

1948

Present : Canekeratne and Dias JJ.

PERERA, Appellant, and PERERA, Respondent.

*S. C. 259—D. C. Avissawella, 4,773.**Married woman—Disposal of immovable property—Consent of husband in Writing—Void or voidable—Matrimonial Rights Ordinance—Married Women's Property Ordinance.*

A woman married before July 1, 1924, cannot dispose of immovable property acquired before that date without the written consent of the husband.

APPPEAL from a judgment of the District Judge, Avissawella.

H. V. Perera, K.C., with *E. A. P. Wijeyeratne*, for the plaintiff, appellant.

N. K. Choksy, K.C., with *S. R. Wijayatilake* and *E. O. F. de Silva*, for the defendants, respondents.

Cur. adv. vult.

March 22, 1948. CANEKERATNE J.—

This is an appeal by the plaintiff, a grand-daughter of one Ango Perera, from a judgment dismissing her action for declaration of title to a land.

Ango Perera became the owner of the land by two deeds dated April 1, 1907, and July 13, 1907, respectively; she made a gift in favour of the plaintiff by deed P 1 dated October 25, 1941, reserving a life-interest to herself and her husband and by deed 1 D 1 dated August 10, 1944, she transferred the same land with the consent of her husband to the first defendant, another grand-daughter—it purports to be a deed of sale.

As Ango Perera was married after the proclamation of the Matrimonial Rights and Inheritance Ordinance of 1876, this land formed part of her separate estate. The right of a married woman to enter into contracts, and to make dispositions of her property under certain circumstances was recognised by this Ordinance (as regards the former, see sections 10 and 9, and 17 *N. L. R.* 357, as regards the latter see sections 9, 12 and 13). The second part of the Ordinance which contained sections 5 to 19 and sections 22 and 23 was repealed and the scope of her capacity to contract and of her rights was widely extended by the Married Women's Property Ordinance, No. 18 of 1923. The Ordinance applies to all married women, whether they were married before the date of the Ordinance, July 1, 1924, or after: certain persons are taken out of the purview of the Ordinance (section 3). The new law ought to be construed so as to interfere as little as possible with vested rights. A retrospective operation is not to be given to a statute so as to impair an existing right or obligation. The repeal of sections 5 to 19, 22 and 23 is, according to the proviso to section 4, not to affect any right acquired while those sections were in force.

The Ordinance provided in effect that if a woman married on or after July 1, 1924, all her property no matter when acquired should be her separate property and she can dispose of any property belonging to her as if she were a *feme sole* (section 7 and section 5 (1)). It contains certain provisions which are applicable to a woman married before this date. The position of such a woman is as follows:—(1) She is entitled to dispose of in manner previously mentioned in the Ordinance as a *feme sole* by deed or will as her separate property whatever accrued to her after the commencement of the Ordinance (section 10 (1)). The section applies to and affects all marriages contracted before the commencement of the Ordinance and alters with respect to such marriages in the manner indicated in the section the consequences of the marital relation. (2) She can make a gift of immovable property acquired before the Ordinance

to her husband. It was an existing right at the time of the passing of the Ordinance of 1923, and the new Ordinance does not alter this right. The Privy Council in *Hulme King v. de Silva*¹ stated that under section 5 of the Ordinance a wife is under no disability as regards coverture in disposing of her immovable property in favour of her husband. A married woman while the Ordinance of 1876 was in force could not dispose of any immovable property by a deed *inter vivos*, except with the written consent of her husband. This limitation of the power of a married woman to dispose of such property still applies in cases where the property is that of a woman married before July 1, 1924, and it has been acquired by her before that date. The consent of the husband may be dispensed with by the District Court where the husband is a lunatic or idiot, or where his residence is not known, or where he is in prison or living apart from his wife by reason of desertion or separation by mutual consent, or where his consent is unreasonably withheld or where the interest of the wife or children requires that such consent be dispensed with (section 12).

A disposition of immovable property made by a married woman before the coming into operation of the Ordinance of 1923, without the requisite consent would have been void, for she could dispose of such property by act *inter vivos* "with the written consent of her husband but not otherwise" (section 9). This section is no longer in force; but his power of controlling to some extent her dispositions, being a right under the repealed sections, is unaffected. The husband of a woman married before July 1, 1924, can still insist on saying that his written consent is necessary. A disposition of property without his written consent is an act done in derogation of the rights of the husband. Mr. Perera contends that the absence of a consent by the husband does not make the disposition made by Ango Perera void, but only renders it voidable at the instance of the husband. When a transaction is said to be voidable it means that it is valid but it can be avoided by one of the parties to it. It entitles one of the parties to take steps to put an end to the transaction, he can rescind it at his option. The transaction is binding and valid till it is set aside.

By marriage the husband of Ango Perera acquired a curatorial power over his wife's immovable property, that is he had a power of seeing that her property is not alienated without his authority. The wife could not act by or for herself in transactions relating to her immovable property, she was incapable of disposing of such property by her own act, something more was necessary to make the disposition binding. The authority or concurrence of her husband manifested in a particular way, a consent by writing was required, without that consent she was by her coverture utterly disabled from transferring her immovable property to a third person. As there was not the written consent of the husband the deed executed by Ango Perera in favour of the plaintiff did not effectively transfer her interests to the donee—it is something more than a voidable transaction.

It may be permissible to point out that, according to the systems founded on the Roman law, there is a distinction between nullities

¹ (1936) 38 N. L. R., 63, pp. 67 and 68.

which are absolute, and those which are relative or respective. Where the act is absolutely null, it can receive no ratification which can by retroaction render it valid at its commencement. But where the nullity is respective, as is that induced by minority or coverture the act can be ratified¹, the ratification has relation to the date of the original act, and renders it valid from the commencement. The nullity is established in favour of the husband, it is competent for him to renounce the benefit of the nullity². The deed P 1 would fall within the class of transactions which are relatively null.

The appeal is dismissed with costs.

DIAS J.—I agree.

Appeal dismissed.
