GRACIA CATHERINE

v.

WIJEGUNAWARDENE

SUPREME COURT.
SHARVANANDA, C. J., COLIN-THOMÉ, J. AND ATUKORALE, J.
S.C. No. 5/85.
C.A. No. 271/77(F).
D.C. GAMPAHA 18663/D.
SEPTEMBER 3, 4 AND 5, 1985.

Matrimonial actions–Customary marriage–Marriage according to Roman Catholic Rites in Church without registration under the General Marriages Ordinance (Marriage Registration Ordinance)–Is it equivalent to marriage according to Roman Catholic custom?–S. 34 of the General Marriages Ordinance (Marriage Registration Ordinance).

A marriage solemnised according to the rules, customs, rites and ceremonies of the Roman Catholic Church may serve two purposes–(1) to satisfy the requirements of s.34(1) of the Marriage Registration Ordinance as preliminary to registration of the marriage under s.34(2) and (3), and (2) since these rules, customs, rites and ceremonies of the church have been absorbed into the web of catholic customary marriage, to constitute a customary marriage.

A marriage solemnised according to the customs, rites and ceremonies of the Roman Catholic Church has legal validity irrespective of legal registration thereof and is regarded as a lawful marriage on the basis of it being a customary marriage recognised in law.

Although the plaintiff was a Buddhist, he intended to marry in the Church, got permission from the Catholic Bishop to marry the defendant and voluntarily chose to go through the catholic ceremonies and subsequently lived with the defendant as husband and wife. He is therefore bound by the marriage which took place according to the customary rites of the church. The onus was on the plaintiff to show that the requisites of a Catholic customary marriage were not performed and this burden he has failed to discharge.

Cases referred to:

(1) *Gunaratne v. Punchihamy–(1912) 15 NLR 501.*

(2) *Sopia Hamine v. Appuhamy–(1922) 23 NLR 353.*

(3) *Aronegary v. Vaigalie–(1881) 2 NLR 322 P.C.*

(4) *Thiagaraja v. Kurukkal–(1923) 25 NLR 69.*

(5) *Poopalaratnam v. Sabapathy–(1921) 2 C.L. Rec. 210.*

(6) *Chellappah v. Kandasamy–(1915) C.W.R. 104.*

(7) *Thiagarajah v. Karthigesu–(1966) 69 NLR 73.*

(8) *Nicholas de Silva v. Shaik Ali–(1895) 1 NLR 229.*

APPEAL from the judgment of the Appeal Court reported in [1984] 2 SLR 381.

Jacolyn Seneviratne with *G. G. Arulpragasam, Lakshman Perera* and *Demeyan de Silva* for defendant-appellant.

Dr. Colvin R. de Silva with *D. R. P. Gunatillake* and *Miss Saumya de Silva* for plaintiff-respondent.

May 7, 1986.

SHARVANANDA, C. J.

By his plaint dated 21.11.1975, the plaintiff-respondent instituted this action against the defendant-appellant praying for a declaration that there was no marriage between him and the defendant and/or that the marriage is null and void or, in the alternative, for a decree for divorce–vinculo matrimonii dissolving the marriage with the defendant, on the ground of her constructive malicious desertion. By his amended plaint dated 27.3.1976, the plaintiff stated that although it was thought that the defendant and plaintiff were married on the 13th August 1973, at the St. Anthony's Church, Kongodamulla, there was no such marriage in fact or, in law. The defendant filed answer on the 2nd April 1976, denying the allegations in the plaint and stated that she was the legally married wife of the plaintiff and that the marriage between her and the plaintiff was effected on the 13th August, 1973, at the Kongodamulla St. Anthony's Roman Catholic Church by Rev. Batepola. This defendant further stated that all the activities in connection with the ceremony were performed in a simple way because the defendant's father was ill at the time of this marriage. But the defendant expressly stated that "all those rites were performed according to custom and procedure".

When the case was taken up for trial on 29th June, 1976, both parties admitted that "there is no valid marriage registration under the Registration of Marriages (General) Ordinance". The case proceeded to trial on the following issues:–

(1) As no marriage under the General Marriages Ordinance has taken place between the plaintiff and the defendant, can the plaintiff obtain a declaration that there was no marriage between the plaintiff and defendant?

(2) Did the defendant conduct herself in the way set out in paragraphs 10 to 15 of the amended plaint?

(3) If the answer to issue No. 2 is "yes", was the defendant in fact and/in law guilty of constructive malicious desertion?

(4) If so, can the plaintiff obtain a judgment for divorce?

(5) Was there a customary marriage and a marriage of repute between the plaintiff and the defendant in this case?

(6) Was the defendant in this case, maliciously deserted by the plaintiff on or about the 13th of July 1975?

(7) If issues No. 4 and 5 are decided in the defendant's favour, should this case of the plaintiff be dismissed?

(8) As no marriage has been registered under the General Marriages Ordinance, is the defendant lawfully entitled to raise issue No. 5?

By his judgment dated 23rd September 1977, the trial Judge answered issues 1, 2 and 3 in the negative and issues 5, 6, 7 and 8 in the affirmative. In relation to issue 4, the District Judge said that it did not arise in view of his answer to issue 3. The trial Judge accordingly dismissed the plaintiff's action with costs. The plaintiff preferred an appeal to the Court of Appeal. By its judgment dated 29.8.84, that court allowed the appeal on the ground that the defendant had failed to establish a customary marriage and hence the plaintiff was entitled to a declaration that the marriage between the plaintiff and defendant was null and void. Counsel for the plaintiff did not canvass the findings of the trial Judge that it was the plaintiff who maliciously deserted the defendant on the 13th July 1975. The defendant-appellant has filed this appeal against the said judgment of the Court of Appeal.

The plaintiff is a Buddhist and the defendant is a Roman Catholic. In his evidence the plaintiff stated that he was intending to marry the defendant at the Kachcheri, but as the defendant said that they must marry at the church, he agreed, and accordingly got permission to marry from the priest at Gampaha. He gave notice of marriage at the Registry Office, Gampaha and on the 13th August 1973, he along with the defendant, her mother, aunt and sister-in-law went to Kongodamulla St. Anthony's Church. He went to the church at about 7.00 p.m. and they had some prayer, a ring was put on to the defendant's finger and they said something in English and Sinhalese, which he could not understand. He said that everything was over at

about 8.30–8.45 p.m. The trial judge has rejected the evidence of the plaintiff that the ceremony took place between 7.00 and 8.00 p.m. in the evening and has held that–

> "at the Church Rev. Batepola held a ceremony according to the customs of the Catholic Church and solemnized a marriage between plaintiff and defendant".

According to the plaintiff, both he and the defendant came back to Gampaha and went to live at a house at Sri Bodhi Road. At this house he and the defendant started living as husband and wife; the friends and relatives of both parties accepted them as husband and wife; the two of them lived together and accepted each other as husband and wife. These facts are admitted by both plaintiff and defendant. In cross-examination the plaintiff admitted that he accepted the defendant to be his legal wife, after the marriage at Kongodamulla church on 13th August 1973, and it was with that idea the two of them lived together and during this period they moved about in public with that idea in mind and he showed the world that the defendant was his lawful wife.

After the plaintiff and the defendant had so lived together as husband and wife for two years, the plaintiff wanted to divorce the defendant. For that purpose the plaintiff tried to obtain the marriage certificate. When he tried to obtain a marriage certificate he was informed that the marriage between him and the defendant had not been registered under the General Marriages Ordinance. Hence arises the prayer of the plaintiff for a declaration that the marriage between the plaintiff and the defendant is void or that no marriage had taken place between the two of them.

The defendant's position is that though no marriage has been registered under the General Marriages Ordinance in fact a customary marriage was performed at the church and hence, the plaintiff could not maintain this action for a declaration that there was no marriage between him and the defendant. The relevant question arises whether there was a customary marriage countenanced in law between the plaintiff and defendant.

In this case it is common ground that notice of marriage in terms of section 24 of the General Marriages Ordinance was given. It is manifest therefore that the parties intended to get married under the General Marriages Ordinance. But the plaintiff contends that certain indispensable formalities prescribed by the General Marriages

Ordinance had not been observed, namely that the marriage was not solemnized in church between 6.00 a.m. and 6.00 p.m. as prescribed by section 34(1) of the Ordinance and that the marriage was not registered as required by the Ordinance. The certificate of marriage which alone gives the Minister of the church the authority to solemnize the marriage was never issued and hence the Minister was not empowered to register the marriage.

The trial judge has accepted the evidence of Rev. Batepola, in preference to the evidence of the plaintiff and has held that the marriage was solemnized at about 4.00 or 4.30 in the evening. This finding of fact is well based and the plaintiff's challenge to the validity of the marriage on the allegation that the marriage rites were performed after the prescribed time stands rejected.

This finding cannot be faulted. But as regards registration I agree with the counsel for the plaintiff that it is only on the production of the certificate of the Registrar that a Minister of the church can solemnize a marriage. Since there was no such certificate Rev. Batepola had no authority under the Ordinance to register the marriage. It is accepted by the parties that in the circumstances the marriage could not have been lawfully registered by Rev. Batepola.

The case has then to be decided on the basis that there had been no valid registration of marriage between the parties under the General Marriages Ordinance. But then, is registration essential to the validity of marriage? Section 41 of the General Marriages Ordinance provides–

> "The entry made by the Registrar in his marriage register under sections 34, 35 and 40 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 does not exclude other recognised forms of marriage and a customary marriage may, therefore, be proved and established. Marriage has been defined to mean any marriage save and except marriages contracted under and by virtue of the Kandyan Marriages Ordinance of 1870 or of the Kandyan Marriages and Divorce Act and except marriages contracted between persons professing Islam (section 64).

A customary marriage is a marriage coming within this definition, though not one under the provisions of the Ordinance as to form and registration.

Regulation 9 of 1822 attempted to introduce as a part, not merely of the evidence but of the constitution of marriage – a stringent system of registration and enacted that no marriage contracted after the 1st August of that year should be valid unless it was registered. The next enactment No. 6 of 1847 was intended to restrict valid marriage to such as should be solemnized either by a Christian minister or by a Marriage Registrar. But the 6th section which again provided that unregistered marriages should be invalid was never proclaimed. The law of 1822 still remained in force. It was however provided by section 3 of the Ordinance No. 6 of 1847 that past marriages rendered invalid by not being registered in conformity with Regulation 9 of 1822 were to be deemed good and valid, except where the parties to any such marriage or either of them, not being Mohamedans, shall during the lifetime of both parties have contracted a valid marriage. The effect of this clause was to validate all customary marriages contracted prior to 1847. Section 2 of this Ordinance declared valid past marriages solemnized by Christian Ministers. It specifically enacted that –

> "all Marriages which have been heretofore bona fide solemnized within this Island between parties legally competent to marry by Ministers of the Christian religion ordained.....either by licence or after the publication of banns and, according to the rites of the religious communities to which such Ministers shall have belonged, shall be deemed and taken to have been a good and valid marriage in law."

As to subsequent marriages, the law of 1822 continued to apply. The next Ordinance was No. 13 of 1863 which came into operation by proclamation on 1.3.1867. In the ordinance of 1863 the provision of the earlier Ordinance which made registration essential to the validity of the marriage was omitted. Section 15 of Ordinance No. 2 of 1895 enacted that no marriage should be valid unless it was duly solemnized by a Minister or Registrar and was registered in the manner and form prescribed by the Ordinance. The only exception was made in favour of Hindus–Tamils not domiciled in Ceylon. This section 15 was repealed by Ordinance No. 10 of 1896, and it has not been reintroduced into the present Marriages Registration Ordinance No. 19 of 1907. The present legal position is that while registration is

essential for the validity of a marriage under the Kandyan Marriages Ordinance of 1870, it is open to persons other than Kandyans to contract a marriage according to native rites and customs. Vide *Gunaratne v. Punchihamy* (1), *Sopia Hamine v. Appuhamy* (2), *Aronegary v. Vaigalie* (3), 2 N.L.R. 322, P.C., *Thiagarajah v. Kurukkal* (4), *Poopalaratnam v. Sabapathy* (5).

In *Chellappah v. Kandasamy* (6) where two persons, Tamils of Jaffna having given the Registrar of Marriages notice of their intention to marry, solemnized their marriage according to Hindu rites but owing to certain disputes refused to proceed to registration, it was held that the customary form of marriage according to Hindu rites constituted a valid marriage independently of registration.

Where marriage has to be established by proof of performance of customs or ceremonies, case law shows that the relevant customs and ceremonies vary according to the race, caste, religion or social status of the parties. If it is shown by the custom of the caste or religion or district that certain form is considered as constituting a marriage, then the adoption of that form with the intention of thereby completing the marriage union is sufficient in law to constitute marriage. When the fact of celebration of the marriage is established it will be presumed, in the absence of evidence to the contrary, that all the forms and ceremonies necessary to constitute a valid customary marriage have been gone through. Where there is a marriage in fact, there would be a presumption in favour of there being a marriage in law.

In *Aronegary v. Vaigalie, (supra)* it was held by the Privy Council that where it is proved that parties have gone through a form of marriage and thereby shown an intention to be married, persons who claim by virtue of the marriage were not bound to prove that all necessary ceremonies had been performed. In *Thiagarajah v. Carthigesu* (7), the question in issue was whether a marriage was celebrated according to customs and the evidence showed that the parties had neither cohabited for a single day nor even lived together under the same roof, and it was held that in such a case there is no presumption in favour of their marriage and that in such a case, proof of marriage depends solely on the evidence to the effect that a valid ceremony of marriage was actually performed. By parity of reasoning it would thus appear that where parties have lived together as husband and wife following upon

performance of certain rites and ceremonies associated with marriage, the burden of proving that the appropriate marriage customs and the fact that the required ceremony were not performed would lie heavily on those who deny the validity of the marriage. In this case since the plaintiff has admitted that after the marriage ceremony at Kongodamulla, both he and the defendant had lived together openly as husband and wife and had been accepted by the public to be husband and wife, the onus will lie on him to show that it is invalid because certain vital ceremonies had not been gone through. The Court of Appeal has on the admitted facts of this case erred in casting the burden of proof on the defendant to show what are the essential requisites of a Catholic marriage and that the marriage between her and the plaintiff conformed to those requisites. The onus was on the plaintiff, in view of these admissions referred to above, to show that the essential requisites of a Catholic customary marriage were not performed. He has failed to lead any evidence on these matters to discharge the burden that rested on him.

In *Nicholas de Silva v. Shaik Ali* (8) a Divisional Bench of the Supreme Court held that a marriage of two members of the Catholic church solemnized by a minister of the church, at a Roman Catholic church, did not become null and void for want of registration, but was valid in law. The oral evidence in that case "proved the ceremony to have been a christian one". This case establishes that a marriage performed in a Catholic church according to customary Catholic rites is a lawful marriage, even though there is no registration of the marriage according to law. The religious rites may owe their origin to the canon law but thereby we are not importing the canon law into our jurisprudence. The religious rites and ceremonies of the church are relevant because they have come to be the customary rites and ceremonies according to which the catholics solemnize their marriages. Thus they have as such acquired legal significance.

The trial Judge has accepted the evidence of Rev. Batepola and has held that it is crystal clear that the marriage has been solemnized according to the Roman Catholic customs. He finds that "it has been proved in this case that the marriage between the plaintiff and the defendant has been solemnized at a Roman Catholic church according to the customs of the Roman Catholic church before a Roman Catholic priest". Rev. Batepola who officiated at the marriage of the parties, testified that he performed the marriage inside the church between

4.00 and 4.30 p.m. and that he took about 35 minutes for the ceremony and that he explained to the parties what he was doing. In cross examination by counsel for the plaintiff he stated as follows:

"Q. During this period, how many marriages were you concerned with?

A. About 1,000 marriages.

Q. You have a very good understanding of the ceremonies held in connection with marriages?

A. I know.

Q. How many kinds of church marriages are there?

A. There is only one method in the church.

Q. What is that method?

A. To effect it according to the rules of the Catholic church, according to law.

Q. In your church, is there a marriage called customary marriage?

A. The marriage is performed under the law of the church.

Q. Is there something called customary marriage?

A. It is done according to the rules of the church.

Q. If the man is not a Catholic, can the two parties come to the church and get the blessings of the church?

A. It can be done with the authority of the church.

Q. By the "authority of the church" do you mean the authority of the Bishop?

A. Yes.

In re-examination the witness clarified the position as follows:

A. "If both are Christians we get them to marry according to the law of the church, if they are a non-Christian and a Christian we marry them after obtaining the authority of the church. According to the religious rites of the church the same thing is done in both cases. If it is a case of the non-Christian and a Christian only, we obtain the authority of the church."

The witness further stated that the plaintiff (a Buddhist) and the defendant (a Catholic) applied for permission to the Catholic church to get married and the two of them got the permission from the church. It is to be noted that during a searching cross-examiniation of Rev. Batepola apart from a single question that he told the plaintiff only that he blessed the ring, not a single suggestion was made that any ceremony or rite necessary for the solemnization of the marriage was not performed. Rev. Batepola quite categorically said that the wedding took place according to the customs and the laws of the Catholic church. The Court of Appeal has held that–

> " ..... this does not render it a customary marriage ..... If indeed there is a Roman Catholic customary marriage, there should be evidence of what are the essential requisites of such marriage ..... The evidence only proves that a ceremony took place according to the rules, customs and rites of the Catholic church, in terms of section 34(1). It does not prove that a customary marriage took place. It seems to me that the learned District Judge has equated the celebration of a marriage according to the rules, customs and rites of the church, with marriage celebrated according to customary rites and has thus confused one with the other."

With all respect to that court, I cannot agree with that court's comments and conclusion. The defendant's case is that the customs and rites of the Catholic church represent the customary rites and ceremonies essential for a Catholic customary marriage, and that the solemnization of a marriage according to the said customs and rites of the church satisfies the requirements of a customary marriage of the Roman Catholics. The rules and customs of the Roman Catholic church do not have any independent authority to validate a marriage. They are relevant only because the Roman Catholics have adopted them as part of their customary ceremonies regulating their marriage. A marriage solemnized according to the rules, customs, rites and ceremonies of the church may thus serve two purposes–one to satisfy the requirements of section 34(1) of the Marriage (General) Ordinance as preliminary to registration of the marriage under Section 34(2-3) and secondly since these rules, customs, rites and ceremonies of the church have been absorbed into the web of Catholic customary marriage, to constitute a customary marriage. It is to be noted that section 2 of the Ordinance No. 6 of 1847, quoted supra,

recognised marriages solemnized according to Christian rites and gave legal validity to Christian marriages solemnized by a Minister of Christian religion according to the rites of the religious communities to which such Minister belonged without such marriage being registered according to law. Thus a marriage solemnized according to the customs, rites and ceremonies of the Catholic church has legal validity irrespective of legal registration thereof and is regarded as a lawful marriage on the basis of it being a customary marriage recognised in law.

In my view, the trial judge acted under no confusion when he accepted the sufficiency of the marriage ceremonies conducted by Rev. Batepola at the church on 13.08.1973 in accordance with the rites of the church to satisfy the requirements of a customary marriage of Roman Catholics.

It was said that the plaintiff is a Buddhist and hence could not have adopted a Catholic customary marriage. But, the evidence shows that he intended to marry the defendant at the Kongodamulla Church, got the permission of the Catholic Bishop to marry the defendant as required by the church and voluntarily chose to go through the Catholic ceremonies, with a full appreciation that he was marrying according to catholic rites. Having elected voluntarily to marry the defendant who is a Catholic according to the customary rites of the Catholics, he is bound by the marriage which took place according to those rites. Further he subsequently lived with the defendant as husband and wife on the basis of the validity of the marriage that took place between him and the defendant on 13th August 1973. His conduct manifested a recognition of the existence and validity of the marriage; he had approbated the marriage which he is seeking to get rid of; it is most inequitable and contrary to public policy that he should be permitted to challenge it with effect.

I allow the appeal and set aside the judgment of the Court of Appeal and affirm the judgment of the District Court and dismiss the plaintiff's action with costs in all the courts.

COLIN-THOMÉ, J. – I agree.

ATUKORALE, J. – I agree.

Appeal allowed.