 go out in *deega* and forfeit their rights ?

(3) Prescriptive rights of parties.

(4) Damages.

(5) On the death of Appuhamy, did defendants and their brother Kiri Banda, in pursuance of a family arrangement, divide the paternal properties amicably in the proportion of one third share to each ?

The learned District Judge held that, although the defendants were married in *deega*, their brother was not the sole owner of the land ; that the defendants did not forfeit their rights as they re-acquired them. On the question of prescription, he held that the plaintiff had not acquired a

prescriptive title and therefore was not entitled to any damages. He further held that on the death of the defendants' father the property was enjoyed in equal shares by the defendants and their brother in pursuance of an arrangement among them. The plaintiff appeals against that order of the District Judge.

It appears from the evidence that the father of the defendants died when they were children aged 4 years and 1½ years respectively. The defendants married long after their father's death, but while their mother was alive. The marriage of the first defendant was registered in 1903 (P1), and that of the second in 1910 (P2). It appears from an entry in P1 that the first defendant married in 1898, though her marriage was not registered till 1903.

In support of their allegation that their brother and they possessed the paternal lands in common in equal shares, the defendants produced certain deeds. I shall refer to them in their chronological order. By deed No. 516 of January 24, 1901 (D2), the first defendant, her mother, and her brother sold a paddy field called Himbiliyagaha Kumbura to one Muthu Menika; by deed No. 5,492 of May 8, 1932 (D3), the defendants sold two-thirds of a land called Pellagaha-arawe Paulapanguwa to two daughters of Badderala ; by deed No. 9,306of October 23, 1932 (D1); Kiri Banda sold one-third of the land in dispute to one Badderala ; by deed No. 15,060 dated May 1, 1938 (D4), the first defendant sold to the plaintiff's son, Naidehamy, a land called Willarawatta which she claimed by right of paternal inheritance.

Learned counsel for the appellant submits that the evidence does not establish that the defendants re-acquired *binna* rights after their marriage. He submits that the fact that the brother of the defendants had renounced his right to certain immovable property belonging to the family which he permitted the defendants to treat as their own although they were not entitled to do so, does not confer on the defendants any right to them. Counsel contends that, in any event, the fact that the brother did not insist on his rights to the ancestral lands does not entitle the defendants to claim *binna* rights in respect of them. He submits that no prescription can arise because the defendants possessed this land with the consent of their brother who was entitled to it and that there was no adverse possession. The field itself is cultivated by one Gamarala on an " ande " basis.

There is no evidence that the defendants re-acquired *binna* rights, nor does learned counsel for the respondents seriously contend that the defendants had acquired *binna* rights, but he relies on the long-standing family arrangement by which the brother and sisters enjoyed the ancestral lands in equal shares.

The arrangement relied on by the defendants is denied by their brother, who states that he waived his rights in certain lands only. He denies that he waived his rights in the land in dispute.

In the instant case the deeds produced and the oral evidence which the learned District Judge has accepted go to show that despite the fact that the defendants were not entitled to a share of the ancestral lands, including the land in dispute, they continued to possess and enjoy the subject-matter of the action and other lands as if they had not gone out in *deega*.

I am unable to see anything in the statements of Kandyan Law by Sawers and Armour which has a direct bearing on the case under consideration. The nearest case is found in Armour where he discusses the right of a *deega* married sister who gets possession of the paternal lands. He says [1]:

"If, after the father's death, the daughter was married out in *deega* by her brother, or by their mother, the said daughter will thereby lose her right to a share of the inheritance, and consequently her brother will then become sole heir to the father's landed property. And although the said *deega* married sister did afterwards get possession of a portion of her father's lands, she will not have a permanent title of that portion it will at her death revert to her brother, or he being dead, to his issue—it being premised that the said parties were full brother and sister, and that the latter had remained in her *deega* settlement until her death."

As there is no rule of Kandyan Law which is applicable to the present question it must be decided according to general principles of law.

In S. C. 234—C. R. Kegalle, Case No. 16,342—S. C. Minutes of February 9, 1922* which was cited by the proctor for the defendants in the trial court but to which no reference was made at the argument in appeal, it was held by Sir Anton Bertram, Chief Justice, that it is open to a brother to waive the forfeiture of the rights of a sister married in *deega*. In that case it was proved by the production of a series of deeds that the *deega* married sisters had dealt with several paternal lands as if they had rights to them. The rule applied in that case has its origin in the Roman Law (Code 1, 3, 51) according to which everyone is at liberty to renounce any benefit to which he is entitled.

I prefer to apply to this case the doctrine of "acquiescence" [2] rather than the associated doctrine of " waiver " applied by Sir Anton Bertram in the case I have cited. In the words of Lord Cottenham in *Duke of Leeds v. Earl of Amherst* [3]:

"If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain."

Thesiger, L.J., states the same doctrine thus in the case of *De Bussche v. Alt* [4]:

"If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottenham said in the case already cited, is the proper sense of the term ' acquiescence ', and in that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct."

[1] *Armour's Grammar of the Kandyan Law—Perera's Edn. p. 55.*
[2] *Spencer-Bower on Actionable Misrepresentation, p. 351.*
Encyclopaedia of the Laws of England, Vol. 1, p. 128 (2nd Edn.)
Story—Equity Jurisprudence, Vol. II, Secs. 1533–1553 (12th Edn).
[3] *41 English Reports 886 at 888.* [4] *(1878) L. R. 8 Ch.D. 286 at 314.*
* *(1922) 50 N. L. R. 276.*

The defendants, with the knowledge of their brother, the plaintiff's predecessor in title, enjoyed two-thirds of the land as their own for over thirty years, the first defendant for about forty-six years and the second for about thirty-six years. His evidence and his conduct show that he was not unaware of his rights and that he assented to the defendants' dealing with the lands in the way they did. He cannot now be allowed, after standing by, with a knowledge of his rights, to deny the defendants the right to the land which they have enjoyed as their own for so many years.

The appeal is dismissed with costs.

GRATIAEN J.—I agree that the appeal should be dismissed with costs.

Appeal dismissed.

1949 *Present :* **Gratiaen J.**

KRISHNAKUTTY, Appellant, *and* MARIA NONA, Respondent

S. C. 315—Workmen's Compensation C3/149/47

Workmen's Compensation—Night watchman—Going home for dinner—Murdered on way home—Accident not in course of employment.

The deceased was a night watchman who was not supplied with meals while on duty and therefore returned home every night for dinner. One night he was murdered on his way home on a highway which did not form part of the premises over which he was employed to keep watch.

Held, that the accident did not arise out of and in the course of his employment.

APPEAL against an order for compensation under the Workmen's Compensation Ordinance.

N. K. Choksy, K.C., with *J. N. David*, for the appellant.

Vernon Wijetunge, for the respondent.

Cur. adv. vult.

May 25, 1949. GRATIAEN J.—

This is an appeal against an order for compensation under the Workmen's Compensation Ordinance (Chapter 117) in favour of the widow of a man named Solomon who was at the date of his death employed as a night-watchman on certain premises belonging to the appellant. The question of law which arises for my determination is whether Solomon came by his death in an accident " arising out of and in the course of his employment " under the appellant within the meaning of Section 3 of the Ordinance.