Present : Garvin A.J. and Jayewardene A.J.

1923.

MOHITIAPPU *et al. v.* KIRIBANDA *et al.*

98—D. C. Kegalla, 6,197.

Refusal of a husband to consummate marriage—Action by wife for damages against husband and person instigating the husband to do so.

The refusal of a husband to consummate a marriage does not amount to a tort giving rise to a claim for damages. Refusal to cohabit, that is, to consummate the marriage, amounts in law to desertion, and entitles the wife to obtain a dissolution of the marriage.

Both under the Roman-Dutch law and the English law husbands have been entitled to bring action for damages against persons, who maliciously or without just cause, have enticed away their wives and procured them or have induced them to absent themselves from their husbands. In the Roman-Dutch law no case can be found where a wife has been held entitled to bring a similar action when the husband is kept away from her—probably because she has no *locus standi in judicio* without her husband. A Kandyan wife is in the eye of the law a *femme sole*, and enjoys all the rights which a married woman in England has under the Married Woman's Property Act, 1882, and more especially if she is married in *binna*, and there is no reason why she should be held disentitled to maintain an action of this kind.

THE plaintiffs sued the defendants, appellants, in the District Court of Kegalla in case No. 6,197 for the recovery of a sum of Rs. 350, being damages sustained by the refusal of the first defendant to consummate his marriage with the second plaintiff.

Of consent a preliminary issue of law was argued, whether there was a misjoinder of parties and of causes of action, and the learned District Judge on June 12, 1923, held on that issue in favour of the plaintiffs.

The defendant appealed.

F. de Zoyza, for defendants, appellants.

Keuneman, for plaintiffs, respondents.

The following authorities were cited at the argument :—*8 C. W. R. 149 ; 16 Halsbury, 318, 319, sections 627–630 ; 9 H. L. 577, at page 591 ; 4 N. L. R. 316 ; De Villiers, p. 36, p. 82.*

Cur. adv. vult.

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September 13, 1923. JAYEWARDENE A.J.—

This is a peculiar action. The parties are Kandyan Sinhalese. The second plaintiff is the wife of the first defendant. She alleges that she married the first defendant with the consent of the first plaintiff and the second defendant. I presume they are the fathers of the second plaintiff and first defendant respectively. She further alleges that since the date of the marriage her husband, the first defendant, at the instance of the second defendant, has refused to consummate the marriage and has deserted her. By reason of this conduct the plaintiffs say they have been greatly disgraced in the eyes of the public and have suffered damage in reputation, which they estimate at Rs. 350. They claim this sum jointly and severally from the defendants.

The defendants filed a joint answer containing a general denial of all the allegations in the plaint, including the averment of marriage. They further pleaded that this action was not maintainable in law as there was a misjoinder of parties and causes of action. No objection was taken on the ground that the plaint disclosed no cause of action. From the issues suggested for the defendants it would appear that they now admit the marriage between the second plaintiff and the first defendant. The first issue which raised the question of misjoinder of parties and causes of action was taken up, and the Court's decision invited on it as a preliminary issue. The learned District Judge held that there was no misjoinder of parties and causes of action. On the plaint, as it stands, there is clearly no misjoinder of either parties or causes of action. Damages are claimed against both defendants as a result of a tort committed by the first defendant at the instance of the second. They can be sued in the same action if the action is maintainable. But during the argument it appeared to us that the real objection of the defendants was that the action in its present form was not maintainable, at least against the husband, the first defendant. We, therefore, invited counsel to argue the question whether the action was maintainable in law against the defendants or either of them. Now, the cause of action alleged against the husband is that he refused to consummate the marriage. In my opinion the refusal of a husband to consummate a marriage does not amount to a tort giving rise to a claim for damages, whatever might have been the object or intention of the husband in so refusing. Marriage, especially among Kandyans, under the Kandyan Marriage Ordinance of 1870 is a purely civil contract. Such a marriage induces the usual consequence of marriage—the duty of the husband to live together, and cohabit with his wife. Refusal to cohabit, that is, to consummate the marriage, amounts in law to desertion, and entitles the wife to obtain a dissolution of the contract of marriage. Refusal to cohabit may in some cases disgrace the wife in the eyes of her friends and relatives, but I know

of no case, and none have been cited to us, where such a refusal has enabled a wife to treat it as a tort sounding in damages whether under the Kandyan, the English, or the Roman-Dutch law. Her only remedy is to obtain a divorce. In my opinion, therefore, the plaint does not disclose any cause of action against the first defendant, and the action against him must be dismissed, with costs.

To the case against the second defendant different considerations apply. Perhaps owing to the novelty of the action the plaint has not been properly framed. It is in substance a claim for damages against the second defendant for inducing the husband to refrain from cohabitation, that is, to desert his wife and to deprive her of the *consortium* of her husband. Is a wife entitled to bring such an action ? Both under the Roman-Dutch law and under the English law husbands have been entitled to bring actions for damages against persons, who maliciously or without just cause, have enticed away their wives and procured them or have induced them to absent themselves from their husbands. *3 Nathan, p. 1666, s. 1623*, and *Halsbury's Laws of England, vol. 16, p. 318, s. 623*. In the Roman-Dutch law no case can be found where a wife has been held entitled to bring a similar action where the husband is kept away from her. This may be due to the fact that in the Roman-Dutch law a wife is supposed to be under the tutelage of her husband, and the difficulties in the way of her instituting such an action, as she has no *locus standi in judicio* without her husband. But in England such an action was recently brought, and was held to be maintainable. See *Gray v. Gee.*[1] The absence of any previous case was attributed to the fact that the wife could not sue alone prior to the passing of the Married Woman's Property Act, 1882. In an old case which came before the House of Lords, *Lynch v. Knight*[2] from the Irish Courts, Lord Campbell L.C. and Lord Brougham strongly favoured the view that such an action would lie, but Lord Cranworth and Lord Wensleydale took the opposite view. In *Gray v. Gee* (*supra*) Darling J., in over-ruling the objection that the action was not well founded, said :—

> " In this country a woman was never a chattel of her husband. He had *potestas* over her and his children, but *potestas* and *proprietas* were very different things. He (His Lordship) had come to the conclusion that there was no distinction to be drawn here to the effect that the husband could bring the action because his wife was his property, and that the wife could not because her husband was not her property. If a man was allowed to bring such an action, why should not a woman ? He could see no

[1] *(1923) 39 T. L. R. 429.*

[2] *(1861) 9 H. L. B. 576.*

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reason. A woman might not lose quite as much as her husband, but if another woman enticed the husband away, she lost far more than necessities and far more than money could replace. This form of action had been allowed in the United States andin Canada, and although these decisions were not binding upon a Judge in this country, they laid down what was the old law of England. He thought it was entirely consistent with the principles of our Common law, and he thought the reason why such an action had never been brought before was that there had been difficulties of procedure. These had now been swept away by the Married Woman's Property Act, 1882. He was of opinion that the rights of the two parties were the same. The difficulty had been, not that there was not the right, but that the remedy had not been devised. The law had devised that remedy by the Act which gave a married woman the right to sue in her own name for her own benefit. The legal objection was bad, and the action should proceed."

A Kandyan wife by the Common law which regulates her rights is, and has always been, in a stronger position than her English sister. She was in the eye of the law a *femme sole*, and enjoyed all the rights which a married woman in England has under the Married Woman's Property Act, 1882, and more especially, if she was married in *binna*. So that the reasoning of Darling J. entirely applies to her, and there is no reason why she should be held disentitled to maintain an action of this kind. It is not necessary to decide whether wives whose rights are governed by the Roman-Dutch law and the Ordinance No. 15 of 1876 are in the same advantageous position. If the allegation in the plaint be construed as meaning that the second defendant instigated or induced the first defendant not to consummate the marriage, that is, not to live with her, and thereby the second plaintiff has lost the *consortium* of and joint residence with her husband, it discloses a cause of action against him. Perhaps the plaint requires amendment, and the plaintiff should be allowed to make the necessary amendments. If the action of the first defendant was intended to cause, and did cause, disgrace to the plaintiff, that circumstances may be taken into consideration in awarding damages. It is difficult to understand the first plaintiff's presence in the case. His name should be struck out. I do not think he has any place in the action. The appellants are entitled to their costs of appeal.

GARVIN A.J.—I agree.

Varied.