1953 *Present :* **Gunasekara J. and Pulle J.**

P. SIVAKKOLUNTHU *et al.*, Appellants, *and* KAMALAMBAL *et al.*, Respondents

S. C. 98—D. C. Jaffna, 1,156

*Evidence—Marriage contracted in a foreign country—Way of proving it—Decree for judicial separation—Scope of its relevancy as evidence—Estoppel—*Res judicata *—" Privies in interest "—Evidence Ordinance, s. 41* (2) (c).

In proceedings taken to administer the intestate estate of one R., each of two persons, K. and P., claiming to be the widow of the deceased, applied for letters of administration. K. alleged that she married the deceased in India on the 11th December, 1929, under the provisions of the Indian Christian Marriage Act. P. alleged that K. was not validly married and that she was the lawful widow by reason of her marriage to the deceased which was registered on the 3rd March, 1930, and solemnized according to Hindu rites in September of the same year. The principal contest was whether K. had contracted a valid marriage with the deceased. The trial Judge held that K., as widow, was entitled to letters of administration.

In a suit brought by P. in 1937 against the deceased for separation *a mensa et thoro* the deceased had admitted that he was lawfully married to P. and counterclaimed a dissolution of the marriage on the ground of malicious desertion. In his evidence the deceased had also admitted that he had been intimate with K. both before and after he was married to P. K. also gave evidence. She admitted sexual intimacy with the deceased but, in order to save the deceased from a prosecution for bigamy, falsely denied that she was married to him. A decree for separation was then entered as between P. and the deceased.

Held, (i) that although the evidence given by the deceased and K. in the suit for judicial separation raised a strong presumption that they had not contracted a marriage in 1929, evidence could be given in the present administration proceedings so as to displace that presumption.

(ii) that it was not essential that K. should lead expert evidence to prove that all the provisions of the Indian Christian Marriage Act requisite for a valid marriage had been complied with. *If the certificate of marriage in the form* prescribed by the Indian Christian Marriage Act was properly produced, the Court was entitled to hold upon that certificate and the oral evidence that K. contracted a valid marriage with the deceased.

(iii) that the decree entered in the suit for judicial separation was not one which could come within the terms of section 41 (2) (c) of the Evidence Ordinance; it could not, therefore, operate in the present action as conclusive proof that P. was the lawful wife of the deceased.

(iv) that the conduct of K. in wilfully concealing her marriage in the suit for judicial separation could not operate as an estoppel against her in the present action.

(v) that the decree entered in the suit for judicial separation could not operate as *res judicata* against K.'s children.

APPEAL from a judgment of the District Court, Jaffna.

C. Thiagalingam, Q.C., with *G. T. Samarawickreme* and *T. Parathalingam*, for the 9th and 10th respondents, appellants.

H. V. Perera, Q.C., with *H. W. Tambiah, C. Shanmuganayagam* and *Felix Dias*, for the 1st to 6th respondents.

Cur. adv. vult.

October 30, 1953. PULLE J.—

This appeal relates to proceedings taken to administer the intestate estate of one V. S. Ramanathan who died on the 29th October, 1948. Two persons claiming to be the widows of the deceased applied for letters of administration. One of them Kamalambal alleged that she married the deceased in India on the 11th December, 1929. The other named Parupathy alleged that Kamalambal was not validly married and that she was the lawful widow by reason of her marriage to the deceased which was registered on the 3rd March, 1930, and solemnized according to Hindu rites in September of the same year. Kamalambal had four children by the deceased. Parupathy had none. The learned District Judge held Kamalambal as widow to be entitled to letters of administration. Parupathy has not appealed. The appellants before us are two intervenients who claimed shares in the estate as heirs on the basis that the deceased was lawfully married to Parupathy and died issueless.

The principal contest was whether Kamalambal had contracted a valid marriage with the deceased. If this question was answered in

favour of Kamalambal it was argued both here and below that the decree entered in a suit brought by Parupathy in 1937 against the deceased for separation *a mensa et thoro* and the evidence given therein by Kamalambal precluded her and her children from maintaining that she was married to the deceased.

It may perhaps be convenient to deal first with the proceedings for judicial separation as they have a bearing both on the issue of fact as to whether Kamalambal was lawfully married to the deceased and on the issues of law as to the legal results flowing from the decree in that case.

In District Court Jaffna (Divorce) case No. 15 Parupathy alleged, among other things, that she was lawfully married to the deceased in 1930 and that thereafter he deserted her and, since May, 1931, lived in adultery with Kamalambal. She prayed for a decree for separation and alimony. The deceased admitted in his answer that he was lawfully married to Parupathy and counterclaimed a dissolution of the marriage on the ground of malicious desertion. In his evidence the deceased admitted that he was intimate with Kamalambal both before and after he was married to Parupathy. He denied having even gone through a ceremony of marriage with her. Kamalambal also gave evidence. She admitted sexual intimacy with the deceased but denied that she was married to him. On the 22nd December, 1939, a decree for separation was entered and it was affirmed in appeal in 1941.

The pleadings and the evidence given by the deceased and Kamalambal in the divorce proceedings raise, in my opinion, a strong presumption that they had not contracted a marriage in 1929. The question for determination is whether the evidence of their marriage given in the proceedings under appeal was such as to displace that presumption.

The evidence leaves no room for doubt that on the 11th December, 1929, Kamalambal and the deceased went through a ceremony of marriage in a place called the Heart of India Mission church at Bangalore. The evidence of Kamalambal on this point is corroborated by a retired minister of Church, one Rev. Paul Ratnasabapathy, who was one of the attesting witnesses. He has identified his own signature and that of the pastor who officiated which appear on the original of a certificate of marriage in the form prescribed by the Indian Christian Marriage Act, 1872. There was also produced an extract A2 from the register kept in the church purporting to be a certified copy of the registration of the marriage. Of the grounds taken in the petition of appeal one was that the evidence adduced to prove that the deceased became a Christian before his marriage was insufficient and the other that there was no proof that one Rev. K. Manickam who solemnized the marriage was authorized to do so under the Indian Christian Marriage Act. On both points there was oral evidence supporting Kamalambal which the learned Judge seems to have accepted. Assuming that the marriage certificate was properly admitted in evidence there was ample material on which the Judge could have come to a finding that the deceased was a Christian at the time of his marriage with Kamalambal and that Rev. K. Manickam

was duly authorized to solemnize the marriage. The oral evidence of Rev. Ratnasabapathy is specific that he had himself seen the Rev. Manickam officiating as registrar of marriages for about two years and that the registrar who officiated at the marriage of Kamalambal was this same Rev. Manickam.

Another ground urged in appeal is that expert evidence had not been called to prove that all the provisions of the Indian Christian Marriage Act requisite for a valid marriage had been complied with. Speaking for myself I feel, in view of the conduct of Kamalambal and the deceased in deliberately concealing from the Judge who tried the suit for judicial separation the fact that they had gone through a ceremony of marriage in Bangalore, that it would have been more satisfactory had expert evidence been called. Their conduct is calculated to raise the suspicion that at the time the matrimonial suit was heard they did not believe they were validly married. No authority, however, was cited that in a case of this type the only way of proving that two persons had contracted a valid marriage in a foreign country is by calling an expert on the laws of that country. Our attention has been called among others to the following cases, namely, *Roe v. Roe* [1], *Browning v. Browning* [2] and *De Mowbray v. De Mowbray* [3] in which certificates of marriage were accepted in England as proof of marriages in St. Helena, Bulawayo and Ceylon respectively. In *Brown v. Brown* [4] the Judge thought it proper to call for evidence that a Gold Coast Ordinance was in force in order to apply the provisions of section 40 of that Ordinance. Assuming that the certificate of marriage A2 was rightly admitted it is impossible to say that the trial Judge was wrong in holding upon that certificate and the oral evidence that Kamalambal contracted a valid marriage with the deceased.

The final question in regard to the proof of marriage is whether the certificate of marriage A2 ought to have been admitted in evidence. The certificate is in the form prescribed by the Indian Christian Marriage Act and is an exact copy of what purports to be the original certificate itself marked A1. On the face of A2 is a certificate by one Rev. W. Borthwick, the Superintendent of the Heart of India Mission, that it is a true copy of the original marriage certificate. There is a further certificate under the seal of a notary public to the effect that A2 is a true extract and copy of the original certificate of marriage and that it has been duly certified by Rev. W. Borthwick, the officer having the legal custody of the original. The notary's certificate purports to be one under section 78 (6) of the Indian Evidence Act. Although it was argued in appeal that there was no formal proof that the Indian Christian Marriage Act was the one applicable, the argument in the lower court appears to have proceeded on the basis that that Act was applicable. No material was placed before us to show that if Kamalambal and the deceased were Christians in December, 1929, the celebration of their marriage was governed by any other Act. In my opinion the objection to the admission of the certificate A2 fails.

[1] *(1916) 115 L. T. 792.*
[2] *(1918) 35 T. L. R. 159.*
[3] *(1920) 37 T. L. R. 830.*
[4] *(1917) 116 L. T. 702.*

There remain for consideration three other issues raised on behalf of the parties who contested the claim of Kamalambal and her children of whom the latter were named as 1st to 4th respondents to her application for letters of administration. These issues are—

" (i) Does the decree in case No. 15 (Divorce) of this Court operate as a bar to the petitioner's claim in view of section 41 of the Evidence Ordinance ?

" (ii) Are the respondents 1 to 4 the lawful heirs of the deceased Ramanathan ?

" (iii) If so, are they estopped by the decree in case No. 15 (Divorce) of this Court ? "

The argument on issue (i) was that in case No. 15 the court entered a decree for separation in the exercise of its matrimonial jurisdiction and that as that jurisdiction was exercised on the basis that Parupathy was the wife of the deceased the decree is conclusive proof that Parupathy was, to the exclusion of Kamalambal, the lawful wife. It is not necessary to discuss all the submissions on this for the reason that the point is directly covered by the authority of the Divisional Bench judgment of *Punchirala v. Kiri Banda et al.* [1]. It was held in this case that the provision in section 41 which applies to matrimonial suits is in sub-section 2 (*c*) and that it provides that a judgment or order or decree in the exercise of matrimonial jurisdiction is conclusive proof that any legal character which it takes away from any person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease. It is obvious that the decree for judicial separation is not one which would come within the terms of section 41 (2) (*c*) of the Evidence Ordinance. It also follows that if section 41 (2) (*c*) could not be invoked to defeat Kamalambal's claim to be the lawful wife of the deceased, issue (ii) was also rightly answered in favour of her children.

In appeal the argument on issue (iii) which raised an estoppel against the children of Kamalambal went beyond its terms. It was argued that the conduct of Kamalambal in wilfully concealing her marriage estopped her from denying that Parupathy was the lawful wife. In my opinion the appellants were not entitled to take this point as the facts which constitute an estoppel should be specially pleaded. *Odgers on Pleading and Practice 13th ed. p. 177.* No issue was raised at the inquiry as to whether the conduct of Kamalambal operated as an estoppel. Even assuming that such an issue was specifically raised, it could not be said that the conduct of Kamalambal amounted to a representation to Parupathy intended to be acted upon to her detriment. Kamalambal was called as a witness in case No. 15 and she committed perjury to save the deceased from a prosecution for bigamy. Her conduct really resulted in Parupathy obtaining an order for alimony.

Whether the decree in case No. 15 operates as *res judicata* against the children is a question which must be answered in their favour. The children were complete strangers to the suit instituted by Parupathy

[1] *(1921) 23 N. L. R. 228.*

against the deceased on the basis that she was lawfully married to the deceased. To avoid confessing to a crime the deceased falsely admitted that she was his wife. The children are not, upon the death of the deceased, seeking to succeed to property or money which was the subject of adjudication in case No. 15. In other words it cannot be said that the children were identified in interest with the deceased in his litigation with Parupathy as to make them privies in interest of the deceased. (See *Taylor on Evidence, Vol. II, p. 1059.*)

In the result the appeal fails and should be dismissed. As the deceased and Kamalambal must be held responsible for this litigation it seems to me that the costs of the appellants here and below should be paid out of the estate. The order made by the District Judge as to costs will stand varied so as to give effect to this.

GUNASEKARA J.—I agree.

Appeal dismissed.