1941 *Present :* **de Kretser and Wijeyewardene JJ.**

SELVARATNAM *et al. v.* ANANDAVELU.

45—D. C. (Inty.) Jaffna, 8/4 P.

Thesawalamai—*Customary marriage of minor—Consent of father—Marriage without proper rites and ceremonies—Validity—Ordinance No. 19 of 1907, s. 21 (Cap. 95).*

A customary Hindu marriage contracted without the rites and ceremonies usually performed at such marriages is not valid.

Per DE KRETSER J.—A customary marriage, contracted according to Hindu rites, of a minor governed by the *Thesawalamai* is not valid without the consent of the father.

Per WIJEYEWARDENE J.—*Quaere* whether the want of consent could invalidate such a marriage especially where the marriage has been consummated.

APPEAL from an order of the District Judge of Jaffna.

The first respondent gave notice of his marriage with the third respondent. The second respondent thereupon filed a caveat objecting to the proposed marriage, alleging that the first respondent had married her according to Hindu rites and ceremonies. The District Judge after inquiry held that first respondent had been married to the second respondent. The first respondent appealed against the order.

H. V. Perera, K.C. (with him *L. A. Rajapakse* and *E. C. de Zoysa*), for first respondent, appellant.—The customary marriage sought to be proved in this case is not valid for two reasons, viz. :—(1) There was not sufficient ceremony; (2) there was no binding contract between the parties.

There was nothing real in the nature of a marriage ceremony, and whatever ceremonies were gone through were not sufficient to create a valid marriage. There was no kurukkal present, no dhoby, no tying of a thali. There was no music. It was only a mere pretence of marriage. Marriage as a social event requires a certain degree of publicity, especially in the case of a customary marriage. In the present case the marriage took place behind closed doors. Ramasamy, the father of the bridegroom, was not present. The presence of close relatives is essential in a customary marriage of even the poorest—*Muttukrishna on Thesawalamai, p. 190.*

It cannot be said that Ramasamy consented to his son's marriage. The son was 19 years old and was a minor. This case can be decided on the sole ground that the father did not consent to the marriage. There was no binding contract between the parties. Section 21 of the Marriage Ordinance (Cap. 95) is applicable. See *Thiagaraja v. Kurukkal.*[1]

N. Nadarajah, for second respondent.—The marriage in this case cannot be challenged as invalid for want of ceremony. See *Sastry Valaider Aronegary et al. v. Sembecutty Vaigalie et al.*[2]; *The King v. Perumal*[3]; *Muttukrishna's Thesawalamai, pp. 185-7.*

The consent of the parent was not necessary. In *Thiagaraja v. Kurukkal (supra)* certain sections of the Marriage Ordinance (Cap. 95) were not fully considered. Sections 14, 15 and 17 deal with marriages which are expressly declared to be invalid. In none of those sections is consent of parent, in the case of a minor, made necessary. Nor is absence of consent of parent a ground for dissolution of marriage under section 18 or section 42. Under section 43 the non-fulfilment of the requirement of consent which section 21 speaks of would only involve a penalty and would not render the marriage invalid. See also section 39. Sections 21 and 43 should be read together. Further, section 21 relates only to registered marriages. For a customary marriage under Hindu law the consent of parent is not necessary, for age is not a factor for consideration See *Gour's Hindu Code (1919), p. 231 ; Simpson's Law of Infants, pp. 93-4 ; Mulla's Hindu Law (1936), pp. 500-1 ; Mithra's Guardian and Ward Act, p. 113 ; The King v. The Inhabitants of Birmingham*[4]; *Ram Harakh v. Jagar Nath et al.*[5]; *202, P. C. Point Pedro, 3,994*[6]. Under the Marriage Ordinance, the marriage is good provided that the girl is not under 12 and the boy is not under 16.

H. V. Perera, K.C., in reply.—We are not concerned in this case with Hindu law in its original form. We are concerned really with *Thesawalamai* which is applicable both to Hindus and non-Hindus. Even in a Hindu marriage, the father's approval is necessary, not only in the case of a girl but also of a boy—*Gour's Hindu Code, pp. 235, 226, 227.* Under the *Thesawalamai* it has already been shown that the marriage was invalid

[1] *(1923) 25 N. L. R. 89.*
[2] *(1881) 2 N. L. R. 322.*
[3] *(1911) 14 N. L. R. 496.*
[4] *(1928) 8 B. & Cr. 29 ; 108 Eng. Rep. 954.*
[5] *A. I. R. 1932 All. 5.*
[6] *S. C. Minutes of April 5, 1936.*

for want of sufficient ceremony and the absence of close relatives, particularly the father, at the wedding. The ceremony in this case was utterly lacking in reality.

When a minor marries the consent of parent or guardian is necessary. This rule is of universal application in Ceylon. A minor desiring to marry contrary to the wishes of his parent has always to obtain permission from the District Court and cannot circumvent the law by resorting to any customary marriage. The requirement of consent under section 21 of Cap. 95 will be overlooked under section 39 only in the case of a marriage registered under the Ordinance. If *Thesawalamai* is silent as to consent, the Roman-Dutch law would apply. For the Roman-Dutch law on the point see *Pereira's Laws of Ceylon (1913), pp. 218-9; Voet 23.2.9; Stoney's Translation of Voet 23.2, p.* iv., where reference is made to *Johnson v. McIntyre ; Lee's Introduction to Roman-Dutch Law* (*2nd ed.*), *p. 57, et seq.*

Cur. adv. vult.

August 26, 1941. DE KRETSER J.—

Anandavelu, son of Ramasamy, aged 19, the first respondent in this case, gave notice of marriage with Rasaratnam, the third respondent. Thereupon Selvaratnam, the second respondent, filed a caveat objecting to the proposed marriage, alleging that Anandavelu had married her according to Hindu rites and customs in March, 1940. The evidence disclosed that the date of the alleged marriage was March 25. The Registrar reported the matter to the District Court as required by the Ordinance and the District Judge after a lengthy inquiry has held that Anandavelu had been married to Selvaratnam, and Anandavelu appeals against that order.

It seems to have been assumed at the inquiry that if Anandavelu's father had not given his consent the marriage would not be valid. Selvaratnam had alleged that Anandavelu's father did consent but fearing his brother Doraisamy, who disapproved of the union, had absented himself on March 25 from his home after arranging for the marriage, which took place in his absence. The question whether Ramasamy had consented was of primary importance and the trial Judge realized this, but he thought the best way of approaching the subject would be to do so from a distance and as a result he made such a long detour that in the end he has not dealt directly with this question. He believed the evidence of Selvaratnam and her witnesses and therefore one may infer that he has held that Ramasamy did consent. He also held that a valid marriage had been contracted.

It is difficult to follow the learned Judge's reasoning in many parts of his judgment and Counsel for the respondent did not attempt to support any part of it except the conclusion he arrived at. It is clear from the evidence that Ramasamy did not consent to his son's marrying Selvaratnam. The story related by Selvaratnam and her relatives would be considered preposterous but for the fact that the Judge with his experience of Jaffna thinks it a thing that may have happened. Apart from the oral evidence there is the evidence given by the respondent's witnesses regarding Ramasamy's conduct on hearing of the marriage and there is

documentary evidence—one of the documents having been written in Selvaratnam's house on the night of the alleged marriage—which proves that Ramasamy had not given his consent.

Saravanamuttu, Selvaratnam's uncle, who took a leading part in connection with the marriage, stated that Ramasamy first consented but later withdrew his consent, and then tried to make out that Ramasamy had changed his mind again. It appears clear from the evidence that when Selvaratnam attained puberty in November, 1939, Saravanamuttu and his brother Kitnasamy, father of Selvaratnam, made up their minds to bring about a marriage between Anandavelu and Selvaratnam. Kitnasamy was not possessed of property; he was Ramasamy's tenant and neighbour. Saravanamuttu lived next door to Ramasamy and had married Ramasamy's cousin and discarded her. Ramasamy was a man of some means; Anandavelu was employed in his shop. It is conceivable that the young couple may have been attracted to each other but there is not the slightest evidence of this. One can understand that Saravanamuttu and his brother would consider the match a very good one, but no reason has been given as to why Ramasamy should not have sought a better partner for his son. There is evidence that he did seek a better match, for it is regarding that union that notice of marriage was given. There is also evidence that Selvaratnam's mother had contemplated marrying her daughter to her brother's son, and that she was so upset by what took place on the night of March 25, that she left her husband Kitnasmy between that night and March 30, on which date the letter 2 R 3 was written.

Selvaratnam's case is that the marriage was arranged only seven or eight days before. Saravanamuttu's evidence is that on the morning of the 12th (by which is meant, apparently, the 12th day of *Panguni* or March 25), Ramasamy had informed him that his brother Doraisamy was not in favour of the marriage and that he saw Doraisamy only that night. Kitnasamy states that his brother said: "I hear that there is another marriage proposal, therefore this must take place. All right, we will see to it". The time and place of this remark are not clear. It at least establishes that at the time of the alleged arrangement another marriage proposal was in the air. Kitnasamy says that it was on the *11th* that Ramasamy told him of Doraisamy and his opposition, and that he had informed his brother that very night. Selvaratnam herself says that she heard of the marriage only that morning, and that seven or eight days before she understood from her parents' conversation that Doraisamy was opposed to the marriage.

There can be little doubt that, having heard that a marriage was being arranged for Anandavelu, Saravanamuttu and Kitnasamy decided on March 25 to achieve their object as quickly as possible. It so happened that Ramasamy did not return home that evening and it was only after his absence was discovered that they at once took the opportunity to carry out their plan. Had the wedding been planned even that morning the arrangements would have been otherwise and the girl's mother would scarcely have been taken so much by surprise. What is more, Selvaratnam says that it was only after Anandavelu was brought to the house that she was asked to get ready for her marriage. It would seem that

Anandavelu was inveigled into the house during his father's absence and then thè alleged marriage was rushed through. The account of the marriage reads more like a farce then a reality. There was no priest present, only three or four relatives, no neighbours, nobody on the bridegroom's part, not even a friend of his, no music, and—closed doors!

It is necessary to realize that even in the case of minors there is a contract, and a contract presupposes agreement between two persons who are willing to enter into the contract. The parents give their consent and so implement what was wanting in discretion on the part of the minors. Assuming that Selvaratnam, who had very little voice in the matter, was a consenting party and that Anandavelu was a free agent (which is a more violent assumption) and also a consenting party, the question arises whether any marriage which took place that night was invalid by reason of Ramasamy's consent being wanting. Counsel for the respondent did not argue that Ramasamy's consent had in fact been given but he argued that it was unnecessary. Relying on certain sections of the Marriage Ordinance he argued that there was no section which said that a marriage without consent was void but on the other hand section 39 seemed to imply that it would be valid. Relying on *Gour's Hindu Code (page 231)* ; *Mulla's Hindu Law (8th ed., pp. 500-501)* ; *A. I. R. 1932 All., p. 5,* he argued that under the Hindu law consent was not necessary. He further argued that if marriage under the Ordinance did not stipulate parental consent as a *sine qua non* it could not be possible that our law intended that customary marriages should be on a different footing, more especially in view of the Hindu law.

In my opinion Mr. Perera was quite right when he argued that we were not concerned with the Hindu law except in so far as it may through light on the marriage ceremonies, but he went on to point out by reference to *Gour (pp. 226, 227, 235)*, that under the Hindu system the marriage was arranged by the parents, the contract was made by them and was implemented by the children, one of the inevitable concomitants of the ceremonial being the presence of the relatives and friends of the two contracting parties. They took a vital interest in the marriage and, as Article 12 of the *Thesawalamai* indicates, they took the place of deceased parents in seeing that the marriage was a suitable one, that suitable provision was made, and that the ceremonies were properly carried out. Mutukistna in his book on the *Thesawalamai* gives the different ceremonies and the persons who would ordinarily be present at a wedding in Jaffna. I think it is impossible to say that the Hindu law did not require the consent of the natural guardians of minors. It must be remembered, however, that the Hindu law fixed the age of discretion at 16 and that age was left undisturbed by the Indian Act relating to majority. In our law the age of majority is fixed at 21, except in special cases.

As I said before, in the Court below no contention was raised that consent was unnecessary. So much did they consider consent necessary that they invented the story of Ramasamy really consenting though he pretended not to. The trial Judge says : " Almost every man in this district where early marriages are the rule knows that the father's consent is necessary ".

Mr. Perera urged that, since the Hindu law did not apply, if the Ordinance did not apply we were thrown back on the Roman-Dutch law. Voet clearly states that the marriage of a minor without the consent of his parents was of no effect. (*Bk. 23, tit. 2, s. 9.*) Marriage had its own peculiar rules. Although the contract was one which the law did not recognize, public policy indicated that when a certain state existed it should be regularized as often as and whenever possible. Lee in his *Roman-Dutch Law* (*3rd ed., p. 59*) infers that the contract is voidable and not void. I think it would be better to describe it as one which the law did not recognize but would not go out of its way to upset. Accordingly if the parents subsequently gave their consent the marriage was recognized as valid *ab initio*. We have the same "referring back" of the marriage when children born before marriage are legitimatized by the subsequent marriage of their parents. So also might the minors ratify the marriage when they came of age. The Dutch jurists were dealing rather with cases of elopement and clandestine marriage than with circumstances such as we are dealing with in the present case. Naturally the young couple would not invoke the assistance of the Court and the Court would therefore act only if an aggrieved parent appealed to it. Then the Court could not help giving the law its full effect and would be forced to declare the marriage void. (*Lee p. 59 ; Nathan, vol. I., p. 225 ; Voet, Bk. 23, t. 2.*)

It is of no particular interest to deal with the *Edict of Charles V.*, an echo of which we have in section 43 of our Ordinance. The position then under the common law was that the Court could not say that a marriage without consent was valid. Nathan supports the view I have just stated (Vol. I., p. 225). So rigorous was the law that the children were regarded as illegitimate.

The English law is on much the same lines, based as it is, in this department, on the Civil law. In the case of *The King v. The Inhabitants of Birmingham*[1] which was decided in 1828, Lord Tenterden C.J. held that the marriage of a minor whose father did not consent to the marriage was nevertheless valid, the section requiring consent being treated as directory only. What had happened was this: an earlier statute made such a marriage void; a later statute repealed the section making the marriage void, and one of the sections rendered valid marriages which had been solemnized under the earlier statute without consent. The new statute did require consent unless there was no person authorised to give consent. Another section declared—"If any valid marriage solemnized by licence shall be procured by a party to such marriage to be solemnized between persons, one or both of whom shall be under age, by means of falsely swearing to any matter to which such party is required personally to depose", *not* that the marriage shall be void but that all the property accruing from the marriage shall be forfeited for the benefit of the innocent party or the issue of such marriage. From these facts it was inferred that the marriage was valid.

It will be seen that while our Ordinance contains very similar provisions there are also differences. It seems to me that we had in mind the provisions of the Roman-Dutch law. Section 39 of our Ordinance does not say that a marriage under the Ordinance without consent is valid. What

[1] *(108) English Reports, K. B., 954.*

it does is it shuts out evidence regarding certain defects, one of them being the absence of consent. It adopts, in other words, the policy of the Roman-Dutch law and authorises a Court to shut its eyes to the absence of consent in the case of marriages registered under the Ordinance. Under the Roman-Dutch law, it will be remembered, the Court was obliged to give effect to the law and to pronounce the marriage void, on application being made to it. In Ceylon the Court is not obliged to do so in the case of marriages under the Ordinance. Section 21 which requires consent is of general application and therefore applies to marriages according to custom. The position then is that relief has been given in the case of marriages under the Ordinance but not in the case of marriages outside it.

The history of local legislation is interesting but does not, in my opinion, affect the question. More than once the Legislature tried to enforce registration and much confusion has been caused by the requirement not being insisted on. Ordinance No. 13 of 1863 impliedly recognized marriage without registration but it very emphatically declared that a marriage without consent was " utterly void " unless it had been authorised by a District Judge. Section 27 enacted that no evidence of the want of consent should be admitted " after any marriage shall have been contracted ". This was an enactment of general application and would apply to a Hindu marriage. Section 40 of Ordinance No. 2 of 1895 confined the scope of the prohibition to marriages solemnized under the Ordinance. The change is noticeable. It was intended probably to give effect to the mind of the Legislature when it enacted section 27 of Ordinance No. 13 of 1863. Ordinance No. 2 of 1895 had insisted on registration but the section requiring it was repealed in 1896. Then came the present Ordinance. The Legislature therefore had before it the fact that registration was not essential. With this knowledge it enacted section 39 and it gave relief only in cases of marriage under the Ordinance. The Court is now empowered to shut its eyes to the fact that an element is wanting which the Ordinance expressly says is " required for the said marriage ". Why should there be this difference ? It seems to me that the Ordinance provides for a number of safeguards and that the cases which will escape the precautions so taken are so few that it was considered better to recognize what had taken place irregularly rather than impair the value of the marriage state or affect the legitimacy of the children.

But the law never entirely condoned the irregularity, for section 43 provided certain forfeitures to be imposed, on application being made to a Court either by the person whose consent was required or by the Attorney-General. The conferring of this power on the Attorney-General is significant. If no such application were made it would be because of acquiescence and ratification could be assumed. If a marriage without consent were valid, then it does not seem fair or proper to impose a forfeiture of rights which would ordinarily accrue from the marriage. Where the provisions of the Ordinance have been flagrantly flouted section 42 declared such marriage null and void. Want of consent was not so drastically treated; and when one examines the various safeguards and penalties provided it will be seen why it was not put in the same category as the cases mentioned in section 42.

Section 21 provided for consent being obtained from the District Judge when it was unreasonably withheld. This section only emphasises the necessity for obtaining consent and, as Mr. Perera rightly stated, the general opinion is that consent must first be obtained. If consent were not required in the case of customary marriages the most awkward consequences would ensue and many of the provisions of the Ordinance would in fact be unnecessary. Any youthful couple, with the assistance of their friends, relatives, and/or priests, would only have to go through a form of marriage according to custom and thereby avoid the necessity of going before a District Court and escape the forfeiture imposed by section 43.

In my opinion the order of the District Judge must be set aside. As Selvaratnam is a minor and her father is not a party to the proceedings and cannot be condemned in costs, there will be no order for costs. The Registrar will issue his certificate.

WIJEYEWARDENE J.—I have had the advantage of perusing the judgment of my brother and I agree that this appeal should be allowed without costs.

The Additional District Judge has inferred from the evidence that the first respondent's father consented to the alleged marriage between the first and the second respondents. I think that such an inference cannot be drawn without taking an unreal view of the conduct of the various persons interested in the marriage. Moreover the evidence of the second respondent herself shows that, in this case, there has been a marked absence of most of the rites and ceremonies usually performed at Hindu marriages in Ceylon. The thali was not tied, a priest was not present and neither a dhoby nor a barber took part in the ceremonies. The first respondent was inveigled into the house of the second respondent and at the time no preparations had been made for the marriage ceremony. Almost immediately afterwards, his relatives made an effort to rescue the first respondent. The village headman entered the house within an hour or two but did not " notice even any sign of camphor being burnt or coconut being broken . . . . or a brass pot with mango leaves ". Taking a view most favourable to the second respondent I do not think that there could have been anything more than an abortive attempt at a rudimentary form of marriage ceremony. Further the evidence forces me to the conclusion that the first respondent was not a free agent at the time and that he was prevented by threats from exercising his judgment.

As regards the point of law argued before us, I share the doubts expressed by Drieberg J. in 202, P. C. Point Pedro, 3,994 (*S. C. Minutes, April 5, 1936*) whether the want of the consent " required " under section 21 of Ordinance No. 19 of 1907 could be held to invalidate the marriage, according to Hindu rites, of a minor under 21 years, governed by the *Thesawalamai*, especially where the marriage had been consummated.

Appeal allowed.