FERNANDO *v.* FERNANDO.

1899.
November

D. C., Negombo, 2,933.

Contract of marriage between bridegroom and father of bride — Breach by bridegroom—Action by father and daughter—Damages—Penalty.

It is competent to a daughter, on whose behalf her father had entered into a contract with defendant that the defendant should marry her, to adopt the contract made for her benefit, and conjointly with her father sue the defendant for a breach of it.

A Court may award as damages the amount of the penalty stipulated between the parties, if it is not too excessive or disproportionate to th circumstances of the case.

IT was alleged in the plaint that the defendant by his deed dated 10th August, 1896, entered into a contract with the first plaintiff that he would marry the first plaintiff's daughter,

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the second plaintiff, within three months of the date thereof, according to the rites of the Roman Catholic religion, and that in the event of either party failing to fulfil the contract a sum of Rs. 2,000 should be paid as " estimated damages;" that the second plaintiff was always ready and willing to marry the defendant, but that defendant committed a breach of the contract by marrying another woman on the 12th August, 1896. Plaintiff therefore claimed the sum of Rs. 2,000 mentioned in the deed.

Defendant pleaded, *inter alia*, that second plaintiff being a minor was incompetent to maintain the present action; that no cause of action accrued to the second plaintiff against the defendant; that there was no consideration for the promise made by defendant to the first plaintiff; that he signed the deed by coercion and compulsion on the part of the first plaintiff and his son; and that first plaintiff had suffered no damages.

The District Judge found that there was no compulsion; and that defendant had seduced the second plaintiff and signed the agreement to marry her with the intention of making reparation; that his parents objected to the marriage and persuaded him to marry another woman; that the damages consequent on the breach should be the sum fixed by the parties, which was not excessive; that that amount should be paid into Court for the sole use of the second plaintiff, who upon attaining her majority should get it.

Defendant appealed.

Sampayo, for appellant.

Bawa, for respondent.

6th November, 1899. BONSER, C.J.—

In this case the father of an unmarried girl under age entered, on her behalf, into a notarial contract with an unmarried young man, providing that he would give her in marriage to this young man. The young man on his part agreed to marry her within a stipulated time, and the parties agreed that in case either of them should break the contract—the father or the intended bridegroom—the person in default should pay to the other Rs. 2,000 as a penalty. The father purported to enter into this contract on behalf of his daughter. The intended bridegroom broke the contract by marrying another lady. The father and daughter thereupon commenced this action to recover the stipulated penalty of Rs. 2,000.

The defendant raises certain objections of law and of fact. He objected that it was not competent for the daughter to sue, as she

was not a party to the contract. He objected that the contract was against public policy, and could not therefore be enforced, and he stated that he was made to enter into the contract by force and was not a free agent. All these objections were overruled at the trial. The judge found that the contract was not made under coercion, and it has not been sought in the appeal to induce us to reverse that finding.

Mr. Sampayo argued the objection of law that the daughter could not sue, not having been a party to the contract. It seems to me that it was quite competent for her to adopt a contract made for her benefit, and I see no reason why a contract of this kind should be held by this Court to be against public policy. The parties are Sinhalese, and such a contract is one entirely in accordance with Sinhalese customs and feelings.

Then Mr. Sampayo contended that the sum of Rs. 2,000 was a penalty, and that no damage having been proved the utmost that could be given was nominal damages.

Now these stipulations for penalties originated in the difficulty of proving damages. Voet (*XLV., 1, 13*) states that where damages had to be determined by a Court there was considerable difficulty in the way of the plaintiff, owing to the natural difficulty of proof and also to the rule of practice which required the judge, in cases of doubt, to give the benefit of the doubt to the defendant. He states that in consequence of these difficulties the practice arose of the parties agreeing to a fixed penalty which would obviate the necessity of the Court entering into an inquiry as to the *quantum* of damages. Justinian, in his *Institutes*, recommends the parties to agreement to this course (*III., 16, § 7*): *Non solum res in stipulatum deduci possunt, sed etiam facta: ut si stipulemur fieri aliquid vel non fieri. Et in hujusmodi stipulationibus optimum erit pœnam subjicere, ne quantitas stipulationis in incerto sit ac necesse sit actori probare quid ejus intersit. Itaque si quis, ut fiat aliquid, stipuletur ita adjici pœna debet: "Si ita factum non erit, tunc pœnæ nomine decem aureos dare spondes?"* But Voet, in the same title to which I have referred, states this: *Denique moribus hodiernis volunt, ingente pœna conventioni appositâ, non totam pœnam adjudicandum esse, sed majis arbitrio judicis eam ita oportere mitigari, ut ad id prope reducatur ac restringatur, quanti probabiliter actoris interesse potest. (XLV., 1, 13).*

In other words, where the amount of the penalty is out of all proportion to the damages likely to be caused by the breach of the contract, in such a case the equitable course is not to give judgment for the whole amount of the penalty, but to reduce the

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amount to something more like the real loss incurred by the parties. That, however, is no authority for the proposition that, wherever a penalty is fixed, it is the duty of the Court to enter into the question of the *quantum* of the damages. It must be shown that the *pœna* is, as Voet describes it, *ingens*, or, as other writers call it, *immanis* or *immensis*.

In this case I see no reason for thinking that the penalty agreed upon by the parties comes under any of these categories, or that it is so disproportionate to the circumstances that it would be inequitable for the Court to enforce this claim.

WITHERS, J.—

I agree. As to the objection raised to this contract—in the first instance that the young lady had no right to sue, and in the next place, that the contract is a contract *contra bonos mores*,—I am unable to see any force in these objections.

As to the question of reducing the damages, I agree in all that has fallen from the Chief Justice.

I have gone at length in a former judgment into the question of penal stipulations, and I cited the passage from Justinian referred to by my Lord. The word " penal " has not the same force in Roman-Dutch Law in this connection as it has in English Law.

There is nothing in the use of the word " penal " in contracts governed by the Roman-Dutch Law to prevent the stipulation being enforced.