Present : Porter and Schneider JJ.

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THIAGARAJA *v.* KURUKAL.

60—D. C. Jaffna, 4,971.

Brahmin marrying a girl of eleven years according to Hindu rites—Sub sequent cohabitation of spouses for several years—Is marriage valid ?—Marriage Ordinance applicable to Hindu marriages—Recognition of marriage according to Hindu rites is only as to solemnization.

A Brahmin married a girl when she was eleven years and one month old according to Hindu customary ceremonies. The spouses cohabited after the female had attained puberty and lived for some years as husband and wife, and were received as such by their relations and friends.

Held, that the marriage was not valid. Subsequent cohabitation did not render the marriage valid *ab initio.*

" The recognition of customary marriages is a recognition only of the custom as to the mode of somenization and nothing else. The Marriage Ordinance must be regarded as applicable to all marriages in regard to all other matters about which it contains express provisions. The provisions of the Ordinance as to the prohibited age of marriage (section 16), prohibited degrees of relationship (section 17), incest (section 18), re-marriage (section 19), dissolution of marriage (section 20), suits to compel marriage (section 21), legitimation by subsequent marriage (section 22), consent to marriage of a minor (section 23), are applicable to all marriages however solemnized."

THE facts appear from the judgment.

Hayley (with him *J. E. Obeysekera* and *Nadarajah*), for appellant

Arulanadan (with him *Ramachandra*), for respondent.

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July 4, 1923. SCHNEIDER J.—

The District Judge has found that the intestate Sundrakurukkal was a Brahmin, and had been married in September, 1909, to one Chelamma, when she was eleven years and one month old, according to Hindu customary ceremonies. He also found that the spouses cohabited after the female had attained puberty, that they lived together for some years as husband and wife, and were received as such by their relations and friends. The findings of the learned District Judge were not seriously challenged, even if they had been challenged, I would have accepted them as they are warranted by the evidence.

The only question of law submitted for our decision was whether the marriage in question was a valid one. The learned District Judge had held that it was invalid, inasmuch as the female party had not completed her twelfth year at the date of the marriage as required by section 16 of the Marriage Registration Ordinance, No. 19 of 1907. But he also held that the marriage was rendered valid by the subsequent cohabitation. For this proposition of law he cites the following passage from *2 Pereira's Laws of Ceylon, p. 215* : " Although the want of age avoids the marriage, cohabitation after the attainment of the age of puberty renders the marriage valid *ab initio.*" For the appellant it was contended that the marriage in question was invalid as being obnoxious to the provisions of section 16 of the Ordinance already mentioned. This contention and the ground upon which the District Judge decided the case raises two questions. First, whether the Ordinance, No. 19 of 1907, applies to the marriage of the intestate, and, next, whether the subsequent cohabitation rendered that marriage valid *ab initio*, even if it were invalid according to the provisions of that Ordinance. It was contended on behalf of the respondent that the provisions of section 16 of the Ordinance did not apply to the marriage in question, because the parties were Brahmins, and according to their customary law the females should be married before they attain the age of puberty, which, in all cases, would mean before they attain twelve years of age, and, next, that although the marriage was solemnized according to customary law, it was still a valid marriage, although not solemnized according to the provisions of the Ordinance, and that, therefore, section 16 would not apply to such a marriage.

Neither of these arguments appears to me to be sound. In the preamble of the Ordinance it is set out that it is " expedient to consolidate and amend the language relating to marriages in this Island other than the marriages of Kandyans or of Muhammadans." It is clear, therefore, that the Ordinance does not exclude Hindu marriages from its provisions, and that Hindus are governed by its provisions. That marriages solemnized according to custom are recognized as valid by decisions of this Court is not an argument

which supports the contention that the provisions of section 16 do not apply to such marriages. The reason why customary marriages are recognized is that the Ordinance does not render registration nor solemnization according to the provisions of the Ordinance compulsory. The recognition of such customary marriages is a recognition only of the custom as to the mode of solemnization and nothing else. The Ordinance must be regarded as applicable to all marriages in regard to all other matters about which it contains express provisions. Customary law must cede to Statute law. It seems to me that the provisions of the Ordinance as to the prohibited age of marriage (section 16), prohibited degrees of relationship (section 17), incest (section 18), re-marriage (section 19), dissolution of marriage (section 20), suits to compel marriage (section 21), legitimation by subsequent marriage (section 22), consent to marriage of a minor (section 23), are applicable to all marriages however solemnized. The Ordinance defines marriage as " any marriage save and except marriages contracted under and by virtue of the Ordinance No. 3 of 1870, entitled " An Ordinance to amend the Laws of Marriage in the Kandyan Provinces " and except marriages contracted between persons professing the Muhammadan faith." That definition indicates that the term marriage is not restricted to marriages solemnized under the provisions of this Ordinance. The sections I have mentioned contain no limitation of the term marriage, whereas in a number of other sections the language expressly indicates that their provisions are limited to marriages solemnized under the provisions of the Ordinance, as, for example, sections 24, 43, and 44.

The argument that according to their custom Brahmin girls should be married before they attain puberty, and that, therefore, it is not possible in their cases to observe the provisions of section 16, is one which should be addressed to the Legislature, it is irrelevant when the only question is the interpretation of the Ordinance. In my opinion, therefore, section 16 does apply to the marriage in question, and the marriage was invalid, as the female party had not completed twelve years of age.

There then remains the question whether the subsequent cohabitation rendered the marriage valid. In my opinion it did not. The word " valid " as used in section 16 must be given the same meaning, which it seems to have in a number of other sections of that Ordinance, and which it has in ordinary legal language when applied to marriage. A valid marriage is one recognized by law, an invalid marriage is one which is void. That seems to be the only meaning, which can be attached to the word " valid " as used in section 19, which enacts that " no marriage shall be valid where either of the parties thereto shall have contracted a prior marriage, which shall not have been legally dissolved or declared void." The same inference may be drawn from the language of section 43,

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where the words used are "null and void," and the language of section 44 where the word used is "valid." The passage relied upon by the learned District Judge is a statement of the law made by Burge as recognized by the Roman-Dutch law. Even if the Ordinances dealing with marriage had not repealed, the Roman-Dutch law of marriage almost *in toto*, it seems to me that such a provision in that law cannot be recognized, as it would be inconsistent with the express provision in the Ordinance that marriage during non-age is not valid. But, as a matter of fact, the effect of the legislation in regard to marriages in this Island has been to repeal all those portions of Roman-Dutch law on the subject in regard to matters which are expressly dealt with by legislation. The age limit, which is to be found in the present Ordinance and in the Ordinances preceding it, corresponds with the limit to be found in the Roman-Dutch law, and it seems to indicate that the Legislature was not unmindful of the provisions of that law as regards the prohibited age for marriage. The fact that the Legislature did not at the same time adopt the provision that cohabitation of persons married during non-age after the female party had attained puberty renders the marriage valid *ab initio*, is clear indication that the Legislature was not disposed to adopt that provision of the Roman-Dutch law. In the amended Kandyan Marriage Ordinance, No. 3 of 1870, section 12, there is an express provision on this point. It enacts "no such marriage shall be valid to which the male party is under sixteen years of age, or the female under twelve years of age; but if the parties shall have continued to cohabit as husband and wife for one year after they shall have attained these ages, respectively, or if a child shall have been born to them during the non-age of both or either of them, such marriage shall, in either case, cease to be impeachable and invalid on the ground of non-age." From this enactment the inference may rightly be drawn that where the Statute law declares a marriage not to be valid if contracted during non-age, and sees reason for modifying the declaration that the marriage shall be invalid, it would do so in express terms.

I would, therefore, hold that the marriage in question was not valid. I would accordingly set aside the order of the learned District Judge, with costs, and remit the case for proceedings in due course.

PORTER J.—I agree.

Set aside.