1934 *Present:* **Dalton and Akbar JJ.**

FRADD *v.* FERNANDO.

75—D. C. Colombo, 46,425.

Husband and wife—Married woman's contract—Consent of husband—Letter from husband approving of draft agreement to sell—Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876, s. 9.

Where the consent of a husband to the disposition of his wife's property was given in a letter written to the latter's attorney, approving of a draft of the agreement to sell the property,—

Held, that there was a sufficient compliance with the requirements of section 9 of Ordinance No. 15 of 1876.

Per DALTON J.—It is not necessary that the consent should appear on the face of the document making the disposition or that it should be given by a writing notarially executed.

THIS was an action brought by the plaintiff, a married woman, claiming specific performance of an agreement to sell land or in the alternative, damages in the sum of Rs. 15,000. The only question for decision was whether the agreement was entered into with the written consent of her husband and if not whether it was unenforceable. The learned District Judge held that the consent should appear in the document making the disposition and dismissed the plaintiff's action.

H. V. Perera (with him *H. E. Garvin* and *D. W. Fernando*), for plaintiff, appellant.—The attorney of the plaintiff was acting under a power of attorney dated March 11, 1925, when he entered into the agreement of August, 1928, for the sale of the property named Bunty's Nook. That power of attorney had an endorsement by the plaintiff's husband at the foot of it signifying his consent to his wife selling or otherwise disposing of all or any of her property belonging to her or registered in her name. This is sufficient consent for the purposes of the proviso to section 4 of Ordinance No. 18 of 1923, which repeals section 9 of Ordinance No. 15 of 1876. Further, the plaintiff's attorney, while he was negotiating with the defendant for the sale of Bunty's Nook, was in communication with the plaintiff's husband who was in India. The letters P 1 to P 3 show that the draft agreement was submitted to the plaintiff's husband and he approved of it. No particular form of words is necessary for the written consent required by section 9 of Ordinance No. 15 of 1876 (*Ponnammal v. Pattaye* [1]).

Even assuming that there is no consent by the plaintiff's husband, the effect of the proviso to section 4 of Ordinance No. 18 of 1923 is not to make a disposal without her husband's consent by a woman married before Ordinance No. 18 of 1923 of her property acquired before that Ordinance void, but only voidable at the instance of the husband. Section 4 of Ordinance No. 18 of 1923 repealed section 9 of Ordinance No. 15 of 1876, but provided that the repeal shall not affect any act done, or right or status acquired whilst the repealed sections were in force. The only right reserved to the husband by that proviso is the right to restrain his wife

[1] *13 N. L. R. 201.*

from alienating her property without his consent. No right is reserved to a third party, and the defendant cannot make use of that proviso to get behind his agreement with the plaintiff's attorney on the ground that the plaintiff's husband had not given his consent.

A. E. Keuneman (with him *E. F. N. Gratiaen*), for defendant, respondent.—With regard to the endorsement on the power of attorney of 1925 a general consent in the terms used in that endorsement is not sufficient for the purposes of section 9 of Ordinance No. 15 of 1876. Consent must be express consent in writing by the husband prior to or at any rate contemporaneous with the execution of the particular instrument involved and having relation to that instrument. The consent must have special reference to the particular disposition. (*Wickramaratne v. Dingiri Baba*[1] *and Ponnammal v. Pattaye*[2]—Wood Renton J.'s judgment.)

The letters P 1 to P 3 have no reference to this particular agreement and therefore they cannot constitute a consent by the plaintiff's husband within the terms of section 9 of Ordinance No. 15 of 1876.

Plaintiff's attorney in entering into this agreement has exceeded his authority. The power of attorney is only to sell the property. Such a power of attorney does not authorize the holder to enter into an agreement to sell at a future date. The terms of a power of attorney must be strictly construed.

With regard to section 4 of Ordinance No. 18 of 1923 and the proviso to that section, see *In re Application of R. Caroline Nona*[3].

Cur. adv. vult.

July 30, 1934. DALTON J.—

The question to be decided in this case, so far as this appeal is concerned, is whether the plaintiff, a married woman, entered into the agreement of August 28, 1928, the breach of which is the foundation of this claim, to sell to defendant a property in Nuwara Eliya, named Bunty's Nook, with or without the written consent of her husband.

The plaintiff was married in the year 1915, and acquired the property in question on December 6, 1920. Under the provisions of section 9 of the Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876, she has full power of disposing of and dealing with her property by any lawful act *inter vivos* with the written consent of her husband, but not otherwise.

Ordinance No. 15 of 1876 has been amended by the Married Women's Property Ordinance, No. 18 of 1923. Section 9 and other sections of the earlier Ordinance are repealed in so far as they relate to persons married on or after June 29, 1877. It is provided, however, that the repeal shall not affect any act done, or right or status acquired whilst the repealed sections were in force.

The plaintiff resided at the time of this action, and apparently has been residing for some years, in England. In November, 1920, she appointed her brother-in-law, Leonard Fradd, as her attorney in India and Ceylon, amongst other things to sell, transfer, mortgage, lease or otherwise deal with her property in Ceylon. On March 11, 1925, she executed another power (exhibit P 1) in favour of the same person,

[1] *2 C. A. C. 132.* [2] *13 N. L. R. 206.*

[3] *6 C. L. R. 46.*

confined to Ceylon and apparently not in such wide terms, authorizing him amongst other things to sell at such time or times as he shall think fit any of her property in Colombo or Nuwara Eliya. This latter power at the foot carries the following endorsement by the plaintiff's husband, signed by him on the day following its execution:—

"I, the above-named, Percy Harold Fradd, hereby approve and confirm the above-written power of attorney and consent to my wife the above-named, Violet Loraine Fradd, selling or otherwise disposing of all or any property belonging to her or registered in her name and I hereby agree to her said attorney, the said Leonard Collins William Fradd, doing or causing to be done all or any of the acts, matters and things therein set out.

Dated this 12th day of March, 1925. (Sgd.) PERCY H. FRADD."

This endorsement at the foot of the power was duly witnessed and notarially attested. I would add here that there is no suggestion in this case that the later power cancelled the earlier one.

In 1928 plaintiff's husband was employed in India, his wife still living in England. He returned, however, to England in 1929, because he was ill, and he is now stated to be a very sick man in England. Hence he is not available as a witness. The attorney of his wife in Ceylon in 1928 entered into negotiations with the defendant for the purchase by the latter of the property Bunty's Nook at Nuwara Eliya. He was in communication with his brother in India on the subject, and seems to have taken his instructions from him. Two letters, proved to have been written by the plaintiff's husband from India to the attorney in Ceylon, were produced, dated July 12, 1928, and July 19, 1928, respectively, for the purpose of proving that the former had consented to the sale. The admission of the first letter (exhibit P 2) was objected to by defendant's counsel, on the ground, set out on the record, that this was hearsay evidence. The objection was upheld, but counsel for defendant in this Court concedes that he can formulate no sufficient ground to support either the objection to the admission of the document or the decision of the trial Judge in upholding the objection. Although rejected, the letter P 2 was marked and is part of the record of the lower Court of admitted evidence sent up to this Court. Having regard to the fact that it should not have been rejected, it may now remain part of the record. The second letter (exhibit P 3) was objected to for the same reason, but the objection was not upheld, the trial Judge holding that the portion relating to this transaction was admissible. He states later, however, that he has strained a point in favour of the plaintiff in admitting documents, and I take it he is referring to his ruling as regards this second letter. The signature to the letters being proved, they were both admissible for the purpose for which they were tendered.

The material part of the letter P 2 is as follows :—

"My dear old Leonard,—Glad of yours to-day to see that you had been to Macks and had come to an arrangement over B. Nook, as I was very afraid it was going to fall through. He must have occupied the house now fully four months so he will be owing quite a bit, and I hope

you will see he pays this up promptly as I ought to send dear old Loraine home £40, and this money owing by Fernando would just about do this. I should like to see the draft agreement if possible before it is signed as I think there should be some penalty clause in case he backs out in the end and a clause should be inserted as regards keeping the place in good condition . . . .

Yours, &c.,
(Initialled) P. F."

"Macks" referred to in the letter are the proctors for Percy Fradd, the husband, his wife, and Leonard Fradd, and they had been so for some years. "B. Nook" is the property Bunty's Nook, the subject of the agreement. "He" and "Fernando" are the defendant.

The attorney is unable now to produce the letters he sent to his brother in India or copies of them, but exhibit P 3 shows he replied to this letter P 2, and he sent the draft agreement to him as requested. The material part of P 3, dated July 19, 1928, is as follows :—

"This morning, old dear, I got your letter with the draft deed of Bunty's Nook, which I have carefully read through, and must say it appears quite fair. The only thing, the deed starts from August 1, which is alright if he is paying rent from the time he took over up to the end of July, which must be five months. I am therefore returning the deed, old dear, and shall be glad when it is all over."

Thereafter, on August 28, 1928, the indenture or agreement now sued on was executed by the plaintiff by her attorney and by the defendant. The attorney states that, so far as he knows, no change was made in the draft agreement returned from India by his brother. No suggestion was made to him that the indenture which was executed did not conform in all respects to that draft agreement. If there was any such change after the agreement came back from India, it was presumably known to the defendant or his proctors, but because the witness did not produce that draft agreement in the witness-box to compare with the indenture, it is suggested there is no evidence to show that plaintiff's husband agreed to the indenture which was actually executed by the parties to it.

The trial Judge has held, with regard to the power of attorney P 1, and the endorsement thereon, that a general consent in the terms used there is not a sufficient compliance with the provisions of the law contained in section 9 of the Ordinance. In addition, the indenture of August 28, executed by the attorney states in the attestation clause that it was executed by him under the powers given him by the power of November, 1920. The authorities, I think, would go to support the conclusion that such a general consent is not sufficient for the purpose for which it was presumably intended, but I do not find it necessary to deal with this matter further as I find that the requisite written consent was given later, just prior to the execution of the agreement.

The trial Judge has further held that the consent of the husband must appear on the document disposing of or dealing with the property ; if consent is given prior to its execution, that fact must be referred to in the document, and the written consent itself must be filed with the

document. By the word "filed" he may possibly mean attached to it in some way or other. He has not rejected the attorney's evidence that he submitted the draft agreement to his brother and received that agreement back again, and that so far as he, the attorney, is aware, the indenture executed conformed to that draft agreement without any change. Even if the evidence be accepted, he finds, I understand, that the letter P 3 which he admitted in evidence did not conform to the requirements of section 9, and was no sufficient consent of the husband as is required by law. He accordingly answered the question in defendant's favour and dismissed plaintiff's action. The latter now appeals.

The nature of the consent required in such a case as this has been the subject of previous decisions of this Court.

The case specially relied upon by defendant's counsel in the course of his argument in this Court is *Wickramaratne v. Dingiri Baba*[1], decided by Wood Renton and Pereira JJ. There Wood Renton J. held that the martial consent required by section 9 is a consent with special reference to the particular disposition, the validity of which is in question. He also quotes a passage from his own judgment in the case of *Ponnammal v. Pattaye*[2], to which case I refer later. That quotation is as follows:—

> "I think that in order to satisfy the provisions of section 9 of Ordinance No. 15 of 1876 there must be an express consent in writing by the husband prior to, or at any rate contemporaneous with, the execution of the particular instrument involved, and having relation to that instrument".

Pereira J. goes considerably further than Wood Renton J. in his judgment. He appears to hold that the husband's written consent to the disposition of the particular property dealt with must be given at or before such disposition, and by means of a duly executed notarial instrument. That he finds is the combined effect of section 9 of Ordinance No. 15 of 1876 and section 2 of Ordinance No. 7 of 1840.

The case of *Ponnammal v. Pattaye* (*supra*) was decided by a Court of three Judges—Hutchinson C.J. and Middleton J., Wood Renton J. dissenting. From that decision it would seem that no particular form of words is necessary for the written consent. The deed in question there was executed by the wife in the presence of two witnesses, and immediately below the name of the second witness was the mark of the woman's husband. The notary's signature came below the mark. There appears to be nothing in the body of the deed stating that the husband had consented to the disposition or that he by affixing his mark was giving his consent. The Court had to decide the question whether in the circumstances a husband by simply signing a conveyance given by his wife to a purchaser thereby gave his written consent to the transfer under the provisions of section 9. The execution of the deeds was admitted at the trial and no evidence was called to prove it or as to the circumstances attending the execution. Hutchinson C.J., in pointing out that there seemed no reason why the husband should have signed the deeds except for the purpose of signifying his consent to them, held that the only

[1] *2 C. A. C. 132.* [2] *13 N. L. R. 206.*

possible inference as to the husband's signature which could be drawn from an inspection of the deeds was that he signed to show his consent, and that it was not absolutely necessary to add the words "I consent" or any other words to that effect.

Middleton J. answered the question in the same way, holding that, apart from the attestation clause subscribed by the notary, there was an unrebutted presumption amounting to proof that the husband, by signing the deed in question, consented to its contents. Wood Renton J. in dissenting from this conclusion held that if the husband was merely signing as a witness, the point was governed by authority which should be followed, to the effect that such a signature is insufficient for the purpose of satisfying section 9. If he was in fact by his signature expressing consent to his wife's conveyance, he held the requirement of section 9 had still not been satisfied. Then follows his opinion I have quoted above, to the effect that there must be an express consent in writing, leaving no need or room for oral evidence or conflicting inferences.

Although the judgment of Wood Renton J. was a dissenting judgment, Mr. Keuneman relied upon it also to support his argument, urging that the method of approach used by Wood Renton J. in construing the law, and his view of the terms and requirements of the section had not gone beyond anything the other Judges had taken or said in their judgments. He suggested they were only in disagreement as to the application of the principles to be applied, Hutchinson C.J. holding there could be only one possible inference from the presence, in the circumstances, of the husband's signature on the document, Wood Renton J. on the other hand holding apparently that there were other possible inferences as to its meaning. I think there is foundation for this argument. Counsel further conceded that he could not uphold in its entirety the trial Judge's view of the requirements of section 9, but he maintained the consent must be to the actual disposition, all the terms of which including price must be settled before the consent is given.

It then remains to apply the law as above construed to the facts of this case. The consent of the husband to the sale of Bunty's Nook by his wife's attorney is in writing in his letters produced, the consent is directed to the wife's attorney, and is with reference to the particular disposition in question in this case. The draft agreement was seen by the husband and approved of by him just prior to the completion of the agreement. These facts are proved and none of them are denied. The reference in the second letter to the payment of rent by the defendant from the time he took over cannot, in my opinion, be taken to be, as was suggested, a condition upon which approval to the draft agreement depended. It is referred to presumably as a matter to which the attorney's notice is called and to which he should attend. The draft is returned with the husband's consent to its contents; and he adds he will be glad when the matter is completed. The only reasonable inference to be drawn from the evidence, in my opinion, is that the husband consented to the sale of the property in question to the defendant and gave that consent in writing. I find no room for any conflicting inference. That written consent is, in my opinion, a sufficient compliance with the requirements of section 9

of Ordinance No. 15 of 1876. This case, so it seems to me, is a stronger case than *Ponnammal v. Pattaye* above cited. I would further add that I can find nothing in the law as laid down in that case in the dissenting judgment of Wood Renton J. inconsistent with my conclusion. With the opinion of Pereira J. that the consent must be notarially attested I regret I am not able to agree, nor has that opinion been urged upon us in this case as one we should follow. The view of the trial Judge that the consent should be referred to in the document making the disposition and be filed with it in some way may be a counsel of perfection, but I can find nothing in section 9 of the Ordinance making any such requirement.

For the above reasons I have come to the conclusion that the question before this Court must be answered as follows: That the indenture or agreement of August 28, 1928, was entered into by plaintiff with the written consent of her husband.

It is not necessary therefore to consider the further question raised before us that the requirements of section 9 of Ordinance No. 15 of 1876 in respect of written consent being obtained by the wife to any disposition of her property *inter vivos* are repealed by section 4 of Ordinance No. 18 of 1923. I might point out, however, that this question appears to have been already answered by this Court in the case of *In re Application of R. Caroline Nona*[1].

It was agreed in the lower Court that if the indenture was held to be valid, the damages to which plaintiff is entitled in respect of her claim should be fixed at the sum of Rs. 12,500 with interest as claimed, plaintiff waiving her claim for rent and further rent, and defendant withdrawing his claim in reconvention.

Plaintiff is therefore entitled to judgment in the sum so agreed upon with costs of suit. A decree should be entered accordingly, the decree already entered being set aside. She is also entitled to her costs of appeal.

AKBAR J.—

The appellant sued the defendant on an agreement to sell her land dated August 25, 1928, claiming specific performance of this agreement or in the alternative damages in the sum of Rs. 15,000. The parties agreed that if the agreement was held to be valid the damages were to be fixed at Rs. 12,500 with interest as claimed. The plaintiff waived her claim for rent and the defendant withdrew his claim in reconvention. The only question which arises in this appeal is whether the agreement was entered into by the plaintiff without the written consent of her husband, and if so it was invalid and unenforceable. The plaintiff is a married woman and under section 9 of Ordinance No. 15 of 1876 the written consent of her husband was necessary to validate the agreement to sell. Section 9 of Ordinance No. 15 of 1876 had been repealed by section 4 of Ordinance No. 18 of 1923, at the date of the agreement, but by the proviso to this section the right of the husband to prevent the disposal of any immovable property belonging to the wife by the wife

[1] *6 C. L. R. 46.*

(which had accrued to him owing to his marriage with this wife during the time Ordinance No. 15 of 1876 was in force) was kept alive (see *In re R. Caroline Nona* [1]).*

Plaintiff's attorney, however, who is a brother of the plaintiff's husband gave evidence and produced three documents namely P 1, P 2, and P 3.

The effect of his evidence is that plaintiff's husband who was in India at the time had written to the attorney for the draft of the agreement to sell and that the copy had been sent to him and that he had approved of it.

In my opinion the District Judge was wrong in rejecting P 2. Both P 2 and P 3 prove the main issue of fact in this case, namely, that plaintiff's husband had expressly approved of the draft agreement to sell, on which plaintiff sues in this case. It was held by a majority of the Judges in a full bench case (*Ponnammal v. Pattaye* [1]) that the question whether the transaction of the wife relating to her immovable property had the express written consent of her husband was to be decided in the same manner as any other question of fact. It is entirely a question of evidence. The plaintiff's attorney in his evidence stated that, as far as he knew, the draft agreement approved by his brother was not changed and that it was that draft which defendant signed. The terms of letters P 2 and P 3 prove to my mind that it was this draft (which was approved by plaintiff's husband) which was copied and signed by the defendant. P 1 shows that both plaintiff and her husband and her attorney knew of the importance of the husband's written consent to validate any dealings or disposition of plaintiff's immovable property.

In my opinion there is ample evidence to enable me to hold that the agreement to sell on which plaintiff claims was entered into by the plaintiff with the written consent of her husband. I would set aside the judgment of the trial Judge and enter judgment for the plaintiff in the sum of Rs. 12,500 with interest as claimed and costs in both this Court and the Court below.

Appeal allowed.