

TISSSELHAMY v. NONNOHAMY.

1897.  
May 28 and  
June 1.

D. C., Badulla, B/21.

*Marriage—Presumption from cohabitation and repute—Facts primâ facie giving rise to presumption of marriage.*

A, a man of the low-country, goes up to Uva and settles down there. He takes a woman, B, to his house, and she bears him children, who are treated as such by the parents. A and B live together until the latter sickens, and goes to her own people accompanied by A, and dies. After her death their daughter is given away in marriage by the father publicly and on a big scale. The stepmother of the bride is present at the marriage and countenances it—

*Held*, that by these facts the presumption of a valid marriage between A and B is *primâ facie* established.

The argument that the presumption of marriage arising from cohabitation and repute does not arise in a district where concubinage is not considered immoral is not to be favoured.

THE facts of the case appear in the judgment of WITHERS, J.

*Dornhorst*, for appellant.

*Wendt*, for respondent.

*Cur. adv. vult.*

1st June, 1897. WITHERS, J.—

The District Judge has decided that the first petitioner is not the legitimate offspring of the late Baba Sinno and the late Sahaḍu, or, in other words, that her parents were not validly married.

Is that decision right or wrong? It would have helped me to answer this question if the Judge had found which he considered to be the true state of facts. The stories of the contending parties differ materially, so much so that if I credited the respondents I should be disposed to endorse the decision appealed from. In this matter Kandyans witnesses came forward for the petitioner, appellant, and low-country witnesses for the respondent.

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It is common ground that Baba Sinho was a low-country man, that he was quite a young man when he came to trade in Uva, and that he died a few years ago at an advanced age. It is further common ground that the petitioner, appellant, is the daughter of Baba Sinho and one Sahadu (of whose origin little is known), and that the parents lived together for a great many years and had one or more children besides Tisselhamy, the appellant. They lived together, say the Kandyans, as man and wife, as man and mistress say the low-country men. This is a *façon de parler*. But the material difference to my mind is the end of this *régime*.

The witnesses for the petitioner, appellant, aged men, and occupying some of them respectable positions, concur in this that Sahadu died before Baba Sinho cohabited with the respondent when he came out of jail, that she fell so sick—this was before the trial—that her relatives fetched her home, and that Baba Sinho accompanied them, and that she died either before or during Baba Sinho's imprisonment.

I understand Tisselhamy, the petitioner, to say that she was about six or seven years old then, and that she remembers accompanying her father to her mother's house on that occasion. Now, the respondent's witnesses say that though Baba Sinho was a wealthy man, and though Sahadu stayed in his house and carefully minded his property of which he was in possession, yet that just before his term expired she ran off with a pauper named Podi Sinho and took her two children with her. This I find it hard to believe. One witness says that Sahadu appeared when Baba Sinho and Nonnohamy (the respondent) were living together, and there was a quarrel when she disappeared again. Nonnohamy swears that Sahadu came to see them twice while she and Baba Sinho were cohabiting. As to dates, no one's dates can be relied on, for they are so vague. Now, I have little hesitation in accepting the story as told by the Kandyan witnesses, who seem to be absolutely independent witnesses. I take, then, these to be the facts. . Baba Sinho lived for very many years with Sahadu as a man and woman do who are really married. He called her by the respectful name of "haminey," to which in no case was she entitled. Tisselhamy, the respondent, was their child, and treated

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as such, and the girl was eventually given away by her father at what was described as a "big wedding," which her stepmother Nonnohamy attended. Sahadu died before Baba Sinho began to associate with Nonnohamy, whom he eventually married.

Now, Baba Sinho's country was one where the law of monogamy prevailed, and where also the law presumed a valid marriage when a man and woman are proved to have lived together as man and wife. Given the facts as I take them to be, why should not this presumption avail the appellant? The District Judge thinks that that evidence is insufficient, that it wants the support of facts expected and required in England, such as appearance in church together, visits together in respectable society, and so forth. Those are strengthening facts, but are they necessary? But the Judge seems to think that if there was a backing up of like facts in this case they would lose weight in Uva, where marriage was then the exception and concubinage the rule; but, as I have had occasion to point out lately, my Lords of the Privy Council did not favour the argument that the presumption of marriage does not arise in a district where concubinage is not considered immoral. I refer to the Batticaloa case of *Sinne Pillai v. Sambonade* reported in 50 L. J. P. 28.

The argument which impressed me most was this: "But in a country where a man might have more wives than one, and where marriage after the custom of the country was so lightly dissolved," what repute could there be of marriage in the sense of a union of one man and one woman for their joint lives? For a Kandyan at that time to say that two persons were living as man and wife might mean anything, e.g., a wife of associated husbands or one of several wives belonging to one man. But all the witnesses agree that Baba Sinho and Sahadu cohabited together. A man and a wife could not live in the same house other than those two did. Now, cohabitation is the cardinal element in these cases—repute, reception, conduct, &c., are attendant circumstances, and the union of all of course is stronger than cohabitation alone. In other countries and with other people you would expect more proof of attending circumstances, such as the Judge points out. But here a young man comes up from the low-country and settles down in Uva to make money if he can. He succeeds, and takes a woman to his house, and she bears him children, whom they treat as children, and they live together till she sickens and goes to her own people accompanied by him, and dies. After her death their daughter is given away in marriage by her father. This is done publicly on a big scale, and the stepmother is there and countenances it. What more proof

could be expected after so long a time? These people could not visit their Kandyan neighbours or be visited by them. Why should not a valid marriage be then presumed from the facts which I have accepted? I think it ought to be. The presumption of a valid marriage is *prima facie* established. As Lord Lyndhurst observed, "it is not lightly to be repelled," and it can only be repelled by evidence strong, satisfactory, and conclusive. (*Morris v. Davies*, 4 C. L. and F. 163.)

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If I believed the evidence that in Sahadu's lifetime, and while his children were with her, Baba Sinho cohabited with another woman intending to make her his wife, I should be inclined to consider that the presumption of a valid marriage between Baba Sinho and Sahadu had been repelled, but, as I have said before, I do not believe that evidence. It certainly is not "strong, distinct, satisfactory, and conclusive." I am for setting the judgment on this point aside, and declaring the first petitioner to be the legitimate daughter of the late Baba Sinho.

The question whether she is entitled to any part of the estate belonging to Baba Sinho at his death conditionally or not is a distinct question, which has yet to be determined by the Court below.

LAWRIE, A.C.J., agreed.

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