[FULL BENCH.] 1922.

Present : Ennis, De Sampayo, and Schneider JJ.

SOPHIA HAMINE *v.* APPUHAMY.

141 and 144—D. C. Negombo, 1,859.

Low-country Sinhalese resident in the Kandyan Provinces—Does Ordinance No. 3 of 1870 apply to them?—Marriage by custom—Ordinance No. 2 of 1895.

Ordinance No. 3 of 1870 is applicable to Kandyans and not to Low-country Sinhalese resident in the Kandyan Provinces.

Since the repeal of section 15 of Ordinance No. 2 of 1895, it is open to Low-country Sinhalese resident in the Kandyan Provinces to establish a marriage by custom.

THE facts appear from the judgment.

A. St. V. Jayawardene, K.C. (with him *R. L. Pereira, Rodrigo,* and *H. V. Perera*), for appellants in No. 141 and respondents in No. 144.—The deceased though a Low-country Sinhalese was a resident of the Kandyan Provinces at the time of his marriage. So Ordinance No. 3 of 1870, which requires that all marriages should be registered to be valid (section 11), applies to this case. Marriages governed by this Ordinance are defined in section 4, which does not exclude the case of a Low-country Sinhalese marrying a Kandyan.

[SCHNEIDER J.—What is the object of section 25? Is not that a recognition of customary marriages?]

That section applies only to marriages contracted between 1859 and 1870, and not after the coming into operation of this Ordinance. The definition of marriage is the same in Ordinance No. 3 of 1870 as in Ordinance No. 13 of 1859. But the schedule to the latter Ordinance contains a column for the description of parties as "Kandyans or not," thus clearly contemplating the case of non-Kandyans coming within this Ordinance. Case of *Narayanee v. Muttusamy*[1] cannot be considered an authority, as the parties concerned were Indian immigrant coolies who can never properly be said to be residents of the Kandyan Provinces.

Even if it be held that this marriage comes under the general marriage law of the Colony, Ordinance No. 2 of 1895, which was the Ordinance in force at the time of deceased's marriage (August 21,

[1] *(1894) 3 S. C. R. 125.*

1922.

Sophia Hamine v. Appuhamy

1907), no marriage is valid under this Ordinance unless it be registered. The preamble to this Ordinance shows that the object was "To consolidate and amend the law relating to the registration of marriages." So the whole law relating to the solemnization of marriages must be found in this Ordinance, which has by implication abolished the common law. The preamble is similar to that found in the Civil Procedure Code and the Criminal Procedure Code, which respectively contain the whole law on the subject.

[DE SAMPAYO J.—Section 15, which made registration compulsory, was repealed by Ordinance No. 10 of 1896.]

That repeal has been ineffective, as the provisions regarding the giving of notice and the other preliminary steps are still in force. Rule as regards the interpretation of a Code is laid down in *Bank of England v. Warlianu*.[1] Counsel also cited *23 Cal. 563 at p 571*.

[ENNIS J.—Does not section 43 contemplate the possibility of customary marriages ?]

That section must be read with the repealed section 15, which prohibited customary marriages. The marriage will be valid if the parties did not know of the requirements of the law (*Greaves v. Greaves* [2]).

Bawa, K.C. (with him *H. J. C. Pereira, K.C., Samarawickreme*, and *Croos-Dabrera*), for respondents in No. 141 and appellants in No. 144.—There was no interference by the Legislature with the Kandyan marriage laws till Ordinance No. 13 of 1859, which, as its preamble clearly shows, relates to Kandyans only. At the time of the repeal of this Ordinance by Ordinance No. 3 of 1870 there was a well-defined class of people who were residents of the Kandyan Provinces, *i.e.*, the Kandyans as defined in Ordinance No. 23 of 1917. Further, there are certain sections which cannot possibly relate to others than Kandyans, *e.g.*, sections 15–25.

On the second point there is ample authority for the proposition that customary marriages are valid under the general marriage law (*Tisselhamy v. Nonnohamy* ;[3] *Senien Tamby v. Annama* ;[4] D. C. Colombo, 59,572 ;[5] *Babina v. Dingi Baba* ;[6] *Valliammai v. Annammai* ;[7] *6 S. C. C. 121; 1 C. W. R 104*).

Jayawardene, in reply.

Cur. adv. vult.

July 17, 1922. ENNIS J.—

These are two appeals arising out of a judgment of the District Court of Negombo in the matter of the last will and testament of one Don Carolis Appuhamy. Sophia Hamine, asserting that she was the widow of the deceased Don Carolis Appuhamy, applied for letters

[1] *(1891) L. R. A. C., p. 107, at p. 144.*
[2] *2 P. & D. 423.*
[3] *(1897) 2 N. L. R. 352.*
[4] *(1900) 1 Br. 28.*
[5] *1 Br. App. A 1.*
[6] *(1882) 5 S. C. C. 9.*
[7] *(1900) 4 N. L. R. 8.*

of administration, with the will annexed, to his estate. She said that she and her son, the first respondent in the case, were the heirs of Don Carolis Appuhamy, and she prayed that the second respondent should be appointed guardian *ad litem* of the first respondent, who was a minor. The second respondent was duly appointed guardian *ad litem*, and certain added-respondents intervened, asserting that the will propounded was a forgery, and that Sophia Hamine was not the lawful wife of the deceased. Certain issues were framed, and the learned Judge held that the will propounded was a forgery, but that Sophia Hamine was the lawful wife of Don Carolis Appuhamy. The first four added-respondents appeal, in appeal No. 141, from the finding that Sophia Hamine was the lawful wife of Don Carolis Appuhamy, and, in appeal No. 144, Sophia Hamine appeals against the finding that the will was a forgery.

Mr. Bawa, for the appellant in No. 144, suggested that it would be unnecessary for him to argue that appeal if he were successful in appeal No. 141, so appeal No. 141 was considered.

Mr. A. St. V. Jayawardene set out the following grounds of appeal :—

(1) That the evidence did not prove that there had been a marriage by custom ;

(2) That the parties were resident in the Kandyan Province, and that had there been a marriage by custom it was invalid, as Ordinance No. 3 of 1870 applied ; and

(3) If Ordinance No. 3 of 1870 were held not to apply, then a customary marriage, if any, was null and void by virtue of the provisions of section 34 of Ordinance No. 2 of 1895, which was in force at the time of the marriage, viz., August 21, 1907.

The appeal was not seriously pressed on the first ground. As there is a strong finding of fact by the learned Judge and evidence which supports it, I would accept the finding that a customary marriage was entered into by Sophia Hamine and Don Carolis Appuhamy by means of a *poruwa* ceremony in the house of Sophia's mother in Anuradhapura, when, in the presence of relatives, the fingers of the bride and bridegroom were tied together by thread, water poured over them, and other customary rites performed, and that thereafter the parties lived together as man and wife, and were recognized as man and wife by their relatives, friends, and others until Carolis died on April 15, 1920.

On the second ground it was conceded that the parties were not Kandyan, but Low-country Sinhalese, and it appears that they were living in the Kandyan Province at the time of the marriage. It was contended on these facts that the parties were " residents in the

1922.

ENNIS J.

Sophia Hamine v. Appuhamy

Kandyan Provinces," and as such subject to the Ordinance No. 3 of 1870, under which the marriage was not registered, and was therefore not valid by virtue of section 11 of that Ordinance.

In the case of *Narayanee v. Muttusamy* (*supra*) it was held that the words "residents in the Kandyan Provinces" found in the definition of "marriage" in section 4 of the Ordinance must be interpreted as meaning Kandyans. The section reads as follows :—

> "The word 'marriage' shall mean marriage contracted by and between residents in the Kandyan Provinces other than marriages under the Marriage Ordinances in force in the Maritime Provinces of this Island, or marriages between persons commonly known as Europeans or their descendants, or persons commonly known as Burghers, or marriages between any such persons and any Sinhalese (whether of the Maritime or Kandyan Provinces), or marriages between persons professing the Muhammadan faith."

It seems to me that this is not an appropriate case for a consideration of the question as to the persons subject to the operation of the Ordinance No. 3 of 1870, for the question really is whether the marriage in question is invalid under section 11 of the Ordinance, which declares :—

> "Except as is hereinafter provided, no marriage contracted since the Ordinance No. 13 of 1859 came into operation, or to be hereinafter contracted shall be valid unless registered in manner and form as is hereinafter provided in the presence of any Registrar . . . ."

Marriage is a contract between two parties, and by the Kandyan marriage custom it could be dissolved by mutual consent. This Kandyan custom was a special custom, and such marriages would not be regarded as marriages by and for Europeans and Burghers. The Ordinance No. 3 of 1870, which followed others to much the same effect, was to make provision for proof of such marriages and to make registration necessary to the validity of such marriages. When, therefore, the Ordinance defined marriage (in an Ordinance "to amend the laws of marriage in the Kandyan Provinces") as marriages between persons "resident in the Kandyan Provinces" other than (briefly) European and Burghers, the exclusion meant that Europeans and Burghers could not contract a valid marriage by Kandyan custom, and when the definition proceeded to exclude "marriages under the Marriage Ordinances in force in the Maritime Provinces of this Island," the Ordinance of 1870 would be one to amend the laws of marriage with regard to marriages other than marriages under the Marriage Ordinance in force in the Maritime Provinces.

Marriages by and between residents in the Kandyan Provinces under the marriage law in force in the Maritime Provinces were not affected by the Ordinance No. 3 of 1870, and were, therefore, not invalid under section 11 of that Ordinance.

That this was the intention of the Legislature is borne out by Ordinance No. 14 of 1909, which was enacted to remove doubts as to whether persons who might lawfully have contracted a marriage under the Ordinance No. 3 of 1870 could contract a valid marriage under the general marriage law. It was declared that they could, and that no marriage solemnized and registered under the general marriage law should be deemed to be invalid, because the parties thereto were persons who might lawfully have married under the Ordinance No. 3 of 1870.

I am of opinion, therefore, that the Legislature intended the special Kandyan Marriage law and the general law of Ceylon to run concurrently and alternatively in the Kandyan Provinces.

The marriage in this case was not solemnized or registered in accordance with the requirements of either Ordinance. It remains to be considered whether the marriage is valid under the general law of marriage, which, at the time of the marriage, was the Ordinance No. 2 of 1895. This Ordinance (since repealed and subsequently re-enacted by Ordinance No. 19 of 1907) was the General Marriage Ordinance in force on August 21, 1907, the date of the marriage in this case, and in section 4 it defines "marriage" for the purpose of the Ordinance as—

> "Any marriage, save and except marriages contracted under and by virtue of the Ordinance No. 3 of 1870"

The Ordinance No. 2 of 1895, when enacted, contained the following section :—

> "No marriage contracted after this Ordinance comes into operation shall be valid unless it shall have been duly solemnized by a minister or a registrar and registered in manner and form as is hereinafter provided.
>
> "Provided that nothing herein contained shall be construed to render invalid, merely by reason of its not having been registered, any marriage between persons professing the Hindu religion not domiciled in this Island, or to preclude any legal evidence other than that of registration from being adduced in proof of such marriage."

This section was repealed the following year by Ordinance No. 10 of 1896.

It was argued that the Ordinance No. 2 of 1895 was a "consolidating" Ordinance, and as such superseded marriages which depend for their validity upon rites and customs not mentioned in the Ordinance. It is difficult to see how this argument is tenable since the repeal of section 15. It is to be observed that the Ordinance is

1922.

ENNIS J.

Sophia Hamine v. Appuhamy

one " to consolidate and amend the laws relating to the registration of marriages . . . ." The definition of marriage in section 4 of the Ordinance is wide enough to cover a marriage which depends for its validity upon custom, and, since the repeal of section 15, registration is not a necessary element to the validity of a marriage. Section 39 merely makes the entry in the register the best evidence of a marriage, and does not preclude any legal evidence other than registration being adduced in proof of a marriage.

In the case of *Gunaratne v. Punchihamy*,[1] Pereira J. expressed the opinion—

> " That it was open to parties to contract a marriage according to nature, rites, and customs quite independently of the Ordinance (of 1863), and that marriages contracted according to such rites and customs . . . . were not invalid by reason of the provisions of the Ordinance of 1865 being disregarded."

The Ordinances referred to were repealed in 1895. In *Valliammai v. Annammai* (*supra*) it was held that there can be lawful marriage in Ceylon without registration under the local Ordinances. I mention these two cases, although it was conceded by Mr. A. St. V. Jayawardene at the hearing of the appeal that prior to 1859 there were two forms of marriage, customary and statutory. I am unable to see that the position has been altered by the enactment of the Ordinance No. 2 of 1895.

A marriage valid by native custom is a marriage " under " section 4 of the Ordinance, although not under the provisions of the Ordinance as to form and registration.

I am unable to see how section 34 can apply to the present case, as the marriage under consideration does not purport to have been contracted under the provisions of the Ordinance.

In view of the conclusion I have come to, I would dismiss the appeal No. 141, with costs, and, adopting the suggestion of Mr. Bawa, would dismiss appeal No. 144 without any order as to costs.

DE SAMPAYO J.—

It has been well proved that the usual ceremonies attending a marriage among the Sinhalese according to custom were fully observed in the case of Ariyapperuma Aratchige Don Carolis Appuhamy and Wijesinghe Aratchige Sophia Hamine, whose marriage is now in question, that these two persons intended to marry each other when they went through the customary form, and that they thereafter lived together as husband and wife, and were socially acknowledged as such until the death of Don Carolis Appuhamy. If a customary marriage was valid, there is no question that they

[1] *(1913) 15 N. L. R. 501.*

were lawfully married, and that Sophia Hamine, who is the petitioner in this suit, and Don Hendrick, the first respondent, who is their son, are the heirs of Don Carolis Appuhamy. But certain views as regards the law on the subject, which have been submitted on behalf of the appellants, who claim to be the sole heirs of Don Carolis Appuhamy, and dispute the status of Sophia Hamine and Don Hendrick, have to be considered.

Don Carolis Appuhamy and Sophia Hamine were Sinhalese of the low-country. The former was a trader at Anuradhapura, and the latter was the widow of one Don Pedrick, and at the time of their marriage, which took place at Anuradhapura on August 21st 1907, both of them were resident at Anuradhapura. It is contended on behalf of the appellants, in the first place, that, being resident within the Kandyan Provinces, they could only have lawfully married in accordance with the provisions of the Ordinance No. 3 of 1870, which makes registration essential to the validity of a marriage. That Ordinance defines the word "marriage" as marriage contracted by and between "residents in the Kandyan Provinces," other than marriages under the Marriage Ordinance in force in the Maritime Provinces of the Island, and marriage between certain persons which need not be specified for the present purpose. What is the meaning of the expression "resident in the Kandyan Provinces" in the context? The Ordinance ever since it has been enacted has been understood to be an Ordinance for the regulation of marriages among the "Kandyans" only, but as the Sinhalese of the Maritime Provinces are not among the excepted persons in the definition of the word "marriage," it is now, and, so far as I know, for the first time, argued that such Sinhalese, if they are resident in the Kandyan Provinces, can only validly contract a marriage by registration under the Ordinance. There is no provision in the Ordinance for marriages to be celebrated by a Christian Minister as in the General Marriage Ordinance, and so, if the argument in this case is sound, Christians are obliged to marry before the Registrar, though this may be contrary to the precepts of their religion. In registering a marriage the parties must state the nature of the marriage, that is to say, whether it is to be in *diga* or in *binna*, which is a peculiarity unknown to, and the effect of which is repugnant to, the social ideas of others than Kandyans. Again, a marriage is dissolved, not by a decree of Court, but by a mere entry in the register, and the grounds of divorce, *inter alia*, are (1) inability to live happily together and (2) mutual consent. If the Legislature intended to subject the Sinhalese of the Maritime Provinces to these strange consequences, simply because they may happen to be resident in the Kandyan Provinces, the Ordinance must be given this extended operation. But I do not think there was any such intention. The Ordinance No. 3 of 1870 is an Act is expressly declared to be "The Amended Kandyan Marriage Ordinance." It is an amendment

1922.

DE SAMPAYO J.

Sophia Hamine v. Appuhamy

of and a substitution for the Ordinance No. 13 of 1859 with which it is closely interwoven. Section 8 provides for marriages before the Ordinance No. 13 of 1859 if contracted according to the laws, institutions, and customs in force "among the Kandyans" at the time of the contract. Here the expression "among the Kandyans" is noticeable. Section 10 declares registrations made by registrars without the legal proof of marriage required by section 19 of Ordinance No. 13 of 1859 should be deemed good and valid registrations. Section 11 regularizes marriages which were contracted since the Ordinance No. 13 of 1859, and which were invalid for want of registration under that Ordinance. It is clear that the scope and object of the Ordinance No. 3 of 1870 are the same as those of the Ordinance No. 13 of 1859. Now, the preamble of the latter Ordinance is as follows :—

> "Whereas it was agreed and established by a Convention signed at Kandy on March 2, 1915, that the dominion of the Kandyan Provinces was vested in the Sovereign of the British Empire, saving to all classes of people in those Provinces the safety of their persons and property with their civil rights and immunities according to the laws, institutions, and customs established and in force among them . . . . :
>
> "And whereas the custom of the Kandyans . . . . permits a man to have more than one living wife, and a woman to have more than one living husband :
>
> "And whereas this custom is wholly unsuited to the present condition of the Kandyans, and is in no way sanctioned by their national religion . . . . :
>
> "And whereas from the circumstances mentioned the marriage custom of the Kandyans is become a grievance and an abuse, and a large and influential portion of the Kandyan people have petitioned for the redress and reform of the same :
>
> "And whereas it is expedient, in order to such redress and reform, that Her Most Gracious Majesty should, in accordance with the said Convention, make provision through the Legislature of this Island for the contracting and solemnization of marriages within the said Provinces, and for the registration of such marriages, and for the dissolution of such marriages, and for other matters relating to the same :"

This recital and the provisions which follow put it beyond doubt that the Ordinance was intended to be applicable to Kandyans alone. And yet the word "marriage" in the Ordinance is defined as meaning marriage contracted and solemnized by and between "residents in the Kandyan Provinces." The word "resident" in the context,

considering the scope and purpose of the Ordinance, must necessarily mean "Kandyan," and cannot include Sinhalese of the Maritime Provinces, who have nothing to do with the Kandyan custom of marriage which the Ordinance was enacted to reform. This being so, the Ordinance No. 3 of 1870, when it defined marriage as marriage contracted by and between "residents in the Kandyan Provinces," meant the same thing. This also was so decided in *Narayanee v. Muttuswamy* (*supra*), in which Lawrie A.C.J. delivered the principal judgment, and which, therefore, is of special value as an authority. I think the first argument in support of the appeal must be rejected.

The next argument may be disposed of very shortly. It was contended that even under the General Marriage Ordinance, No. 2 of 1895, which was in operation at the time of the marriage between Don Carolis Appuhamy and Sophia Hamine, the only valid form of marriage was that provided by the Ordinance. It was said that, as the preamble of the Ordinance showed that it was intended "to consolidate and amend the law relating to the registration of marriages," the Ordinance constituted a Code, and that no other form of marriage than that thereby provided could be recognized. I do not think that there is any magic in the word "consolidate." The nature of the provisions of the Ordinance must also be looked at, in order to conclude that it intended to lay down the whole law on the subject. There might be some force in the argument if the Ordinance stood as originally enacted. For section 15 of the Ordinance made registration under it essential to the validity of the marriage, but that section was soon repealed by the Ordinance No. 10 of 1896. After this repeal there is left only the provision of section 39 (1) which declares that the entry in the registrar's book "shall constitute the registration of the marriage, and shall be the best evidence thereof before all Courts and in all proceedings in which it may be necessary to give evidence of the marriage." This Ordinance as amended does not exclude other recognized forms of marriage, and a customary marriage may, therefore, be proved and established. This principle has been affirmed by the Privy Council in *Arumogam v. Vaigali*,[1] and by a Full Bench of this Court in *Valliammai v. Annammai* (*supra*).

I, therefore, think that the District Judge was right in holding that Don Carolis Appuhamy and Sophia Hamine were lawfully married, and I agree that appeal No. 141 should be dismissed, with costs.

With regard to appeal No. 144, which is concerned with the question of the validity of a will propounded as the will of Don Carolis Appuhamy, counsel intimated to us that it would be necessary to argue it only if the other appeal succeeded. In the circumstances, we need only dismiss it without any order as to costs.

[1] *6 A. C. 364.*

1922.

Sophia Hamine v. Appuhamy

SCHNEIDER J.—

I have had the advantage of perusing the judgments of my brothers Ennis and De Sampayo, and I am of opinion that there is nothing I can usefully add to what they say. I therefore agree with the orders they direct should be made as regards both appeals.

Appeal dismissed.