1937

Present : **Soertsz and Hearne JJ.**

THAMBY LEBBE *et al. v.* JAMALDEEN.

196—D. C. Kandy, 47,009.

Agreement—Promise to give as dowry immovable property worth Rs. 20,000—Agreement not notarially attested—Validity—Ordinance No. 7 of 1840, s. 2—Ordinance No. 22 of 1871, s. 8.

An agreement to give as dowry immovable property to the value of Rs. 20,000 or the equivalent in cash, which is not notarially attested, is enforceable.

The words "promise, bargain, contract or agreement for effecting any such object" in section 2 (b) of the Ordinance of Frauds refer to a means of and a stage in the formal effectuation of a sale, purchase, transfer, assignment, or mortgage.

***Held, further,* that the cause of action arose on the refusal to carry out the agreement and that the action was not barred by section 8 of the Prescription Ordinance.**

THE paintiffs, husband and wife, sued the defendant for the recovery of a sum of Rs. 20,000 on account of dowry promised them by the defendant. The plaintiffs relied, for the basis of their action, on the arrangement and promise entered into at the time that the negotiations for the marriage were concluded. The defendant stated that his promise was in respect of immovable property and was, in the absence of a notarial writing, unenforceable in law (section 2 of Ordinance No. 7 of 1840). A plea of prescription was also raised by the defendant. The District Judge gave judgment for the defendant and the plaintiffs appealed.

Hayley, K.C. (with him *C. V. Ranawake*), for plaintiffs, appellant. The defendant admits the promise of land, but claims that it cannot be enforced as there is no notarial agreement. The marriage register P 1 records whatever *Mahr* or *Stridanam* was given. The question here is whether Ordinance No. 7 of 1840 applies to a promise to give unspecified land. The Ordinance has no application to a mere promise to settle land. If there is no conveyance, the remedy is an action for money damages as for a breach of contract.

Here there is no specific performance available as there is no land specified. Section 2 of Ordinance No. 7 of 1840 refers to—(*a*) an actual specific conveyance of land, *i.e.*, immediate dealings with land; (*b*) a "promise . . . . for effecting such object". This does not mean a promise to effect, in the future. Promise . . . . for "effecting a mortgage" results in a mortgage bond. It does not refer to future transactions; and (*c*) contracts or agreements for the future dealings with land; these refer only to sale or purchase.

A strict interpretation of this Ordinance is required. It was held in *Narayan Chetty v. James Finlay & Co.*[1] that the Ordinance did not apply to equitable interests. The English Act has specific provisions regarding trusts, which are excluded from our Ordinance. Section 4 of the English Act makes definite provision for settlements on marriage; our Ordinance regarding future dealings speaks only of sale and purchase. Thus the promise in this case is not covered by the Ordinance at all.

[1] *29 N. L. R. 65.*

As regards the action for damages—vide *25 Hals. 547 (old ed.)*. Under the Registration Ordinance "any land" is specific land. Section 6 and section 8 are taken over *verbatim* from the Statute of Frauds. Section 14 requires description of land. Thus a promise to give land, as in this case, is one that cannot be registered, but is one that can be duly enforced to the extent of obtaining damages.

L. A. Rajapakse (with him *H. V. Perera, K.C.*, and *M. J. Molligoda*), for defendant, respondent.—The plaint was filed on October 19, 1935, and para. 3 recites:—"The defendant agreed to settle on the two plaintiffs a house and paddy field . . . . whenver they demanded the same". Therefore the cause of action was one on demand. Further, para. 6 of the plaint recites that "plaintiffs complain that during the last two years they requested the defendant to implement the undertaking". The answer was filed in December, 1935, and the plea was taken that the claim was prescribed in three years from the date of the cause of action.

The amended plaint then recites:—"In October, 1930, a marriage was arranged and the defendant promised a dower gift of Rs. 20,000 and in pursuance of such arrangement the defendant confirmed the said promise and undertook to give the gift either in land or in cash "whenever according to custom the plaintiffs shall have made demand. and in October, 1935, the defendant failed to keep to his promise. P 1, the marriage certificate, mentions the amount of *Mahr* and *Stridanam*, viz., "*Stridanam*—cash Rs. 1,000 and house and paddy field and estate worth Rs. 20,000 at *Nawalapitiya* and *Rambukpitiya*. Stridanam amount received, balance to be given whenever bride and bridegroom asked for them". Thus the defendant undertook to give property not in general, but *certain* property in a *specific* place.

The cause of action in the plaint was upon a certain writing and if the writing was enforceable in law, the action was prescribed in six years. If the cause of action was not upon the writing, *vide* amended plaint, *e.g.*, promise—the action is prescribed in three years.

The cause of action arose immediately, for the agreement to give the dowry was one on demand. In the case of a promissory note, the cause of action arises from the moment the money is due. Therefore the cause of action in the present case, whether based on P 1 or on an alleged oral agreement is one for money payable on demand; and comes within section 7 or section 8 respectively of Ordinance No. 22 of 1871. Section 7 upon P 1, section 8, if not on a writing.

[SOERTSZ J.—Suppose the action was on the footing of a verbal promise which in the course of evidence is supported by writing—will it not be governed by section 7? Must the fact of writing be pleaded? Here the plaintiffs file an amended plaint after the answer.]

Dealing with section 2 of Ordinance No. 7 of 1840 the appellants limit this case to a future promise. Here the lands are in Nawalapitiya and not lands in general. This is a promise or an agreement for effecting a transfer of land.

[SOERTSZ J.—How are you going to register lands, supposing the defendant had lands in Nawalapitiya?]

Section 14 (1) and (5) refer to the particulars required and the Registrar can refuse to register the document. From the mere fact that the instrument cannot be registered, one cannot necessarily infer that the Ordinance does not apply.

Narayen Chetty v. James Finlay & Co. does not say that equitable interests may be conveyed without a notarial instrument. The dictum that equitable interests could be transferred without a notarial agreement is *obiter*. Therefore the provisions of section 2 of Ordinance No. 7 of 1840 cannot exclude this promise. The claim for damages is prescribed in three years.

Hayley, K.C., in reply.—On the point of prescription, the *Kaduttam* deed P 1, was signed by the plaintiffs and the defendant. Therefore whatever be the date on which the previous contract was made, this deed is to be regarded as a new contract and prescription runs from that date—six years. Even the amended plaint comes within six years. Damages do not arise till the plaintiffs have made demand and the defendant has failed to comply. If he wants to limit the plaintiffs' right, the defendant must show a statute obstructing their right. Section 4 of the English Act is expressly left out of our Ordinance, *i.e.*, *re* settlements in consideration of marriage.

"Any land" in the Registration Ordinance must be specific lands. There is no sense in going before a notary and promising to give what is indefinite. If the land is registered, it can be traced. A mere general promise need not be attested by a notary.

Cur. adv. vult.

July 1, 1937. HEARNE J.—

In this case the trial Judge found that the defendant-respondent had promised the plaintiffs-appellants a dowry gift of Rs. 20,000 in consideration of their marriage which took place on December 20, 1930, and that he failed to give them immovable property to the value of Rs. 20,000 or the equivalent in cash as stated in the marriage certificate. In the marriage certificate it is stated that the *Stridanam* was to be "cash Rs. 1,000 and house and paddy field and estate worth Rs. 20,000 at Nawalapitiya and Rambukpitiya". The next paragraph is to the effect that "the Stridanam amount (had been) received, the balance to be given whenever the bride and bridegroom asked for them". It is agreed for the purposes of this appeal that "*Stridanam*" should read "part of the *Stridanam*" and that the sum of money that actually changed hands was Rs. 1,000 only. On the issue of prescription the Judge found in favour of the plaintiffs, now appellants, but dismissed their claim on the ground that the defendant-respondents, not having agreed to give Rs. 20,000 in cash, the plaintiffs were not entitled "to claim immovable property in the absence of notarial writing".

Whether or not notarial writing is necessary depends upon the interpretation that is placed on section 2 of Ordinance No. 7 of 1840. That section provides that (*a*) no sale, purchase, transfer, assignment, or mortgage of land or other immovable property, (*b*) no promise, bargain, contract, or agreement for effecting any such object . . . . , and (*c*) no contract or agreement for the future sale or purchase of any land or immovable property, shall be of force or avail in law unless . . . .

The facts of this case cannot be said to fall within (c), for there was no agreement of *sale* or *purchase* nor, in so far as (*a*) is concerned, was there any sale, purchase, transfer, assignment, or mortgage. The question for which there is, as I understood, no authority in this Court is whether an agreement made upon consideration of marriage to settle upon the plaintiffs landed property is a bargain, promise, or agreement for "effecting" one of the "objects" referred to in (*a*). I do not think that (*b*) is susceptible of or intended to have that meaning. I regard the words "promise, bargain, contract, or agreement for effecting any such object" as referring to a means of and a stage in the formal effectuation of a sale, purchase, transfer, assignment, or mortgage. The draftsman no doubt had before him the Statute of Frauds and it would appear that the clause in section 4 of the Statute relating to agreements made upon consideration of marriage was omitted designedly. A clause of that nature would not have been left to the Courts to infer from the text but would have been stated expressly. It is possible, if not probable, that the conditions in Ceylon would have made impracticable an insistence upon notarial attestation in every case and that this was the reason for the omission.

Apart from this view which I take of section 2 of Ordinance No. 7 of 1840, I doubt very much whether the Ordinance has any application at all where the land, as in the present case, is unidentifiable land. The defendant-respondent's promise had reference to property which was limited as to value and as to situation but apart from these limitations was a promise of land at large. Section 8 (*a*) of the Registration of Documents Ordinance, No. 23 of 1927, refers to the same instruments affecting land as does section 2 of Ordinance No. 7 of 1840 and it would appear that the instruments in question as mentioned in both are those which relate to or affect specific properties.

In my opinion the view taken by the learned District Judge was wrong.

On the question of prescription Counsel for the respondent has argued that as the plaintiffs relied upon a verbal promise for payment of the dower gift on demand, the cause of action arose in October, 1930, and that in consequence the plaintiffs' claim was barred by section 8 of Ordinance No. 22 of 1871. Now apart from the fact that the plaintiffs alleged that the defendant had confirmed his promise at the marriage in writing, it is quite clear from the evidence of the plaintiffs (the defendant did not give any evidence at all) that the defendant verbally renewed his promise from time to time till October, 1935, when he definitely refused to fulfil it. This refusal gave rise to the cause of action. The District Judge was, in my opinion, right in finding that the cause of action accrued to the plaintiffs in 1935.

The appeal is allowed with costs. No issue was framed in the lower Court on the question of damages. The case should be remitted to the Judge to decide the amount of damages suffered by the plaintiffs consequent upon the defendant's refusal to settle property on the plaintiffs and to enter judgment in their favour in accordance with his finding.

SOERTSZ J.—I agree.

Appeal allowed.