

PODINONA
v.
HERATHHAMY AND OTHERS

COURT OF APPEAL.

H. A. G. DE SILVA, J. AND T. D. G. DE ALWIS, J.

C. A. No. 253/79.

D. C. ANURADHAPURA No. 7227.

FEBRUARY 21, 1985.

Action for declaration of title – Revocation of deed of transfer by original owner declaring it was a gift – Kandyan Law – Kandyan Marriage Ordinance No. 13 of 1859 – S. 5, 6, 7, 8 and 39 of Kandyan Marriage Ordinance No. 3 of 1870 – Kandyan Marriages (Removal of Doubts) Ordinance No. 14 of 1909 – Kandyan Marriage and Divorce Act, No. 44 of 1952.

A deed of transfer is not revocable.

After 1859 registration is of the essence of a valid Kandyan marriage and customary Kandyan marriages ceased to be valid. The marriage here being one said to have been contracted some time prior to 1937, the entry in the Register of Marriages is in terms of s. 39 of Ordinance No. 3 of 1870, the best evidence of the marriage. The expression 'best evidence' as used in the said s. 39 refers to the registration entry in the Register of Marriages and excludes all evidence of an inferior character.

Cases referred to :

- (1) *Mampitiya v. Wegodapela* (1922) 24 NLR 129.
- (2) *Seneviratna v. Halangoda* (1921) 22 NLR 472.
- (3) *Dinohamy v. Balahamy* (1927) 29 NLR 114 (P. C.)
- (4) *Kandiah v. Thangamany* (1953) 55 NLR 568.
- (5) *Fernando v. Dabrera* (1965) 65 NLR 282.

APPEAL from the District Court of Anuradhapura.

S. C. B. *Walgampaya* for appellant.

Respondents absent and unrepresented.

Cur. adv. vult.

May 15, 1985.

T. D. G. DE ALWIS, J.

The plaintiff-appellant instituted this action for a declaration of title to the six allotments of land described in the schedule to the plaint, for ejection of the defendant respondents therefrom and for damages. The plaint averred that one P. A. Muthumenika alias Beatrice Ratnayake was the original owner of the lands in dispute. She married Punchirilage Herathhamy alias Vincent Herathhamy. The two of them were persons to whom the Kandyan Law was applicable, and they had no children. Beatrice Ratnayake by deed No. 1227 dated 8.12.1937 produced marked P 1 transferred these lands to Vincent Herathhamy, reserving a life interest in the same to herself. Thereafter Vincent Herathhamy died on 11.12.1942, leaving as his only heir his widow Beatrice Ratnayake, whereby she once again became the owner of these lands. Further Beatrice Ratnayake declaring that the deed of transfer P 1 was a deed of gift purported by deed of revocation No. 185 dated 6.11.1954 marked P 3 to revoke the earlier deed No. 1227, P 1. Thereafter by deed No. 1277 dated 14.7.1955 marked P 4 Beatrice Ratnayake transferred these lands to Wanniamige Seneviratne also subject to her life interest. Wanniamige Seneviratne by deed No. 3543 dated 24.4.1962 marked P 5 transferred these lands to the plaintiff. Beatrice Ratnayake died on 26.1.1965.

The defendants have admitted that Beatrice Ratnayake was the original owner of these lands, and that she and Vincent Herathhamy were persons subject to the Kandyan Law, but they however denied that Beatrice Ratnayake and Vincent Herathhamy were legally married. The 1st defendant stated that she was the sister of Vincent Herathhamy, and his only heir. The defendants have also pleaded that deed P 1 was a deed of transfer, and hence was not revocable.

After trial the learned District Judge held that the plaintiff had failed to prove a valid marriage between Beatrice Ratnayake and Vincent Herathhamy, and also that deed P1 being a deed of transfer was not revocable. As such he has held that the 1st defendant is the lawful owner of the property in dispute and has dismissed the plaintiff's action. From this judgment the plaintiff has appealed.

At the trial the plaintiff claimed these lands on the footing that after Vincent Herathhamy's death the properties once again devolved on Beatrice Ratnayake she being his widow and they having no children, and also on the footing that the property devolved on her by virtue of the deed of revocation P 5. The latter position was however not pressed in appeal. The learned District Judge has held that deed P 1 was an outright transfer and hence not revocable. We agree with his findings on that matter.

No marriage certificate was produced to prove that Beatrice Ratnayake and Vincent Herathhamy were legally married. However the plaintiff's case was that both Beatrice Ratnayake and Vincent Herathhamy were brought up by one Mrs. Carney in the Roman Catholic faith, and that she got them married at the Roman Catholic Church at Thalawa. The only evidence regarding this marriage at the Thalawa Church is that of the plaintiff herself. She was 75 years old at the time she gave evidence in 1976. She is a cousin of Beatrice Ratnayake, and she states that she attended the wedding of Beatrice Ratnayake and Vincent Herathhamy at the Thalawa Roman Catholic Church. She does not state the date of the marriage, but it should be sometime prior to 1937 when Beatrice Ratnayake executed deed P 1. She does not however give any details of this marriage ceremony, nor does she state whether a marriage register was signed. After Vincent Herathhamy died Beatrice Ratnayake lived as the mistress of Wanniamige Seneviratne for sometime. He too states that Beatrice Ratnayake was married to Vincent Herathhamy, but gives no details of

the marriage. Another witness Dingiri Banda also states that Beatrice Ratnayake was married to Vincent Herathhamy, but apart from saying that they were married he states nothing more. The other items of evidence regarding this marriage is the fact that in deeds P 1 and P 3 Beatrice Ratnayake herself refers to Vincent Herathhamy as her husband.

It was submitted by learned counsel for the plaintiff-appellant that though this marriage has not been proved by the production of a marriage certificate, nevertheless the items of evidence enumerated above were sufficient to establish that they were regarded as husband and wife, and hence a presumption that they were living as husband and wife in pursuance of a valid marriage arises.

Being persons subject to the Kandyan Law, in matters regarding marriage, Beatrice Ratnayake and Vincent Herathhamy would have been governed by the Kandyan Marriage Ordinance No. 3 of 1870, which was in force till it was repealed by the Kandyan Marriage and Divorce Act, No. 44 of 1952. The Kandyan Marriage Ordinance No. 3 of 1870 refers to marriages before Ordinance No. 13 of 1859, and marriage since Ordinance No. 13 of 1859, Section 5 of Ordinance No. 3 of 1870 enacts that –

“All marriages contracted in any district before Ordinance No. 13 of 1859 came into operation in that district shall be deemed to have been valid, if they were contracted in accordance with the laws, institutions, and customs, in force among the Kandyans at the time of the contract.”

Sections 6 and 7 of Ordinance No. 3 of 1870 makes provision enabling such customary marriages as are set out in section 5 thereof to be registered. Section 8 of Ordinance No. 3 of 1870 enacts that –

“Except as is hereafter provided, no marriage contracted since the Ordinance No. 13 of 1859 came into operation, or to be hereinafter contracted, shall be valid unless registered in manner and form as is hereinafter provided in the presence of any Registrar for the District where such marriage is contracted, and at the appointed office of the Registrar, or at any other place as the Provincial or Assistant Provincial Registrar shall, in any special case, direct or appoint.”

The enactment of this section created some doubts regarding the validity of marriages of Kandyan which had been registered under the Marriage Registration Ordinance. Hence the Kandyan Marriages (Removal of Doubts) Ordinance No. 14 of 1909 was enacted which confirmed the validity of marriages between Kandyan registered under the Marriage Registration Ordinance. This feature regarding Kandyan marriages still subsist under the present law, namely the Kandyan Marriage and Divorce Act, No. 44 of 1954, where it is enacted by section 3 thereof that a marriage between persons subject to Kandyan law shall be solemnised and registered under this Act or under the Marriage Registration Ordinance, and any such marriage which is not so solemnised and registered shall be invalid. Thus after 1859 registration is of the essence of a valid Kandyan marriage, and customary Kandyan marriages ceased to be valid.

Thus it was essential for the plaintiff, if he were to succeed, to have proved that a marriage between Beatrice Ratnayake and Vincent Herathhamy had been registered as required by Ordinance No. 3 of 1870. Section 36 of that Ordinance enacts that –

“The entry as aforesaid in the register of marriages shall be the best evidence of the marriage contracted and of the other facts stated therein. If it does not appear in the register whether the marriage was contracted in binna or diga, such marriage shall be presumed to have been contracted in diga, until the contrary is proved.”

In the case of *Mampitiya v. Wegodapela* (1) referring to section 36 of Ordinance No. 3 of 1870 Bertram, C. J. stated as follows :

“Section 39 of the Amended Kandyan Marriage Ordinance (No. 3 of 1870) enacts that the entry in the register shall be the best evidence of the marriage contracted and of the other facts stated therein. The expression ‘best evidence’ is used in the sense which belongs to it in the English Law. It is the essence of ‘best evidence’ according to English Law that it excludes all evidence of an inferior character.”

This view was followed by De Sampayo, J. in the case of *Seneviratna v. Halangoda* (2). He stated :

"The question whether the character of a Kandyan marriage can be proved by oral evidence to be other than that stated in the register was recently considered by the Chief Justice and Ennis, J. in *Mampitiya v. Wegodapela*. The learned Judges have held that in section 39 of the Kandyan Marriage Ordinance, No. 3 of 1870, which declares that the entry in the registers shall be the best evidence of the marriage and the other facts stated therein the expression 'best evidence' is used in the English Law sense, and excludes all evidence of an inferior character. I certainly accept this ruling with regard to the Kandyan Marriage Ordinance because under section 11 of the Ordinance registration is the only valid form of marriage for Kandyans and further section 39 itself indicates the exceptional case in which oral evidence may be admitted."

De Sampayo, J. went on to state that he did not think that this interpretation can be extended to other enactments such as the General Marriage Ordinance, section 39 (1) where the same expression 'best evidence' occurs presumably because under the General Marriage Ordinance registration is not essential for the validity of a marriage.

In any event the plaintiff in this case has failed to adduce any reason for his failure to produce the 'best evidence' namely the register. Nor has he produced any evidence to show that the register is lost or destroyed, or that the Parish Priest of the Thalawa Church was empowered by the Provincial Registrar to register marriages under the Kandyan Marriage Ordinance. Nor is there evidence that a register was signed at all at the Thalawa Church. In a Church two types of marriages can be performed, a civil law marriage and a marriage under the Canon Law. There is nothing to show that the marriage which according to the plaintiff was solemnised in the church was anything more than a marriage under the Canon Law.

The other matter raised by learned counsel is that the fact that Beatrice Ratnayake and Vincent Herathhamy lived as man and woman and were accepted as such created strong evidence of a valid marriage. The law in this regard was stated by Lord Shaw, in the Privy Council case of *Dinehamy v. Balahamy* (3) as follows :

"It is not disputed that according to the Roman-Dutch Law there is a presumption of marriage rather than of concubinage ; that 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."

The facts in that case were that the parties lived together in the same house for twenty years, and eight children were born to them. The husband during his life recognised, by affectionate provisions, his wife and children. For a long course of years they were recognised as married citizens, and family functions were conducted on the footing that they were husband and wife. This evidence of habit and repute was considered strong enough to presume that they were living as man and wife in consequence of a valid marriage. Where these parties were concerned some sort of customary marriage had been gone through. The parties married with the procession, the giving of gifts, and other ceremonials familiar to the law of Ceylon. So that it appears that the valid marriage presumed in this case was a customary Sinhalese marriage which is a valid marriage in Ceylon and which does not require registration for its validity. This type of marriage is no longer recognised by the law applicable to Kandyan.

In the case of *Kandiah v. Thangamany* (4) Nagalingam, A. C. J. stated as follows :

"Under our law however, some antecedent public ceremony, public in the sense of a ceremony in the presence of relatives, friends, and third parties had to take place before the mere

circumstances 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."

In the case of *Fernando v. Dabrera* (5) Sinnatamby, J. stated as follows :

"The learned District Judge took the view that, to establish a marriage by habit and repute, there must be satisfactory evidence of some customary rites followed by evidence of habit and repute. In our view he misdirected himself on this point. If one of the parties is alive, then of course, it would be necessary to establish the existence of marriage ceremonies, for, a party to the marriage must necessarily be aware of it, and be able to give evidence in regard to it ; but where neither of the parties is alive, and the marriage itself was contracted at a very early date, evidence of customary rites or religious rites would be difficult, if not impossible, to obtain, and is, therefore, not insisted on. It is for that reason that the law recognises proof of a marriage by habit and repute."

From the above dicta it would appear that the marriage recognised as valid by habit and repute is a customary marriage, and evidence of customary or religious rites could be dispensed with only when it is not possible due to circumstances such as lapse of time to produce such evidence. Such a marriage is inappropriate to a Kandyan marriage as the law no longer recognises a customary Kandyan marriage.

For the above reasons it is our view that the learned District Judge was right when he held that a valid marriage between Beatrice Ratnayake and Vincent Herathhamy had not been established. We therefore affirm the judgment of the learned District Judge, and dismiss the appeal, but without costs.

H. A. G. DE SILVA, J. – I agree.

Appeal dismissed.