Present: Bertram C.J. and Garvin A.J.

1921.

APPUHAMY *et al.* *v.* BANDA.

135—D. C. Kegalla, 5,333.

Kandyan law—Interest of mother in acquired property of her husband—Usufruct.

The interest of a mother in the acquired property of her husband is not defined with exactitude in Kandyan law; but it seems clear that it was regarded as nothing more than a usufruct.

THE plaintiffs in this action sought to vindicate their title to a half share of the land in dispute which they claimed on a planting agreement executed by the original owner in favour of their father.

The defendant denied the planting agreement relied upon by the plaintiffs, and also the fact that plaintiffs' father had planted the lands in terms of the agreement.

On the date of trial it was admitted that the plaintiffs' mother who was entitled to a life interest in the property in dispute was alive and not a party to the action. The District Judge dismissed the action as the mother was not a party. The plaintiffs appealed.

Keuneman, for the appellants.

Samarawickreme, for the respondent.

November 21, 1921. BERTRAM C.J.—

This was an action by two persons claiming a planter's share of land in the Kandyan Province by inheritance from their father. On the day of trial a motion was made for the first time to join

1921.

BERTRAM C.J.

Appuhamy v. Banda

the mother of the plaintiffs as a party. The learned Judge rejected that application, for what reason it was not altogether apparent. It then seems to have been assumed by all the parties that the fact that the mother was alive and not a party to the action was fatal to the action, and that it could not further proceed. Apparently under that apprehension a formal motion was made that the action be dismissed, and to this the learned Judge acceded. I think that this procedure was mistaken. The interest of a mother in the acquired property of her husband is not defined with exactitude in Kandyan law ; but it seems clear from a number of incidental references that it was regarded as nothing more than a usufruct. In *Modder's Kandyan law, paragraph 170*, it is spoken of as a right of possession, and it is similarly spoken of in *Kalu v. Lami* [1] by Layard C.J., who also speaks of it as a right of retention of the acquired property. There is another case (*Ausadahami v. Tikiri Etana*[2]), where it is spoken of as a life rent. But the most deliberate expression of this point of view is to be found in the judgment of Wood Renton J. in *Josi Nona v. Batin Nona*,[3] where he says : "But it will perhaps prevent future litigation if at the same time we direct, as I suggest that we should, a declaration in the decree of the admitted rights of the respondents to a share in the property in question—a right which is vested now, and will become a right *in posse* on the death of the first defendant appellant."

It is not necessary for us to go into this question now. But it is at least arguable that in this case the right of the plaintiffs was vested, subject to a right of possession in their mother. If that was the case, the learned Judge was clearly wrong in dismissing the action of the plaintiffs, because, even if the mother was not a party, the plaintiffs would be entitled to a declaration of their title in respect of their vested interest. I cannot help thinking, however, that it would have been better if the mother had been joined. Such possession as the sons had, if they had any, must have been in right of their mother. The right claimed was practically a family right, and it would be much better that all the parties should be before the Court. Of course, the mother cannot be joined without her consent. But I think that the learned Judge should give her an opportunity of being joined. If she elects not to be joined, the action can still proceed with regard to the rights claimed by the children.

In my opinion the order dismissing the action should be set aside, and the case remitted for further trial. As the application to join the mother was only made on the date of trial, the defendant should have the costs of the day. But the appeal should be allowed, with costs.

GARVIN A.J.—I agree.

Sent back.

[1] *(1909) 11 N. L. R. 222.*
[2] *(1902) 5 N. L. R. 117.*
[3] *2 Leader L. R. 47.*