

1935

*Present : Poyser J. and Soertsz A.J.*

SILVA *v.* RATNAYAKE.

385—D. C. Colombo, 30,036.

*Donation—Immoral consideration—Right of donor to recover—Roman-Dutch law.*

Under the Roman-Dutch law a woman cannot recover property gifted by her to her paramour.

**A** PPEAL from a judgment of the District Judge of Colombo.

*H. V. Perera*, for appellant.

*Weerasooria* (with him *J. L. M. Fernando*), for respondent.

July 30, 1935. POYSER J.—

The plaintiff alleged that, in 1922, she purchased a share of the land called Bogahawatta in the name of the defendant and had erected buildings thereon to the value of Rs. 7,000, that the defendant held the property in trust for her and had undertaken to convey it to her when requested but had wrongfully and fraudulently refused to do so.

The defendant, in his answer, denied that the plaintiff purchased this land or erected any buildings therein but alleged that he purchased the land in question with his own money and that the buildings were erected at his own expense. He admitted borrowing sums of money amounting to Rs. 750 from the plaintiff for the purpose of erecting the said buildings, but alleged that he paid back Rs. 650 of that amount and that the plaintiff retained goods of his to the value of Rs. 300. He did not however make any claim in reconvention.

The following are the material issues that were framed :—

- (1) Did the plaintiff purchase the land in dispute by deed No. 24 of July 27, 1922, in the name of the defendant in trust for the plaintiff ?
- (2) Did the plaintiff improve the said land and erect a building thereon ?

The plaintiff's evidence was to the following effect :—That the defendant, who had been a Buddhist priest but had given up his robes, came to her house in 1922, in search of employment. Her husband assisted him both financially and in other ways. She further stated that her husband wished to buy a property and put up a Sangha Vasa for the use of Buddhist priests who came to Maligakande temple to study and the land in question was purchased with that object in view. Her husband did not purchase the land in his own name as he thought there might be litigation in connection with it.

After the land was purchased in the defendant's name the plaintiff commenced to build a house, outhouses were first erected and the defendant went to live in them at the plaintiff's request. The house was completed in 1926, and the defendant from that date has resided in the house. The plaintiff's husband died in 1927. In June, 1928, the plaintiff demanded that the defendant should execute a transfer of the property (P 14), but the defendant refused to do so.

The defendant's evidence was to the effect that he purchased the land and erected the house with his own money, that he had been on terms of illicit intimacy with the plaintiff since 1908, and that in 1926, he disrobed himself, in consequence of such intimacy, that the plaintiff requested him to marry her after her husband's death and was angry with him when he refused, that he got married to another woman in September, 1928, and the plaintiff refused to speak to him after that date.

At the conclusion, however, of his evidence he admitted, in an answer to a question by the Court, that the whole of the building was put up by the plaintiff for him and the property was bought for him by the plaintiff as a gift.

The Judge having very carefully considered the evidence, both oral and documentary, came to the conclusion that the plaintiff and the defendant were on terms of illicit intimacy, that the plaintiff and her

witnesses were not speaking the truth in stating that the land was bought in the defendant's name in trust for her, that the plaintiff's false case was met by a false defence, and such defence was filed as the plaintiff thought that a person building on another's land would receive compensation and that he would have to compensate the plaintiff.

The truth of the case the Judge finds is contained in the last two answers of the defendant, viz., that the land was gifted by the plaintiff to the defendant and that the building was the joint endeavour of the plaintiff and the defendant and that the greater part of the money came from the plaintiff.

At the conclusion of the case, it was argued on behalf of the plaintiff, that she was entitled to compensation. The Judge however held, and rightly so in my opinion, that there was no question of *bona fide* or *mala fide* possession in the case: the land was gifted to the defendant and she did as much as she could to meet the expense of building a house on it, consequently she was not entitled to compensation, and in view of his finding of fact he dismissed the plaintiff's action.

In regard to the facts all the circumstances of the case support the Judge's finding that the plaintiff and the defendant were for a long period on terms of illicit intimacy. The plaintiff was apparently infatuated with the defendant and did as much as she could for him. The defendant however in 1928 began to get tired of the plaintiff and desired to sever their connection.

This fact is clearly indicated by the plaintiff's letter (D 5) of May 7, 1928, and this letter was followed by her proctor's letter (P 14) of June 26, 1928.

As the facts found by the Judge clearly establish that there was no trust he was clearly right in dismissing the action as framed.

It has however been argued on appeal, that as the defendant finally admitted that his defence was false and that the land and money were gifted to him, further issues should have been framed in regard to whether such gifts were valid or recoverable by the plaintiff, and the case should be sent back for that purpose.

In my view, no good object would be served by sending the case back for such issues to be framed. Under the Roman-Dutch law the Courts, no doubt, would not enforce a contract made for immoral consideration; but when a gift has been made for such consideration, it cannot be recovered. In support of this proposition I think I need only cite the following passage in the judgment of Middleton J. in the case of *Sendris Appu v. Santakahamy*<sup>1</sup>:—

“It seems to me that the principle adopted by the Cape Supreme Court that it will not lend its power and authority to the enforcement of contracts made for illegal or immoral consideration is the correct view of the law. That Court, while admitting that there was a conflict of opinion arising from the Roman-Dutch law authorities, inclined to the view that a concubine or prostitute would not be able to sue for anything promised her in consideration of illicit intercourse; but that if the thing promised had been transferred, it could not be taken from the concubine or prostitute, following the maxim of the civil law;

<sup>1</sup> 13 N. L. R. 239.

*quum per delictum est duorum semper oneratur petitor et malior habetur possessoris causa* (when both persons are in the wrong the burden always lies on the claimant, and the possessor is in the better legal position (2 *Nathan* 552) ). Applying that principle here, the intervenient is, in the eye of the law, in possession of the property granted by the deed of gift, and her possession must prevail as against the plaintiff's claim for the partition of the land. ”

The principles laid down in this case must also be applied to the case of where a woman makes gifts to her paramour. In this case not only the gift of the land but also the gifts of money for the building of the house were made during the time the illicit relationship existed between the parties, and on account of such relationship. Such gifts are not recoverable.

The appeal must consequently, in my opinion, be dismissed. I would however vary the order in the lower Court as to costs. The defendant has been awarded his costs. I do not consider he should receive them, in view of his defence which resulted in the trial taking much longer than it need have done, and also in view of his perjury.

I would consequently order that the decree be varied by ordering that each party pay its own costs, and for the same reason I would make no order as to costs in this Court. Subject to this variation in the decree the appeal is dismissed.

SOERTSZ A.J.—I agree.

*Appeal dismissed.*

