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BABAPULLE *v.* RAJARATNAM *et al.*

1900.
October 26.

D. C., Colombo, 10,344.

Marriage agreement between father of bride, bride, and bridegroom—Promise of father to pay cash to daughter in the event of one of the stipulations not being carried out by father—Failure of the father to carry out the stipulation after marriage was solemnized—Right of husband to sue for the money without his wife as a party or her consent—Ordinance No. 15 of 1896, s. 19.

Where, in a marriage agreement between the father of a bride, the bride, and the bridegroom, it was agreed that, in the event of the father not carrying out one of the stipulations within a certain time after the marriage, he should pay to the wife a certain sum of money, and he failed to carry out the stipulation after the marriage,—

Held that, under section 19 of the Matrimonial Rights Ordinance, 1876, the husband was entitled to sue for and recover the money, without his wife's consent or making her a party to the case.

THE nature of the agreement, on the footing of which the present appeal arose, is fully set forth in *4 N. L. R. 348*. The issue as agreed between the parties was "whether under the terms of the marriage agreement the first defendant alone is entitled to sue the plaintiff in reconvention for its fulfilment.

After hearing the arguments and witnesses called, the Additional District Judge entered judgment for plaintiff in these terms:—

"The first defendant insists on his counterclaim for Rs. 8,000 even in spite of his wife, to whom the money was payable under the agreement, on the ground that under the 19th clause of the Matrimonial Rights Ordinance all movable property of a wife vests absolutely in her husband. This is undoubtedly true, and a wife's choses in action form part of her personal estate. If any money became due to the wife under this agreement, her husband could no doubt sue for it, but it is quite a different thing to say that he was also entitled to recover it. In determining this matter we must look upon this agreement as a whole. Its main object

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has been to prevent the husband from getting hold of any of his wife's property, and to say that the husband is entitled to convert her realty into personalty, even in spite of her own wishes, would be entirely contrary to the spirit of the agreement.

"I feel bound to take an equitable view of the situation, and say that under this agreement the wife can elect to have the land and not the money, and that the husband cannot insist on claiming the latter as a liquidated sum which became due to his wife on the expiry of the six months.

" The very letters of the first defendant written in June, after the expiry of six months, show that they were then not asking for the money but the land, and the second defendant is even now willing to have the land. Unless the first defendant can show that his wife has made no such election, I must decline to benefit him at the expense of his wife. This he has not done, and the plaintiff's evidence as to what his daughter really wants stands uncontradicted.

" I am satisfied that the advance made on the note sued upon had no connection whatever with the marriage agreement. It was quite an independent transaction, and the first defendant is not entitled to set off against it anything which his wife was entitled to get under the agreement ".

The first defendant appealed.

Walter Pereira (with him *E. W. Jayawardena*), for appellant.—The appellant did not plead a set off in this action, nor did his wife, the second defendant, become entitled, as assumed by the District Judge, to anything on breach of the marriage agreement. The claim of the appellant is a claim in reconvention, and the sum of Rs. 8,000 that became due on the marriage agreement was the exclusive property of the appellant. By this agreement the plaintiff no doubt agreed to convey the land to the second defendant, and in default to pay her Rs. 8,000, but the moment the default was made, the chose in action that resulted vested absolutely in the appellant by force of section 19 of the Ordinance No. 15 of 1876. That Ordinance defines movable property as property of every description except immovable property. Even under our Common Law a chose in action like the present is movable property (*Censura Forensis, pt. I., bk. II., chap. I., para. 4*, and *Van Leeuwen, vol. I., p. 145*), and hence it is the property of the husband, the appellant.

Allan Drieberg, for respondent.—The agreement of the plaintiff was to pay the second defendant the Rs. 8,000. The second defendant does not claim the amount. The claim of the second defendant is adverse to the interests of the first defendant. The

evidence shows that the second defendant, after the expiration of the six months, requested the plaintiff not to convey to her the land until the first defendant paid the plaintiff the money due on the note.

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The District Judge rightly characterized this as a very peculiar case. The action was on a promissory note for Rs. 5,000 brought by the plaintiff against his daughter and his daughter's husband, who had made the note in his favour. The husband claimed in reconvention a sum of Rs. 8,000 as being due to him in right of his wife under certain articles of agreement which were entered into by the plaintiff and the defendants in contemplation of the marriage of the two defendants. The agreement is a curious one in several respects. The intended husband agreed that he would become a Roman Catholic within a certain time, and like a more illustrious person, King Henry IV. of France, who thought that Paris was well worth a mass, this gentleman thought that the lady's *beaux yeux* were well worth a change of faith. The father of the lady on his part agreed that after the marriage he would upon the joint request of the two spouses convey to his daughter certain property by way of dowry, and amongst the property agreed to be conveyed was a certain garden and house in Barber street, Colombo, which was stated to be of the value of Rs. 8,000, and it was provided that, if he should make default then, he would pay to his daughter Rs. 8,000 in lieu of the garden and house. The marriage was celebrated, and the spouses duly requested the plaintiff to convey the house and property, but the plaintiff made default in complying with this request.

It is unnecessary to go into the reasons which actuated him in declining to perform his part of the agreement. The husband, as I said before, made this claim in reconvention, and at the trial the plaintiff's counsel desired to have this issue stated: "whether "under the terms of the marriage agreement, the first defendant "alone is entitled to sue the plaintiff in reconvention for its fulfil-"ment". He submitted (as the District Judge records) that only the wife could claim the money, and that the right to claim never vested in the husband; it would only vest in him under the Matrimonial Rights Ordinance when the Court would make a declaration that he was entitled to it. That issue was accordingly agreed to between the parties and was formulated by the District Judge as the third issue.

It will be seen that this is a pure question of law upon the construction of the agreement. At the trial it was argued by

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the counsel for the plaintiff that this claim under the marriage agreement had nothing whatever to do with the original claim in the action, which was on the promissory note; that they were quite independent transactions, and that the claim being a claim in reconvention which did not arise from the same transaction, was not admissible, and the District Judge seems to have been taken with that view of the law as presented to him. for he says:—"I am satisfied that the advance made on the note "sued upon had no connection whatever with the marriage "agreement; it was quite an independent transaction, and the "first defendant is not entitled to set off against it any-"thing which his wife was entitled to get under the agree-"ment." But this is not a question of set off. It is a question of cross-claim, and I am not aware of, and the counsel for the respondent were unable to cite, any authority for the proposition that a claim in reconvention must arise out of or be closely connected with the original claim. The sole question is whether the right of action under the agreement in case of default vested in the husband, so that he could sue for it without joining his wife?

The law of this Island was, until the passing of the Matrimonial Rights Ordinance of 1876, that, in default of any ante-nuptial contract between the spouses, any property which belonged to the wife at the time of her marriage or which was acquired by her subsequently was the joint property of husband and wife. and that the husband, being the managing director of the matrimonial partnership, could deal with the property as he pleased, and he could sue or be sued in respect of the property without his wife being joined. The Ordinance to which I have just referred to made considerable alterations in the law on this question. While it abolished the community of goods, it gave a wife as regards her immovable property the sole right of enjoying the rents and proceeds. She was restricted from dealing with the *corpus* during the marriage except with the written consent of her husband, but she might deal with it by her will without his consent. As regards movable property, her wages and earnings from any occupation and trade carried on by her, and any money or property acquired by her literary, artistic, or scientific skill, was to be her separate property, and she had the full power of dealing with such property and disposing of it as if she was unmarried. As regards her jewels and wearing apparel, and the tools, implements, and appliances belonging to any trade, they were to be her separate property; but as regards all other movable property, the Ordinance made an absolute

present of it to the husband. So that in some respects her position was worse than before the passing of the Ordinance. As regards immovable property her position was better, but as regards movable property, except with regard to such property as I have specified above, her position was worse. As to this right to recover the sum of Rs. 8,000 which vested in the wife, not being immovable property, it is, under the definition in the Matrimonial Rights Ordinance, " movable property and is vested in the husband. "

It seems to me, therefore, that the right to sue for this money vested in the husband, and that he could sue for it without joining his wife as a party and without her consent. Probably this result was not contemplated by the parties who drew up this agreement, but that cannot alter its legal effect. It is the fault, it seems to me, of the parents in not having a proper ante-nuptial contract drawn up. The answer to that issue will then be in the affirmative, that the husband is entitled alone to sue the plaintiff in reconvention.

The result will be that, as the plaintiff has obtained judgment for Rs. 5,000 on the promissory note, there will be judgment for the defendant for the balance sum of Rs. 3,000.

BROWNE, A.J.—I agree.