

1951

Present : Gratiaen J. and Pulle J.

MANELHAMY *et al.*, Appellants, and SILINDUHAMY *et al.*,
Respondents

S. C. 67—D. C. Kurunegala, 3,781

Kandyan Marriage Ordinance (Cap. 96)—Marriage contracted prior to passing of Ordinance—Binna or diga—Burden of proof—Section 36.

In regard to a Kandyan marriage contracted before the Kandyan Marriage Ordinance was passed, the burden of proving that the marriage was in *diga* is on the person who asserts it.

In the absence of a certificate of the registration of a marriage under the Kandyan Marriage Ordinance there is no scope for the application of the presumption created by section 36.

APPEAL from a judgment of the District Court, Kurunegala.

H. W. Jayewardene for the 1st, 2nd and 3rd defendants appellants.

N. E. Weerasooria, K.C., with *C. E. Jayewardene* and *E. O. F. de Silva*, for the 4th and 5th defendants respondents.

C. R. Gunaratne, for the plaintiff respondent.

Cur. adv. vult.

May 16, 1951. PULLE J.—

The appellants in this case are the 1st, 2nd and 3rd defendants in an action instituted for the partition of a land called Kongahamulawatta. Admittedly the original owner of the land was one Ausadahamy who died leaving two sons, Appuhamy Vedarala and Mudalihamy, and three daughters, Kirimenika, Yasohamy and Gunamal Etana. The plaintiff is the son of Kirimenika and the appellants are the three sons of Mudalihamy. A sister of the appellants Ukkumenika was married to the plaintiff. It was common ground that Gunamal Etana was married in *diga*. One of the points of contest in the case was whether Kirimenika and Yasohamy were both married in *diga*. It was the case for the appellant that they were so married. The learned District Judge held against the appellants and at the hearing of the appeal the finding in regard to Kirimenika was not challenged. The argument was confined to the question whether the finding that Yasohamy was not married in *diga* was wrong.

There was no evidence as to whether Yasohamy was married before or after passing of the Kandyan Marriage Ordinance (Cap. 96). It was submitted on behalf of the appellants that in the absence of any specific evidence in regard to the character of the marriage one should start with the presumption that Yasohamy was married in *diga*. In respect of marriages contracted before the Ordinance was passed there is one passage in the judgment in D. C. Kandy Case No. 22,692 reported in (1833-1850) Austin Reports p. 141 according to which, in the absence of positive proof of a *diga* marriage, the Court will presume in favour of a *binna* one. The current of authorities is, however, to a different effect, namely, that the burden rests on the person who asserts that a marriage was *diga* to prove it. It was so held in D. C. Kandy Case No. 51,219, (1860-1871) Vanderstraaten Reports p. 92 and in the case of *Punchi Nilame and another v. Dingirā Etana and others*¹ and *Doretugawe v. Ukku Banda Korale and others*². The same view was taken in S. C. No. 222—D. C. Kegalla Case No. 9,563, Supreme Court Minutes of 1st August, 1933. I am indebted to Mr. C. R. Gunaratne for a reference to this unreported case.

If, as is not unlikely, Yasohamy was married after the passing of the Kandyan Marriage Ordinance there would still be no room to start with the presumption that she was married in *diga*. Whether she was married according to the provisions of that Ordinance or under the Marriage Registration Ordinance (Cap. 95) we do not know. No certificate of marriage has been produced and there is no scope for the application of the presumption contained in section 36 of the Kandyan Marriage Ordinance which states that if it does not appear in the register whether the marriage was contracted in *binna* or in *diga*, such marriage shall be presumed to have been contracted in *diga* until the contrary is shown. In the absence of a statutory presumption in favour of the existence or the non-existence of a fact one would have to fall back on the ordinary rule as to burden of proof, namely, that it rests on the person who asserts the fact.

¹ (1909) 1 Cur. L. R. 239.

² (1909) 1 Cur. L. R. 259.

According to the plaintiff Yasohamy had three children Ukku Banda, Unguhamy and Baba Etana. His evidence reads as follows:—

“ Ukku Banda was brought up by Mudalihamy. Mudalihamy was in the mulgedera. Unguhamy and Baba Etana also lived in the mulgedera. All the three Ukku Banda, Unguhamy and Baba Etana were in my uncle's house. They were brought up there”. It is true that another witness called by the plaintiff himself stated that Yasohamy was not in the mulgedera and that her children did not come to the house of Mudalihamy. The learned District Judge has come to a specific finding that Ukku Banda was in possession of the land sought to be partitioned. I find it impossible to take the view that the learned Judge was wrong in rejecting the appellants' contention that Yasohamy was married in *diga*. The fact that Kirimenika the sister of Yasohamy conveyed to the plaintiff a $\frac{1}{4}$ th share indicates that the position had been long accepted that only one out of the three daughters was married in *diga*. A point has been made that the 6th-11th defendants to whom Yasohamy's $\frac{1}{4}$ th share had been allotted by the plaintiff did not appear and claim their shares. Taken by itself that would not be a ground for construing it as an admission on their part that Yasohamy was married in *diga*. If the view which I have expressed is correct that the burden rested on the appellants to prove a *diga* marriage the appellants have wholly failed to show that the finding is wrong. .

I would dismiss the appeal with costs.

GRATIAEN J.—I agree.

Appeal dismissed.
