1966 *Present :* **H. N. G. Fernando, S.P.J., and G. P. A. Silva, J.**

K. THIAGARAJAH, Appellant, *and* P. KARTHIGESU, Respondent

S. C. 568/1963—D. C. Batticaloa, 1909/Misc.

Jurisdiction—Action for a declaration of status as an unmarried man—Maintainability—Declaratory judgments—Limitations on the exercise of declaratory jurisdiction of courts—" Cause of action "—Civil Procedure Code, ss. 5, 40, 217 (G), 392 et seq.*—Courts Ordinance, s. 62.*

Customary marriage—Burden of proof.

A civil court has jurisdiction to make a decree or order declaring a status. The maintainability of an action for declaration of status is clearly contemplated in the definition of " cause of action " in section 5 of the Civil Procedure Code, read together with the provisions of section 217 (G) of the same Code and section 62 of the Courts Ordinance.

The plaintiff instituted action praying for a declaration that he was not married to the defendant. The defendant denied the status of the plaintiff as an unmarried man. The dispute was whether a valid ceremony of marriage according to the custom prevailing in their community took place between the plaintiff and the defendant.

Held, that the action was maintainable. Inasmuch as the dispute was a legal dispute concerning the status and rights of the parties, the declaratory jurisdiction of the Court could be invoked. The jurisdiction of the Court to make a declaration of status included the jurisdiction to declare the status which the defendant denied.

Held further, that where the question at issue is whether a marriage was celebrated according to custom, and the evidence shows that the parties have neither cohabited for a single day nor even lived together under the same roof, there is no presumption in favour of their marriage. In such a case, proof of marriage depends solely on evidence to the effect that a valid ceremony of marriage was actually performed.

APPEAL from a judgment of the District Court, Batticaloa.

S. Nadesan, Q.C., with *C. Ranganathan, Q.C.*, *S. C. Crossette-Thambiah* and *K. Thevarajah*, for the plaintiff-appellant.

H. W. Jayewardene, Q.C., with *K. Kanthasamy* and *Mark Fernando*, for the defendant-respondent.

Cur. adv. vult.

July 22, 1966. H. N. G. FERNANDO, S.P.J.—

This is an unusual action, probably one of first instance in our Courts, in which the plaintiff prays for a declaration that he is not married to the defendant. Reference to the facts is not necessary at this stage, for the first question is whether our Courts have jurisdiction to grant such a declaration.

Section 217 of the Civil Procedure Code provides that " a decree or order of court.....may, without affording any substantive relief or remedy, declare a right or status ", and Section 40 of the Code refers to an action " to establish, recover or enforce a status ". Chapter XXV of the Code, which deals with the continuation of actions after alteration of a person's " status ", shows that the expression as used in the Code regards the marriage of a woman as being a change of her status. If, as the Code contemplates, the change from being a *femme sole* to being a married woman is a change of status, the change from bachelorhood to the condition of being a married man is equally a change of status. In the former case, the change can affect the capacity in two ways, *i.e.* a woman's right to property or her contractual capacity may be altered by reason of marriage, and also her capacity to contract a valid marriage is ordinarily limited by the fact of her subsisting marriage. In the latter case, the capacity of a married man to contract a valid marriage is equally limited. In fact, the counsel for the defendant in appeal did not seriously contend that the declaration sought in this case is not a declaration of the plaintiff's status.

Counsel's principal argument was that this action is one for jactitation of marriage, *i.e.* to restrain a defendant from boasting that he or she is married to the plaintiff. (The plaintiff in this action has asked for that very relief in addition to the declaration which he claims). That action was a matrimonial action, which in England used to be entertained by the Ecclesiastical Courts. But it is argued that such an action cannot be entertained by our Courts, because the matrimonial jurisdiction referred to in Chapter XLII of the Code does not include such an action. The omission to include such a reference was, it is argued, deliberate, and established an intention that our Courts should have no jurisdiction to entertain actions for jactitation of marriage.

I do not disagree with the argument that the action for jactitation of marriage is one within matrimonial jurisdiction, and no authority was cited to us which might indicate that the Courts in Holland or Ceylon entertained such an action. But the plaintiff in this case seeks also another remedy, which is a declaration of his status as an unmarried man ; and the objections which I have thus far considered are not relevant to the question whether the jurisdiction to make a declaration of status (the existence of which jurisdiction is clearly contemplated in Head G of Section 217 of the Code) does or does not include the jurisdiction to declare the status which the defendant in this case has denied.

Counsel for the defendant sought to draw an analogy between the present case, and that decided in *1860-1862 Ramanathan's Reports* (page 133). This Court there held that it had no jurisdiction to order the restitution of conjugal rights, on the ground that the Courts in Holland were not shown to have had such a jurisdiction. The decision was so expressed, but what is its principle ? If the Courts of Holland did not make orders for the restitution of conjugal rights, the reason was that the

substantive law governing the marriage contract did not compel a spouse to participate in marital relations, although the denial of marital right might constitute a breach of the contract. The principle is the same as that which prevents a party to certain other contracts from enforcing specific performance of the contract by the other party. If the law does not compel the specific performance, then equally the courts will not decree the remedy of specific performance. In appropriate cases, the courts have the duty to determine that the contract was not performed, but only for the purpose of exercising its jurisdiction to decree the relief which the law allows for non-performance, which in most cases would be pecuniary damages for breach of contract. Indeed there can be no doubt that the Courts in Ceylon, for the purpose of deciding whether a decree of divorce or separation should be granted, do have the duty to determine whether a party to a marriage has failed to perform his or her contractual duties of cohabitation.

The suggested analogy between such cases and the present one is in my opinion fallacious. For no question here arises of a Court making any order inconsistent with substantive law governing contracts of marriage. Even if a court were to grant a positive declaration that A *is* married to B, the court would not thereby order either party to perform conjugal duties. The question whether A is or is not married to B can arise for determination in several contexts, *e.g.* in a matrimonial action, in an action for declaration of title to land, in an action for defamation, in an action for injury caused to A or to B, and so on. In the instant case, the plaintiff's action for a declaration of his status calls for a determination of that question, and it is the duty of the court to decide it, if there is jurisdiction to decree the declaration.

Counsel has argued that under our Code a person cannot institute an action unless he is able to plead that he has a cause of action as defined in Section 5 of the Code. A similar argument was considered in *Aziz v. Thondaman* [1], where the court apparently took the view that, because Section 217 (G) of the Code declares that a decree may " declare a right or status ", a person may therefore bring an action to have a right or status declared. The precise objection, based on the definition of " cause of action ", was (I think with respect) not clearly formulated in that judgment. The objection is that the definition *does* expressly include the denial of a *right*, but makes no reference to the denial of a *status*, and that therefore the denial of a status does not give rise to an actionable cause. The answer to this objection is that the definition and the provisions of Section 217 (G) must be read together, and construed as far as reasonable so as to render both provisions effective. Inconsistency is avoided by the construction that, in the definition, " denial of a right " includes the denial of a status. To deny a status can involve a denial of the legal rights flowing from such a status. To deny the plaintiff's status of bachelor was to deny his right and his capacity

[1] *(1959) 61 N. L. R. 217.*

to contract a valid marriage. A cause of action can therefore arise upon that denial. Any other construction would render the provision for a decree or order declaring a status a dead letter, and would offend the principle of construction *ut magis valeat quam pereat*.

The arguments of counsel were to some extent based upon the absence of any precedent in the Courts of Holland for the grant of the particular declaration sought in this case, that A is not married to B. The lack of such precedent can compel me to assume, even though the assumption may in fact be incorrect, that the courts of Holland had no jurisdiction to make such a declaration. But it is not to be further assumed that therefore the Courts in Ceylon do not have that jurisdiction. Section 62 of the Courts Ordinance, which is only a re-enactment of the corresponding provision in Section 24 of the Charter of 1833, confers on District Courts "original" jurisdiction in all civil.....matrimonial .....matters, ...and in any other matter in which jurisdiction.....*is now or may hereafter be given to District Courts by law*". Section 62 had in contemplation the jurisdiction referred to in Section 217 of the Civil Procedure Code for a Civil Court to make a decree or order declaring a status. It is significant, and decisive of this matter, that the date of operation of the Courts Ordinance, No. 1 of 1889, was 2nd August 1890, while the date of operation of the Code, No. 2 of 1889, was 1st August 1890. The jurisdiction referred to in Section 217 (G) of the Code was thus in existence immediately before Section 62 of the Courts Ordinance came into operation. That jurisdiction now exists quite independently of the consideration whether or not it was recognised in the Roman-Dutch Law. And it is very nearly beyond argument that in conferring that jurisdiction, the Legislature of Ceylon intended to adopt the English law contained in Order XXV Rule 5, of the English Rules of the Supreme Court 1883, to the following effect :—

> " No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not. "

That the modern declaratory judgment is in many jurisdictions the consequence of adoption from the English Law has been stated in a comprehensive and very helpful study of numerous English cases by Dr. Zamir of the University of Jerusalem. (*The Declaratory Judgment* 1962). Section 217 (G) of our code amply confirms that statement so far as Ceylon is concerned.

In *Aziz v. Thondaman* (supra), this court disapproved the opinion of the trial judge that the granting of a declaration of status is not a matter within the discretion of the Court. That opinion I think with respect was correct, not merely because it was in line with English decisions, but because those decisions demonstrate the danger and inconvenience which can result if a declaratory judgment can be claimed as of right.

" It seems to me that when the court is simply asked to make a declaration of right, without giving any consequential relief, the court ought to be extremely cautious in making such a declaration, and ought not to do it except in very special circumstances. "

(*Grand Junction Waterworks Co. v. Hampton U.D.C.* (1898) 2 Ch. 331).

"The power of a court to make a declaration, where it is a question of defining the rights of two parties is almost unlimited . . . . . The discretion should of course be exercised judicially, but it seems to me that the discretion is very wide ". (*Hanson v. Radcliffe U. D. C.* (1922) Ch. 490).

These two citations from judgments delivered in 1898 and 1922 respectively show how sharply the attitude of the Courts in England towards declaratory judgments changed within a short space of time. In 1953 (*Barnard v. National Dock Labour Board* [1]), Denning L.J. said " I know no limit to the power of the court to grant a declaration, except such limit as it may in its discretion impose upon itself ".

The limits of the jurisdiction as laid down in English cases are classified in Dr. Zamir's book, and I shall freely borrow from it, in order to refer to the limitation appropriate to cases like the one before us.

The declaratory jurisdiction can be invoked for the determination of legal disputes, but not for disputes of a moral, social or political character. The dispute in the present case, whether a valid ceremony of marriage took place between the plaintiff and the defendant, is certainly a legal dispute, because it concerns the status and rights of the parties.

Theoretical issues cannot be determined. " The question must be a real and not a theoretical question ; the person raising it must have a real interest to raise it ". (1921 A.C. 438). If the right asserted by the plaintiff is not denied by the defendant, or where there exists only the possibility of a claim against the plaintiff or the possibility of the denial of his rights, the issue is only theoretical ; so also where the facts in relation to which a declaration is sought are hypothetical.

There are two other limitations on the exercise of the declaratory jurisdiction which have to be specially considered in this case. A person who contemplates some course of action cannot seek a declaratory order pronouncing upon the lawfullness of the proposed action, or upon the rights which might be claimed or denied if and when he takes the proposed action (*Lever Brothers v. Manchester Ship Canal Co.*, at page 56 of Zamir). Again a declaration will not be granted if it can be of no practical consequence. Thus, where the plaintiff claimed a declaration that they were entitled to an ancient ferry from point to point, the declaration was refused on the ground that no disturbance had been proved of the plaintiff's alleged rights.

[1] *(1953) 2 Q. B. 18.*

Both such limitations might appear to be applicable in the present case. The mere assertion that the plaintiff is married to the defendant, by itself, has no practical consequences, and it seems to follow that a declaration to the contrary also will have no practical consequences. The plaintiff may have fears that the defendant may claim from him such personal or proprietary rights as may be accorded to a wife by the relevant law applicable in their cases; but there has yet been no such claim, and if there is one, the dispute as to their marriage can then be determined. The plaintiff may fear that, if he now contracts a marriage, he may become liable to a conviction for bigamy; but that liability can arise, not because of the defendant's assertion, but because of the facts involved in the assertion which if they are subsequently proved will establish the offence of bigamy. If in effect it is the plaintiff's purpose to obtain from a civil court a declaration that will or may protect him from future criminal proceedings for bigamy, that in itself might be sufficient reason for denying to him a declaratory decree.

The principle underlying the limitations just mentioned is a general one, applicable to every exercise of a Court's jurisdiction, and not only to the declaratory jurisdiction. It is stated thus by Allen (*Law and Orders*, 2nd Edition page 266):—

> "It is a principle of our jurisprudence—and, it is to be supposed, of most systems of law—that courts will not entertain purely hypothetical questions. They will not pronounce upon legal situations which may rise, but generally only upon those which have arisen."

Since this principle is generally applicable, it must be presumed that its requirements are satisfied when a Court enters a decree of nullity of marriage or of divorce. Taking in particular an action for a decree of nullity *ab initio*, it must be presumed that there is a pending legal dispute for determination by the Court and that the decree when entered will have practical consequences. But the point of the dispute is no different from that arising in the present case, namely, "was there a valid marriage between the plaintiff and the defendant?". Denning, L.J. (in *Har-Shefi v. Har Shefi* [1]) stated that the sole object of a suit for nullity was "to obtain a declaration that what purported to be a valid marriage was in law a nullity". The present action differs from a suit for nullity only because the plaintiff does not concede that there was even the semblance of a marriage in his case. But the dispute is precisely whether the ceremony relied on by the defendant as purporting to be a valid marriage, was valid according to customary law. Again, the consequences of a decree of nullity *ab initio* are no different from those which will flow from a declaration in the present case that the plaintiff and the defendant are not, and never were, husband and wife. Hence the principle, that the issue involved in litigation must be real and not hypothetical, must be held to be equally satisfied in both types of action.

[1] *(1953) 1 A. E. R. 783.*

Consideration of this matter leads me to the opinion that, properly classified, a decree of nullity *ab initio* of a purported marriage falls within the categories of decrees declaring status. And since a person's status, whether of bachelor, spinster or married person, so obviously affects his rights and capacities, there is a reasonable presumption that a declaration of such status will have practical consequences. The same presumption may I think be invoked when the plaintiff in this action seeks a declaration of his status as a bachelor.

I would hold for these reasons that the District Judge rightly held that he had jurisdiction to grant the declaration.

The learned District Judge dismissed the plaintiff's action because he reached a finding upon the evidence that the plaintiff and the defendant were in fact married on 21st January 1959 according to the custom applicable to the community to which both parties belonged, namely the *Mukkuwa* community of the Tamils of the Batticaloa District.

The plaintiff is a graduate teacher, and the only child of a teacher. The defendant is the daughter of a teacher. Both parties enjoy a high social status in their community on this account, and both parties are comparatively speaking regarded as being affluent units in their community.

On 16th January 1959, there was a meeting between the plaintiff, his father, the defendant's parents, and one or two others, at which a marriage between the plaintiff and the defendant was arranged. The defendant's father agreed to give as dowry a sum of Rs. 10,000 in cash, and a land on which he agreed to erect a house of the value of Rs. 25,0000 or more, and two paddy fields. Actually, the erection of a house on the land had already commenced at the time, but the major part of the building operations had yet to be taken in hand. According to the plaintiff, the dowry included a motor-car of the value of Rs. 13,000; but according to the defendant's father the arrangement was that he would assist the plaintiff to purchase a car.

There is conflict as to the further arrangements made on 16th January. According to the plaintiff, it was arranged that on 21st January he and the defendant should become formally engaged to each other, in token of which there would be an exchange of rings; the notice of (prospective) marriage was also to be signed on that day and given to the Registrar of Marriages; the dowry deed was also to be signed on the 21st. But the cash dowry of Rs. 10,000 was to be paid on the day of the marriage, and the erection of the house would also be completed before that day. The actual date of the marriage was not fixed.

The defence version of the events arranged for 21st January was similar to that of the plaintiff, but differed vitally in that (according to this version) a marriage according to custom was to take place on that day. It was arranged that the dowry deed for the land and paddy fields were to be signed on the 21st, but there was no arrangement as to the payment of the cash dowry and no undertaking that the house would be erected within any specified time.

The trial Judge has assumed, presumably upon the evidence of the actual events of 21st January, that the parties, and principally the plaintiff, had intended to contract a customary marriage on the 21st. But he did not attempt to test the truth of the two conflicting versions of the arrangement reached on January 16th by an examination of those versions themselves.

The plaintiff's evidence is that, very soon after the arrangements made on the 16th, he received some disturbing information concerning the defendant. For this reason he wrote a letter on the 19th to the defendant's brother in which he requested that the engagement ceremony, fixed for the 21st, should be postponed. But the brother came and saw him and persuaded him not to press for the postponement. He then withdrew his request for the postponement, because at that stage the information which he had was only a matter of rumour, and because in any event he was only to become engaged, and not to be married on the 21st.

The defendant's father admitted the receipt of a letter requesting a postponement of the ceremony arranged for the 21st. But according to him the request was for a postponement of *the marriage ceremony* fixed for that date. The letter, he said, had been handed to the defendant's proctor, but he could " not definitely say whether I can produce this letter this afternoon ". These statements were made by the witness on the morning of 16th July 1962. When the trial was resumed that afternoon, the witness again said that the letter had been given to the proctor. But, in answer to a further question, he admitted that he had not asked the proctor whether the letter was still available. It was not produced at the trial.

This letter would in all probability have either confirmed or rebutted the plaintiff's evidence that what had been arranged for the 21st January was only an engagement ceremony. If it did refer to an engagement, and not to a marriage ceremony, it would have shown at the least that, shortly before the 21st January, the plaintiff had denied an arrangement for a marriage on that day ; and if so, the failure to refute in writing such a denial made in a letter was significant. It is unfortunate that the trial Judge did not choose to infer that the defence withheld the letter because it must have contained evidence unfavourable to the defendant's case. That inference can nevertheless be relied upon at the stage of appeal.

The trial Judge has noted in the record a statement of defence counsel that " certain documents had been misplaced ". But even if this statement might show that the letter had been misplaced, it was open to the defence to call the proctor as a witness to give secondary evidence of the contents of the letter. As matters actually stood, the plaintiff's evidence as to the contents of the letter was not contradicted by the best available evidence.

Before referring to the grounds upon which the learned trial Judge held that the plaintiff and the defendant were married according to the custom prevailing in their community, I must note one feature which distinguishes this case from many contained in our Law Reports in which there arose the question whether a marriage had been celebrated according to custom. The distinction is that the question there arose in relation to persons who claimed to have been husband and wife by habit and repute, and not (as in this case) to persons who have never lived together even as man and concubine. In the usual cases "where a man and a woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage". *Aronegary v Vallie et al.*[1] In view of the evidence of cohabitation and repute, it was held in that case that it was wrong to place, on the party asserting the marriage, the burden of proving the appropriate marriage customs and the fact that the requisite ceremony was performed. But in the present case, the parties have neither cohabited for a single day nor even lived together under the same roof. There is therefore no presumption in favour of their marriage, proof of which depends solely on evidence to the effect that a valid ceremony of marriage was actually performed.

In deciding what was the custom prevailing in this particular community, the learned trial Judge has adopted the opinion of the witness Pandit Periatambipillai which was :-

> "whether it be milk and fruit or rice and curry they are all mixed up and placed in the same vessel and both the he and the she who had lived and grown up in two different homes partake of the meal that is mixed up, the one and only meal and this is intended to achieve the oneness of the he and the she. In other words it is the identity of one getting merged into the identity of the other. This is also what is described as the identification of both in the sorrows and happiness of one with the other."

This witness appears to have created a very favourable impression both as to his learning and his credibility. It is fortunately not necessary for me to examine the credentials of the witness, which counsel for the plaintiff in appeal has quite properly attempted to attack. I am satisfied, on different grounds, that the evidence of this witness fell far short of establishing that a valid marriage according to custom did take place between the plaintiff and the defendant.

The witness admitted more than once that the essential element of a customary marriage in this particular community is the *Kalam* ceremony, in which rice and seven curries are offered to the bridegroom ; it is interesting to note that this " rice ceremony " was accepted eighty years age

[1] *(1881) 2 N. L. R. 322 (Privy Council).*

in the judgment of the Privy Council (2 N.L.R. 322) as being the essential element of a valid marriage, and that in a case from the District Court of Batticaloa. The ceremony, according to the witness, is that the bride-groom mixes some rice with the curries, and first eats three mouthfulls himself; he then with his hands feeds three mouthfulls to the bride. The defendant's father did state that this rice ceremony was performed between his daughter and the plaintiff; but the trial Judge quite rightly did not act upon that statement, for the unusually good reason that there was not at the time any witness who could claim to have been present at the rice ceremony and to have seen it performed. Since the performance of this ceremony is the essential element of the marriage custom, it is incredible that it was performed in secret, without opportunity for invited friends and relatives to witness its performance if so minded. The defendant's "expert" witness had often witnessed this ceremony, and indeed his qualification as an expert depended very much on the fact that he had attended several marriages at which the rice ceremony was performed. Moreover, the trial judge has not rejected the evidence of at least one reputable witness called by the plaintiff that the rice ceremony ordinarily takes palce in the view of invited guests.

The trial Judge should not in my opinion have been content with merely declining to act upon the evidence of the defendant's father that the rice ceremony was performed. There were good grounds for him to find, in all the circumstances, that no rice-feeding ceremony took place.

The plaintiff's evidence at the trial was given on 25th October 1960 and on 17th January 1961. In regard to the *Kalam* ceremony alleged to have taken place on 21st January 1959, the plaintiff was cross-examined solely on the basis that he and the defendant had jointly partaken of milk and fruit. No question was put to him suggesting that the rice ceremony had been performed. His evidence was concluded on 17th January 1961.

On 18th January 1961, during the cross-examination of a witness called by the plaintiff to speak to marriage customs, it was suggested more than once to this witness that rice is not essential for the *kalam* ceremony and that "something like milk or something pure" could be used instead. The same suggestions were repeated to the witness during the afternoon session. But a while later, defence counsel for the first time suggested in his questions that the rice ceremony had actually been performed between the plaintiff and the defendant in an inner room in the house.

It seems to me that the plaintiff was entitled to the benefit of the fact that, until the afternoon of 18th January 1961, it had not been the defence position that the rice ceremony had been performed. The inference which strongly arises is that the rice-ceremony did not in fact take place.

The plaintiff was subsequently recalled by the Judge and in answer to him denied that the rice ceremony had taken place. Thereafter, the defendant's father asserted that it had. The trial Judge did not think it necessary to consider who spoke the truth, and who the lie, on this point. If the circumstances to which I have just referred had been taken into account, together with the unusual feature that there was not available to the defence a single witness, not even the defendant herself or her father, who could testify at first hand to the performance of the rice ceremony, it would have been a perfectly justifiable conclusion that the evidence of the defendant's father on this point was deliberately false, and conversely that the plaintiff's evidence was true.

By way of parenthesis I must here refer to defence counsel's explanation to the Judge " that by some over-sight perhaps he did not put it to the plaintiff. . . . that there was a *kalam* ceremony. . . . meaning participation in rice and curry. . . . inside a room ". One point has been established beyond doubt by the evidence in this case, namely that the rice ceremony alone would constitute a valid marriage between these parties. That being so, the plaintiff can rightly ask this court to presume that the fact of its performance should have been the vital and decisive question for determination at the trial of this action. The failure of the defence to raise this question, except belatedly, must enure to the plaintiff's advantage despite the explanation from the Bar, which quite properly was expressed in uncertain terms.

It is convenient at this stage to consider a matter to which I have already referred, namely the omission of the trial Judge to consider the question of the intention which the plaintiff entertained when he came to the defendant's house on 21st January 1959, that is to say " did he come there as prospective fiancee or else as bridegroom "? According to his evidence, he did not imagine that he could contract a valid marriage except by participation in the rice ceremony, and for the reasons I have stated he certainly did not participate in such a ceremony. As to the alleged symbolic and alternative participation in milk and fruit, he was not even asked in cross-examination whether he was aware, before he came to the defendant's house on 21st January 1959, that the arrangements fixed for that day contemplated any ceremony in which he would drink from some vessel and thereafter hand the vessel to the defendant. Nor was he questioned with a view to showing that he had been informed that his marriage would be solemnized, not by the known rice ceremony, but instead by some alternative ceremony, the validity of which could if necessary be established by " expert " evidence in a court. There is no evidence that he was instructed in any way as to his part in such an alternative ceremony, which would have been novel to him. The fact that the rice ceremony was not performed on 21st January 1959, and the lack of evidence indicative of a prior arrangement to perform an alternative ceremony of marriage, render reasonable and credible the plaintiff's evidence that he did not intend to be married that day.

It is common ground that the " financial " transactions fixed for the 21st was only the execution of a deed for the promised land and paddy fields ; these were valued in the deed at Rs. 9,000. Hence the parties did not contemplate that the cash dowry of Rs. 10,000 would be given on that day, nor that any agreement would then be executed binding the defendant's parents to fulfil their promise to erect a valuable house on the land and to assist the plaintiff in th · purchase of a car. Indeed the defendant's father admitted that " there was no talk as to when the money (the cash dowry) should be paid ".

The defence version meant that, although the marriage was fixed for January 21st, the plaintiff was content to rely on the bare word of the defendant's parents in regard to a very substantial part of the promised dowry, and did not seek even an oral assurance as to the time when the promise would be perform: d. There is literally nothing in the evidence to indicate that the plaintiff was thus ready to marry in haste without troubling to eliminate possible causes for subsequent repentance. Indeed, I shall immediately refer to evidence which eliminates the possibility that the ordinary motive for a hasty marriage was present in the mind of either of these two parties.

This alleged marriage was in fact not consummated. At one stage, the defendant's father appeared to give the court the impression that by some prior arrangement " the marriage was to be consummated only after the tying of the *tali* is gone through " at some later time. But he later admitted that there had been no discussion of the question of the consummation of the marriage. Since there had been no discussion of this delicate but important detail, one cannot understand why both parties appeared to have readily assumed (this is obvious from the evidence) that they were not to live as husband and wife after the ceremony which took place on January 21st.

I need refer only to one other matter which is relevant to the question whether the plaintiff intended to be married on 21st January. The defendant's expert witness stated that " depending on the means of the parties concerned ", the *koorai* and *tali* ceremonies take place on the day of the marriage. There was in this case no *tali* ceremony. This omission was explained by the defendant's father's evidence that both sides had earlier agreed to have this ceremony performed " after the wedding ", but without fixing even an appropriate date. At one stage of his cross-examination, the witness resiled from this position by stating there had been no discussion as to the *tali* ceremony. A while later he reverted to the explanation of a postponement of that ceremony, stating that on 9th January, the question was discussed and " the plaintiff's party were finding it difficult to have the *tali* made, and I suggested that I could get that *tali* made ". This explanation was later expanded by the witness, when he stated that the plaintiff's family were at the time unable to afford the expense of buying a *tali*. He then proceeded to give evidence as

to the means of the plaintiff and his parents, in an effort to support the allegation of their inability to pay for a *tali*. But he did admit that the plaintiff's parents were possessed of several properties, and he had earlier made the admission that " both his parents and we are fairly well to do ".

The trial Judge refers in the judgment to the explanation that the *tali* ceremony was not performed because the plaintiff's family did not have at the time the Rs. 600 or 700 necessary to procure a *tali*. But he did not consider the credibility of that explanation, and expressed no view as to its truth. Nor did he examine the truth of the assertion that the question of the *tali* ceremony had been discussed and settled on 9th January. Had he examined that assertion in the light of the relevant evidence to which I have now referred, he would not have found any reasonable grounds upon which to accept it as true. I am myself convinced in the circumstances of this case that, if the intention of the parties had been that the ceremony of a customary marriage should take place on 21st January, that *tali* ceremony would also have been fixed for that day.

I have referred in detail to the matters relevant to the point whether the plaintiff came to the defendant's house on 21st January with the intention of marrying her. There must be added to these the item that the truth of the evidence of the defendant's father on this point is cast in doubt by the falsity of his version that the rice ceremony was in fact performed. There is also the consideration that the defendant herself did not enter the witness box to speak to her own state of mind. The only reasonable conclusion which the trial Judge could have reached on this point, if he had considered these matters, is that the plaintiff did not leave his home with any intention of contracting a marriage.

I shall now consider the crucial question decided by the trial Judge namely that a ceremony did take place on 21st January which constituted a valid customary marriage. He referred to the evidence that the " bridegroom " was brought to the " bride's " house by the latter's elder brother ; the house of the defendant was decorated for the occasion and a canopy of white cloth had been erected ; on the arrival of the plaintiff the defendant's father broke a coconut and the " evil eye ceremony " was performed ; the plaintiff and the defendant garlanded each other and sat together on a settee ; they exchanged rings ; a porcelain vessel containing milk and fruit was delivered to the defendant who offered it to the plaintiff ; the plaintiff took three sips from the vessel and returned it to the defendant who in turn took three sips ; thereafter a dowry deed was read over by a notary and signed by the parties including the plaintiff.

It is the partaking in the manner stated above of fruit and milk which the Judge has held to have had an " inner meaning " and to have constituted the marriage ceremony.

The evidence of the defendant's chief witness Pandit Periyathambipillai makes it quite clear that the *kalam* ceremony which had customarily been observed in this community is the rice ceremony performed in the manner I have already explained. But he stated his opinion that according to the sastras it is sufficient if fruit and milk is used instead of rice. The answers of the witness in subsequent cross-examination appear to indicate that his opinion is not supported by the writings he had in mind. But even if valid this was opinion evidence based on the witness's interpretation of ancient writings. He was questioned further as to the instances in which to his knowledge milk and fruit had actually been used in the *kalam* ceremony instead of rice. His answers revealed that during the course of twenty five or thirty years he had noticed the use of milk and fruit only on two occasions although he had been present at over a hundred marriages.

One of the two occasions was a case where on the day of the marriage the bridegroom's party threatened to take away the bridegroom (and thus not to proceed with the arranged marriage). At this stage, according to the witness, he himself suggested an immediate second marriage between the two families, i.e. "an exchange marriage" between the bridegroom's sister and bride's brother. This emergency proposal made after midnight was proceeded with and the bridegroom's sister was hurriedly brought from the house, knowing then for the first time that she was to be married. In this emergency the witness himself apparently suggested that milk and fruit, instead of rice should be served for both the marriages.

The second instance according to the witness where fruit and milk took the place of rice was in 1940 but he attempted no explanation as to why a traditional rice ceremony was not performed.

The effect of the evidence of this witness surely is that custom as followed among this community in Batticaloa requires the performance of the rice ceremony, and that in nearly every case to which he can speak that ceremony was in fact performed, but that on two occasions, one of which had been of his own devising, milk and fruit took the place of rice. Thus the use of milk and fruit even according to the witness was an exception to the traditional custom and in one at least of the two instances was resorted to in quite extraordinary circumstances at the witness's own suggestion. Two deviations from traditional custom are in my opinion quite insufficient to support the witness's position that in modern times young people are accustomed to follow the deviation rather than the tradition. In the first of the two instances, the deviation was not made in consequence of the modern views held by young people nor in the present case is there any clue that either the plaintiff or the defendant abhorred the use of rice or that milk and fruit are modern in comparision with rice. In fact, the defendant's father could not even attempt to explain why in this instance, fruit and milk were used as a

substitute for rice. The witness's frequent admissions concerning the observance of the rice ceremony contradict his own assertion that the community has recognised any new custom.

The dowry deed P6 contains a recital that it is a conveyance to the plaintiff "as bridegroom" and the defendant "as bride". The acknowledgment which they signed in acceptance of the gift also refers to them as bridegroom and bride. This undoubtedly constitutes an admission by the plaintiff that the marriage took place on 21st January.

The plaintiff explained at the trial that when the dowry deed was read, he understood it to refer to a future marriage. He had given the same explanation in the letter P5 written by his Proctor to the defendant on 26th May 1959. No reply to this letter was sent to the plaintiff, and no satisfactory reason was given for the failure to reply. There was not even evidence that the plaintiff was ever requested to complete the alleged outstanding arrangements for the civil marriage before the Registrar and for the *tali* ceremony. The plaintiff's denial in May 1959 was not contradicted in writing or by conduct until after the institution of this action in March 1960.

The considerations just mentioned, and the matters with which I have dealt in discussing whether the plaintiff intended to contract a valid marriage, are more than sufficient to rebut the effect of the apparent admission in the deed P6.

During the argument of the appeal my brother suggested that the proceedings (if I may so term them) of 21st January 1959 had the appearance of a marriage ceremony, and that many of the events of that day would not have taken place on the occasion of an engagement. It was in view of this feature, unfavourable to his case, that the plaintiff's counsel proposed to produce certain love-letters alleged to have been written by the defendant to a Sinhalese by the name of Mendis; counsel proposed a line of cross-examination designed to show that "there was an alleged plan on the part of the defendant's father to stage a milk-feeding ceremony and to incorporate in the dowry deed a term to the effect that the marriage had already taken place". This course the Judge did not permit, because in his view "what is really before the court is the nature of the ceremonies and other things that took place on that day". This statement confirms my clear impression that the Judge did not consider important or even relevant the question whether the plaintiff intended to contract a marriage. In the result, he presumed that intention because the ceremonies in his opinion constituted a valid marriage, but he took little or no account of the several matters which (as I have tried to show) negatived that intention. The inconsistency, that the plaintiff, who had no intention to contract a marriage, nevertheless participated in ceremonies which bore the appearance of a marriage, is explained in the submission of plaintiff's counsel that the defendant's father planned to stage a marriage ceremony. It is fortunate that this already long judgment need not include any pronouncement on the validity of that explanation.

I am compelled for the reasons stated to reverse the finding of fact of the trial Judge and to hold that the plaintiff is not married to the defendant :—

(*a*) on the ground that the plaintiff did not intend to contract a marriage to the defendant on 21st January 1959 ; and/or

(*b*) on the ground that a valid marriage between the plaintiff and the defendant did not take place on that day, or at any other time.

The legal issues in this appeal are interesting and important, and the factual issues have been at the least interesting. On both aspects, counsel for both parties have been of great assistance to the Court.

The decree appealed from is set aside, and decree will be entered declaring that the plaintiff is not married to the defendant. The decree will order payment to the plaintiff of taxed costs in both courts.

G. P. A. SILVA, J.—I agree.

Appeal allowed.