1957 *Present :* **Basnayake, C.J., and Pulle, J.**

WIJESINGHE and another, Appellants, *and* KULAWARDENE and others, Respondents

S. C. 321—D. C. Gampaha, 2,631/L

Marriage by habit and repute—Quantum of evidence.

Two brothers, A and B, were the associated husbands of C. One of them, A, was lawfully married to C. After A's death, C's relationship with B continued for about 30 years, during which period two children were born. The two children instituted the present action claiming title to a land, which admittedly belonged to their deceased father B, on the ground that they were B's heirs at law. Their averments, however, that B and C were married according to customary rites and were accepted as husband and wife in the social circles in which they moved were not satisfactorily proved. Further, according to an entry in the birth certificate of the 2nd plaintiff, the informant B who was the father had stated that the parents were not married.

Held, that the long period of cohabitation was not by itself sufficient evidence of " habit and repute " that B and C were lawfully married.

APPEAL from a judgment of the District Court, Gampaha.

H. V. Perera, Q.C., with *S. C. E. Rodrigo*, for the plaintiffs-appellants.

N. E. Weerasooria, Q.C., with *G. D. C. Weerasinghe* and *S. D. Jayasundera*, for the defendants-respondents.

Cur. adv. vult.

June 7, 1957. PULLE, J.—

The two plaintiffs who are the appellants sought a declaration of title to a divided portion of land called Wellabodawatte which admittedly belonged to their father, one W. A. Punchi Appuhamy. The question for determination in this appeal is whether the learned District Judge was wrong in holding that their mother, one Gajanayake Kankanlege Yasohamy, was not lawfully married to Punchi Appuhamy.

It is not disputed that Yasohamy was first married to one Appusingho, the elder brother of Punchi Appuhamy. Appusingho died on 11th February, 1900, leaving children of whom one is the witness W. A. Baban Nona. The case for the plaintiff is that after the death of Appusingho there was a marriage between Punchi Appuhamy and Yasohamy according to customary rites and that by that union the 2nd plaintiff was born on 10th September, 1901, and the 1st plaintiff in 1907. The defendants have resisted the claim of the plaintiffs on the basis that Punchi Appuhamy having died unmarried the plaintiffs were not his heirs at law.

The plaintiffs attempted to prove a marriage according to customary rites by the evidence of a younger brother of Yasohamy, named Thelenis. The trial Judge has discounted his evidence and it is, therefore, not necessary to discuss the facts deposed to by him.

J. N. B 9463—1,592 (11/58).

Punchi Appuhamy died about the year 1930 and Yasohamy in 1947. According to the 1st plaintiff the children of the two unions of Yasohamy grew up together. Regarding the division of the properties of the family the 1st plaintiff stated,

"My mother's lands were amicably settled between my brothers and sisters and my step-brothers. My *senior father's* properties were possessed by his children and my *junior father's* properties were possessed by me." By "senior father" the 1st plaintiff meant his father's elder brother, Appusingho.

The 1st plaintiff also stated in evidence that his parents used to attend weddings, funerals and temples together. On this point the witness was not supported by his step sister Baban Nona who stated that she had not seen Punchi Appuhamy and her mother going together to temples, fairs, weddings or funerals. It is fairly clear from the judgment under appeal that the trial Judge was not inclined to accept the evidence of the 1st plaintiff on this point.

The defendants took up the position at the trial that the two brothers were the associated husbands of Yasohamy, supported by the evidence given by Baban Nona. According to her Punchi Appuhamy also lived with Yasohamy in the same house, although at times he resided with his mother Nonahamy. Baban Nona used to address Punchi Appuhamy as the "junior father" and Appusingho as "father" and she regarded the former also, during the lifetime of the latter, as her mother's husband. She added,

"I remember the time that Appusingho died. After that no marriage ceremony was performed in my house between Punchi Singho and my mother. Everything went on as before but there was no ceremony." The trial Judge's finding that Appusingho and Punchi Appuhamy were associated husbands of Yasohamy whose relationship with Punchi Appuhamy continued after Appusingho's death has been attacked on the ground that there was no evidence to support it. I am unable to agree that on the evidence of Baban Nona, supported as it is to some extent by the 1st plaintiff, the trial Judge could not justifiably come to a finding that Appusingho and Punchi Appuhamy were the associated husbands of Yasohamy.

The fact that Punchi Appuhamy was also regarded as a husband of Yasohamy was not an impediment to his becoming her lawful husband after the death of Appusingho. It was strenuously urged on us that the long period of cohabitation from about 1900 to 1930 raised a strong presumption of a valid marriage which could only be displaced by cogent evidence to the contrary. Now in the cases cited to us like *Sastry Velaider Aronegery v. Sembecutty Vaigalie et al.* [1] and *Dinohamy v. Balahamy* [2] there was not only direct evidence of what appeared to be marriage ceremonies but also evidence that the man and woman were accepted as husband and wife in the social circles in which they moved. On this aspect there is no evidence in the present case. The trial Judge felt he could not attach much importance to the evidence that Punchi Appuhamy and Yasohamy together attended weddings and funerals and worshipped

[1] *(1881) 2 N. L. R. 322.* [2] *(1927) 29 N. L. R. 114.*

at temples because Thelenis who was admittedly living in adultery also went about with his mistress to weddings, funerals and temples. In this connexion I would quote the observation of Simonds, J., in *Re Taplin, Watson v. Tate* [1] ". . . . the man and woman lived together at Rockhampton for ten years as man and wife in the sight of that small community. They were there received into society, which was not a society of loose and uncertain morals, but with proper views as to marital relations, and were at all times regarded as man and wife. This being so, the presumption of our law is that they were man and wife. This presumption is not to be disturbed except by evidence of the most cogent kind."

Punchi Nona v. Charles Appuhamy [2] was also a case in which after the death of her husband a woman continued to live with her associated husband. It was contended that the evidence of cohabitation raised a presumption that they lived together in consequence of a valid marriage and not in a state of concubinage. The woman who gave evidence made it clear that she did not go through any customary formalities of marriage after the death of her lawful husband. Following the decision of this court in *Gunaratna v. Punchihamy* [3] it was held in effect that any presumption arising from evidence of cohabitation was effectively rebutted. It is true that in the instant case Yasohamy could not give evidence, as she was dead, but her daughter Baban Nona who was living with her ought to have known whether a marriage ceremony had in fact taken place shortly after her father's death but she denied the happening of any such event. It seems to me that it is a matter for a judge of first instance to assess the proper weight of a circumstance of this kind in judging of the extent to which the presumption has been rebutted.

A good deal of reliance was placed on the case of *In re Shepard, George v. Thyer* [4]. The parties who were residing in England went through a form of marriage in a French village and it was assumed for the purposes of the judgment that it was impossible according to the law of France that there should have been a marriage as alleged. After the ceremony they lived together in England as man and wife for thirty years and had several children who were recognised as lawful children by members of the man's family. It was held on the authority of *Sastry Velaider Aronegery v. Sembecutty Vaigalie et al.* [5] that the presumption in favour of marriage arising from the long continued cohabitation of the parties as man and wife was not rebutted. I must confess I do not, with all respect, find it easy to follow the reasoning in this case, if the validity of a marriage has to be tested by the rule of *lex loci celebrationis*. Perhaps the *ratio decidendi* lies in the concluding part of the judgment which reads,

"Now here I have the intention to marry: about that there is not a shadow of doubt. I have some evidence about which there is a great deal of doubt. There is a somewhat romantic story, doubtful in its details, of a marriage de facto, of something gone through to perfect the intention of marriage, and I have some evidence of recognition of children. Now after thirty years, the Court has been asked to say

[1] *(1937) All E. R. p. 105 at p. 108.*
[2] *(1931) 33 N. L. R. 227.*
[3] *(1912) 15 N. L. R. 501.*
[4] *(1904) 1 Ch. 456.*
[5] *(1881) 2 N. L. R. 322.*

that because the marriage has not been proved, and cannot be proved, these children are not to be admitted to share. I think I should be going against the authorities if I came to any such conclusion, and therefore I must hold that they are entitled to share."

I would distinguish this case from the present on the ground that here there is no evidence of any intention to marry or of proof of any ceremony connected with a marriage. If this view is not sound I would prefer to follow the reasoning in the two local cases cited above, *Punchi Nona v. Charles Appuhamy* [1] and *Gunaratne v. Punchihamy* [2]. Dicey on *Conflict of Laws* (Sixth Edition) has the following interesting footnote at page 763,

"The courts will sometimes, when some evidence is given that persons who lived as reputed husband and wife have gone through some marriage ceremony in a foreign country, presume, on very slight grounds, that the local form of marriage was followed. *Re Shepard* (1904) 1 Ch. 456, where the alleged marriage was asserted to have been celebrated in France, but can hardly have been in any event valid by French law. The decision illustrates the tendency to assume that foreign law is in its operation similar to English law with its fondness to presume legal origins for relations existing *de facto*."

Another circumstance relied on by the defendants is the entry in the certificate of the birth of the 2nd plaintiff. The informant is the father who had stated that the parents were not married. One does appreciate that a statement such as this does not by itself have the effect of rebutting the presumption but I cannot agree that it should be ruled out as wholly irrelevant in the context of the circumstances which are relied on by way of rebutting the presumption.

Before concluding the judgment I wish to refer again to the case *Sastry Velaider Aronegery v. Sembecutty Vaigalie et al.* [3] in which a particular ceremony on a particular occasion was relied on as evidence of marriage (p. 325), but that other ceremonies "necessary for marriage" were said not to have been performed on account of a row. In commenting on this the Privy Council said,

"Strong reliance was placed by the defendants upon the statement that other ceremonies were necessary for marriage, but were not 'performed on account of the row'. It is to be observed that this statement was obtained upon cross-examination, and was probably in answer to a leading question. The witness was in all probability better acquainted with what ceremonies were usually performed than what were actually essential to the validity of a marriage.

"Their Lordships do not attach much importance to the answer. There is evidence from which it may be inferred that the serving of rice was the essential ceremony, and it was proved that rice was served. But the evidence of marriage does not rest here. It is confirmed in the strongest manner by some dowry deeds."

It seems to me that where, as in this case, an attempt is made to establish by direct evidence that the marriage in question according to

[1] *(1931) 33 N. L. R. 227.* [2] *(1912) 15 N. L. R. 501.*
[3] *(1881) 2 N. L. R. 322.*

customary rites took place on a particular occasion and such evidence is wholly discredited, a trial judge is entitled to take this circumstance into account in judging how far the presumption arising from cohabitation and habit and repute is rebutted.

For the reasons stated by me I am unable to say that the finding of the learned District Judge is wrong. I would dismiss the appeal with costs.

BASNAYAKE, C.J.—

I have had the advantage of reading the judgment prepared by my brother Pulle, and I agree that this appeal should be dismissed with costs.

The plaintiffs have failed to establish by evidence of "habit and repute" that Punchi Singho Appuhamy and Yasohamy were lawfully married. Mere cohabitation or living together does not constitute "habit". The man and woman must live together behaving in every way with the evident belief and assumption that they have the rights and responsibilities of persons who have contracted a lawful marriage. The birth certificate of the 2nd plaintiff certainly negatives any such belief and assumption as the parents who informed the Registrar of her birth stated to him that they were not married.

The evidence of "habit" must be supported by evidence of "repute". When both are established they lead to the inference that the parties were lawfully married. In the instant case the plaintiffs have also failed to establish "repute". There is no satisfactory evidence that the conduct of the parents of these plaintiffs produced in the society of which they were members, among their relatives, neighbours, friends and acquaintances, a general belief that they were really married.

Appeal dismissed.