

Present: Grant J. and Maartensz A.J.

1927.

NONA v. MANUEL *et al.*

63—1). C. (Inty.) Galle, 24,101.

Married Women's Property Ordinance—Action for declaration of title to land—Married after the Ordinance—Land bought before—Ordinance No. 18 of 1923, ss. 4 and 5.

A woman married before July 1, 1924, the date at which the Married Women's Property Ordinance, No. 18 of 1923, came into operation, sued for a declaration of title to a land bought by her before July 1, 1924.

Held that she was entitled to maintain the action without joining her husband.

PLAINTEIFF, a woman married before the Married Women's Property Ordinance, 1923, came into operation, sued the defendants without the assistance of her husband for declaration of title to a land to which she claimed title under a deed executed in her favour on June 11, 1924. The cause of action alleged was an ouster by the defendants in August, 1925. The defendants took the objection that the action was not properly constituted as the plaintiff's husband had not been made a party. The learned District Judge upheld the objection and dismissed the plaintiff's action.

Weeraratne, for appellant.—Section 5 of Ordinance No. 19 of 1923 empowers a woman in the position of the plaintiff to sue, as if she were a *feme sole*. The District Judge's view is that the proviso to section 4 conserves the necessity to join the husband. The proviso does not have that effect. Section 4 repeals section 5-19 of Ordinance No. 15 of 1876, which do not deal with this question. The proviso says that the repeal does not affect the right or liability of a woman married before the commencement of the Ordinance to sue or be sued under the provision of the repealed sections. The disability of the wife arose not from the repealed sections but from the common law. The cause of action arose after Ordinance No. 19 of 1923 came into operation. The cause of action is the ouster. The fact that the land was purchased before the coming into operation of the Ordinance does not matter. In *Wildon v. Wensloo*,¹ it was held that in an action for tort committed before the Married Women's Property Act of 1882 came into operation the husband of the married woman need not be joined as a party when the action was after the coming into operation of the statute. The Act of 1882 contains words identical with section 5 (2).

¹ 13 Q. B. D. 784.

1927.
Nona v.
Manuel

H. V. Perera (with him D. E. Wijewardene), for defendants, respondent.—The disability, it is true, did not arise under sections 5-19 of Ordinance No. 15 of 1876. It was a disability created by the Roman-Dutch law. But the proviso to section 4 says that the repeal shall not affect any rights or status acquired *whilst such sections were in force*—and not merely under those sections. The marriage of the plaintiff having taken place after 1876, she acquired the status of a married woman with the rights, obligations, and disabilities involved in such status while those sections were in force, and they are therefore unaffected by the repeal.

July 12, 1927. LYALL GRANT J.—

The question for decision is whether a married woman can, in the circumstances of this case, sue without her husband as co-plaintiff. The facts, so far they are relevant, as are follows:—The plaintiff is a married woman living apart from her husband. She was married after 1877, the date at which the Married Women's Right of Inheritance Ordinance came into force, and before 1924 when the Married Women's Property Ordinance of 1923 came into force. The action is one for declaration of title to a certain piece of land and for ejectment of the defendants therefrom. The plaintiff also prays to be put in quiet possession, for damages, and for costs.

Her plaint sets forth that the land was conveyed to her by a bill of sale dated June 11, 1924. She alleges that the defendants who have no right of title to the land deny and dispute the plaintiff's title to the same and are in forcible and unlawful possession of the same since August, 1925. The plaint is dated November 15, 1926.

An important date to be noted in connection with these proceedings is the date on which the Married Women's Property Ordinance of 1923 commenced. That date is July 1, 1924.

The plaintiff therefore bought the land before the commencement of the Ordinance but the cause of action arose thereafter.

The learned District Judge has held that the plaintiff must join her husband before she can proceed with this action. He holds that "she is seeking to enforce a contract made some seven days before the new Ordinance came into force. If the new Ordinance had not been passed it would have been necessary to join the husband as co-plaintiff, in other words the husband had a certain status which is kept in force by the terms of section 4 of the new ordinance."

From this judgment the plaintiff appeals and argues that the cause of action did not arise until August, 1925, and that consequently the husband cannot be a party to the proceedings.

It is not disputed that under the Roman-Dutch law as it stood before the enactment of the Matrimonial Rights Ordinance of 1876

a married woman could not sue without her husband being joined as a party. That Ordinance made several important alterations as to the property rights of a married woman.

Section 9 provides that "any immovable property to which any woman, married after the proclamation of this Ordinance, may be entitled at the time of her marriage, or may become entitled to during he marriage, shall . . . belong to the woman for her separate estate . . . Such woman shall have full power of disposing of and dealing with such property by any lawful act *inter vivos*, with the written consent of her husband, but not otherwise . . . as if she were unmarried."

Section 12 provides that where the wife was deserted by her husband or separated from him or by certain other eventualities, she might petition the District Court for an order authorizing her to deal with such property without her husband's consent, and the District Court was empowered to make, such order after inquiry into the truth of her petition.

Broadly speaking, therefore, up to July 1, 1924, a wife could not dispose of her property without her husband's consent.

Section 5 of the Married Women's Property Act of 1923 by sub-section (1) empowered a married woman to acquire, hold, and dispose of movable or immovable property as her separate property in the same manner as if she were a *feme sole*, and by sub-section (2) empowered her to sue and be sued either in contract or in tort or otherwise in all respects as if she was a *feme sole* and her husband did not need to be joined with her either as plaintiff or defendant or to be made a party to any action or other legal proceeding brought by or taken against her . . . and it was further provided that any damages or costs recovered by her in any such action should be her separate property and any damages or costs recovered against her in any such act or proceeding should be payable out of her separate property and not otherwise.

The property, which a woman married before the commencement of the Ordinance is empowered to hold as her separate property, is limited by section 10 (1) to property which accrues after the commencement of the Ordinance. Section 4 of the Ordinance of 1923 repeals sections 5 to 19 of the Matrimonial Rights Ordinance of 1876, in so far as they relate to persons married on or after June 29, 1877, that is to say, persons in the position of the present appellant and her husband. This section contains the following proviso :—

" Provided, however, that such repeal shall not affect any act done or right or status acquired while such sections were in force, or any right or liability of any husband or wife married before the commencement of this Ordinance, to sue or be sued under the provisions of the said repealed sections for or in respect of any debt, contract, wrong, or

1927.

LYALL
GRANT J.*Nona v.
Manuel*

other matter or thing whatsoever for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Ordinance."

The question to be considered in the present case is, therefore, whether the right of the plaintiff to sue arose in respect of a debt, contract, wrong, or other matter in respect of which any status, right or liability had accrued to or against her husband before the commencement of the Ordinance.

In the case of the application by *Ramanayakage Caroline Nona*¹, it was held by this Court that a husband's right to restrain his wife from disposing of her immovable property without his written consent in respect of property acquired before the commencement of the Ordinance of 1923, by a married woman before that Ordinance, was unaffected by the repeal of sections 9 and 12 of Ordinance No. 15 of 1876.

The wrong complained of by the plaintiff is said by her to have arisen in August, 1925, and her right to sue would not appear to have arisen until that wrong was committed.

The learned District Judge has proceeded on the ground that the plaintiff is seeking to enforce a contract, that is, the contract for the purchase of the land. This, however, is clearly not the case. The action is one in tort in respect of the wrongful act of third parties.

The argument advanced for the respondent in appeal was that this property in respect of which the wrong complained of has been committed was bought by the wife before the commencement of the Ordinance, and that immediately upon her acquisition of the property her husband acquired a certain status in regard to it. That he did acquire such a status cannot be disputed in view of the case just referred to. The wife could not alienate the property without her husband's consent. The precise question before us in this case, however is whether this status necessitates the husband being joined as a party in every case where the wife finds it necessary to defend her rights in regard to the property.

Section 9 of the Ordinance of 1876 provides that such estate is the separate estate of the wife and that it is not liable for the debts or other engagements of her husband. She is empowered to give receipts which are a good discharge for the rents, issues, and profits arising from the property, and the only limitation which is placed upon her is in regard to her powers of disposing of and dealing with it.

I am doubtful whether that limitation can be extended so as to disqualify a woman, living apart from her husband, who has bought a property presumably with her own money, from suing a person who dispossesses her of the property, unless she joins her husband as co-plaintiff.

¹ 6 Cey. Law Recorder, p. 46

In a case which arose soon after the commencement of the Ordinance of 1876, it was decided that section 20 of the Ordinance which enacted that a married woman might maintain an action in her own name in certain matters does not dispense her from joining her husband as a party. That was the case of *Hettiakandage Joseph Fernando and another v. Maria Felsingar and D. J. Fernando*¹.

That case followed the English case of *Hancocks v. Lablache*,² a case decided on the Married Women's Act of 1870. After the decision of that case, however, the Married Women's Property Act of 1882 was passed, which contained words which are practically reproduced in section 5 (2) of our Married Women's Property Ordinance of 1923. On that Act it was decided by the Court of Appeal in the case of *Weldon v. Winslow*,³ that by virtue of the provisions of the section, a married woman could sue for a tort committed before that Act came into operation. The words "a married woman shall be capable of being sued in tort in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff, or be made a party to any action, and any damages recovered by her in any such action shall be her separate property." were interpreted as applying to an action brought after the statute came into operation even although the cause of action was previous. It was held that there was nothing in the Act to limit its provisions to causes of action arising after the statute came into operation. It is true that the cause of action in that case was personal injury, but in the present case the position of the wife is in some respects stronger.

The tort complained of, as well as the institution of the action, occurred after the commencement of the Ordinance of 1923. The words of the English Act of 1882 are practically identical with those of the Ordinance of 1923.

Assuming that the husband had acquired some right of status in regard to this property, I am not satisfied that he would have been entitled under the operation of the 1876 Ordinance to maintain an action in respect of the injury alleged against the defendant. Unless he was vested with such right of action independent of the wife's right of action, he can acquire no status in respect of the wife's separate property, which in any way could be interfered with by the wife separately maintaining this action.

There is nothing in the Ordinance of 1876 which shows that the husband had any such right. Section 8 of that Ordinance makes it clear that there was no community of goods in respect of the property. Section 9 makes it equally clear that the property was the woman's separate estate. Nor do I find that any right is given

¹ 6 *Sup. Court Circular*, p. 34.

² *Law Rep. 3 C. P. D.*, p. 197.

³ 13 *Q. B. D.*, p. 784.

1927.

LYALL
GRANT J.

*Nana v.
Manuel*

1927.

LYALL
GRANT J.

*Nona v.
Manuel*

to the husband to sue separately in respect of any wrong done to the woman in connection with such property, as if it were a wrong done to the husband himself.

I do not think therefore that he has acquired any status, to use the language of section 4 of the Ordinance of 1923, which is affected by his wife's action in this case.

I think the appeal must be allowed with costs.

MAARTENSZ A.J.—

This appeal raises a question with regard to the construction of section 4 and sub-section (2) of section 5 of the Married Women's Property Ordinance, 1923.

The plaintiff, a woman married before the Ordinance came into operation, sued the defendants without the assistance of her husband for declaration of title to a land called Mestrigewatte to which she claimed title under a deed No. 300 executed in her favour on June 11, 1924.

The cause of action alleged is an ouster by the defendants in August, 1925.

The defendants took the objection *in limine* that the action was not properly constituted, as the plaintiff's husband had not been made a party to it either as plaintiff or defendant.

The learned District Judge upheld the objection and the appeal is taken from this order.

The learned District Judge held that the husband had a status prior to the coming into operation of the Ordinance of 1923 and that that status is preserved to him by the proviso to section 4 of the Ordinance.

Section 4 enacts as follows:—

“ Sections 5 to 19 (both inclusive) and sections 22 and 23 of ‘ The Matrimonial Rights and Inheritance Ordinance, 1876, ’ are hereby repealed in so far as they relate to persons married on or after June 29, 1877.

“ Provided, however, that such repeal shall not affect any act done or right or status acquired while such sections were in force, or any right or liability of any husband or wife married before the commencement of this Ordinance, to sue or be sued under the provisions of the said repealed sections, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Ordinance. ”

Section 5, sub-section (2), enacts as follows:—

“ A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on, any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*; and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; nor shall he be liable, merely on the ground that he is her husband, in respect of any tort committed by her and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise. ”

1927.

MAARTENSZ
A.J.
Nona v.
Manuel

The question for decision is whether the proviso to section 4 over-rides the provision of section 5 (2) with regard to a wife suing without joining her husband as a party plaintiff.

The proviso at first sight appeared to me to be intended to preserve to a husband or wife, married before the commencement of the Ordinance of 1923, the effect of any act or right or status acquired under the provisions of the repealed sections, and had not the effect of preserving any right or status acquired otherwise than under any of those provisions.

It was contended, however, on behalf of the respondent that the word “ status ” acquired whilst such sections were in force was wide enough to include any status acquired whether under those sections or not and that therefore the right of the husband to be joined as a party plaintiff or defendant was preserved by the provisions of that proviso.

I am of opinion that this argument is not a sound one. The proviso must be construed with reference to its place in the Ordinance. It follows upon a repeal of certain sections of the Matrimonial Rights and Inheritance Ordinance of 1876 and I am of opinion that the effect of the proviso must be determined with reference to these sections.

If the effect was not so determined it would mean that the provision of section 5 (2) would only affect persons married after the Ordinance came into operation.

Now there are sections in the Ordinance of general effect, i.e., sections which are applicable to persons married before or after the Ordinance came into operation of which section 5 (2) is one and sections which distinguish between persons married before the Ordinance came into operation and persons married after that event. If the legislature intended to limit the operation of section 5

1927.

MAARTENSZ

A.J.

*Nona v.
Manuel*

(2) to marriages entered into after the Ordinance came into operation, I have no doubt there would have been the words necessary to give effect to that intention enacted in the section. There are no such words, and I therefore, am of opinion that the provisions of section 5 (2) are applicable to married persons whether married before or after the Ordinance came into operation.

I would accordingly allow the appeal with costs in both courts and remît the case for trial in due course.

Appeal allowed.

