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VALLIAMMAI *et al. v.* ANNAMMAI *et al.*

D. C., Batticaloa, 1,968.

Marriage—Cohabitation as husband and wife—Presumption of marriage—Ordinance No. 13 of 1863, s. 21—Ordinance No. 8 of 1865, s. 6—Hindu marriage—Registration—Marriage with deceased wife's sister.

In Ceylon there can be lawful marriages without registration thereof under the local Ordinances.

The presumption of marriages arising from cohabitation with habit and repute holds good in Ceylon.

By the law of this Colony there is no objection to a man marrying his deceased wife's sister.

PLAINTIFFS sued one Katpagepillai in case No. 1,685 of the District Court of Batticaloa, and having recovered judgment against him, sued out a writ of execution to seize and sell an undivided one-third share of a garden called Kalvetuvalavu, the property of the judgment-debtor by right of inheritance from one Tangamma; but the defendants claimed it when it was seized, and their claim was upheld by the District Court on the 19th November, 1898. The plaintiffs raised the present suit to have that claim set aside, and the one-third share declared bound and executable under the judgment in case No. 1,685.

The defendants denied that Katpagepillai was entitled to an undivided one-third share in question by right of inheritance from Tangamma. At the trial it appeared that one Peria Kandu married one Kannatchi, and the whole of the land in question was settled upon them. Kannatchi died shortly afterwards leaving behind one child Tangamma, who with her father became entitled to the whole land. He then lived with Kannatchi's sister Annammai, the first defendant in this case, and had six children by her, the eldest of whom was the second defendant. Plaintiff asserted that Peria Kandu lived in concubinage with Annammai, and that therefore all her children were illegitimate; that on Peria Kandu's death the whole land vested in Tangamma, who having died without issue, the land passed to her aunt (the first defendant) Katpagepillai (the judgment-debtor in D. C., 1,685) and one Sinnepillai in equal shares.

The defendants, on the other hand, contended that Peria Tamby married first defendant according to the custom of the country and lived together as man and wife, though their marriage was not registered, and that therefore it was a lawful marriage, and all his six children were legitimate.

The District Judge upheld the second marriage, and said that on Tangamma's death without issue her " half brothers and sisters

" succeeded under section 30 of Ordinance No. 15 of 1876 to the " whole property to the exclusion of her aunts." He therefore considered the claim of the defendants in case No. 1,685 to be right, and dismissed plaintiff's action.

Plaintiffs appealed.

The case was argued on 16th and 21st May, 1900, before LAWRIE, J., and MONCRIEFF, J., who disagreed, and the case was set down for argument before the Collective Court.

WENDT, *A. A.-G.*, for appellant.—Under Ordinance No. 13 of 1863 parties to a marriage must give notice of marriage and must marry either in a registered place of marriage as provided by the Ordinance or before a duly appointed registrar. In *Vairamuttu's* case, reported in *7 S. C. C. 56*, it was held that a marriage not registered in manner provided by the Ordinance was not valid. Notice of marriage was given. There was no registration of marriage after that. Hence there was no marriage. In an earlier case, *Babina v. Dingi Baba*, it was decided that registration was not necessary, but Your Lordships would not decide so now. In the present case, evidence appears to have been led on the footing that a valid marriage could subsist independently of the Ordinance. All that evidence is inadmissible, because no marriage can take place save under the Ordinance. Even supposing that such evidence is admissible, it is insufficient. There is no proof that the *thali* was tied; on the contrary, it is proved that the *thali* was not tied. The *thali* is an essential element in a Hindu marriage. The parties to this marriage are Hindus. For want of proof of the essential elements of a Hindu marriage, the case fails even as one outside the Ordinance. *Arumogam v. Vaiyali* (*2 N. L. R. 322*), decided by the Privy Council, does not apply to the circumstances of the present case.

Sampayo (with *Tiru-Navuk-Arasu*), for respondents.—The decision in *Arumogam v. Vaiyali* admits proof of marriage otherwise than by registration. It is a very strong authority in favour of respondents. The Ordinance No. 13 of 1863 does not imperatively require registration as an essential condition of a valid marriage. The regulation No. 9 of 1822 and the Ordinance No. 6 of 1847 contain provisions requiring registration as a necessary step in a valid marriage. The Ordinance of 1863 mitigates the harshness of the old law by omitting the provision requiring registration in every case of marriage. In the case of *Babina v. Dingi Baba* (5 S. C. C. 9) the point whether there can be a valid marriage outside the Ordinance was decided in the affirmative.

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The Ordinance in force when that case was decided was No. 13 of 1863. The case reported in *7 S. C. C. 56* is not in conflict with the authorities cited. The parties there gave notice of marriage as required by the Ordinance, but did not complete it by registration. The Supreme Court decided that when two parties had given notice of a marriage under the Ordinance and had then been married according to Hindu rites and cohabited together for some years, but had not fulfilled any of the other requisites prescribed by the Ordinance, no valid marriage had been celebrated. As to the want of the *thali* ceremony, the woman was a widow before she married Peria Tamby, and it is possible that a Hindu widow who marries a second time does not wear a *thali*.

8th June, 1900. BONSER, C.J.—

The question in this case is as to the relationship between one Peria Tamby and Annammai, the first defendant in the case. They are both Tamils living in the Batticaloa District.

Peria Tamby was originally married to Annammai's sister, and had by her one daughter Tangamma. Peria Tamby and his first wife jointly possessed a house and garden. Shortly after the death of his first wife, nearly twenty years ago, Annammai came to live with her deceased sister's husband. By the law of this Colony there is no objection to a man marrying his wife's sister, and therefore there is nothing in the way of our presuming that this was a legal connection. She had seven children by Periya Tamby. The evidence is that they were recognized by their relations and friends as husband and wife, *i.e.*, as people who were living together in marriage, and not in concubinage. The property since Periya Tamby's death has been enjoyed as though the marriage was a legal one.

A short time ago Tangamma died leaving three aunts surviving. The plaintiff in this case obtained a judgment against one of these ladies, and the brilliant idea seems to have occurred to him that, if he could establish that Periya Tamby and Annammai were never married, and that their children were therefore illegitimate, he might be able to claim the house and garden as having passed to Tangamma, as being the only lawful child of Periya Tamby, and from her to his judgment-debtor, and he therefore seized the property. A claim was made by Annammai and her children, which was allowed. He then proceeded to bring an action under section 247 of the Civil Procedure Code to have it declared that this property was liable to be seized and sold in execution of his judgment against Tangamma's aunt.

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The District Judge decided against him, and he has now appealed to this Court. It seems to me that the appeal fails. It was attempted to be argued that there could not be any marriage except a registered marriage under the Ordinance of 1863; and it having been admitted in this case that the marriage was never registered, it was impossible to hold that a marriage ever existed. For my part I am unable to agree with the proposition that there can be no lawful marriage unless that marriage be registered under the Ordinance.

That was the law under the Ordinance of 1847, which expressly provided that all marriages should be invalid if not registered. That was found to be a burden greater than the people could bear, and in 1863 the Ordinance was re-enacted in substance with the omission of this disqualifying provision.

It was provided that it was the duty of persons who wished to marry to follow a certain course of procedure. If they disregard this provision, they will no doubt be liable for disobedience to a direct provision of the law, but there is no longer any enactment which says that a marriage, where the formalities prescribed by the Ordinance are not observed, is to be no marriage at all.

I think that the ordinary presumption in favour of marriage, which was held by the Privy Council (*Sastry Velaiden Aronegary Sembecutty Vaigalu, 6 A. C. 364*) to hold good in Ceylon amongst Tamils, applies to this case.

The plaintiff's own witness Kannapper Kandappen admitted in cross-examination that " Periya Tamby and Annammai lived as " husband and wife; we used to visit them and recognize them as " husband and wife."

The presumption has not been rebutted, and therefore I am of opinion that the judgment of the District Court is right and should be affirmed.

MONCRIEFF, J.—

I am of the same opinion. If Ordinance No. 13 of 1863 had settled that marriages such as this were void, it would not have been necessary to provide by Ordinance No. 2 of 1895, section 15, that no marriage contracted after this Ordinance comes into operation shall be valid, unless it shall have been duly solemnized by a minister or a registrar and registered in manner and form as is hereafter provided.

On reading only the first twenty sections of the Ordinance of 1863 I might have thought that this Hindu marriage was void. The terms of the Ordinance are imperative, but when we come to section 21 (the substituted section 6 of Ordinance No. 8 of 1865)

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we find it is provided that " if both the parties to any marriage " shall knowingly and wilfully intermarry under the provisions " of this Ordinance.....without certificate of notice duly issued, " the marriage of such persons shall be null and void."

In my opinion this Hindu marriage is a marriage " under the " provisions of this Ordinance," because section 7 flatly lays down that " in every case of marriage " (except Kandyan and Mohammedan marriages) certain formalities shall be observed. In this case omission of the required formalities is not fatal to the marriage, because there is nothing to show that both the parties knowingly and wilfully abstained from obtaining a certificate of notice duly issued. Section 21 is clumsily drafted.

BROWNE, A.J., delivered a judgment, which was not taken down in writing, affirming the judgment of the Court below.