1953 *Present :* **Nagalingam A.C.J.**

S. KANDIAH, Appellant, *and* THANGAMANY, Respondent

S. C. 819—M. C. Vavuniya, 25,250

Marriage—Presumption of marriage by habit and repute—Not applicable where cohabitation follows a marriage ceremony which is invalid.

The presumption of marriage by habit and repute cannot prevail where there is evidence that the parties had gone through a marriage ceremony and that the solemnization was invalid for the reason that one of the parties was, at the time of the ceremony, already lawfully married. Cohabitation of the parties and general recognition of them as husband and wife subsequent to the dissolution of the prior marriage are inadequate in law for the application of the doctrine of presumption of marriage.

APPEAL from a judgment of the Magistrate's Court, Vavuniya.

A., who was married to B., instituted divorce proceedings against her. Pending the action for divorce A. purported to marry C. according to Hindu rites and lived with her as husband and wife. There was

no fresh ceremony, either according to custom or under the Marriage Registration Ordinance, subsequent to the dissolution of the marriage of A. with B. In the present case the question arose whether C. could claim maintenance as wife from A. It was contended that the co-habitation of A. and C. after the dissolution of the marriage between A. and B., coupled with the circumstance that A. and C. were recognized by friends and relatives as man and wife, entitled C. to gain the status of a lawful wife.

T. W. Rajaratnam, for the defendant appellant.

K. Sivasubramaniam, with *D. S. Nethsingha*, for the applicant respondent.

Cur. adv. vult.

September 17, 1953. NAGALINGAM A.C.J.—

This appeal involves a determination of the question as to what extent the presumption of marriage by habit and repute could be held to prevail where admittedly there is evidence that the marriage ceremony gone through by the parties is invalid, and further whether, after the factor rendering the marriage invalid has ceased to be operative and co-habitation continues, such co-habitation attended by recognition by members of the families of the parties as husband and wife is adequate in law for the application of the doctrine of the presumption of marriage.

The question arises on the application for maintenance made by the applicant on behalf of herself and her children on the ground that she is the lawful wife of the defendant and that the children were lawfully born in wedlock to him. The learned Magistrate has very carefully analysed the evidence and arrived at certain findings of fact with which I see no reason to disagree. Briefly stated, the facts are : The defendant was anterior to the dates material to these proceedings a widower. On the 28th February, 1948, he married one Ponnammah under the General Marriage Registration Ordinance, and the solemnization of the marriage is evidenced by the certificate of marriage D5. Though the marriage was solemnized between the defendant and Ponnammah, the parties never lived together, and the defendant shortly thereafter instituted divorce proceedings against her, and *decree nisi* dissolving the marriage with Ponnammah was entered on 6th May, 1949 ; the decree was made absolute only on 2nd February, 1953. After the defendant had instituted the action for divorce against Ponnammah, he would appear to have married the applicant according to Hindu rights. The marriage with the applicant took place in January, 1949, that is to say, subsequent to the institution of the divorce proceedings against Ponnammah but prior to even the *decree nisi* dissolving his marriage with the defendant being entered in the action.

It is conceded on behalf of the applicant that the marriage according to custom between her and the defendant having taken place at a time when the defendant was a married man having a lawful wife living,

namely Ponnammah, the marriage according to custom cannot be vested with any legality; so that the marriage was void and of no effect. The appellant must, therefore, be regarded at the date she went through the marriage ceremonies with the defendant as having gone through proceedings which did not culminate in the normal legal consequences that flow from a lawful marriage. She would, therefore, be in the same position as a mistress and would have no legal rights against the defendant.

Counsel for the applicant, however, contends that the co-habitation of the applicant and defendant after the dissolution of the marriage between defendant and Ponnammah coupled with the circumstance that the applicant and defendant were recognized by friends and relatives as man and wife would at least from that day enable the applicant to gain the status of a lawful wife. I do not think that this contention is sound. Counsel relied upon the case of *Breadelbane Peerage Claim*[1], where it was held that living together of parties subsequent to the impediment which rendered the marriage solemnized between them invalid had been removed was sufficient to vest the union with legality. But that was a Scotch case and the judgment quite clearly indicates that under the Scotch Law no previous ceremonies are required for the validity of a marriage, and the mere consent of the two parties is all that is required for a valid marriage, and where the two parties continue to live together as a result of such mutual agreement, a valid marriage is deemed to subsist between them. See the case of *Weerapperuma v. Weerapperuma*[2]. The learned Magistrate himself has been persuaded to follow the principle laid down in the former case, and he has on that basis held the applicant to be a lawfully married wife.

Under our law, however, some antecedent public ceremony, public in the sense of a ceremony in the presence of relatives, friends or third parties, has to take place before the mere circumstance of the parties living together as man and wife followed by recognition of their living together as man and wife by friends and relations can form the basis of a deduction that there was a lawful marriage between the parties. It is not unimportant to stress that the fact of two parties living together as man and wife and their being recognized as such by friends and relations gives rise to a presumption—and a presumption only—of marriage. It does not prove the fact of marriage, and the presumption is not an irrebuttable presumption but one which may be disproved.

In this case, as observed earlier, the only evidence of any antecedent religious ceremony was of one which was invalid. There was no ceremony, either according to custom or under the Ordinance subsequent to the dissolution of the marriage of the defendant with Ponnammah. Therefore the living together of the defendant with the applicant as man and wife even if it is assumed that they lived together subsequent to the dissolution of the defendant's marriage with Ponnammah cannot lead to a presumption of marriage being drawn, for there is positive evidence that there was no valid marriage between the parties.

[1] *L. R. (1872) 2 H. L. S. C. 269.*

[2] *(1938) 39 N. L. R. 433.*

I need only observe further that the application of the applicant was made on 16th September, 1952, even at a date anterior to the order absolute dissolving the marriage of the defendant with Ponnammah was entered, clearly showing that there is no room even for the argument that the applicant and the defendant lived together as man and wife after the impediment which rendered their marriage void had been removed.

I, therefore, hold that the applicant is not the wife of the defendant and is not entitled to an order for maintenance, and set aside the order of the Magistrate to that extent.

The children are, however, entitled to an order in their favour though illegitimate. The defendant describes himself as an Ayurvedic physician, and the order of the learned Magistrate indicates that the defendant has a financial capacity of paying at least a sum of Rs. 37 a month towards the maintenance of his dependants. I think in all the circumstances of this case the amount fixed by the learned Magistrate for the maintenance of the two children is low. I would fix the maintenance for the elder child Thevamalar at Rs. 20 a month and for the younger child Ravendran at Rs. 15 a month. The order will take effect from the date of the judgment of the lower court.

In view of the fact that the defendant himself has on more than one occasion both in the course of these proceedings and in other proceedings described the applicant as his wife, I think the proper order to make with regard to costs is that the parties should bear their respective costs of appeal.

Appeal partly allowed.