*Present:* De Sampayo J. and Schneider A.J. **1919.**

MOHOTHIHAMY *et al. v.* MENIKA *et al.*

*198—D. C. Kegalla, 4,968.*

*Kandyan marriage contracted before 1870—Proof of cohabitation and repute not enough—Observance of Kandyan customs—Ordinance No. 3 of 1870, s. 25.*

Though under the ordinary law evidence of cohabitation and repute may be sufficient to raise a presumption of valid marriage under section 25 of Ordinance No. 3 of 1870, some proof must be given of the observance of the laws, institutions, and customs in force in Kandy at the time of marriage.

THE facts appear from the judgment of the District Judge (H. E. Beven, Esq.):—

The land in dispute in this case between the plaintiffs and defendants is the block of 61 acres and 2 roods within the boundaries coloured pink in plan No. 1,582 filed. This land was part of a larger land called the Mahinkandegallatwasama, some 316 acres in extent, which belonged to four families. One of these families was the Akurukiyana Ganladdalage family, which was admittedly entitled to a one-fourth share. This one-fourth share was vested in one Akurukiyana Ganladdalage Naidehami, as whose grandchildren the plaintiffs base their present claim.

Naidehami died intestate, leaving as his heirs his three sons, Seetalahamy, Balahamy, and Juanhamy. In their plaint the plaintiffs set out title to a one-sixth share (less 25 acres alienated by Balahamy in his lifetime) as the heirs at law of Seetalahamy and Balahamy, the offspring of whose associated marriage they alleged they were. But at the trial they abandoned that portion and claimed a one-twelfth share only as the children of Seetalahamy alone. The reason for this change of attitude is not far to seek, and I will allude to it later.

The defendants base their claim to the entirety of the divided block coloured pink upon a deed of partition entered into between the co-owners, No. 964 of January, 1904, whereby the entirety of this land was allotted to the second defendant's predecessors in title, Singappu and first defendant, Punchi Menika (see D 2). The defendants take their stand upon this deed, and maintain that, inasmuch as the plaintiffs came into a partition case whereby the whole "ganwasama" was partitioned, and in which case they claimed and were allotted shares under and by virtue of this deed, and so took benefit thereunder, they are now debarred from reprobating that deed and reopening the contract embodied in it.

From this state of facts two main question arise for decision: The first, whether the plaintiffs are the children of Seetalahamy; and the second, whether by reason of the partition deed D 2 and proceedings of the partion case No. 4,182, Kegalla, it is now open to the plaintiffs to claim "an undivided share of the whole 'ganwasama.'"

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As to the first point, the onus is strictly on the plaintiffs to prove that they are the legitimate children of Seetalahamy. Now, the plaintiffs have on this question at various times claimed to be the children of one or the other or of two out of the three brothers.

To begin with, the plaintiffs (who were the fifteenth and sixteenth defendants in that case) acquiesced in the allegation made in the plaint filed in D. C. 4,182, paragraph 6, that they were the children of Juanhamy, and on that footing claimed in their answer to be entitled to a share in the lot awarded to Juanhamy by deed D 2 (see paragraph 3 of answer), and in the decree in that case were duly allotted the share so claimed (see D 5).

Next, in their plaint in this case they claimed to be the offspring of Seetalahamy and Balahamy by an associated marriage. Finally, they set up a claim to a share as the children of Seetalahamy alone.

Now, the evidence in the case shows that the three brothers lived in one house with the woman Dingiri Menike, and it is apparent that she was their common wife. Her marriage with none of them was registered.

In the birth certificate of Hamy (P 1) her parents are described as not married.

It will be noted in that document Seetalahamy's name is given as that of the father of Hamy, but it is also significant that it was Balahamy who was the informant, though, according to Dingiri Menike's evidence, Seetalahamy was then alive.

This would seem to indicate that Seetalahamy and Balahamy were both living with Dingiri Menike as their wife.

Again, though Dingiri Menike denies that Juanhamy was married or had children, the death certificate (P 2) of Juanhamy proves the contrary.

The name of the informant on that document is Ganladdalage Punchi Appuhamy, who is described as the son of the deceased. But, according to the evidence of Dingiri Menike, Punchi Appuhamy was her son by Balahamy.

I think it is quite clear from the above that the three brothers lived in a sort of associated marriage with Dingiri Menike. But an associated marriage since December 7, 1859, is illegal, and the offspring are illegitimate. This is the reason why plaintiffs receded from the position taken up in the plaint that they were the children of Seetalahamy and Balahamy by an associated marriage.

There is further no proof that, even if Seetalahamy alone was the husband of Dingiri Menika, their marriage was contracted prior to 1870. All marriages contracted since Ordinance No. 3 of 1870 came into operation are illegal unless registered.

Dingiri Menike had three children, the youngest of whom was born in 1875, so that it is probable her marriage took place since 1870, at least it is possible Dingiri Menike tried to fix the date of the marriage by saying that she lived with Seetalahamy for ten or twelve years, and that Seetalahamy died two years after Hamy was born, i.e., in 1877. But in cross-examination she admitted she was unable to say whether Seetalahamy was alive or dead when Balahamy registered Hamy's birth in 1875. I decide issues 1 and 2 against the plaintiff as to prescription; the defendants have undoubtedly been in possession since the deed of partition was executed in 1904.

I am of opinion, as regards issues 5 and 6, that the plaintiffs having taken benefit in the partition case under and by virtue of the deed of partition and in their capacity as children of Juanhamy, who was himself a party to the deed of partition, are now debarred from reprobating the contract embodied in it. For these reasons I dismiss plaintiff's action, with costs.

*Bawa, K.C.* (with him *J. W. de Silva*), for plaintiffs, appellants.

*F. M. de Saram*, for defendants, respondents.

October 8, 1919. DE SAMPAYO J.—

The main question in this case is whether the paintiffs are the legitimate children of Seetalahamy. The District Judge considered that Seetalahamy and his two brothers, Balahamy and Juanhamy, lived in association with the plaintiff's mother, Dingiri Menike, and that, as associated marriages were illegal since the Ordinance No. 13 of 1859, the plaintiffs were illegitimate. The evidence of Dingiri Menike, however, was that she was married to Seetalahamy, and upon this the District Judge remarked that, even if Seetalahamy was the sole husband of Dingiri Menike, as there was no proof that their marriage was contracted prior to the Ordinance No. 3 of 1870, the marriage was illegal without registration. But, I think, all the evidence indicates that if there was a marriage between Seetalahamy and Dingiri Menike it was contracted before 1870, and the provision of section 25 of the Ordinance No. 3 of 1870 applies. This section, however, requires that the marriage should have been " according to the laws, institutions, and customs in force in Kandy " before the date of the Ordinance No. 13 of 1859. Dingiri Menike only gave general evidence that she was married to Seetalahamy, without stating the circumstances and without giving any details. Under the ordinary law evidence of cohabitation and repute may be sufficient to raise the presumption of a valid marriage. I cannot say that in this case there is even such evidence, but in my opinion, under section 25 of the Ordinance No. 3 of 1870, something more must be proved.

The Kandyan Marriage Ordinance established registration as the only valid form of marriage between Kandyan parties, and I think that, in order to enable a party to take advantage of the exception created by section 25, some proof, however slight, must be given of the observance of " the laws, institutions, and customs in force in Kandy " at the time of the marriage. This being so, the plaintiffs must, I think, be held to have failed in the necessary proof of a valid marriage between Dingiri Menike and Seetalahamy, especially in view of the fact, which the learned Judge notes, that the plaintiffs at various stages changed their attitude as to who was their father. It is very possible, so far as the evidence goes, that the association of Dingiri Menike with Seetalahamy was an irregular one, just as

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it was with Balahamy and Juanhamy. The first issue being thus decided against the plaintiffs, it is not necessary to consider the defendant's plea of prescription. If it were necessary, however, I should say that the evidence of possession was hardly sufficient, though the circumstances make it very probable that the defendants had prescriptive possession.

On the first ground I am of opinion that this appeal should be dismissed, with costs.

SCHNEIDER A.J.—I agree.

*Appeal dismissed.*