

1977 *Persent* : Ismail, J., Sharvananda, J., and Ratwatte, J.

P. P. G. SEDIRIS, Appellant and M. S. ROSLIN and two others,  
Respondents

S. C. 213/72 (Inty)—D. C. Matara 3973/P

*Marriage—Presumption of marriage—Marriage by habit and repute—  
Rebuttal of presumption of marriage—Prescription among  
Co-owners.*

Where a man and a woman belonging to two different castes are proved to have lived together as man and wife for many years and where there is evidence that relatives and friends of the man had ostracized him from their society,

*Held*, the association between the parties attracted the presumption of marriage which could be rebutted only by strong and cogent evidence.

“The test is whether the conduct of the parties produced among their relatives and friends a general belief that they were really married. Ordinarily, in the case of parties of the same caste, their relations and friends acknowledge and recognize their marriage by visiting them and mixing with them in their social ceremonies. But, if a person marries outside his caste beneath his social status, his relatives and friends disapprove that marriage and manifest their disapproval by ostracizing him from their society. The recognition they give to such a marriage is in the shape of outcasting him and boycotting him from their social functions. This negative conduct is exhibited only if the parties are married and not if they live in concubinage”.

**A** PPEAL from a judgment of the District Court, Matara.

*P. R. Wikremanayake*, for the Plaintiff-Appellant.

*J. W. Subasinghe* for the 3rd Defendant-Respondent.

1st and 2nd Defendant-Respondents absent and unrepresented.

*Cur. adv. vult.*

February 7, 1977. SHARVANANDA, J.—

In this action, the plaintiff seeks to partition the land called Lot D of Belikatulande Dawaniyagahakoratuwa, which is depicted as Lot A in Plan 153 filed of record marked X.

It is common ground that one Siyadoris and Andiris Appu were both declared entitled equally to this lot by final decree in partition action D. C., Matara 1438. By deed No. 6864 dated 24.6.35 marked 3D1, Siyadoris sold his rights to Pinonahamy, his sister-in-law, who, on deed No. 44595 dated 8.1.63. marked 3D2, sold her half share to Rosalin, the 1st defendant. According to the plaintiff, Andiris Appu, who was entitled to the balance half share, died leaving as heirs five children, three of whom died without marriage or issue, leaving the plaintiff and the 2nd defendant as the only heirs. As such, the plaintiff claimed one fourth and second defendant the other one fourth of the corpus. The 3rd defendant, in his answer, denied that the plaintiff and the 2nd defendant were entitled to any share on the plea that they were not the legitimate children of Andiris Appu. According to the 3rd defendant, Andiris Appu died unmarried and issueless and his rights devolved on his brother Carolis and the latter joined Siyadoris in the execution of deed No. 6864 of 1935 (3D1) and purporting to transfer the half share which originally belonged to Andiris Appu. The transferee Pinonahamy is a daughter of Carolis. According to the 3rd defendant, Pinonahamy, who was thus entitled to the entire lot on deed No. 6864 of 1935, by deed No. 1610 dated 12.1.63 (3D3), transferred to him the balance half share remaining after her disposition on deed No. 44595 (3D3). The 3rd defendant states that neither the plaintiff nor the 2nd defendant are entitled to any rights in the corpus.

The crucial question in this case is whether Andiris Appu was married to Dingihamy, the mother of the plaintiff, and the second defendant or not. Andiris Appu died on 27.05.29; Dingihamy the mother of the plaintiff is also dead. According to the 1st and 3rd defendants, Dingihamy was only the mistress of Andiris Appu and not his wife. If Andiris Appu was not married to Dingihamy, then admittedly, no rights pass to the plaintiff or the 2nd defendant. But, if there was a valid marriage between Andiris Appu and Dingihamy, then the plaintiff and the 2nd defendant would be entitled to Andiris Appu's half share, and Carolis could not have any right to dispose that half share, and his purported transfer of Andiris Appu's half share on 3D1 is null and void.

The evidence in this case shows that Andiris Appu was a man of the Durawa community while Dingihamy, the mother of the plaintiff and the 2nd defendant, was a woman of the Salagama community. The birth certificates P4 of 1907 and P5 of 1909 of the plaintiff and of the 2nd defendant, respectively, show that Andiris Appu was their father and Dingihamy their mother. Counsel for the 3rd defendant-respondent stressed the fact that

in the case in P4 and P5 'Were the parents married?', both parents have given the answer 'No' and submitted that this answer supported his contention that the parents were not married. Though this is a relevant circumstance, as stated in the case of *Ladeu Adirishamy v. Peter Perera* 38 C. L. W. 88, such declarations to a Registrar of Births might well amount, particularly in the case of ignorant villagers, to little more than an admission that the marriage of the parents was not registered and not necessarily to an admission that a marriage by custom had not taken place. The evidence in this case establishes that Andiris Appu and Dingihamy lived together as man and wife for very many years and that the relations of Andiris Appu disapproved of this association and outcast Andiris Appu from their society. The evidence of Pinonahamy is as follows: "I knew that Carolis had a brother called Andiris. I have seen Andiris. I do not know where he was living, but occasionally he used to come to our house. During my father's life-time, he used to come to our house. He comes only to meet my father. We did not go to their house. Nobody visited the uncle's house. Even during the life-time of my father, there was no association with them. Andiris used to come occasionally to our house." On the evidence led in this case, the trial Judge relevantly observes: "The evidence in this case shows that Andiris was a man of the Durawa community, while his wife Dadalage Dingihamy was a woman of the Salagama community. There is the evidence of Jansohamy that these two communities lived on either side of the bridge and they never intermarried. For the first time, Andiris Appu appeared to have broken this tradition and brought a woman from the Salagama community. As such, this was an inter-community marriage. The burden is on the plaintiff to establish that the association between Andiris Appu and Dingihamy was of such a nature as to establish a marriage by habit and repute." Here co-habitation or living together does not constitute 'habit.' "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. . . ."—per Basnayake C. J. in *Wijesinghe v. Kulawardene* 60 N. L. R. 121 at 125. The test is whether the conduct of the parties produced among their relatives and friends a general belief that they were really married. Ordinarily, in the case of parties of the same caste, their relations and friends acknowledge and recognize their marriage by visiting them and mixing with them in their social ceremonies. But, if a person marries outside his caste beneath his social status, his relatives and friends disapprove that marriage and manifest their disapproval by ostracizing him from their society. The 'recognition' they give to such a marriage is in the shape of outcasting him and boycotting him from their

social functions. This negative conduct is exhibited only if the parties are married and not if they live in concubinage. Had Andiris Appu kept Dingihamy, who was of an inferior caste, as a mistress only he would have been admitted in the society of his relatives and friends, though Dingihamy would have been kept out. But, if Andiris Appu had married Dingihamy, then of course he would have been ostracized by his relatives and friends. In this case, the evidence of Pinonahamy, a niece of Andiris Appu, is that Andiris Appu was never invited for any of the family functions or social occasions. This animosity of Andiris Appu's relatives and friends can be appreciated only in the context of an inter-caste marriage between Andiris Appu and Dingihamy. This circumstance tends to support the evidence of the plaintiff that his father's relatives and friends believed that Andiris Appu was married and demonstrated their recognition of the marriage by outcasting Andiris Appu from their society. From this conduct, it can be presumed that there was an inter-caste marriage.

It was stated in *Fernando v. Dabrera* 65 N.L.R. 282 that evidence of marriage ceremonies or religious rights is not essential to establish marriage by habit and repute if both the parties to the marriage are dead and the marriage itself was contracted at a very early date. As was stated by the Privy Council in *Valaider v. Vaigalie* 2 N. L. R. 322 "Under the law of Ceylon, where a man and woman are proved to have lived together as man and wife, the law would 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". The evidence, for the purpose of resisting this presumption, must always be strong and cogent. In the present case, the learned District Judge has not acted on the aforesaid presumption but has cast a very heavy burden on the plaintiff to establish marriage between Andiris Appu and Dingihamy. The facts of this case attract the presumption of marriage between Andiris Appu and Dingihamy and this presumption has not been rebutted by the 3rd defendant. In these circumstances, it has to be held that Andiris Appu was lawfully married to Dingihamy and that the plaintiff and the 2nd defendant are the legitimate children of Andiris Appu entitled to the half share of Lot A which was admittedly vested in Andiris Appu. Carolis had, therefore, no right to transfer Andiris Appu's half share to his daughter Pinonahamy on deed No. 6864 (3D1). On the transfer by Siyadoris of his half share, Pinonahamy became a co-owner of the land along with the plaintiff and the 2nd defendant.

The trial Judge has, on the question of prescription, held that the 1st and 3rd defendants and their predecessors-in-title have prescribed to the entire land and that in any event Andiris Appu's

heirs, who are the plaintiff and the 2nd defendant, have lost their rights, if any, in the corpus. Because Pinonahamy and her successors were admittedly in possession of the land from 1935, the trial Judge has concluded that they have prescribed to the land. Influenced by his earlier finding that Andiris Appu died unmarried and issueless and that the plaintiff and the 2nd defendant were not co-owners, he was predisposed to hold with the 1st and 3rd defendants on the question of prescription. He might not have reached that result had he borne in mind that the plaintiff and the 2nd defendant were co-owners of the land with Pinonahamy and that the possession of the land by Pinonahamy was, in law, possession by the other co-owners. The possession of one co-owner does not become adverse possession for the purpose of acquisition of title by the other co-owner by prescription, unless ouster, or something equivalent to ouster, had taken place. As was stated by de Silva J. in *Abdul Majeed v. Umnu Zaneera*, 61, N.L.R. 361 at 372. "In considering whether or not a presumption of ouster should be drawn by reason of long-continued possession alone of the property owned in common, it is relevant to consider the following, among other matters :

- (a) The income derived from the property.
- (b) The value of the property.
- (c) The relationship of the co-owners and where they reside in relation to the situation of the property.
- (d) Documents executed on the basis of exclusive ownership.

If the income that the property yields is considerable and the whole of it is appropriated by one co-owner during a long period, it is a circumstance which, when taken in conjunction with other matters, would weigh heavily in favour of adverse possession on the part of that co-owner. The value of the property is also relevant in considering this question although it is not so important as the income. If the co-owners are not related to one another and they reside within equal proximity to the property, it is more likely than not that such possession is adverse and it would be particularly so if the property is valuable or the income from it is considerable. If the co-owners are also co-heirs, the position would be otherwise."

On an application of this test to the facts of this case, a presumption of ouster cannot be drawn by reason of long-continued possession alone by Pinonahamy from 1955 onwards.

In his report XI dated 26.10.64, the Surveyor has stated that the land contains a few houses and a few coconut trees and that the land is in extent 14.6 perches of the value of Rs. 365 only. The houses consist of building No. 1 in Plan X described as part of a house under construction which commenced in 1963 only. This incomplete building is claimed by the 1st defendant who acquired

interest in this land on deed No. 44595 dated 8.1.63 (3D2). The other buildings on the land are a tomb, a part of a foundation for a house claimed by the 3rd defendant valued at Rs. 150, and a temporary shed also claimed by the 3rd defendant valued at Rs. 30. The plantation on the land consists of nine coconut trees, 50 years old, valued at Rs. 135, and five 'Billing' trees. Thus, it would appear that the income derived from the property is meagre and that the total value of the property is only Rs. 1,445.

According to Pinonahamy, the predecessor-in-title of the 1st and 3rd defendants, she never recognized the plaintiff and the 2nd defendant as her relatives. Yet, as the plaintiff and the 2nd defendant were residing miles away from the land, even if the plaintiff's evidence that they were given certain sums of money, such as Rs. 5, or Rs. 10, or Rs. 15 once in 4 or 5 months' time by Pinonahamy is not accepted, as the property was not valuable and the income from it small, the possession of Pinonahamy cannot be regarded as adverse to that of the plaintiff and the 2nd defendant. Further, Pinonahamy executed the transfers 3D2 and 3D3 in favour of the 1st and 3rd defendants, respectively, only in 1963. Thus, in the circumstances of this case, though Pinonahamy had, according to her evidence, been in exclusive possession of the land after the conveyance 3D1 in her favour in 1935, a presumption of ouster in her favour cannot be drawn. The deed No. 6864 of 1935 (3D1), though couched as a deed of sale, appears to be a deed of gift. Further, the transferee Pinonahamy must have been aware when she obtained the conveyance that Andiris Appu's heirs were, in fact entitled to the half share conveyed to her by Carolis.—*Kanapathipillai v. Meera Saibo*, 58 N.L.R. 41. The learned District Judge was in error in holding that the 1st and 3rd defendants had prescribed to the land.

For the reasons set out above, the conclusions of the District Judge cannot be sustained and his judgment has to be set aside. On the evidence led in this case, I hold that the plaintiff and the 2nd defendant are each entitled to a one-fourth share and the 1st defendant to a half share of the land as pleaded by the plaintiff. The 3rd defendant is not entitled to any share or rights in the land.

The appeal is allowed and judgment of the lower Court dismissing the plaintiff's action is set aside and the case is sent back for further proceedings in the District Court with the direction that interlocutory decree be entered on the basis of the title pleaded by the plaintiff. The 3rd defendant-respondent shall pay the plaintiff the costs of contest and of this appeal.

ISMAIL, J.—I agree.

RATWATTE, J.—I agree.

*Appeal allowed.*