Present : Ennis J. and De Sampayo J.

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CHELLAPPA *et al. v.* KUMARASAMY *et al.*

308—D. C. Jaffna, 9,437.

Tesawalamai—*Right of wife to deal with immovable property without consent of husband—Marriage according to Hindu custom after having given notice of marriage under the Marriage Ordinance.*

Under the *Tesawalamai* a married woman is not competent to deal with her immovable property without the concurrence of her husband.

Where parties, after giving notice of marriage under the Marriage Ordinance of 1907, went through a marriage ceremony according to Hindu custom,—

Held, that the marriage was not invalid.

In re Vairamuttu[1] commented upon.

THE facts are set out in the judgment of Ennis J.

Bawa, K.C. (with him *Balasingham*), for appellants.

Arulanandam (with him *J. Joseph*), for respondents.

Cur. adv. vult.

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September 30, 1915. ENNIS J.—

The plaintiffs-appellants in this case sued for a declaration of title to certain land, and for possession.

The plaintiffs are husband and wife, and the second defendant is their daughter. It is in question on the appeal whether the first defendant is the husband of the second defendant.

On October 11, 1905, the first plaintiff transferred the land in dispute to his daughter, the second defendant, and on September 18, 1910, a conveyance of the land to the second plaintiff, which purports to have been made by the second defendant, was executed.

The learned District Judge has found that the conveyance was in fact executed by the second defendant, but that it was inoperative, in that the husband of the second defendant did not join in the conveyance.

Two points were argued on the appeal. First, whether the defendants were married at the date of the execution of the deed, and, secondly, if they were married, whether the wife could effect a valid transfer without the consent of her husband. On the second point it is conceded that by the law of the country a husband's consent is necessary, but it was contended that the *Tesawalamai* allowed a wife to deal with her property without the consent of her husband. The contention is hardly consistent with clause 1 of section 4 of the *Tesawalamai*, and I can see no reason to consider that provision obsolete. The main argument in the case is the first.

On September 15, 1910, a marriage between the defendants was being solemnized, and there is no doubt that the Hindu ceremonies for a valid marriage were complete. The Registrar of Marriages was present at the time, or shortly afterwards, but the first plaintiff and the first defendant had fallen out about the amount of dowry, and the first defendant refused to sign the marriage register and left the house. It has been urged that there was no consent by the first defendant. I do not think that this is so. He had consented, and had in fact allowed the Hindu ceremony to be complete. His refusal to complete a marriage under the Marriage Ordinance did not affect the Hindu ceremony or his consent to that. Within a month of the ceremony the defendants met, and have since lived together as man and wife. The only point left for consideration is whether the Hindu ceremony constituted a valid marriage.

Counsel for the appellants rely on *Vairamuttu's* case,[1] where it was held that after notice of marriage under the Marriage Ordinance had been given there could be no subsequent valid marriage by Hindu custom.

This case was decided on August 7, 1885, on a consideration of the Marriage Ordinances of 1863 and 1865. In 1895 an Ordinance was enacted which declared (section 15) that no marriage should be valid unless registered. The section contained a proviso exempting

[1] (1885) 7 *S. C. C.* 56.

non-domiciled Hindus. This was repealed the following year by Ordinance No. 10 of 1896. All the Marriage Ordinances have since been consolidated in the Ordinance No. 19 of 1907, but section 18 of the Ordinance No. 2 of 1895 has not been re-enacted. Since Vairamuttu's case, therefore, there has been a declaration by the Legislature against the validity of unregistered marriages, and later a definite repeal of that provision, and nowhere now is there any express provision declaring unregistered marriages invalid. In 1900, in the case of *Valliammai v. Annammai*,[1] a Full Bench of the Supreme Court held that in Ceylon there can be lawful marriages without registration thereof under the local Ordinances, and in my opinion the decision in that case is ample authority for the learned District Judge's decision in this, and is consistent with the Legislative intention which must be inferred from the definite repeal of the former prohibition.

I would dismiss the appeal with costs.

DE SAMPAYO J.—

I agree with the judgment of my learned brother on both the points argued before us. So far as I know, this is the first case in recent times in which it has been contended that under the law prevailing in Jaffna a married woman is competent to deal with her immovable property without the concurrence of the husband. The *Tesawalamai*, section 4, clause 1, which was cited on behalf of the plaintiffs, scarcely supports the contention, for it expressly says " the wife, being subject to the will of her husband, may not give anything away without the consent of her husband." Reference was also made at the argument to some passages of Muthukishna's *Tesawalamai*, in which some old decisions of the local Courts are noted; but they are neither authoritative nor consistent. The best of the decisions in Muthukishna's *Tesawalamai* is that reported at page 269. It is a judgment of the Supreme Court, and there it was decided, on the authority of the *Tesawalamai*, section 4, clause 1, above referred to, that the wife's deed was in contravention of the husband's right, and could not be supported by the Tamil law. I think that the disability of a married woman is the same under the Tamil customary law as under the general law prevailing in the Island. The main question, however, is whether the first and second defendants were legally married. The following are the facts relating to that question. A marriage between them having been arranged; the relatives and friends of the parties assembled at the second defendant's parents' house on September 15, 1910, for the wedding ceremony. A Hindu priest was present and performed the religious part of the ceremony, and the usual forms were also gone through according to custom.

[1] *(1900) 4 N. L. R. 8.*

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It appears, however, that it was intended that, after this ceremony, the marriage should also be registered on the same day. Notice of marriage had been duly given for that purpose, and the registrar also came. But, after the customary marriage ceremony, some dispute arose between the first defendant and the second defendant's father as to the dowry which had been promised, and the first defendant refused to proceed to the registration of the marriage and left the house. The deed of transfer, the validity of which is now in question, was executed by the second defendant three days after, namely, on September 18, 1910. The first defendant did not consent to its execution, and had no knowledge of it until the causes which led to the present action arose. But soon afterwards—I infer it was within a month, as the plaintiffs allege the Hindu ceremony was in fact performed in October, 1910—the first defendant and second defendant came together as husband and wife, and there has never been any question until recently as to their being lawfully married. There is no proof whatever that the Hindu ceremony was perfomed in October, and not on September 15, and the point was apparently abandoned at the trial. In the circumstances the question is whether a valid marriage did or did not take place on September 15, 1910. Generally speaking, there are three requisites for a valid marriage, namely, competency, intention to marry, and a recognized form of marriage. There is no dispute in this case as to the first two requisites, and it is equally without doubt that under our law the customary form of marriage is good, independently of registration. I am satisfied on the evidence that in this case all the various rites, religious and other, in vogue among the Tamils were observed and perfomed. But it is said that as notice of marriage under the provisions of the Marriage Ordinance had been given and the parties had intended also to register the marriage, the customary marriage which the parties actually went through is a mere nullity. The plaintiffs mainly rely on the authority of *In re Arumogam Vairamuttu*,[1] where a notice of marriage had been given to the registrar but was not proceeded with, and the parties subsequently contracted a Hindu marriage. The headnote of the report of that case is somewhat misleading, and when the judgments are examined it will be found that that case is no authority for the present contention. Both Fleming C.J. and Lawrie J. thought that by the Ordinances of 1863 and 1865, which were then in operation, a marriage was not valid in the absence of registration, and their decision was based on that view of the law. Fleming C.J. expressly dissented from the previous case, *Babina v. Dingi Baba*[2] to the contrary. Lawrie J., if I understand his judgment rightly, thought that, though registration was not essential in the first instance, the policy of the law required that the marriage should

[1] (1865) 7 *S. C. C.* 56.

[2] (1882) 5 *S. C. C.* 9.

be registered some time or other. Dias J., who also took part in *Babina v., Dingi Baba*,[1] dissented from the view of the majority of the Court. Accepting that decision, however, as a correct exposition of the law as it then stood, it is clear that in view of the later legislation it is no longer an authority on the question. By section 15 of the Marriage Ordinance, No. 2 of 1895, it was enacted that "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 in manner and form as is hereinafter provided." But this section was repealed almost immediately after by Ordinance No. 10 of 1896. Here, then, is proof of a policy which is quite contrary to that which was supposed, in *In re Arumogam Vairamuttu*,[2] to be the policy of the previous Ordinances. That case was cited in *Valliammai v. Annammai*,[3] but was not followed, and Bonser C.J. considered that even under the Ordinance of 1863 registration was not essential to a marriage, thus reviving the authority of *Babina v. Dingi Baba*.[1] I may also refer to King *v. Perumal*,[4] *and Guniaratne v. Punchihamy*,[5] which were decided on the same view of the existing law.

Only one other point remains to be noticed. Mr. Bawa, for the plaintiffs, argued that as the registration was intended to take place on the same day as the Hindu rite, and did not take place, the Hindu rite did not constitute the marriage even in the estimation of the parties. I believe it is usual among Hindus both to celebrate a religious marriage and to register the marriage afterwards. But I cannot see on what principle the one can be said to vitiate the other, nor do I think any distinction can be drawn from the fact that both were to take place on the same day. Of course, when the parties go through the religious and customary ceremony, they must intend thereby really to contract a marriage. Counsel accordingly argued that in this case the intention was negatived by the fact that the marriage was not consummated immediately afterwards, and that the second defendant signed the deed on September 18 wihout describing herself as the wife of the first defendant. In my opinion these circumstances are wholly insufficient for the purpose. The reason for the first defendant leaving the house after the marriage ceremony has already been explained. It is quite clear that by taking that step he merely intended to induce the first plaintiff to give the dowry he had promised. As regards the deed, it was evidently prepared at the instance and on the instructions of the first plaintiff, and it is not reasonable to draw any inference against the second defendant from the omission in the deed to describe her as the wife of the first defendant. On the other hand, the first defendant and second defendant very soon

[1] (1883) *5 S. C. C. 9.*
[2] (1885) *7 S. C. C. 56.*
[3] (1900) *4 N. L. R. 8.*
[4] (1911) *14 N. L. R. 496.*
[5] (1912) *15 N. L. R. 501.*

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afterward began to cohabit in the plaintiff's own house, with their consent and approval, and the plaintiffs ought not to be heard to say that they knew all the time that the second defendant, their daughter, and the first defendant were not married. Moreover, the first and second defendants have given evidence in this case, and there is to my mind no question that they intended by the performance of the Hindu rites to marry each other.

For these reasons I think the judgment appealed from is right, and would dismiss the appeal with costs.

Appeal dismissed.