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

In the matter of an Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

1. Gayani Manohari Balasuriya (Minor)
2. Hubert Balasuriya (Next Friend)
   Both of No. 52, Old Road,
   Veralupe, Ratnapura.

**Plaintiffs**

**S.C. Appeal No. 181/2014**
**S.C./SPL/L.A. No. 295/2013**
**C.A. Appeal No. 109/2000 (F)**
**D.C. Ratnapura Case No. 6199/P**

**Vs.**

1. Ramanayake Arachchilage Lakshman Ramanayake.
2. Ramanayake Sarathchandra Ramanayake.
3. Ramanayake Arachchilage Appuhamy.
   All of No. 329/1, Kalawana

**Defendants**

**AND**

1. Ramanayake Arachchilage Lakshman Ramanayake.
2. Ramanayake Sarathchandra Ramanayake.
3. Ramanayake Arachchilage Appuhamy.
   (Deceased)

3A. Ramanayake Arachchilage Lakshman Ramanayake.
3B. Ramanayake Sarathchandra Ramanayake
All of 329/1, Kalawana.

**Defendant-Appellants**

**Vs.**

1. Gayani Manohari Balasuriya (Minor)
2. Hubert Balasuriya (Next Friend)
Both of No. 52, Old Road,
Veralupe, Ratnapura.

**Plaintiff-Respondents**

**AND NOW BETWEEN**

1. Gayani Manohari Balasuriya (Deceased)
1(A). Wijesinhage Priyantha Anuradha Wijesinghe
1(B). Sanuka Damsath Wijesinghe
Both of 1/4/D/1, Kospelawinna Road,
Weraluppa, Ratnapura.

**Plaintiff-Respondent-Appellants**

**Vs.**

1. Ramanayake Arachchilage Lakshman Ramanayake.
2. Ramanayake Sarathchandra Ramanayake.
3. Ramanayake Arachchilage Appuhamy (Deceased)
3A. Ramanayake Arachchilage Lakshman Ramanayake.

3B. Ramanayake Sarathchandra Ramanayake
All of 329/1, Near Lecam Walawwa,
Ratnapura Road, Kalawana.

**Defendants-Appellants-Respondents**

**Before:** **Murdu N.B. Fernando, PC, J.**
**A.L. Shiran Gooneratne, J.**
**Arjuna Obeyesekere, J.**

**Counsel:** R.M.D. Bandara with Ms. Lilanthi de Silva **for the 1A and 1B Substituted Plaintiff-Respondent-Appellants.**

Anuruddha Dharmaratne with Indika Jayaweera **for the 1st, 2nd, 3A and 3B Defendant-Appellant-Respondents.**

**Argued on:** 20/07/2021

**Decided on:** **16/12/2021**

## A.L. Shiran Gooneratne J.

This is an appeal filed against the Judgment dated 22/10/2013, delivered by the Court of Appeal, setting aside the Judgment of the District Court of Ratnapura, dated 22/02/2000.

The 1st Plaintiff-Respondent-Appellant, being a minor, instituted an action in the District Court of Ratnapura, through her next friend, the 2nd Plaintiff-Respondent Appellant, (hereinafter referred to as the Plaintiff-Appellants) against the 1st, 2nd and 3rd Defendant-Appellant-Respondents (hereinafter referred to as the Defendant-Respondents) seeking to partition the land called "*Gedaragawa Hena*".

By Plaint dated 12/10/1983, the Plaintiff-Appellants pleaded, *inter alia*, that;

1. by Deed No. 1792, dated 26/07/1956, Ratnayake Arachchilage Tillakaratne became the owner of the said land.
2. Ratnayake Arachchilage Tillakaratne who died intestate, had four children namely, Sumana Tillakaratne, Piyaratne Tillakaratne, Sujatha Tillakaratne and Padma Tillakaratne.
3. the said Sujatha Tillakaratne married under the Marriage Registration Ordinance during the life time of her father.
4. the 1st Plaintiff is the daughter of the said Sujatha Tillakaratne.
5. Sujatha Tillakaratne predeceased her father, intestate, leaving the 1st Plaintiff as the sole heir.
6. upon the death of Ratnayake Arachchilage Tillakaratne, the 1st Plaintiff, Sumana Tillakaratne, Piyaratne Tillakaratne and Padma Tillakaratne, each became entitled to an undivided 1/4th share of the land.
7. the said Sumana Tillakaratne, Piyaratne Tillakaratne and Padma Tillakaratne, soled their rights of the land to the 1st and 2nd Defendants.

Accordingly, prayed for a declaration that the 1st Plaintiff is entitled to an undivided 1/4th share of the corpus.

The Defendant-Respondents in their Statement of Claim dated 25/01/1994 pleaded, *inter alia*, that;

1 Ratnayake Arachchilage Tillakaratne died intestate and Sumana Tillakaratne, Piyaratne Tillakaratne and Padma Tillakaratne became entitled to their father's estate in its entirety.

2 Sujatha Tillakaratne having married in *diga* during the life time of her father forfeited her rights to paternal inheritance.

3 by Deed No. 275, dated 14/12/1981, the land in suit was transferred to the Defendant-Respondents who became entitled to the entire land in equal shares.

4 the said Defendant-Respondents have acquired prescriptive title to the said land.

The learned District Judge by Judgment dated 22/02/2000, *inter alia*, held that, the 1st Plaintiff-Appellant, as the heir of the deceased Sujatha Tillakaratne, is entitled to an undivided 1/4th share of the corpus and allotted shares accordingly.

The Court of Appeal having considered the submissions made by both parties held that, the said Sujatha Tillakaratne married in *diga* and had forfeited her rights to paternal inheritance and by her conduct could not regain such rights in view of the mandatory provisions contained in Section 9(1) of the Kandyan Law (Declaration and Amendment) Ordinance. (hereinafter sometimes referred to as the Kandyan Law Ordinance)

When this case was taken up for support, the Court decided to grant Special Leave to Appeal on the questions of law set out in paragraph 9(i) to (vii) of the Petition dated 28/11/2013. However, on the date of the hearing, parties agreed to confine the present appeal to the questions of law set out in paragraph 9(ii), 9(v) and 9(vii) of the Petition, which reads as follows;

Paragraph 9,

(ii) did the Court of Appeal err in law holding that the marriage of Sujatha Tillakaratne who married under the General Marriage Ordinance was a *diga* marriage and thereby forfeited her rights to paternal inheritance

(v) did the Court of Appeal err in not evaluating the evidence led before the District Court to determine whether the marriage is in *diga*

(vii) when a Kandyan woman Marries under the General Marriage Ordinance, will it raise a presumption that the marriage is a *diga* marriage as held in ***Lewis Singho vs. Kusumwathie and Another,*** C.A No. 390/91(F), (2003) 2 SLR 128, decided by the Court of Appeal

At the hearing of this case, both parties agreed that the main question to be determined by this Court is, whether the presumption set out in Section 28(1) of the Kandyan Marriage and Divorce Act, No. 44 of 1952, (hereinafter sometimes referred to as the 1952 Act) apply in equal force to a Kandyan woman who contracts a marriage under the Marriage Registration Ordinance.

Sujatha Tillakaratne is a Kandyan woman, married under the Marriage Registration Ordinance in the life time of her father. The register under the Marriage Registration Ordinance has not provided to record whether a marriage is in *diga* or in *binna*. The position of the Plaintiff-Appellant is that the Marriage Registration Ordinance does not recognize two different kinds of marriage as *diga* or Binna and therefore, Section 3(1)(a) of the 1952 Act, or the presumption set out in Section 28(1) of the said Act will not apply. The Plaintiff-Appellant also contends that, succession to property of a party married in terms of the Marriage Registration Ordinance is necessarily to be determined by the nature of the marriage from subsequent conduct of the parties in order to decide on paternal inheritance as recognized in ***Perera vs. Asilin Nona (1958) - 60 NLR 73***, ***and Samarakoon vs. Samarakoon (2003) 2 SLR 321***.

The Plaintiff-Appellant further contends that in the absence of a casus omissus clause in Section 66 of the Kandyan Marriage and Divorce Act, the Act applies only to marriages contracted under the said Act and not applicable to marriages solemnized and registered under the Marriage Registration Ordinance or any other Act.

It is also the position of the Plaintiff-Appellant, that the presumption under Section 28(1) of the Kandyan Marriage and Divorce Act would apply only in instances where a marriage registration takes place in terms of Section 23(3) of the said Act and which does not indicate whether the marriage was in *diga* or in *binna*. Therefore, the rebuttable presumption applies only to a Kandyan marriage registered under Section 23(3) of the Kandyan Marriage and Divorce Act. It is submitted that in Section 39 of Ordinance No. 3 of 1870, the words *'if it does not appear in the register whether the marriage was contracted in diga or in binna'* makes reference only to a marriage registration under

the said Ordinance and therefore, removed any possibility of applying the rebuttable presumption to a marriage contracted under the Marriage Registration Ordinance.

In terms of Section 23 (1)(a)(ii) of the Kandyan Marriage and Divorce Act, when the nature of the marriage (whether in *diga or in binna*) is entered in the registration of marriage, in terms of Section 9 of the Kandyan Law, --- ' *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 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.'*

The Defendant-Respondent's position is that under Section 3(1)(a) of the Kandyan Marriage and Divorce Act, when a registration of marriage between persons subject to the Kandyan law is solemnized and registered under the Marriage Registration Ordinance, it *'shall not affect the rights of such persons, or of other persons claiming title from or through such persons, to succeed to property under and in accordance with the Kandyan law',* and where it is not possible to record whether the marriage was in *diga* or in *binna*, in terms of Section 28(1) of the Kandyan Marriage and Divorce Act, it is presumed that the women married in *diga*, , until the contrary is proved. Therefore, it is contended that Sujatha Tillakaratne who was given away in *diga* marriage by her father is not entitled to a share of her family estate, until the presumption is rebutted.

The Counsel for the Defendant-Respondent, whilst placing reliance on the applicability of Section 28(1) of the Kandyan Marriage and Divorce Act and also Section 9(1) of the Kandyan Law Ordinance, questions the learned District Judge's failure to consider the applicability of the said laws.

**Applicability of Section 28(1) of the Kandyan Marriage and Divorce Act, when a woman contracts a marriage under the Marriage Registration Ordinance.**

The learned Counsel for the Plaintiff-Appellant submits that, a registration of marriage under the Marriage Registration Ordinance is not recognized as valid, under the Kandyan Marriage and Divorce Act and as such, the presumption contemplated under Section 28(1) of the said Act would not apply to Sujatha Tillakaratne.

It is apparent from the proceedings that, the parties to the action have accepted that they possess the required legal recognition and the capacity to contract a valid registration of marriage under the Marriage Registration Ordinance and that the parties are governed by the Kandyan Law. Moreover, both parties agree that the rights of succession claimed by the Plaintiff-Appellant depended on her marriage.

*In 1859, Ordinance No.13 of 1859 titled, An Ordinance to amend the law of marriage in the Kandyan provinces was enacted. Accordingly, customary Kandyan marriages ceased to be valid after 1859. The intent of the said Ordinance was to require all marriages since Ordinance No. 13 of 1859 to be registered. In the year 1870 the law was again amended by Ordinance No. 3 of 1870. ---"A marriage between a Kandyan and a non-Kandyan cannot be registered under Ordinance No. 3 of 1870. Such a union should be registered under the Marriage Registration Ordinance No. 19 of 1907".* ***(A.B. Collin De Soysa, Digest of Kandyan Law, at page 15)*** It was also "*the intention of the legislature that the special Kandyan Marriage Law and the general law of Ceylon should run concurrently and alternatively in the Kandyan Provinces".* ***(Sophia Hamine vs. Appuhamy. (1922) 23 NLR 353***

Marriages were also lawfully registered or solemnized according to the Marriage Registration Ordinance No. 19 of 1907. "*A marriage between Kandyans has been solemnized or registered under the said Ordinance of 1907, will not affect the rights of the parties, or the rights of persons claiming title from or through them to succeed to property according to the rules of the Kandyan law".* ***(Section 2 of Ordinance No. 14 of 1909).***

The Kandyan Marriage and Divorce Act repealed Ordinance No 3 of 1870. The said Act was enacted to '*amend and consolidate the law relating to Kandyan Marriages and Divorces, and to make provisions for matters connected therewith or incidental thereto'*.

Section 3(2) of the Kandyan Marriage and Divorce Act reads thus;

> *"the fact that a marriage, between persons subject to Kandyan law, is solemnized and registered under the Marriage Registration Ordinance shall not affect the rights of such persons, or of other persons claiming title from or through such persons, to succeed to property under and in accordance with the Kandyan law"*

Accordingly, the said Act amended and consolidated the law relating to Kandyan Marriage and Divorce between persons subject to Kandyan law or marriages solemnized and registered under the Marriage Registration Ordinance, claiming title under and in accordance with the Kandyan law.

In ***Piyadasa and Another Vs. Babanis and Another (2006) 2 SLR 17***, the Court of Appeal held,

> *"The fact that a marriage, between persons subject to Kandyan Law, is solemnized and registered under the Marriage Registration Ordinance shall not affect the rights of such persons, or the other persons claiming title from or through such persons, to succeed to property under and in accordance with the Kandyan Law."*

A similar conclusion was arrived in ***Lewis Singho Vs. Kusumawathie and Others (2003) 2 SLR 128,*** where the Court of Appeal held that,

> *"It is interesting to note that section 3(2) of the Marriage and Divorce (Kandyan) Act provides that a marriage between persons subject to Kandyan Law, solemnized and registered under the Marriage Registration Ordinance shall not affect the rights of such persons or of persons claiming rights through them to succeed to property under the Kandyan law".*

In the circumstances, there is no doubt that the intention of the legislature in enacting Section 3(2) of the said Act was not only to recognize a marriage registration entry made under section 23(3) of the Act, but also to recognize a marriage between persons solemnized and registered under the Marriage Registration Ordinance as a marriage recognized under the Kandyan law.

**The Presumption in Section 28(1) of the Kandyan Marriage and Divorce Act**

In terms of Section 28(1) of the Kandyan Marriage and Divorce Act, if there is no entry made in the marriage register to state that the marriage was in *diga* or in *binna*, it is presumed that such a marriage is in *diga*, until the contrary is proved.

As observed earlier, Sujatha Tillakaratne contracted a marriage under the Marriage Registration Ordinance and in the absence of an entry in the certificate of marriage with regard to its nature, in terms of the presumption recognized under Section 28(1), Sujatha's marriage is presumed to be a marriage in *diga*.

In terms of Section 3(2) of the Kandyan Marriage and Divorce Act, a marriage registered under the Marriage Registration Ordinance shall not affect the rights of such person claiming title to succeed to property under and in accord with the Kandyan Law.

The Court of Appeal having considered the submissions made by both parties, by Judgment dated 22/10/2013, held that,

> *"the said Sujatha Tillakaratne who had married in diga had forfeited her rights to the parental inheritance and hence by conduct she could not regain such rights in view of the mandatory provisions contained in section 9 (1) of the Kandyan Law Ordinance".*

Relying on Section 28(1) of the 1952 Act, the Court presumed that Sujatha Tillakaratne contracted a *diga* marriage and accordingly held that, the parties married after coming into operation of the Kandyan Law Ordinance, and therefore cannot regain *binna* rights or *diga* rights on account of their conduct, in terms of Section 9(1) of the said Ordinance.

The Court cited the case of ***Gunasena and others vs. Ukku Menika and others (1976)-78 NLR 529,*** where it was held that,

> *"No conduct after any such marriage of either party to that marriage or any other person shall cause or be deemed to cause a person married in diga to have the rights of succession of a person married in binna to have the rights of succession of a person married in diga."*

***Gunasena and others vs. Ukku Menika and others (supra)***, considered the question, whether Ukku Menika 2nd Respondent, Kiri Menika 3rd Respondent, and Dingiri Menika 4th Respondent, the three daughters of the deceased Ranhoti Pedi Durayalage Sendiya of Galbodagama, each of whom had been married out in *diga* before Sendiya's death had reacquired *binna* rights. In the said action, it was not in issue as to whether the three daughters married in *diga* or in *binna*.

In the present case, the certificate of marriage did not say whether the marriage was in *diga* or in *binna*. The Court of Appeal presumed that the marriage was in *diga* and applied the ratio decidendi in ***Gunasena and others vs. Ukku Menika and others (supra)*** and held that the rights of succession of Sujatha Tillakaratne came under Section 9(1) of the Kandyan Law Ordinance.

Section 28(1) of the 1952 Act clearly contemplates a registration of marriage which does not indicate whether the marriage was contracted in *diga* or in *binna* as oppose to Section 9(1) of the Kandyan Law Ordinance which makes reference to *"A marriage contracted after the commencement of this Ordinance in binna or in diga"*---- *" 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 shall convert or deemed to convert a binna marriage into a diga marriage or a diga marriage into a binna marriage ---"*

In terms of Section 9(1) of the Kandyan Law Ordinance, as long as the existence of the marriage, (until dissolved) it is not possible to change on account of their residence or

conduct, the nature of the marriage entered in the marriage register and shall have full effect of the marriage contracted.

The Court of Appeal applied the presumption under Section 28(1) of the 1952 Act, and having considered Section 9(1) of the Kandyan Law Ordinance, held that "the said Sujatha Tillakaratne who had married in *diga*, had forfeited her rights to the estate of her deceased father on the presumption that she had contracted a marriage in *diga*.

In the absence of form of marriage in the register, the Court of Appeal nor the trial court applied the best evidence rule to the necessary evidence led in proceedings to decide on the rights of inheritance and succession depended on the bond of matrimony, in order to consider the rebuttable presumption as recognized under Section 28(1) of the 1952 Act.

Section 28(1) of the said Act, reenacted the provisions of Section 39 of the 1870 Ordinance and retained the "best evidence" rule. (***Jayasinghe vs. Kiribindu and others (1997) 2 SLR 1***)

In terms of Section 39 of Ordinance No. 3 of 1870, the entry in the register of marriages is deemed to be the best evidence of the marriage contracted. If it does not appear in the register whether the marriage was contracted in *diga* or in *binna*, such marriage should be presumed to have been contracted in *diga* until the contrary is shown.

*"The rights of inheritance and succession depend chiefly on the bond of matrimony, and wedlock, as sanctioned by the coventional or common law of this country, subsists in two deferent forms, the Deega and the Beena. When a woman is given away in marriage, and is, according to the terms of the contract, removed from her parent's abode, and is settled in the house of her husband, it is a conjugality in Deega. On the contrary, where the bride-groom is received into the house of the bride, and according to stipulation abides therein permanently, it is a marriage in Beena"* ***(Niti Nighanduwa by J. Armour at page 10)***

The Supreme Court in ***Jayasinghe vs. Kiribindu and others (supra)***, having considered the question *"Was the marriage in diga or binna?"* held that, *"there is no definition of what these terms mean in the Ordinance, and therefore the matter must be decided by reference to the principles of Kandyan Law".*

**The 'Best Evidence' rule**

As noted earlier, the best evidence rule was introduced by Section 39 of Ordinance No. 3 of 1870 and was retained in the Kandyan Marriage and Divorce Act.

Section 28(1), states that the registration under the said Act of a Kandyan marriage shall be the best evidence before all courts and in all proceedings in which it may be necessary to give evidence of the marriage.

In ***Manipitiya vs. Wegodapola (1922) 24 NLR 129***, the Supreme Court having considered that the defendants were married on 3rd of June 1904, observed that the parties severally gave notice of marriage in which each declared that the marriage was to be in *diga*, and the register of marriages sets out that the marriage was in *diga*. Accordingly, the Court held,

> *"The Amended Kandyan Marriage Ordinance, 1870, made the validity of the marriage turn on the contract only, and section 39 by declaring that the entries in the register should be the " best evidence " of the marriage contracted, and of the other facts stated therein cannot mean that the entries should be conclusive in matters of fact not existing at the time of the entry. Now it has been held by De Sampayo J. in the case of* ***Menikhamy vs. Appuhamy****, that the forfeiture of the bride's rights in the paternal estate turns on the question of fact, whether the bride left the parental home in accordance with the contract. In the absence of evidence there would be a presumption that the terms of the contract relating to residence had been carried out, but I can see no good reason for excluding oral testimony relating to the carrying out of this term of the contract, which was not a matter of fact occurring at the time of the contract".*

The Supreme Court having concluded that the entry in the marriage register cannot be conclusive in matters of fact not existing at the time of entry, further held that *"In the absence of evidence, there would be a presumption that the terms of the contract relating to residence have been carried out"*, and stressed the importance of matters of fact to be considered to rebut the presumption recognized under Section 39 of the Ordinance.

In ***Jayasinghe vs. Kiribindu and others (supra),*** where the relevant entry in the certificate of marriage was written as *diga*, the Court held that *"the residence is only evidence of the character of the marriage. It is not conclusive evidence"*.

In ***Perera vs. Aselin Nona (1958) - 60 NLR 73***, Basnayake CJ held that,

> *"If the marriage had been registered under the Kandyan Marriage Ordinance the register would have indicated whether the marriage was in binna or diga. Such an entry though not conclusive proof of the fact that the marriage was in binna or diga would be an indication of the kind of marriage the contracting parties had in mind and is binding as far as they and their respective representatives in interest are concerne.*

In ***Samarakoon vs. Samarakoon and another (2003) 2 SLR 321***, the Court of Appeal considered that the marriage certificate being one under the Marriage Registration Ordinance and when there is no indication as to whether the marriage was in fact a *diga* or *binna*, taking into consideration the necessary evidence held, 'there is no cogent evidence of a severance with the mulgedera so essential to a *diga* marriage"

As already mentioned, the Plaintiff - Appellant contends that succession to property of a party married in terms of the Marriage Registration Ordinance is necessarily to be determined by the nature of the marriage from subsequent conduct of the parties in order to decide on paternal inheritance as recognized in ***Perera vs. Asilin Nona (1960) NLR 73*** and ***Samarakoon vs. Samarakoon (2003) 2 SLR 321***. On this issue, firstly, the

Defendant-Respondent contends that, both the above cases, dealt with marriages prior to the enactment of the Kandyan Marriage and Divorce Act, No. 44 of 1952, and secondly, that there was no presumption of marriage in *diga* similar to Section 28(1) of the 1952 Act, prior to 1952.

It is correct to state that both the above cited cases, ***Perera vs. Aselin Nona*** and ***Samarakoon vs. Samarakoon and another (supra)***, dealt with marriages contracted prior to the enactment of the Kandyan Marriage and Divorce Act. However, as observed earlier, the entry in the register of marriages and in the register of divorces being the best evidence of the marriage contracted or dissolved by the parties and of the other facts stated therein, was introduced by Section 39 of Ordinance No. 3 of 1870 and retained in the Kandyan Marriage and Divorce Act. Therefore, the contention, that the law as it stood prior to 1952, did not have a presumption of a *diga* marriage similar to Section 28(1) of the 1952 Act, is incorrect.

Therefore, it is clear that the Supreme Court in decisions prior to the 1952 Act, applied the best evidence rule in recognition of the presumption under Section 39 of the Ordinance No. 3 of 1870, when the register is silent as to the nature of marriage and also applied in matters relating to the character of marriage arising under Section 9(1) of the Kandyan Law Ordinance.

The Counsel for the Defendant-Respondent has placed much reliance on the Court of Appeal Judgment in ***Lewis Singho Vs. Kusumawathie and Others (2003) 2 SLR 128,*** where the question of law to be decided was whether the deceased Plaintiffs mother, Enso Nona who married in *diga* was entitled to succeed to her father's premises in suit. Enso Nona's marriage certificate was issued under the Marriage Registration Ordinance. The Court considered that, the certificate of marriage of Enso Nona is one issued under the Marriage Registration Ordinance, where an entry with regard to the nature of marriage is absent.

In ***Lewis Singho Vs. Kusumawathie and Others (supra),*** the Court, prior to arriving at its decision considered the principle set out by Fredric Austin Hayley in his book on *"Treaties on the Laws and Customs of the Sinhalese"* at page 195, where it is 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".*

And the Court held,

> *"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 marriage contracted the presumption recognized 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."*

It is important to note that in the said case the Court considered the presumption recognized under Section 28(1) of the said Act, with the available evidence led in the proceedings of the District Court, and observed that *'there was no evidence led to the contrary'*. Therefore, it is clear that in ***Lewis Singho Vs. Kusumawathie and Others (supra),*** the Court prior to arriving at the said decision was mindful to consider matters relating to law, in accord with the available evidence.

In the case at hand, the Court of Appeal was correct in its recognition of Section 28(1) of the 1952 Act, however, in the circumstances where the parties did not precisely state the type of marriage intended by them, the Court considered the mandatory provisions contained in Section 9(1) of the Kandyan Law Ordinance, without due consideration to the necessary evidence led in proceedings to determine the nature of the marriage, in deciding whether Sujatha Tillakaratne forfeited her rights to paternal inheritance. Therefore, since the register of marriage is not conclusive of the intention in which the marriage was celebrated, in terms of Section 28(1), necessary evidence of the marriage should be taken into consideration applying the best evidence rule to decide whether

the marriage was contracted in *diga* or in *binna*, and until such time, the marriage shall be presumed to have been contracted in *diga*, according to law.

It is the contention of the Defendant-Respondent that Sujatha Tillakaratne who married in *diga* was given a dowry by her father at marriage and was therefore not entitled to succeed to her father's estate. Therefore, the onus is on the Plaintiff-Appellant to rebut the Section 28(1) presumption and establish that the said Sujatha Tillakaratne contracted a marriage in *binna* and therefore, succeeded to her father's estate and was not disinherited.

Prior to consideration of evidence led in proceedings, I am mindful of the observations made by Windham J., in ***King vs. Peter Nonis (1947) - 49 NLR 16,*** where a case is brought within the equitable exceptions of section 92 of the Evidence Ordinance, the Court was of the view that, "*It certainly does not, and never did, mean that no other direct evidence of the fact in dispute could be tendered. Its meaning is rather that the best evidence must be given of which the nature of the case permits."*

Both parties at the hearing and in their written submissions have drawn attention to the evidence to be considered when deciding on the nature of the marriage.

The Plaintiff-Appellant supports her claim to the property in question on the basis that a *diga* married women could later re-acquire the rights of a *binna* marriage on the following grounds,

1. Sujatha Tillakaratne after her marriage had lived in the mulgedara.
2. After her marriage her brother and sisters have acquiesced that she was entitled to paternal inheritance.

The learned Trial Judge, did not evaluated the evidence led before him in consideration of Section 28(1) of the 1952 Act, on the question whether Sujatha Tillakaratne married in *diga* or in *binna* or whether she inherited an undivided 1/4$^{th}$ share in the corpus from her deceased father.

*"Daughters, before marriage, or returning from a deega marriage, have an equal claim for maintenance from the shares of all their brothers --- that is to say, all the shares into which their parents' estate may have been divided."* (***Sawers' Digest of Kandyan Law at page 4***)

A *diga* married women could also establish the re-acquisition of *binna* rights, if the siblings of the women acquiesced in their right and permits her to possess the share of the land for a long period of time.

The first ground as stated above, is supported on the basis that it is established by evidence that Sujatha Tillakaratne after marriage lived in the mulgedara. The Plaintiff-Appellant relies on the electoral register to prove that she lived in her father's house after marriage. This is the only available evidence to be considered on re-acquisition of *binna* rights. The intention of the parties that the marriage was in *diga* or in *binna* or the necessary evidence required to establish that the father had intended a *binna* connection at the time of the registration of the marriage is not borne out in evidence. The position that Sujatha Tillakaratne after her marriage lived in the mulgedara for a period of time may be suggestive of the fact that she may have had a close link with the mulgedara, even after the marriage. But is that alone sufficient to establish *binna* rights?

In ***Jayasinghe Vs. Kiribindu and Others (1997) 2 SLR 1 at page 66***, Dr. Amerasinghe J. observed that *"Kiribindu's case is that she did not forfeit her rights because she never left the mulgethara. As we have seen, residence is only evidence of the character of the marriage. It is not conclusive evidence".* Whilst agreeing with counsel that, *"none of the sources of Kandyan Law classify married women as those who lived in the mulgedara as opposed to those who left the mulgedara in referring their rights to the paternal inheritance"* emphasized the fact that *"a diga married women who remained in her father's house to render a most valuable and praiseworthy service, but that alone would not convert her diga marriage into a binna marriage".*

In ***Wickramasinghe vs. Robert Banda and others (2006) 1 SLR 246,*** the Supreme Court observed that *"the legal position in regards to the property rights of a married daughter therefore it is quite clear and even if one were to consider the rights of a daughter who had returned from her diga husband's house, according to Hayley, such women does not ordinarily recover any right to inherit whether she returns before or after her father's death. The only exception to this position where she would be able to inherit, is that if she marries again in binna, with the consent of her parents."*

With reference to the dowry, he received upon marring the said Sujatha Tillakaratne, the 2nd Plaintiff-Appellant, the husband of Sujatha Tillakaratne, has given evidence in the following manner,

ප්‍ර - දැන් තමාගේ පදිංචිය කොහේද?

පි - සුජාතා තිලකරත්නට දෑවැද්දට දීපු ගෙදර.

ප්‍ර - ඒ ගෙදර තියෙන්නේ කොහේද?

පි - වෙරලුපෙ තැපැල් කන්තෝරුව ඉදිරිපිට.

ප්‍ර - තමා විවාහවෙන අවස්ථාවේදී තමාට දෑවැද්දක් දුන්නාද?

පි - දෑවැද්ද කියලා මම බැලුවේ නැහැ. ඔප්පුවක් දුන්නා එයාගේ නමට ගේ ලියලා තිබෙනවා කියලා.

ප්‍ර - තමන්ට තමුන්ගේ භාර්යාවට භාර්යාවගේ පියා විවාහ වෙන අවස්ථාවේදී දුන්නා වූ දෑවැද්ද එයයි?

පි - මම දැක්කේ නැහැ ඔප්පුව. ඔප්පුවක් දුන්නා. එය තමයි කියලා සිතුවා.

ප්‍ර - තමා පදිංචි වෙලා ඉන්න එක ඔප්පුවෙන් දුන්නා කියලා දන්නවාද?

පි - දෑවැද්දට ඉස්සෙල්ලා ලියලා තිබුණ එකක්. ඒ ස්ථානයේ තමයි දැන් පදිංචි වෙලා ඉන්නේ.

පි - ඔව්.

ප්‍ර - විවාහයට පෙර ද ඔප්පුව ලියලා තිබෙන්නේ?

පි - ඔව්. මම සිතන්නේ එහෙමයි. ගෙවල් සීමාවක් ආවා. ඉන්පසු වැඩි ඒවා දරුවන්ට ලිව්වා.

The above evidence will lay back any doubt, that Sujatha Tillakaratne was given a house as dowry by her father and as such having left the mulgedara, would have established a strong claim to reacquire her *binna* rights.

The learned District Judge relied on case No. 5770/P, an uncontested Partition action, which held that the deceased Tillakaratne's four children were entitled to 1/12 share each to the corpus of the said action.

In paragraph 13 of the plaint the two sisters and the brother of Sujatha Tillakaratne denied any entitlement to Sujatha Tillakaratne when they stated that they were entitled to 1/3rd of the corpus to be partitioned. However, the learned Trial Judge decreed that the deceased Sujatha Tillakaratne's daughter Gayani Balasuriya, sisters and brother were entitled to 1/12 share each.

It is observed that the Partition Case No. 5770/P was instituted in 12/10/1983 and the Judgment was entered on 25/09/1991. The Defendant-Respondents were not parties to the said action. The decree was entered without a contest. The learned Trial Judge in that case did not analyze or investigate the devolution of title as required by law. It is also to be noted that the Defendant-Respondents title Deed No. 275 was attested on 14/12/1981.

In the circumstances, relying exclusively on the devolution of title decreed in the said case, as evidence to decide on the waiver or forfeiture of her rights, in my view, cannot be considered as conclusive evidence.

Accordingly, I have no hesitation to hold that the said Sujatha Tillakaratne who is presumed to have married in *diga* has not rebutted the presumption created under Section 28(1) of the 1952 Act, and therefore her marriage is presumed to be in diga.

Therefore, the Court of Appeal was correct in relying on the presumption recognized under Section 28(1) of the 1952 Act, to hold that 'Sujatha Tillakaratne who married under the General Marriage Ordinance was married in *diga* and thereby, forfeited her rights to paternal inheritance'.

Accordingly, the question of law set out in paragraph 9(ii) is answered in the negative.

The question as set out in paragraph 9(v), is hinged to the question of law raised in paragraph 9(ii) above, which I have already answered.

Applying the best evidence rule, to the evidence led in proceedings, I have cited with approval the Judgment in ***Lewis Singho vs. Kusumawathi and another (2003) 2 SLR 128***, *inter alia*, on matters to be decided when a Kandyan women marries under the Marriage Registration Ordinance and the presumption it would create in terms of Section 28(1) of the 1952 Act, that the marriage is in *diga* until the contrary is proved. Accordingly, the question of law set out in paragraph 9(vii) is also decided in favor of the Defendant-Respondent.

Accordingly, this appeal is dismissed. I order no costs in the circumstances.

**Judge of the Supreme Court**

**Murdu Fernando PC. J.**
**I agree**

**Judge of the Supreme Court**

**Arjuna Obeyesekere J.**
**I agree**

**Judge of the Supreme Court**