

SOMASUNDARAM CHETTY v. BANDA.

1903.
March 30.

D. C., Galle, 6,319.

Married woman—Trader—Publica mercatrix—Evidence of separate trading—Keeping hopper boutique. Onus probandi—Promissory note by married woman—Money borrowed mercaturæ intuitu—Liability to be sued on her joint and several notes.

A woman, living with her husband in a house where a "hopper boutique," (*appa kadai*) was kept, and in which she sold hoppers (rice cakes), plaintains, cigars, and betel leaf, cannot be held to be a *publica mercatrix* without some reliable evidence that she was carrying on that trade independent of her husband.

To render a married woman liable on a promissory note made by her without the consent or knowledge of her husband, it must be proved not only that she is a *publica mercatrix*, but also that the obligation was incurred *mercaturæ intuitu*.

THE facts of the case are fully stated in the judgment of Mr. Justice Wendt.

The District Judge gave judgment by default against the first defendant, and (after evidence heard) against the second defendant.

The second defendant appealed.

H. A. Jayawardene, for second defendant, appellant.

Dornhorst, K.C., for plaintiff, respondent.

Cur. adv. vult.

30th March, 1903. WENDT, J.—

The second defendant is sued along with her son, the first defendant, on a joint and several promissory note for Rs. 500 made by them in plaintiff's favour. The plaint alleges that the defendants were "traders". The first defendant is in default. The second defendant's husband appointed a proctor to defend the action on behalf of his wife, and this proctor duly filed the second defendant's answer. A motion by plaintiff to add the second defendant's husband as a party to the action was disallowed by the District Judge (and I think properly disallowed) on the ground that the husband was defending the action on behalf of his wife. The motion was opposed by counsel for the second defendant, and it is therefore somewhat surprising to find an issue framed at the trial between plaintiff and second defendant as to whether plaintiff could maintain the action without joining the husband.

The defence put in by the second defendant was that she was married to her husband in the community of property and was

1903. not a trader, and that she received no consideration for the note.
 March 30. At the trial plaintiff set up that second defendant was a *publica mercatrix* with the consent and authority of her husband, and therefore liable on her note.
 WENDT, J.

It appeared from the evidence that second defendant and her husband lived together in a house on the Wakwella road, where second defendant kept a boutique, in which she sold hoppers, betel, plaintains, fruit, and cigars—what is commonly known as a “hopper boutique.” It is startling to find a married woman who keeps such a boutique dignified with the title of *publica mercatrix*, and therefore clothed with authority to bind not herself only but her husband by her obligations. In view of the man and wife residing together in the boutique, some very strong evidence would be necessary to show that it was the wife’s trade, and that she was carrying it on separately from her husband. That evidence is entirely wanting; in fact, on the materials before the Court, it could be much more plausibly argued that the “trade” was the husband’s and that the wife was merely his saleswoman.

But, assuming the wife to have been *publica mercatrix* there is another condition precedent to her liability laid down by Voet (*Ad Pand. 23, 2, 44*), viz., that the obligation should have been incurred *mercatura intuitu*, in respect of the trade.

The second defendant deposes that she signed the note for the accommodation of her son, while plaintiff’s own version is that it was for money lent to both mother and son. There is nothing whatever to show that the money was required *mercatura intuitu*, and we certainly cannot presume that the “trade” of the hopper boutique needed a loan of Rs. 500. The onus lies heavily upon a creditor who seeks to render a married woman liable on an obligation incurred without the consent or knowledge of her husband. It must be remembered that the effect of a decree will be to render the common property of husband and wife liable in execution.

I am of opinion that the plaintiff in this instance has not discharged that onus, and that the judgment appealed against ought to be reversed and the action dismissed as against the appellant, with costs.

I might add that in the case of a business worthy of being described as *publica mercatura* there would usually be evidence of its having been carried on in the woman’s own name as distinguished from that of her husband. Nothing of the sort is even suggested here.

LAYARD, C.J.—

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The question to be decided here is whether the second defendant, a married woman living with her husband, is liable to be sued on her joint and several promissory note.

Her husband is not a party, and as the question whether she could be sued alone was raised in the first issue, I do not see why the District Judge did not then and there join him as a party.

To my mind it is sufficient to deal with only one point in this case, viz., that the evidence does not show—indeed, rather negatives the suggestion—that the debt was incurred in respect of the second defendant's trade.

Assuming she was a *publica mercatrix*, I am of opinion that the doctrine of Roman-Dutch Law, giving right to sue and a liability to be sued in respect of her debts, is confined as regards the latter to debts incurred *quâ* trader. Voet confines himself to the case of a debt contracted *quâ* *mercatrix* (2. 4. 36), and again he says (23. 2. 44) if the woman's contract is *extra mercaturæ causam in alios usus*, she only binds her husband with his express or tacit consent. *Van Leeuwen* (chap. VI., bk. I.) lays down the law in similar terms.

The money was not borrowed for the purposes of her trade, so far as appears, but for the assistance of her son, who signed the note first and, according to her, got the money, and who (as plaintiff admits) wrote out the note, and apparently induced her to sign it. It was not borrowed for the purposes of the trade, because it is not alleged that mother and son traded together as partners. This therefore relieves us from further consideration of the cases and authorities cited, as this case does not turn upon whether this woman was a *publica mercatrix*.

In these circumstances, I am of opinion this appeal should be allowed with costs.

