1933

Present : **Dalton S.P.J. and Drieberg J.**

WIJEYTUNGE *v.* ATTAPATTU.

95—D. C. Colombo, 36,818.

Gifts in contemplation of marriage—Action to recover—Motive must be promise of marriage—Gifts made to win favour for suit not recoverable.

In an action to recover a gift made in contemplation of marriage the plaintiff must prove that the motive for the gift was defendant's promise of marriage or that the gift was conditional on marriage taking place.

Gifts made with the intention of winning favour for plaintiff's suit in defendant's sight are not recoverable.

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera (with him *Ameresinghe*), for plaintiff, appellant.

De Zoysa, K.C. (with him *N. E. Weerasooria*), for defendant, respondent.

June 1, 1933. DALTON S.P.J.—

The plaintiff (appellant) brought this action against the defendant (respondent) to recover from her certain gifts made by him to her, and certain money contributions made by him towards the construction and completion and repair to a building on land belonging to the defendant, such gifts and contributions having been made in contemplation of a marriage between the parties, or in the alternative to pay their value set out at Rs. 3,569.43. It is alleged that defendant promised to marry the plaintiff about the beginning of the year 1929.

The parties are the children of two sisters, plaintiff being a bachelor 45 years of age at the time of the action, and the defendant a widow 35 years of age, with children. Prior to defendant's first marriage there is evidence to show that plaintiff had wished to marry her, having cherished an affection for her from his youth, but her father objected to his suit, apparently for the reason that according to Sinhalese custom, being the children of two sisters, they would not ordinarily be allowed to marry.

The learned trial Judge has held that the phrase " in contemplation of marriage " must relate to a marriage that has in fact been arranged between the parties, that the foundation of such an action must be a promise of marriage, and he expresses the opinion that that promise can only be proved by a writing, in view of the provisions of section 21 (1) of the Marriage Registration Ordinance, 1907, the proviso to which enacts that no action shall lie for the recovery of damages for breach of promise of marriage, unless such promise of marriage shall have been made in writing. In case, however, he should be wrong on this last point, in this case he has held that there is no evidence at all to justify a finding that defendant had ever promised to marry plaintiff. I have considerable doubt as to whether the proviso referred to applies to such a case as this, but in view of the finding of the trial Judge that in fact there was no promise written or otherwise, with which finding I am not prepared to disagree, it is not necessary to consider this last point further. It is

possible no doubt to infer a promise to marry to some extent from the conduct of the parties, but all the attendant circumstances and correspondence that passed have, it seems to me, been duly considered by the learned trial Judge, and he has come to the conclusion that no promise has been proved. That, in my opinion, is a finding to which on the evidence he was entitled to come.

Mr. Perera then urged for the appellant that even if the promise of defendant be not proved, nevertheless provided it be shown that the marriage was in the contemplation of one party, here the plaintiff, which contemplated marriage has been communicated in some way or other to the other party, who accepts gifts which are made in view of that contemplated marriage, whatever be the reasons in the mind of the second party for accepting them, those gifts are recoverable, if the second party fails to carry out the marriage so contemplated. He urged that defendant knew plaintiff wanted to marry her and that she accepted the gifts and contributions in contemplation of that marriage which he hoped would come to pass.

On this point the trial Judge has found that plaintiff incurred expenses in making presents to defendant, not because he was promised anything in return, but because he hoped to win favour in her sight. He further finds that defendant was reluctant to accept assistance from him, and that she only did so when he said he wished to help her children. He was a bachelor in comfortable circumstances, and she was left with a family not at all well off. According to local custom they would call each other brother and sister. The list of presents filed shows gifts to her children as well as to her, and New Year presents to her servant, including clothing, some household goods, food, money, and a little jewellery. Altogether apart from the question of marriage, help from him to her and her children would in the circumstances not be unnatural and might well be expected.

With regard to the contributions to the house being built on defendant's land for her occupation, it seems clear that the house was not started until certain monies coming to her on her husband's death from the Savings Bank or a Provident Fund were available. The house is said to have cost about Rs. 5,000, of which sum defendant says she paid Rs. 3,827 in all. It is common ground that plaintiff had the spending of this money, and the trial Judge states he cannot say how much of the total cost plaintiff himself found. It would appear, however, to be the difference in these sums. He has in any case very greatly exaggerated the amount he spent. He seems to have taken the supervision of the building entirely into his own hands, not keeping the defendant informed of the amount being expended on the work, in order to create the impression in the family, as the trial Judge concludes, that he was spending a good deal on the defendant. Under the circumstances I do not see that his expenditure here was on any different footing from his expenditure on presents, or his contributions to the maintenance for a short time of defendant and her family, to which I have already referred.

The law applicable in a case of this nature, whether English or Roman-Dutch law, would appear to lead to the same result. It would seem to be governed by the principles of law applicable to ordinary contracts.

Only one local case has been cited, based on the Common law (*Appuhamy v. Mudalihamy.*[1]) That was an action to recover certain jewellery and presents given by the plaintiff to defendant in contemplation of a marriage which defendant refused to carry out. It is, I think, clear from the report that a marriage had been arranged, that is, a promise had been given, with the consent of the defendant's parents, and that as a result of that promise certain gifts were made to the defendant in accordance with local custom. The Court, relying on *Grotius, Introduction, p. 288,* held that as defendant had later refused to marry plaintiff, he was entitled to recover from her the gifts or their value. There was here a breach by the defendant of her undertaking, and the gifts having been made as a result of that undertaking and being conditional on that undertaking being carried out, plaintiff succeeded in his claim.

The English cases seem to set out the law in the same way. The judgment of McCardie J., in *Cohen v. Sellar*[2], deals with the law on the subject at length, and refers to numerous early and later English decisions. In the old case of *Young v. Burrell*[3], on which Mr. Perera relied, the report states that the plaintiff sued for the return of a gold pomander "left as a token at such time as he was a suitor for marriage" with the defendant. The defendant did not marry plaintiff, but she admitted her liability to return it and the Court ordered her to do so. The report does not show that there had been an actual promise to marry, or if so, who broke off the engagement; under the circumstances it was possibly not necessary to do so. McCardie J. assumes, however, it was the defendant who desired to escape marriage with the plaintiff, and she apparently did not wish to keep his gifts. I do not think this case is for the latter reason of any real assistance here, in support of counsel's later contention which I have set out.

Another old case, *Lockyer v. Simpson*[4], is of interest because even although a promise of marriage was proved which could not be carried out owing to the death of the man, the Court declined to order the return of certain gifts to the value of £420 made to the woman subsequent to the arrangement of the marriage in an action by the deceased man's executor, since it was under the special circumstances unable to imply a condition to defeat the presumption that the gifts were absolute and not conditional. Those special circumstances were that the parties were related, and acquainted intimately for many years before the marriage was arranged, and that the deceased had apparently formed an admiration for her from the time she was an infant. The Master of the Rolls points out that if no motive for these presents could be assigned but the marriage, then it would be more reasonable to imply a condition that the gifts were conditional on the marriage. Here, however, he states there were other motives, and it would be too great a strain for a Court of justice to fix upon this motive of marriage out of so many others. Even assuming then in the case with which we are dealing that a promise had been proved, as in *Lockyer v. Simpson* (*supra*), so here the appellant had several other motives apart altogether from the marriage for wishing to give defendant

[1] *Ramanathan's Reports. 1863-1868. p. 226.*
[2] *(1926) 1 K. B. 536.*
[3] *21 Eng. Rep. 29.*
[4] *(1730) 1 Mosely 298.*

and her children presents and for helping them after the death of her husband. In these circumstances, had the promise been proved, it would still have been necessary for the Court to consider whether that promise was the motive for the gifts or payments or any of them.

Another case relied on by Mr. Perera is *Robinson v. Cumming* [1]. There, one Cumming whose income was £100 a year made presents to the value of £120 to a young heiress, whose grandfather made a will appointing him executor and leaving the whole of his estate to him in case he should marry the granddaughter. She was 16 years old on her grandfather's death, seems never to have given Cumming any encouragement, and she did not marry him, but another person. Cumming sought then to obtain the value of the presents he had made to her. His claim failed, it being held he was a mere adventurer. In giving judgment Lord Chancellor Hardwicke stated that in his view, if a person has made his addresses for some time to a lady upon a view of marriage and, upon reasonable expectation of success, makes presents to a considerable value, and she thinks proper to deceive him afterwards, it is right that the presents themselves or their value should be returned. Where, however, presents are made only to introduce a person to a woman's acquaintance and to gain her favour, especially if there is a disproportion between the lady's fortunes and his, like other adventurers, if he runs risks and loses in the attempt, he cannot recover.

On the facts, the case contemplated in the first portion of the remarks of the Lord Chancellor, which are quoted is clearly to be distinguished from the case before us, for, in view of the learned trial Judge's findings on the facts, it certainly cannot be said that plaintiff made any gifts upon reasonable expectation of the success of his suit, if that means a reasonable expectation based upon something that defendant had said or done, or that the defendant, having accepted them, thought proper to deceive him afterwards. Nor do I think this case lays down any proposition of law which is necessarily inconsistent with the conclusions of McCardie J. in *Cohen v. Sellar (supra)*. There he sums up the position as follows:—The conditions which attach to a gift made in contemplation of marriage must be viewed in relation to the incidents which flow from the engagement itself. The matter is governed largely by the principles of law applicable to ordinary contracts. In this event the argument advanced by Mr. Perera, on the assumption that there has been no promise or arrangement of marriage proved, does not seem to me to be sustainable. The appellant had various motives for doing what he did, one of which no doubt was, as the learned Judge finds, to win favour for his suit in defendant's sight, but he has failed to show that any gifts or payments he made were made in contemplation of any marriage arranged, in other words, of any promise of marriage, or that they were in any way conditional gifts.

The appeal must be dismissed with costs.

DRIEBERG J.—I agree.

Appeal dismissed.

[1] *(1742) 2 Atkyns 408.*