

SOOSAI PILLAI
v.
PARPATHIPILLAI

COURT OF APPEAL.

H. A. G. DE SILVA, J. AND JAYALATH, J.

C.A. 318/81- M. C. AKKARAIPATTU 5215/A.

MARCH 15, 1985.

Customary marriage – Kalam Ceremony – Presumption of valid marriage between man and woman living together – Maintenance.

In an application for maintenance the Magistrate accepted applicant's claim that she was validly married to the defendant at a customary *Kalam* ceremony and thereafter lived together as wife and husband and of this union a child was born to her of which the defendant was the father.

Held -

- (1) The burden of proof of the ceremony of the *Kalam* form of customary marriage is on the applicant but expert evidence on the point would be necessary only if the circumstances demand it.
- (2) 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.
- (3) As to what constitutes a valid customary marriage must necessarily vary from region to region, community to community and race to race and depending on the affluence of the parties even within the same group there could be varying degrees of elaboration and embellishments in the ceremonies constituting marriage. But some minimum ritual would be necessary by way of constituting the bare essentials of a valid customary marriage. In the present case it was the ceremonial partaking of a common meal of rice and seven vegetables before the relations. It follows that this ceremony of thus bringing together the parties was a ceremony of valid marriage for no ceremony is prescribed for embarking on concubinage.

Cases referred to :

- (1) *K. Thiagarajah v. P. Karthigesu* (1966) 69 NLR 73.
- (2) *Aronegary v. Vaigalie* (1881) 2 NLR 322 (P.C.)
- (3) *S. Kandiah v. Thangamany* (1953) 55 NLR 568.
- (4) *Madappuli v. Patrick* (1952) 54 NLR 365.
- (5) *Van Breda et al v. Jacobs et al* (1921) S.A. A.D. 330.

APPEAL from the Magistrate's Court of Akkaraipattu.

P. Somatillekam for defendant-appellant.

Applicant-respondent absent and unrepresented.

Cur. adv. vult.

June 12, 1985.

H. A. G. DE SILVA, J.

The applicant-respondent filed an application in the Magistrate's Court of Kalmunai claiming maintenance for herself and her child Suthaharan from the defendant-appellant alleging that she was married to the defendant and that the child was born to her in lawful wedlock. The marriage, she averred, was a customary marriage effected by the performance of the *Kalam* ceremony in the presence of their friends and relatives. The defendant denied the marriage, and paternity. The Learned Magistrate in his judgment held that the applicant was married to the defendant and that the defendant was the father of the child

and ordered that the defendant pay to the applicant a sum of Rs. 100 per month from the date of the application and a further sum of Rs. 60 per month for the infant Suthaharan from that date. It is from this order that the defendant has appealed.

The case for the applicant briefly was that the defendant was a step-brother of her sister's husband. The defendant had expressed a desire to get married to the applicant and as such her mother had arranged the match after comparing their horoscopes. The defendant's father had no objection to the marriage though he did not attend the subsequent ceremonies. The other relations of the defendant were opposed to the marriage. On the 15th January 1977, the day after the Thai Pongal holiday, friends and relatives of the applicant and the defendant were invited for the ceremony and though the defendant's parents were not there, one of his brothers Thambimuttu Tharman was there. They had also invited amongst others the President of the Rural Development Society of the area as well as the Chief of their caste which was the dhoby caste.

The Kalam ceremony was conducted by a woman called Sinnathangam. Seven vegetables were cooked by Sinnathangam along with the rice and were mixed together and served to the couple on a brass tray or stand. The defendant had eaten three mouthfuls out of that rice and so had the applicant. The pot of plenty or fertility was kept and the ceremonial lamp was lit. The bride and bridegroom were dressed in clean clothes. After the ceremony the applicant and the defendant had lived as man and wife in the applicant's home and the defendant looked after her. They were accepted by the members of the community in which they lived as husband and wife. As a result the child in question was born to the applicant on 15th June 1978. His birth certificate P1 states that the father of the child is the defendant and in answer to the question "are the parents married" it is stated "yes, customary marriage". Five days before the birth of the child the defendant saying that he was going to thresh paddy had given the applicant Rs. 50 and left after which he did not return. The applicant had sent word to the defendant about the birth of the child, but he had demanded a dowry and jewellery and had refused to come. The defendant's brother-in-law had come to the applicant's house after the child was born and refused to register the birth. Fifteen days after the birth of the child she had complained to the Grama Sevaka that the defendant was refusing to register the birth and the Grama Sevaka sent for the defendant but the defendant did not come.

Learned Counsel for the defendant-appellant submitted that in the absence of expert evidence as to the necessary ingredients of the Kalam ceremony, the learned Magistrate was in error in holding that the evidence of the applicant and the witnesses called by her established that the applicant and the defendant participated in a valid Kalam form of customary marriage. He relied on the case of *K. Thiagarajah v. Karthigesu*, (1) where a learned Pundit gave expert evidence as to what a Kalam ceremony was and the essential ingredients which would constitute such a ceremony, but it must be borne in mind that such expert evidence was necessary in the circumstances of that case. The Court held there that –

“where the question at issue is whether a marriage was celebrated according to custom, and the evidence shows that the parties have neither cohabited for a single day nor even lived together under the same roof, there is no presumption in favour of their marriage. In such a case, proof of marriage depends solely on evidence to the effect that a valid ceremony of marriage was actually performed”.

In *Aronegary v. Vaigalie et al* (2) the Privy Council held that –

“According to Roman-Dutch Law there is a presumption in favour of marriage rather than of concubinage. According to the Law of Ceylon, as in England, 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. Where it is proved that they had gone through a form of marriage and thereby shown an intention to be married, those who claimed by virtue of marriage were not bound to prove that all the necessary ceremonies had been performed”.

In the instant case the applicant has sought to lead evidence of a Kalam ceremony performed by one Sinnathangam in which both the applicant and the defendant participated. This, she has done by giving evidence herself and through the evidence of her sister Sellam Thangapillai who is married to the defendant's brother. Sellam Thangapillai and Sinnathangam had performed the Kalam ceremony and had together cooked the rice and the seven vegetables used for the ceremony. Sinnathangam, who was not called as a witness, and in

regard to whose absence the defendant's Counsel had commented on, had gone to Vaharai. In addition there was also the evidence of Subramaniam Karunathipillai, the President of the Local Rural Development Society who had been invited to the ceremony but had gone there earlier, seen the arrangements made for the Kalam ceremony, and had blessed the couple. He had not stayed on for the ceremony as he was of the Vellala caste while the applicant and the defendant were of the dhoby caste. The cooking of the curries was in progress and about six or seven people had collected to witness the ceremony. Under cross-examination this witness was asked about Kalam ceremonies he had witnessed in the area and he spoke to what he had seen on those occasions. The ceremonies he had witnessed did not seem to be very different from the ceremony that took place at the applicant's house as spoken to by the applicant and her sister. In addition this witness who was a neighbour of the applicant spoke of the applicant and the defendant living together as man and wife for a period of about six months following the Kalam ceremony. The Grama Sevaka of that area who gave evidence after the applicant also speaks of the applicant and the defendant living and going about together as man and wife. We therefore find in this case evidence of a Kalam ceremony coupled with evidence of life together under the same roof. In these circumstances as stated in *Aronegary v. Vaigalie* (supra) the presumption is that they were living together in consequence of a valid marriage. It is then not necessary to prove that all the ingredients of the Kalam ceremony have been strictly adhered to.

The learned Magistrate in his order states –

"As to what constitutes a valid customary marriage must necessarily vary from region to region, community to community, and race to race. Suffice it to say that if any given community regard some minimum ritual as adequate or necessary to constitute a valid marriage then conformity to the prescribed minimum criteria could result in that particular community regarding the union between the parties as one of lawful wedlock. It is natural, of course, within the same community for there to be various degrees of elaboration in the ceremonial attendant to marriage – or rather wedding – depending upon the wealth and standing of parties but in all marriages within that community there are bare essentials which provide the sine qua non for a lawful marriage.

In the case of the particular community to which the parties belong the ritual that establishes the marriage between man and woman is the ceremonial partaking by the parties of a common meal of rice and seven vegetables before their relations. If in fact that ceremony is performed then a valid marriage will be deemed by law to bind the parties whether or not in addition thereto other embellishments normally associated with weddings such as loud speakers and music, the lavish entertainment of friends and relatives, distribution of invitation cards, the handing over of a Kooray saree, the tying of a Thali, etc., takes place or not".

I am in total agreement with what the learned Magistrate has stated.

He has quite correctly stated that the burden lay on the applicant to prove that such a ceremony did take place and he goes on to hold that –

"In the circumstance of this case no great purpose would serve the respondent by quibbling about whether the ceremonies that took place were adequate enough to constitute a valid marriage for the reason that the respondent's defence was a complete alibi. It does not lie, in his mouth, therefore to question the details of the marriage ceremony. Moreover once it is established that some ceremony took place bringing the parties together it must surely follow that the ceremony was one of marriage, for no ceremony is prescribed for embarking upon concubinage".

In *S. Kandiah v. Thangamany* (3) it was held that –

"the presumption of marriage by habit and repute cannot prevail where there is evidence that parties had gone through a marriage ceremony and the solemnization was invalid for the reason that one of the parties was at the time of the ceremony lawfully married. Cohabitation of 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."

At page 570, the judgment states –

"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 relatives can form the basis of a deduction that there was a lawful marriage between the parties"

In the instant case there is the evidence of the Kalam ceremony with evidence of the parties living together as man and wife. In these circumstances in addition to the evidence of a customary marriage there is the evidence which raises the presumption that an antecedent marriage by custom had taken place.

Learned Counsel for the defendant-appellant also cited the case of *Madappuli v. Patrick* (4) where at page 368 Gratiaen, J. states –

"Soloman J. A. in *Van Breda et al v. Jacobs et al* (5) said that under Roman-Dutch Law which does not differ substantially from the English Law on the subject :-

- (1) the Court must be satisfied beyond any reasonable doubt that the alleged custom does in fact exist ;
- (2) a custom to be valid must be an ancient or long established one ;
- (3) it must be reasonable ;
- (4) it must have been uniformly observed, in the sense that the evidence must not vary in regard to the relative circumstances of the act in regard to time, thing and place in other words, the custom must be proved to be certain".

There is no dispute that in the community to which the applicant and the defendant belong, the Kalam ceremony is a form of customary marriage. The witnesses who gave evidence for the applicant have been cross-examined on this basis and questions have been directed to ascertain the different ingredients which constitute the Kalam ceremony and to ascertain whether all these ingredients were present in the ceremony spoken to by the applicant and her witnesses.

As was stated earlier the defendant's case was a total denial of participating in any ceremony whatsoever as, on the day he was alleged to have so participated, he was said to have been spraying his fields in a different place. This alibi has been rejected by the learned Magistrate.

It was also proved at the trial that the defendant though belonging to the dhoby caste as the applicant did, was a baptized Catholic while the applicant was a Hindu and as such the Kalam ceremony could not

have taken place between two persons belonging to different faiths. No questions were directed on this either to the applicant, her sister Sellam Thangapillai or to Subramaniam Karanathapillai the President of the Local Rural Development Society, all of whom spoke about the Kalam ceremony. Further the learned trial Judge has held that though the defendant was a baptized Catholic he did not appear to have been a practising one for when asked by Court to recite the most basic Catholic catechism — the Lord's prayer — he was unable to go beyond the first few words.

In my view the learned Magistrate has in a comprehensive and well considered judgment held that the applicant and the defendant had gone through a form of customary marriage and lived as husband and wife thereafter and that the child in respect of whom maintenance was being claimed was the result of the union between the parties. I do not think any adequate reason has been urged before us to vary the learned Magistrate's finding on fact and on the law. I affirm the judgment of the learned Magistrate and dismiss this appeal. There will be no costs.

JAYALATH, J. — I agree.

Appeal dismissed.
