1931 *Present:* **Akbar J. and Maartensz A.J.**

PUNCHI NONA *v.* CHARLES APPUHAMY.

44—D. C. (Inty.) Negombo, 2,772.

Marriage—Presumption arising from habit and repute—Evidence by alleged wife—Rebuttal.

A, who was married to T, lived with P, as her associated husband. After T's death, A and P continued to live as husband and wife. A, who gave evidence, did not state that a customary marriage had taken place between P and herself after T's death.

Held, that, under the circumstances, the presumption of marriage by habit and repute did not arise.

APPEAL from a judgment of the District Judge of Negombo.

M. T. de S. Amarasekera, for appellant.

H. V. Perera, for respondent.

September 7, 1931. AKBAR J.—

In this case the only point for decision in appeal is whether the petitioner was the lawful wife of one Peeris, the deceased intestate in this case. The petitioner gave evidence, in which she stated that one Thepanis, a brother of Peeris, was married to her and that he was her husband, but that according to custom Peeris was also an associated husband of hers. She considered both of them as her husbands. It is clear that according to law Thepanis being married to this woman, her association with Peeris was adulterous in spite of the so-called custom. She had 8 children, all during Thepanis' lifetime, and these children were regarded as Thepanis' children. Thepanis died in 1916 and the petitioner continued to live with Peeris as his wife. There was evidence to prove that Peeris and the petitioner were regarded as husband and wife. The District Judge has held in favour of a presumption of marriage between Peeris and the petitioner, because he thought effect should be given to the so-called custom of having associated husbands. It is clear, however, from the evidence of this woman that she considered both Thepanis and Peeris as her husbands and that she continued to live with Peeris without going through any formality of marriage according to custom. It is argued that this evidence of cohabitation was sufficiently strong to raise the presumption that Peeris and the petitioner lived together in consequence of a valid marriage and not in a state of concubinage. The case of *Gunaratna v. Punchihamy*[1] is against the contention of the respondent. In that case too the woman was alive and went into the witness box to give evidence. As Mr. Justice Pereira stated, "No marriage can be contracted or constituted by cohabitation, habit, and repute. Evidence of cohabitation, habit, and repute merely gives rise to a presumption of marriage, and this presumption, as has been held in numerous cases, is a presumption that can only be displaced by means of strong and cogent evidence to the contrary. In the present

[1] *15 N. L. R. 501.*

case whether the respondent was married to the deceased is best known to her; the issue is framed whether she ' was lawfully married to the deceased '; she gets into the witness box to prove the affirmative of the issue; but she does not take upon herself to say in plain language that she was married to the deceased according to native rites and customs. On the contrary, her evidence unmistakably points to the fact that there was no such marriage. She begins her evidence giving full details of the circumstances in which she and the deceased began to live together, and it is manifest from these details that there was no ceremony, no native rite or custom, observed to constitute them (the respondent and the deceased) wife and husband. That being so, I consider that the presumption arising from evidence of cohabitation and habit and repute (I have dealt with the question of the weight to be attached to that evidence already) has been effectively rebutted ".

Mr. Perera who appeared for the respondent, whilst admitting that this case was against him, contended that the later case of *Dinohamy v. Balahamy*[1] decided by the Privy Council should govern this case and that the Privy Council had in effect overruled the decision quoted in the *15 N. L. R.* I do not think this contention is correct, because if reference is made to the decision of the Supreme Court reported in *3 Times of Ceylon Law Reports, p. 186*, it will be seen that in that case, the issue was whether Balahamy was married according to the law of Ceylon to one Don Andris. There was evidence that there was such a marriage solemnized and further there was evidence of cohabitation by habit and repute. There was a total conflict between the witnesses on the one side and those on the other side, and the District Judge held that there was no marriage proved according to the law of Ceylon. But the Supreme Court and the Privy Council held that the marriage must be presumed, because there was ample evidence from which the Court could conclude that there was a marriage according to custom from the strong evidence led in the case to prove that the parties lived together for 20 years as husband and wife and that they were regarded as such by their neighbours; and because no evidence was afforded of repudiation of this relation by husband or wife, or anybody, it was held that the issue must be decided in favour of there being a valid marriage. In the case before us the woman actually gave evidence and the fact whether there was a marriage according to custom after Thepanis' death was one peculiarly within her knowledge. The burden of proving this fact was on her under section 106 of the Evidence Ordinance. Although she spoke to facts proving that she and Peeris lived together, she did not state that she was married to the deceased according to Sinhalese rites and customs. There was no evidence from her that there was any marriage ceremony according to custom whatsoever at any period of her cohabitation with Peeris. Mr. Perera pressed upon us the case of *De Thoren v. The Attorney-General*[2]. But that case was also cited in the *15 N. L. R.* case and distinguished by the Supreme Court. Mr. Justice Ennis pointed out that under the Scottish law a mutual agreement to marry was the one essential to a lawful marriage; but that amongst the Sinhalese some further formalities were required to

[1] *29 N. L. R. 114.* [2] *(1875–6) 1 A. C. 686.*

constitute a lawful marriage. Mr. Perera admitted that the omission by the petitioner to state that there was such a customary marriage was perhaps due to the fact that counsel had relied only on the evidence of cohabitation. But her evidence shows that, as she considered both Thepanis and Peeris as her husbands, she continued to live in that belief with Peeris after Thepanis' death. In view of this opinion of hers, her whole evidence negatives that there was the solemnization of a customary marriage ceremony at any period after the death of Thepanis.

It is not fair that the case should be sent back for the question to be put to the respondent definitely after this point has now been focussed and emphasised in view of the manner in which her case was put in the lower Court. In my opinion, if I may say so with respect, the reasoning of Pereira and Ennis JJ. seems to me to be sound and is in no way in conflict with the later decision of the Privy Council, when this later case is analysed carefully. In my opinion the decision of the District Judge was wrong, and I would set aside the judgment and decree and hold that the petitioner was not the lawful wife of Peeris, the deceased. The appeal is allowed with costs in both Courts.

MAARTENSZ A.J.—I agree.

Appeal allowed.