

**WIJEGUNAWARDENA
v.
GRACIA CATHERINE**

COURT OF APPEAL
TAMBIAH, J. AND MOONEMALLE, J.
C.A 271/77 (F)
D.C. GAMPAHA 18633/D
MAY 28, 29, JUNE 25 AND AUGUST 10, 1984

Divorce-Nullity of marriage-Marriage ceremony in Church-Validity-Marriage Registration Ordinance, Sections 23, 25, 26, 33, 34 (1), (2), (3), 5 (b), 41, 42, 43 and 46-Customary marriage-Burden of proof-Marriage by habit and repute.

The plaintiff-appellant filed this action, praying for a declaration that there was no "marriage" between him and the defendant-respondent and/or that it is null and void or in the alternative for a divorce on the ground of constructive malicious desertion. On 24.7.1973 the plaintiff had given notice of marriage to the Registrar of Marriages and believing that he had complied with the law regarding marriage he went to Church on 13.8.1973 with the defendant to get married and there mass was held, prayers were read, the priest took a ring and put it on the defendant's finger and obtained the signatures of both parties to a book kept in the Church. Candles and oil lamps were burning in the Church during the ceremony. No certificate issued by the Registrar was given to the priest and the book signed by the parties was not one kept in compliance with the provisions of the Marriage Registration Ordinance. Thereafter the plaintiff-appellant lived with the defendant as man and wife. On 13th July 1975 the plaintiff left the defendant after a quarrel with her and filed this action thereafter.

Held-

(1) Before a Minister can solemnise a marriage in terms of s 34(1), there must be a certificate of the marriage notice which alone gives the Minister the authority to solemnise a marriage. In the instant case there was no such certificate of notice given to him. The parties wilfully went through a marriage ceremony in Church knowing fully well that no certificate had been issued. Therefore the marriage is null and void in terms of section 46 of the Marriage Registration Ordinance.

(2) The evidence only proves that a ceremony took place according to the rules, customs and rites of the Catholic Church. It does not prove that a customary marriage took place. What was done was to conduct a form of religious service in accordance with the customs and rituals of the Church as the parties indicated that their marriage had already been registered.

(3) The burden was on the defendant to prove a customary marriage.

(4) In view of the admission that there was no valid marriage under the Marriage Registration Ordinance the only presumption the parties can contend for is a presumption in favour of a customary marriage. When a party fails to establish a customary marriage the presumption of a valid marriage is rebutted and a marriage (by habit and repute) is not established by the parties living together as husband and wife.

Cases referred to :

- (1) *Nicholas de Silva v. Shaik Ali.* (1895) 1 NLR 228
- (2) *The Queen v. Kantar Chinnatamby* 6 SCC 121
- (3) *Gunaratna v. Punchihamy.* (1912) 15 NLR 501, 504
- (4) *Sophia Hamine v. Appuhamy.* (1922) 23 NLR 353, 361
- (5) *Ponnammah v. Rajakulasingham.* (1948) 50 NLR 135, 137.
- (6) *Ratnamma v. Rasiah.* (1947) 48 NLR 475
- (7) *Dinohamy v. Balahamy.* (1927) 29 NLR 114, 116
- (8) *Fernando v. Dabrera.* (1961) 65 NLR 282, 284.

Dr. Colvin R. De Silva, with D. R. P. Goonetilleke, Terence Wickremasinghe, K. S. Tillekeratne and Miss Saumya de Silva for the plaintiff-appellant.

S. D. Jayasundera for the defendant-respondent.

Cur. adv. vult.

August 29, 1984

TAMBIAH, J.

The plaintiff-appellant filed action against the defendant-respondent and prayed for a declaration that there is no marriage between them and or that their marriage is null and void or in the alternative, for a decree of divorce. To sustain his prayer for a declaration, the plaintiff averred in his amended plaint that on 24th July, 1973, he gave notice of marriage to the Registrar of Marriages and on 13th August, 1973, believing that he had complied with the provisions of law regarding marriage, at about 8.30 p.m. he went to St. Anthony's Church at Kongodamulla with the defendant with the intention of getting married; that night, at the Kongodamulla Catholic Church, Rev. Fr. Batepola took a ring and put it on the defendant's finger and requested the plaintiff and the defendant to sign a book kept in the church; that he now finds that he and the defendant have signed a book which has not been prepared according to the provisions of the General Marriages Ordinance; that thereafter he applied for a certified copy of the marriage certificate and this was refused by the Rev. Father who is in charge of the registers at the Kongodamulla Church.

The plaintiff's alternative prayer for a decree of divorce was based on the following averments—that on or about the 13th June, 1975, he was compelled to leave the matrimonial home as he found it difficult and dangerous to live with the defendant for the reasons that there were constant quarrels and disagreements between them, she constantly abused him in indecent language, she treated him

disgracefully in the presence of others, she made false allegations that he associated with other women, she failed to attend to his needs and to look after the household work, she got her brothers to abuse and threaten him and she was always with a morose face and treated him with cruelty giving him pain of mind. He alleged that she was guilty of constructive malicious desertion.

The defendant by her answer admitted the plaintiff's averment that they went to Kongodamulla Church at about 8.30 p.m. on 13th August, and went on to state that she is the legal wife of the plaintiff and that the marriage between them was solemnised by Rev. Father Batepola at the said Church ; that the marriage took place legally as well as with the customary ceremonies such as the function held at the Church on 13.8.73 ; they behaved as husband and wife before the relations and the general public ; that if there was any legal defect in the solemnization of the marriage, it was not a bar to their marriage. She asserted that she was a devoted and faithful wife. She denied that the plaintiff deserted her for the reasons he had given and stated that the plaintiff had started a friendship with one Miyuri Gunaratne and as she did not agree to plaintiff's demand for a divorce, he neglected her, ill-treated and finally maliciously deserted her on 13th July, 1975. She prayed for the dismissal of plaintiff's action.

At the start of the case, it was recorded that both parties admitted that there is no valid marriage between the plaintiff and the defendant under the Marriage Registration Ordinance. Thereafter, the case proceeded to trial on the following issues :-

1. Since the marriage that was intended to be solemnized between the plaintiff and the defendant under the Marriage Registration Ordinance did not take place, can a declaration be obtained that the marriage was void and or that no marriage took place between the plaintiff and the defendant ?
2. In the alternative, did the defendant behave in the manner as set out in paragraphs 10 to 15 of the amended plaint ?
3. If issue 2 is answered in the affirmative, is the defendant guilty of constructive malicious desertion ?
4. If so, can the plaintiff get a decree for divorce ?
5. Did there come into existence and continue, a marriage that was solemnized customarily and publicly ?

6. Did the plaintiff maliciously desert the defendant on or about 13th July, 1975 ?
7. If issues 5 and 6 are answered in the defendant's favour, should the plaintiff's action be dismissed ?
8. As there is no marriage registered under the Marriage Registration Ordinance, has the defendant a right in law to frame issue 5 ?

Issues 1 to 4 and 8 were raised on behalf of the plaintiff and issues 5 to 7 on behalf of the defendant.

The plaintiff, a Buddhist and a teacher in a tutory at Gampaha gave evidence. He gave his age as 32 years and stated his wife was 36 years. There are no children by the marriage. He came to know the defendant in or about 1968 and commenced a friendship. He was living in a rented house and the defendant's brothers, her parents and the defendant herself came to reside with him. He decided to marry her at the Kachcheri but she wanted to get married at the Miriswatta Church to which she belonged. As he was a Buddhist and felt shy to get married at the Miriswatta Church, the defendant's mother and relations made arrangements to have the marriage at the Kongodamulla Church as they knew the priest Rev. Fr. Batepola. He gave notice of marriage and obtained a certified copy of same (P 1), and with a letter from the Rev. Fr. at Gampaha, he met Rev. Fr. Batepola and fixed 13th of August as the date for the marriage. On 13th August, at about 7 or 7.15 p.m., he, the defendant, her mother, the mother's elder sister, the defendant's brother and her sister-in-law went to the Kongodamulla Church. Inside the Church, prayers were read, the Rev. Father put a ring on the defendant's finger, he read something in English and Sinhala which he could not understand and thereafter they were conducted to the living room. He signed. It took about two hours and it was 8 or 8.45 p.m. when all matters were over. There were candles lit and also coconut oil lamps inside the Church.

He also gave evidence concerning the conduct and behaviour of the defendant and her family which compelled him to leave her on 13th July. On the 12th evening, there was a quarrel between them over the false allegation that he was friendly with other women and he left the next day and never returned to her.

Under cross-examination, he admitted that after the wedding at Kongodamulla Church, he accepted the defendant as his lawful wife and lived with her for two years with that knowledge and went about openly with that knowledge ; that his parents and friends accepted them as lawful husband and wife ; that he had sexual intercourse with her. After he separated, he met the Rev. Father at the Kongodamulla Church and applied for a marriage certificate in order to file an action for divorce. The Rev. Father checked his books and said that no such marriage was registered and he looked into another book and asked him whether they came to Church after having got married somewhere else and he replied they were married at this Church, and that he had brought a notice of marriage with him. Then the Rev. Father said that he could remember seeing some long forms and asked him whether this (P1) was it. He answered yes. The mass was held in the Church. The date on which he left the defendant was 13th July 1975, and not 13th June, 1975. It is a mistake. He denied the suggestion that he left the defendant because of his fondness for Miyuri Guneratne.

The plaintiff's only witness Gunawardene gave evidence to support him in regard to issue No. 2.

Rev. Fr. Batepola gave evidence for the defendant. He knew that notice of marriage had been given. He married them on 13.08.1973 and obtained their signatures and of the witnesses to the effect that they were married. A document (D1) which defendant's attorney moved to mark in evidence was ruled out as it was not listed. The marriage took place at about 4 or 4.30 in the evening and lasted about 35 minutes. He explained to them what he did at that time. The marriage took place before the altar. After the wedding took place according to the customs, he registered the marriage in the living room which adjoins the Church, having obtained their signatures.

Under cross-examination, the witness stated the following :-

1. There is only one type of wedding in a Church, which is done according to the directions of the Holy Catholic Church.
2. There are two books kept in the Church. One book is kept according to the law of the State. It is a book given by the Kachcheri. The other book is kept according to the law of the Church.

3. If a marriage that takes place in a Church is registered in the Kachcheri Book, it is the duty of the Priest to send a copy to the Kachcheri.
4. First of all, notice of marriage is given. Secondly a certificate from the Registrar is received. The Registrar gives the authority by a Certificate. If no such certificate is received, the marriage cannot be entered in the book given by the Kachcheri. If a marriage that takes place in the Church is entered in the Kachcheri Book, it is necessary to send a copy to the Kachcheri.
5. The marriage has to be solemnized in the Church between 6 a.m. and 6 p.m. with all the doors of the Church open.
6. To the pointed question "Is there a marriage called customary marriage in Church?", the witness answered "It takes place according to the law of the Catholic Church" Such a marriage is not registered in the Kachcheri Book.
7. If both parties are christians and a marriage had taken place outside the Church they can be married again in Church; if the marriage is between a non-catholic and a catholic, they can be married again with the permission of the Archbishop.

When re-examined the witness stated the following :-

1. If parties are christians, they are married according to the law of the Church. If they are catholic and non-catholic we marry them with the permission of the Archbishop. Religious customs are the same for both.
2. In my Church there are two books for registration of marriages. In one, the registration is done according to the law of the State. The other book is kept according to the doctrine - the canon Law of the Church.
3. In regard to the present marriage, he did not prepare the book according to the Law of the State but according to the Law of the Church. Both the plaintiff and the defendant signed the book. They understood that a marriage took place. The plaintiff was a Buddhist and the defendant a Roman Catholic. (An affidavit (D 2) signed by the parties to show that the parties had got permission from the Catholic Church to marry was rejected by the Judge).

4. Before a marriage is solemnized according to the Law of the State, the parties are asked whether their marriage is registered. The plaintiff asked me to marry them in Church as the plaintiff had registered the marriage. The plaintiff told me that there was a marriage existing according to the Law of the State. That is why the marriage was registered in the book kept according to the law of the Church. The plaintiff did not bring a certificate. A certificate from the State is not necessary for a Church marriage. The couple is married on their mutual trust that they had got married according to the Law of the State.

The defendant then gave evidence and stated she got married at St. Anthony's Church and the Rev. Fr. Batepola officiated at the marriage. He explained about the gravity of the marriage. Thereafter they lived together for two years, behaved as husband and wife, and their parents and relations accepted them as husband and wife. She denied that she neglected her husband or that she did not attend to the household work. The plaintiff left her because of his association with Miyuri Guneratne. She denied that the plaintiff left her for the reasons he had given. He said that she was older than him, had no children and he asked her to get separated from him in order to get married to Miyuri Guneratne. She had known the plaintiff since 1964 and since 1965, for eight years, lived with him in one house but separately. Before the marriage, the plaintiff, she, her parents and her two brothers lived at two rented houses, at Weliveriya and Bendiyamulla and moved into their new house which the plaintiff had built, on the day of their marriage.

The defendant called three other witnesses – Charles, a relative of the defendant, stated he knew both parties and on a day in August 1973, he met the parties at a hotel and they were having tea. The plaintiff told him they had got married. On his invitation, the parties visited his house twice or thrice.

Appuhamy, another relative of the defendant stated that in the presence of the plaintiff, the defendant told him they were married and that on four or five occasions the parties visited his place.

The 3rd witness, Milton, a brother of the defendant, said that he was present at the marriage at the Kongodamulla Church. Father Batepola officiated. It took place at 4 p.m. and lasted about an hour. It is incorrect to say it took place at 8.00 in the night.

The learned Judge observed in his judgment—

"His (Rev. Fr. Batepola's) evidence was that he performed a marriage between the plaintiff and the defendant according to the customs of the Church. He also described the mass held. The mass had taken about 35 minutes. According to the plaintiff there had been religious ceremonies in the Church. A mass had been held, prayers were said and the ring had been put on the defendant. The plaintiff once tried to say that the marriage was performed in the living room. It may be that he attempted to say so in order to minimise the dignity and sacredness of the ceremony. However the plaintiff had to admit that the mass was held, the marriage took place and the ring was put in the Church. In the Church there were candles lit and oil lamps burning. The plaintiff also attempted to show that the mass was held at about 8.00 in the night. To do that the plaintiff made use of the admissions made by the defendant in her answer. The defendant by her answer admitted paragraph 3 of the plaint. In paragraph 3 among other things there appears that the plaintiff and defendant went to Kongodamulla Church at about 8.30 p.m. It appears that the defendant had not been much careful when answering. Paragraph 3 of the plaint is also not devoid of such information. The plaintiff in his plaint has stated that he left the defendant on 13.6.75. He said that it may be a mistake and that he left the defendant on 13.7.75. In evidence it was proved that the mass had been held before nightfall. As stated by Rev. Fr. Batepola it had taken place at about 4-4.30 p.m. According to the defendant's brother Milton it was at 4.00 p.m.

Before the marriage was solemnized Rev. Fr. Batepola had made the plaintiff and the defendant understand what he was doing and thereafter he had solemnized the marriage according to the customs of the church and the laws of the church.

You have to consider the question whether there exists a marriage between the plaintiff and the defendant with the above facts in the background.

There is enough evidence that the wedding took place in public and that the plaintiff and the defendant behaved as a married couple.

But in this case it has been proved that the plaintiff and the defendant were married at a Catholic Church according to the Catholic customs before a Catholic priest. Therefore it can be said that this was a marriage prepared according to the customs.

It is very clearly established that they have got married according to the Catholic customs as stated above.

In the judgment in *Nicholas de Silva v. Shaik Ali* (1) it has been held that a marriage performed by a Catholic priest does not become void for the mere fact that it was not registered. Though that judgment has been given prior to our Ordinance, it is even now accepted that a marriage which is performed according to the religious customs does not become void though it is not registered. Considering the facts in this case and the law, it is certain that there had been a customary and public marriage between the plaintiff and the defendant."

As between the two versions as to why the plaintiff left the defendant, the learned Judge said—

"The evidence in this case reveals that the main reason for the present situation between the plaintiff and the defendant is Miyuri Gunaratne. The plaintiff has left the defendant wilfully and the defendant cannot be held responsible for the plaintiff's act."

The learned trial Judge answered all the plaintiff's issues against him ; the defendant's issues were answered in her favour. Learned Counsel for the appellant did not canvass the finding of the learned trial Judge that it is the plaintiff who maliciously deserted the defendant on 13th July, 1975, but, he submitted that the answers to issues 1, 5 and 8 are erroneous decisions.

The Marriage Registration Ordinance (L.E. Vol. 5, Cap. 112) prescribes certain preliminaries to be observed prior to a marriage under the Ordinance. Notice of marriage must be given to the Registrar of the division in which the parties have dwelt or to the District Registrar in whose district they have dwelt (s. 23). Every Registrar to whom notice of an intended marriage is given is required to enter the particulars of the notice in the Marriage Notice Book (s. 25). The Registrar is bound, upon application of the party giving notice, to issue a certificate in the Form F in the 1st schedule (s. 26). On the production of the certificate of the Registrar, it shall be lawful

for a marriage to be solemnized between the parties by or in the presence of a Minister in a registered place of worship or other authorised place or by a Registrar in his office, station or other authorised place (s. 33). A marriage in a registered place of worship should be solemnized by a Minister in a registered place of worship, with open doors and between the hours of 6 o'clock in the morning and 6 o'clock in the afternoon, in the presence of two or more credible witnesses, and according to the rules, customs, rites and ceremonies of the Church, denomination, or body to which such Minister belongs (s. 34 (1)). The Minister is required to enter in duplicate, in a book to be kept for that purpose, a statement of the particulars of the marriage, and the statement shall be signed by the Minister, the parties to the marriage, and by two respectable witnesses who were present at the solemnization and are personally acquainted with the parties (s. 34 (2), (3)). The Minister, within seven days of the solemnization of the marriage, shall send the duplicate statement of the marriage to the District Registrar who is required to enter the particulars of the marriage in the Marriage Register Book (s. 34 (5) (b)). The entry in the Marriage Register by the Registrar shall be the best evidence of the marriage. (s. 41). Once a marriage is registered, s. 42 states that it shall not be necessary, in support of such marriage to give proof of certain matters mentioned therein and shuts out any evidence to be given to prove the contrary in any suit or legal proceedings touching the validity of such marriage. Where a marriage is contracted, but without the fault of the parties, it has not been registered or erroneously registered, there is provision for supplying the omission or correcting the error in the registration, by an application to the District Court (s. 43); s. 46 sets out the circumstances in which a marriage will be null and void. It states that if both parties to any marriage shall knowingly and wilfully intermarry under the provisions of the Ordinance in any place other than that prescribed by the Ordinance, or under a false name or names, or except in cases of death-bed marriages, without certificate of notice duly issued, or shall knowingly or wilfully consent to or acquiesce in the solemnization of the marriage by a person who is not authorised to solemnize the marriage, the marriage of such parties shall be null and void.

In this case, notice of marriage was given and therefore parties intended to get married under the Marriage Registration Ordinance. It is the plaintiff's case that certain formalities prescribed by the

Ordinance have not been observed, namely, the marriage was not solemnized in Church between the hours prescribed by s. 34 (1) and the marriage was not registered as required by the Ordinance. The marriage solemnized by Rev. Fr. Batepola, according to the plaintiff, was therefore not legal and valid. The learned Judge has accepted the evidence of Rev. Fr. Batepola and the witness Milton in preference to the evidence of the plaintiff, and has held that the marriage was solemnized before nightfall at about 4.00 or 4.30 in the evening. I see no reason to interfere with this finding. As regards registration, and it is common ground that the marriage was not registered, both learned Counsel conceded that registration is not essential to the validity of the marriage.

Learned Counsel for the defendant contended that it is the plaintiff's own evidence that he consented to get married in Church and that on that day, he went to Church with the defendant and his in-laws; in the church, there were candles lit and coconut oil lamps burning; prayers were read, a ring was put on the defendant's finger and Mass was held. He signed. Rev. Fr. Batepola stated that the marriage took place before the altar. Therefore, learned Counsel said that there was a valid marriage that has been solemnized according to the rules, customs, rites and ceremonies of the Church, in terms of s. 34 (1).

Learned Counsel for the plaintiff argued that before a Minister can solemnize a marriage in terms of s. 34 (1), there must be a Certificate of the marriage notice which alone gives the Minister the authority to solemnize a marriage. The evidence is, there was no such Certificate of Notice. I agree with this submission.

S. 33 says that upon the production of the Certificate by the Registrar, it shall be lawful for a marriage to be solemnized by a Minister. It is the certificate, then, that gives the Minister the authority to solemnize a marriage. Unless s. 33 is conformed to, the Minister cannot solemnize a marriage under s. 34.

In *The Queen v. Kanter Chinnatamby* (2) the respondent was indicted for bigamy. The indictment charged that the accused had married Parupathi in June 1876, and that in April 1884, Parupathi being still alive, he had married Valiamma. Notice of marriage between the accused and Parupathi under Ordinance No. 13 of 1883 was given, but the Registrar in evidence admitted that he issued no certificate of the marriage notice to the parties. The marriage was

solemnized by the Registrar of the District. The question arose whether the marriage between the accused and Parupathi was invalid by reason of the non-issue of the certificate of the marriage notice. The Supreme Court held that the issue of the certificate of the marriage notice is a condition precedent to the validity of marriage under the Ordinance.

In this case, according to the plaintiff, only a certified copy of the notice of marriage was given by him to Rev. Fr. Batepola. Rev. Fr. Batepola concedes that it is the certificate of the marriage notice that gives him the authority to solemnize a marriage under the Marriage Registration Ordinance. Though Rev. Fr. Batepola does not expressly say that there was no certificate of the marriage notice, this could be implied from his evidence. The plaintiff was a Buddhist and the defendant a Christian. The parties told him that a marriage between them had already been registered; with the permission of the Archbishop, he married them again in Church and made the necessary entries in the book kept, not under the Ordinance, but under the Laws of the Church. It follows from this item of evidence that if there was a certificate of the marriage notice, he would have solemnized the marriage and made the entries in the book kept under the Ordinance. There is also the admission by the parties before the trial commenced, that there was no valid marriage between the parties. I take the view that there was no valid marriage under the Marriage Registration Ordinance between the plaintiff and the defendant.

S. 46 has to be considered. Learned Counsel for the plaintiff contended that the section does not apply to the present case. For s. 46 to apply, he said, there must be a marriage and the parties must intermarry under the provisions of the Ordinance. Alternatively, he submitted if the section does apply, the marriage is null and void, as Rev. Fr. Batepola solemnized the marriage without a certificate of the marriage notice and the parties knew that there was no such certificate issued.

In my opinion, the case is governed by s. 46. The appellant's case was presented to us on the footing that though the marriage was solemnized by Rev. Fr. Batepola under s. 34 (1), he had not been duly empowered to solemnize the marriage, as he had no certificate of the marriage notice in his hands.

A husband or wife may present a plaint praying that his or her marriage be declared null and void. Such decree may be made on any ground which renders the marriage contract between the parties void by the law applicable to Ceylon (s. 607 Civil Procedure Code). The Marriage Registration Ordinance sets out various grounds on which a marriage may be declared null and void (*see* Sections 15, 16 and 18). S. 46 also is another such ground.

In *Kanter Chinnatamby's* case (*supra*), the Registrar of Marriages solemnized the marriage between the parties at the bride's residence, without the certificate of the marriage notice being issued. The Supreme Court having held that the marriage was invalid, went on to consider the provisions of s. 6 of Ordinance No. 8 of 1865 (which is in terms identical with s. 46) and held that the marriage was valid, although the certificate of the marriage notice had not been issued to the parties and the marriage had been solemnized at an unauthorised place.

"Now it appears to me, that the intention of the Legislature as expressed in the 6th clause was, that marriages solemnized without the particular formalities referred to in that clause should nevertheless be valid unless the omission were knowing and wilful. In the language of Lord Penzance, it was necessary to show not only that both the prisoner and Parupathi when they married knew that no certificate had been issued, and that no authority had been given to celebrate at other than the prescribed places, but that knowing those facts they nevertheless wilfully intermarried."

(*per* Burnside, C.J. at p. 124)

So, it seems to me that the plaintiff can get a declaration that the marriage is null and void, only if it is established that at the time Rev. Fr. Batepola solemnized the marriage, both parties knew that no certificate of the marriage notice had been issued, and yet knowing this fact, they nevertheless wilfully intermarried.

Notice of marriage was given and the parties decided to get married in Church. It is for the parties to obtain from the Registrar the certificate and hand same to the Minister who was to officiate at the marriage. There is not a word in their entire evidence that they obtained one. At the trial of the case, both parties admitted that there was no valid marriage under the Marriage Registration Ordinance. Rev.

Fr. Batepola states, and his evidence has been accepted by the learned trial Judge, that the parties represented to him that they were already married and that their marriage was registered. That is why no entries were made in the book kept under the Ordinance. The only conclusion I can come to is that the parties wilfully went through a marriage ceremony in Church, knowing fully well that no certificate had been issued. The plaintiff is entitled to a declaration that the marriage is null and void. The answer to issue (1) should have been "Yes".

I now come to issue No. 5.

The learned District Judge in his judgment adverted to the fact that a mass had been held, that prayers were uttered, that a ring had been put on the defendant's finger, and that candles and oil lamps were burning inside the Church. He stated that it had been proved in the case that the plaintiff and the defendant were married at a Catholic Church according to catholic customs before a catholic priest, and that there is enough evidence that the wedding took place in public and that the plaintiff and the defendant behaved as a married couple. He concludes that there has been a customary and public marriage between the parties.

Learned Counsel for the plaintiff attacked this finding. He submitted that notice of marriage had been given and that the parties intended the marriage to be solemnized under the provisions of the Ordinance and that it was not open to the defendant to prove a customary marriage ; that a marriage according to the customs, rites and ceremonies of a church does not constitute a customary marriage ; assume that there is a Roman Catholic customary marriage, the evidence in the case is insufficient to establish such a marriage ; that Rev. Fr. Batepola's evidence destroys the defendant's case that there was a customary marriage between her and the plaintiff.

I cannot agree with the first submission. Parties may give notice to the Registrar of their intention to marry, and yet later decide to solemnize their marriage according to the rites and customs of the community to which they belong, quite independently of the Ordinance. Such a customary form of marriage, if proved to have taken place, will constitute a valid marriage independent of registration.

Customary marriages are marriages contracted according to the native rites and customs. All the reported cases deal with customary marriages among the Hindus and Buddhists of Sri Lanka. Both learned Counsel have not been able to refer us to a single decided case which recognised a Roman Catholic customary marriage, nor have I been able to discover one.

Let me assume that there is a customary marriage called the Roman Catholic customary marriage. Marriages contracted according to native rites and customs must be "strictly proved" (*per* Pereira, J. in *Gunaratne v. Punchihamy*. (3)). "A customary marriage must be "proved and established". (*per* Sampayo, J. in *Sophia Hamine v. Appuhamy* (4)).

"A custom is a question of fact and must be proved by him who alleges it to exist. Similarly a person who alleges that a certain customary ceremony is essential to a valid marriage must prove that it is so."

(*per* Basnayake, J. in *Ponriammah v. Rajakulasingham* (5))

The burden was on the defendant to prove a customary marriage. The defendant's evidence is not helpful at all. All that she states is that she got married to the plaintiff at St. Anthony's Church, that Rev. Fr. Batepola officiated and explained to the parties about the gravity of the marriage. Rev. Fr. Batepola's evidence is hardly helpful. All that he states is that the marriage took place at 4 or 4.30 in the evening before the altar of the church and that the wedding took place according to the customs and the laws of the catholic church. But, this does not render it a customary marriage. The tying of a thali is an essential element in a Hindu marriage (*see, Ratnamma v. Rasiah*, (6)). A Puruwa Ceremony, where the fingers of the bride and bridegroom are tied together and water poured over them is an important customary rite in a Buddhist marriage (*see Sophia Hamine v. Appuhamy*, *supra*). If indeed there is a Roman Catholic customary marriage, there should be evidence of what are the essential requisites of such a marriage. All the evidence we have is that that evening a ceremony took place before the altar of the church, in the presence of a few relations, where a ring was put, a mass held, prayers uttered and the solemnity of the marriage was explained by the officiating priest. The church was lit by candles and oil lamps. This evidence only proves that a ceremony took place according to the rules, customs and rites of the Catholic Church, in terms of s. 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 a marriage that is celebrated according to customary rites, and has thus confused one with the other.

Moreover, the evidence given by the defendant's own witness, Rev. Fr. Batepola, destroys the case of the defendant of a customary marriage between herself and the plaintiff, for, he says that he conducted a form of religious service in accordance with the customs and rituals of the Catholic Church, and made the necessary entries in the Book kept according to the Laws of the Church, as the parties indicated to him that their marriage was already registered.

The defendant has failed to prove a customary marriage and issue No. 5, should have been answered against her as "No".

It was submitted by learned Counsel for the defendant that the evidence establishes that a marriage was solemnized by a Minister of the Catholic religion, that thereafter the parties lived together as husband and wife for two years, and that these facts give rise to the presumption that they were so living because of a valid marriage, which presumption must be rebutted by the plaintiff. This submission leads me on to consider the question whether in this case there is a marriage by habit and repute.

"According to the law of Ceylon, where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage."

(per Lord Shaw in *Dinohamy v. Balahamy* (7))

In view of the admission of parties that there was no valid marriage between them under the Marriage Registration Ordinance, the only presumption that the defendant can contend for, is a presumption in favour of a customary marriage.

"If a party seeks to establish a customary marriage by the performance of some religious ceremony and fails in that, then, the presumption is rebutted and the mere fact that the two persons subsequently lived together as husband and wife does not establish marriage."

(per Sinnatambay, J. in *Fernando v. Dabrera* (8)).

As I stated earlier, the defendant has failed to establish a customary marriage, and the presumption in favour of marriage is thus rebutted.

The appeal is allowed and the plaintiff is entitled to a declaration that the marriage between him and the defendant is null and void. There will be no costs of appeal.

MOONEMALLE, J. – I agree.

Appeal allowed
