1934 *Present : Garvin S.P.J.*

LALCHAND *v.* SARAVANAMUTTU *et al.*

45—C. R. Colombo, 83,828.

Husband and wife—Capacity of wife to bind husband by contract—Matters connected with household management—Right incident to marriage status—Roman-Dutch law.

In the Roman-Dutch law a wife may enter into a contract binding upon herself and her husband in respect of matters connected with the management of the household, such as the purchase of food and clothing.

It is a right to contract which is an incident of the status of marriage and which does not depend on a question of agency as under the English law.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

Weerasooria (with him *Batuwantudawe*), for defendant, appellant.

Garvin (with him *S. Alles*), for plaintiff, respondent.

August 30, 1934. GARVIN S.P.J.—

The defendants who are husband and wife were sued by the plaintiff to recover a sum of Rs. 85.05 being the balance due in respect of goods sold and delivered. The account particulars filed with the plaint show that the plaintiff opened this account in the name of Mrs. P. Saravanamuttu, the second defendant, and the goods which were supplied to her at her request consisted of sarees and other dress material. The document P 1 which relates to this account indicates that it was opened in December, 1930. On the credit side there is shown various cash payments, leaving the balance unpaid in respect of which this action was brought. The period covered by these dealings was approximately nine months. The only person connected with the plaintiff's business called to give evidence was the ledger-keeper and the only facts additional to those enumerated above to which he speaks are that the cash payments were made by the second defendant and that the monthly bills tendered were addressed to the second defendant. The sole ground upon which it is sought to make the first defendant liable is that he is the husband of the second defendant.

The second defendant was also called as a witness for the plaintiff. She states that she and her husband ceased to live together about August, 1932. These articles were all purchased by her prior to that date. She says that the monthly bills received by her were brought to the notice of her husband. She does not however say that her husband approved of her action or that he did anything from which a ratification can be inferred. This is denied by the first defendant. The learned Commissioner of Requests has not pronounced upon this conflict of testimony, but I gravely doubt whether these bills or any of them were brought to the notice of her husband. In consequence of what her husband regarded as her extravagance he had as far back as the year 1930 notified various firms

with whom she had dealings not to give her credit, and his position is that thereafter having made what he considered an adequate allowance to her for the maintenance of the establishment he bought everything beyond those needs himself. There is no question, therefore, here of any subsequent ratification of the transactions in respect of which this claim is made. It is to be noted that the plaintiff does not suggest that the first defendant himself, did anything, which would justify the inference that he held her out as having authority to pledge his credit. It has not even been said that he was aware that the two defendants were living together as husband and wife. The account was opened in her name; payments were made by her in cash; there is in short nothing to show that the plaintiff ever gave his mind to the question of the liability of the husband or the right of the second defendant to pledge her husband's credit. When she failed to pay the balance he resorted to the husband apparently upon the sole ground that he was her husband.

The English law in regard to the principles relating to the liability of the husband for a debt of this character incurred by a wife has been laid down in the case of *Debenham v. Mellon*[1].

The Lord Chancellor (Lord Selborne) stated the point for determination as follows :—" Namely, that the question whether a wife has authority to pledge her husband's credit, is to be treated as one of fact, upon the circumstances of each particular case, whatever may be the presumption arising from any particular state of circumstances ". His Lordship rejects the contention that " the mere fact of marriage implies a mandate by law, making a wife the agent in law of her husband, to bind him, and to pledge his credit by what otherwise would have been her own contract, if she had been a *femme sole* ". He then proceeds to deal with the question whether the law implies a mandate to the wife from the fact not of marriage but of cohabitation, and says : " Cohabitation is not (like marriage) a status, or a new contract ; it is a general expression for a certain condition of facts. If, therefore, the law did imply any such mandate from cohabitation, it must be as an implication of fact, and not as a conclusion of law ". Then dealing with the submission that cohabitation between husband and wife does carry with it some presumption, some *prima facie* evidence, of an authority to do those things, which, in such ordinary circumstances of cohabitation, it is usual for a wife to do, which it was suggested amounted to " apparent authority " or " ostensible authority ", His Lordship proceeded as follows : " I am not at all sure that Mr. Benjamin's words may not be very good words, for that ordinary state of circumstances, in the case of cohabitation between husband and wife, out of which the ordinary presumption arises; because in that state of circumstances, the husband may truly be said to do acts, or habitually to consent to acts, which hold the wife out as his agent for certain purposes. Then, the word ' apparent ' or the word ' ostensible ' becomes appropriate. But where there has been nothing done, nothing consented to, by the husband, to justify the proposition that he has ever held out the wife as his agent, I apprehend that the question whether, as a matter of fact he has given the wife authority, must be examined upon the whole circumstances of the case ".

[1] *L. R. 6 A. C. 31.*

Lord Blackburn, in the course of his judgment, agrees and adds, "I think that when husband and wife are living together, it is open to the husband to prove, if he can, the fact that the authority does not exist, it being a question for the jury whether a *bona fide* authority did or did not exist". He also stated earlier in his judgment, "I think that if the husband and wife are living together, that is a presumption of fact from which the jury may infer that the husband really did give his wife such authority. But even then, I do not think the authority would arise, so long as he supplied her with the means of procuring the articles otherwise".

It would seem, therefore, that under the law of England, the liability of the husband would depend upon the question whether or not he had given his wife the authority to make the purchases it being a question in each case whether the facts and circumstances prove or give rise to a presumption of agency. If, therefore, this case had to be determined in accordance with the provisions of the English law, it would be very doubtful whether in the circumstances of this case the plaintiff could recover.

But it seems to me that the question must be determined with reference to the Roman-Dutch law inasmuch as the question relates to the contractual capacity of a wife. The broad rule of the Roman-Dutch law would seem to be that wife cannot contract so as to bind herself or her husband to a third party without the consent of her husband. To this rule there are certain exceptions, and one of them is that a wife may validly contract and incur debts in matters connected with the housekeeping. Not only may she contract in such a case, but she may thereby bind herself and her husband. "The contracts of the wife in the household management bind herself and her husband, as though established by the consent of the husband, who tacitly relinquishes the household affairs and entrusts them to his wife; since the husband is for the most part occupied with other things, and it would be neither honourable nor convenient to saddle him with those little daily duties. Unless at the husband's request, the care of the household affairs and the liberty of managing them have been publicly denied the wife, for good reasons by the authority of a Magistrate". (*Voet, bk. XXIII. tit. 2, s. 46.*) Grotius (*bk. I, ch. 5, s. 23*) says ". . . . . women may only transact business connected with the household and may to that extent bind themselves and their husbands; nor can the husband prevent this unless he interdicts the wife judicially from the management, and give public notice of the same". It would seem from these passages that the management of the household is not merely the duty, but the right of the wife, and that she can only be divested of this right by judicial interdict, and that for purposes connected with the management of the household such as the purchase of food and clothing, she has in her capacity of wife the right to make contracts binding on the husband. The position of a wife, therefore, is different to that which it is under the English law, where even in respect of such contracts the liability of the husband depends upon the authority given her by the husband. It is not under the Roman-Dutch law a question of agency but rather a question of a right to contract which is an incident of the status of marriage. The validity of such contracts,

of course, depends upon the circumstances. As Voet says in the section earlier referred to, " Much must be left to the discretion of the Judge in deciding whether and how far the contract of a wife for household stuff, such as food and clothing, ought to be upheld, or whether she has exceeded what was right. He must take into consideration not only the usage of the locality, but also the position of the husband, his wealth, his habits, and the frequent acknowledgment in the past of similar liability ". In a case of which a note is to be found in *Bisset and Smith's Digest of South African Case Law, vol. II, p. 1330,* the full report of which is not available, it was held by the majority of the Court that the right of the wife to pledge her husband's credit for necessaries was not based on agency, but was an incident which flowed from the marriage. This view of the law would seem to be in accord with the passages in *Voet* and *Grotius* to which attention has been drawn.

A wife, therefore, and especially a wife who is living with her husband, would appear to be entitled under the law to make contracts in connection with the household, and may to that extent bind herself and her husband. The procedure of obtaining an interdict from a Magistrate with a view to determining the right of a wife may be taken to be obsolete, and presumably in these days adequate public notice will be held to be sufficient.

Now the learned Commissioner of Requests has found that having regard to the station in life of this husband and wife, and the nature and quantity of the goods supplied to her by the plaintiff, he could not say that she has exceeded her right, and I cannot undertake to say that he was wrong. His judgment must therefore be affirmed.

The appeal is dismissed with costs.

Appeal dismissed.