1950 *Present:* **Wijeyewardene C.J., Jayetileke S.P.J., Nagalingam J., Gratiaen J. and Pulle J.**

NOORUL HATCHIKA, Appellant, *and* NOOR HAMEEM *et al.*, Respondents

S. C. 355—D. C. Colombo, 4,907

Agreement—Promise to transfer immovable property in consideration of marriage—Should be executed before notary—Prevention of Frauds Ordinance (Cap. 57), Section 2.

An agreement to transfer immovable property in consideration of marriage is governed by section 2 of the Prevention of Frauds Ordinance and should be embodied in a notarial agreement.

Thamby Lebbe et al. v. Jamaldeen (1937) 39 N. L. R. 73 and *Lila Umma v. Majeed (1943) 44 N. L. R. 524* overruled.

APPEAL from a judgment of the District Court, Colombo. This case was referred to a Bench of five Judges under section 51 of the Courts Ordinance.

E. B. Wikramanayake, K.C., with *I. Misso* and *J. B. White*, for defendant appellant.—The case for the plaintiffs was that the 2nd defendant promised to give as dowry to the 2nd plaintiff the premises bearing assessment No. 17, 17th Lane, Kollupitiya. They asked for specific performance of that agreement or in the alternative for Rs. 30,000 as damages. The agreement did not comply with the requirement of section 2 of Ordinance No. 7 of 1840 as it was not executed before a notary and two witnesses.

The District Judge, following the decisions of this Court in *Thamby Lebbe et al. v. Jamaldeen* [1] and *Lila Umma v. Majeed* [2], held that the agreement was valid though not executed in accordance with section 2 of Ordinance No. 7 of 1840. It is submitted that these cases have not been correctly decided. The decision in these cases was that agreements to transfer lands in consideration of marriage were valid even though such agreements were not notarially attested. But there are earlier cases where it was held that such agreements were unenforceable under section 2 of Ordinance No. 7 of 1840. See *A. A. Perera et al. v. Abeydeera* [3] and *Lewai v. Pakeer* [4]. These two cases were not cited at the argument in *Thamby Lebbe et al. v. Jamaldeen* (*supra*) the decision of which was followed in *Lila Umma v. Majeed* (*supra*).

An agreement to convey land as dowry comes clearly within section 2 of Ordinance No. 7 of 1840. Conveyance by way of dowry is a conveyance for valuable consideration. See *Jayasekara v. Wanigaratne* [5].

F. A. Hayley, K.C., with *C. E. S. Perera, M. H. A. Aziz* and *V. K. Kandasamy*, for plaintiffs respondents.—The two earlier cases *Perera et al. v. Abeydeera* (*supra*) and *Lewai v. Perera* (*supra*) were referred to in

[1] *(1937) 39 N. L. R. 73.*
[2] *(1943) 44 N. L. R. 524.*
[3] *(1910) 2 Matara Cases 112.*
[4] *(1915) 6 Bal. Notes of Cases 46.*
[5] *(1909) 12 N. L. R. 361.*

Lila Umma v. Majeed (*supra*) though not in *Thamby Lebbe et al. v. Jamaldeen* (*supra*). The present question whether an agreement to convey land as dowry comes within section 2 of Ordinance No. 7 of 1840 was not considered in the earlier cases.

Thamby Lebbe et al. v. Jamaldeen (*supra*) has been correctly decided so far as it decides that an agreement to convey land as dowry does not come within section 2 of Ordinance No. 7 of 1840. Section 2 prohibits 3 things: (*a*) sale, purchase, etc., of land; (*b*) promise, bargain, etc. for effecting any of the objects enumerated in (*a*); (*c*) any contract or agreement for future sale or purchase of land. The dealings referred to in (*b*) and (*c*) are clearly distinguishable; (*b*) does not refer to future transactions but (*c*) does refer to future dealings and covers contracts or agreements for future sale or purchase only. The word "for" with the present participle means "for the purpose of". See *Attorney-General v. Sillem* [1]. An agreement to convey land as dowry does not come under (*a*) or (*b*) or (*c*). Ordinance No. 7 of 1840 is a restrictive Ordinance and therefore must be strictly interpreted. A consideration of the earlier enactments on the subject tends to show that the Legislature did not intend agreements to convey land as dowry to come within Ordinance No. 7 of 1840. See Regulation 1 of 1806; Regulation 4 of 1817; Kandyan Proclamation of October 28, 1820, and Ordinance No. 7 of 1834; also *1862 Austin's Reports 65, case No. 15,378*. The decision in *Thamby Lebbe et al. v. Jamaldeen* (*supra*) therefore is correct both from a logical and a historical point of view.

Further, it seems reasonable to suppose that Ordinance No. 7 of 1840 did deliberately leave out dowry and marriage settlements owing to the state of our law. Community of property on marriage being part of our law at the time, it was probably thought that difficulties might arise if marriage settlements were brought under the Ordinance No. 7 of 1840. See *In Re Hume Mary Hume v. Brodie Bogus & Co.* [2]

As regards Roman Dutch Law the better opinion seems to be that no writing was necessary for ante-nuptial contracts. See Voet, De Pactis Dotalibus, 23. 4. 32. Van Der Keesal is of the same opinion. See also Lee on Roman Dutch Law (2nd ed.) p. 215 and Wille on South African Law (2nd ed.) p. 104.

E. B. Wikramanayake, K.C., in reply.—In regard to the three classes of transactions contemplated in section 2 of Ordinance No. 7 of 1840 there seems to be no substantial difference between the second and third classes; the two classes cover the same ground and it is difficult to understand why the third class is there at all.

Cur. adv. vult.

February 2, 1950. WIJEYEWARDENE C.J.—

This appeal was argued first before my brothers Gratiaen and Pulle and as they doubted the correctness of two decisions of this Court—*Thamby Lebbe et al. v. Jamaldeen*,[3] and *Lila Umma v. Majeed* [4]—it has come before the present Bench.

[1] (*1864*) *33 L. J.* (*Exchequer*) *209 at 213.*
[2] *1863-8 Ramanathan's Reports 222.*
[3] (*1937*) *39 N. L. R. 73.*
[4] (*1943*) *44 N. L. R. 524.*

The second plaintiff is the wife of the first plaintiff. The first defendant is the father and the second defendant, the mother, of the second plaintiff. The plaintiffs alleged that " in consideration of their marriage the second defendant undertook to give as dowry to the second plaintiff " the premises bearing assessment No. 17, 17th Lane, Kollupitiya. The register kept under the Muslim Marriage and Divorce Registration Ordinance, No. 27 of 1929, contains the following entry in respect of the marriage of the plaintiffs, signed by the second defendant :—

" The dowry promised by the bride's mother is :—

The entirety of premises No. 17, 17th Lane, Kollupitiya, and given when both bride and groom ask for it ".

Following the decisions mentioned above, the District Judge held that the agreement pleaded by the plaintiffs was valid though it was not executed before a Notary as required by section 2 of the Prevention of Frauds Ordinance, No. 7 of 1840.

It was argued for the respondents before us (i) that the Roman Dutch Law did not require agreements in consideration of marriage to be notarially attested or even to be in writing and (ii) that the Prevention of Frauds Ordinance kept the Roman Dutch Law alive as it designedly omitted any reference to such agreements and refused to follow in that respect the Statute of Frauds (29 Car. ii chap. 3 sec. 4) which contained a specific provision dealing with such agreements.

As regards the first point I may state that there is a conflict of opinion among the Roman Dutch Law writers. Dealing with this question, Nathan says :—

" Voet holds that an antenuptial contract need not be in writing and in support of his view cites Neostadius (on Antenuptial Agreements, sections 18,19); and Dutch Consultations (3, 1, 149, 164). Van Leeuwen (Cens. For. 1, 1, 12, 9) takes the same view of the matter. Voet, a little further on, proceeds to state that antenuptial contracts containing gifts amounting in value to above 500 aurei (fixed in modern practice at 500*l*.), require to be in writing, although even then they need not be notarial. It is the same, Voet says, with antenuptial contracts which provide for the future devolution of property by inheritance. Van der Linden (1, 3, 3 ; Juta p. 15) says distinctly that the contract must be in writing, and must be contained in a notarial instrument although, in general Dutch Law, no legal registration thereof is required (23, 4, sections 2-4)."

" Van der Linden's view was followed by the Cape Supreme Court, which decided that an underhand antenuptial contract signed by the spouses and attested by witnesses could not avail as against the wife's creditors, who claimed payment of a debt contracted by the wife before marriage (*Wright v. Barry and Another* 1. S. 6 ; 1 M. 175). Van der Keessel (section 229 ; see also *Steyler v. Dekkers*, 1 R. 111) holds with Voet that antenuptial contracts need not be in writing. Van der Linden's is the more modern opinion, and, supported, as it is by the opinion of the Cape Supreme Court (given in 1850), would appear to be correct as to the general Dutch Law ".

" Voet himself (23.4.50) says that publicity is required ; but this only means that a Notarial contract is necessary ; and the necessity for such notarial contract is limited by Voet as stated above to gifts of 500*l*. and upwards, of landed property and property to go by way of inheritance ". (Nathan, 2nd Edition, volume 1, paragraph 424).

Whatever be the position under the Roman Dutch Law, the important question is whether the Prevention of Frauds Ordinance does not require such agreements to be embodied in a notarial document when such agreements relate to immovable property.

Section 2 of the Ordinance enacts 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, or establishing any security, interest or incumbrance affecting land or other immovable property . . . . . " ;

(c) " Nor any contract or agreement for the future sale or purchase of any land or other immovable property "

shall be of force unless it is in writing and signed by the party making the same in the presence of a Notary Public and two witnesses and unless the execution of such writing is duly attested by such Notary and witnesses.

I do not see any reason why it should be said that an agreement to transfer immovable property in consideration of marriage does not come under clause (*b*), when that clause is wide enough to embrace all agreements for the transfer of immovable property. I note that a restrictive interpretation was sought to be given to that clause in *Thamby Lebbe et al. v. Jamaldeen* (*supra*) by holding that the clause referred to " a means of and a stage in the formal effectuation of a sale, purchase, transfer, assignment or mortgage ". It is sufficient to state that the respondent's Counsel was unable to throw any light on the significance of those words " a means of and a stage in the formal effectuation ".

I am unable to appreciate the argument based on the fact that our Ordinance makes no specific reference to agreements in consideration of marriage while the Statute of Frauds makes such a reference. Section 4 of the English Statute provides that agreements in respect of several transactions shall not be enforceable unless they are in writing and includes among such transactions (*a*) a contract or sale of lands, (*b*) a promise to answer for the debt, default or miscarriage of another, (c) an agreement in consideration of marriage. The arrangement under our Ordinance is quite different. Section 2 of our Ordinance refers only to transactions in respect of immovable property. It is section 21 which refers to the need for a writing (not necessarily a notarial writing) for contracts of suretyship and for agreements to pledge movable property where there is no delivery of the property to the pledgee. Section 21, as it was originally passed, referred also to contracts for the sale or purchase of movable property where there was no delivery of the property or part payment of the price by the purchaser. This latter provision was repealed by section 57 of the Sale of Goods Ordinance (*vide* Legislative Enactments, 1923 Edition, volume 2) as the necessary law with regard

to contracts for the sale of movable property was re-enacted in section 5 of the Ordinance as numbered in the 1938 edition of the Legislative Enactments. When the English Statute made special reference in section 4 to agreements in consideration of marriage it thereby required a writing for all such agreements whether they referred to immovable property or movable property. Our Ordinance classified various transactions under three heads—(*a*) those requiring a notarial document, (*b*) those requiring a non-notarial writing and (*c*) those which require no writing at all. Our Legislature drew a distinction between agreements in respect of immovable property and agreements in respect of movable property. The position under the Prevention of Frauds Ordinance is that agreements in consideration of marriage fall under section 2 if they relate to immovable property and agreements in consideration of marriage relating to movable property fall outside the Ordinance.

I am unable to follow the decisions in *Thamby Lebbe et al. v. Jamaldeen* (*supra*) and *Lila Umma v. Majeed* (*supra*). The view I have taken is supported by two earlier decisions of this Court—*Perera v. Abedeera* [1] and *Levvai v. Pakeer Tamby* [2].

I allow the appeal and direct decree to be entered dismissing the plaintiffs' action with costs in both the Courts.

JAYETILEKE S.P.J.—I agree.

NAGALINGAM J.—I agree.

GRATIAEN J.—I agree.

PULLE J.—I agree.

Appeal allowed.

1949 *Present :* **Jayetileke S.P.J. and Canekeratne J.**

WANIGASURIYA, Appellant, *and* HINIDUMA CO-OPERATIVE SOCIETY *et al.*, Respondents

S. C. 4—D. C. Galle X 412

Civil Procedure Code—Execution of mortgage bond by surety as security for manager of Co-operative store—Dispute—Arbitration—Award—Seizure of property hypothecated—Section 348—Not applicable.

The appellant executed a mortgage bond as security for the due performance by the 2nd respondent of his duties as manager of a Co-operative store. A dispute between the 1st and 2nd respondents was referred to arbitration under the Co-operative Societies Ordinance and an award was made against the 2nd respondent. Writ issued but was returned to Court. Thereafter the 1st respondent moved for a notice on the 2nd respondent in terms of section 348 of the Civil Procedure Code to show cause why the property hypothecated should not be sold.

Held, that section 348 of the Civil Procedure Code did not apply. That section applied only where a liability was incurred as surety for the performance of the decree after the institution of the action and before the entering of the decree.

[1] (*1910*) *2 Matara Cases 113.*
[2] (*1915*) *6 Balasingham's Notes of Cases 46.*