1955 *Present:* K. D. de Silva, J., and Sansoni, J.

K. A. CHANDRASENA, Appellant, *and* I. KARUNAWATHIE, Respondent

S. C. 370—D. C. Colombo, 25,633

Breach of promise of marriage—Plea that defendant was already married at time of promise—Validity of such plea.

Under the Roman Dutch Law an action for damages for breach of promise of marriage cannot be founded on a promise made by a man who was already married at the time he made such promise.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the defendant-appellant.

S. W. Jayasuriya, with *A. Nagendra*, for the plaintiff-respondent.

Cur. adv. vult.

December 13, 1955. SANSONI, J.—

The plaintiff appearing by her father as her next friend sued the defendant on two causes of action. On the first cause of action she claimed a sum of Rs. 1,000 as damages for breach of promise of marriage; on the second cause of action she claimed a sum of Rs. 1,500 as damages for seduction. The defendant pleaded that he was a minor at the time he became acquainted with the plaintiff. He denied that he ever promised to marry her or that he was liable to pay her damages on either cause of action.

The learned District Judge after trial held in favour of the plaintiff on both causes of action, and gave her judgment as prayed for with costs. In appeal, the defendant's Counsel did not seriously contest the learned Judge's findings on the second cause of action. There was ample material on which the learned Judge could have found against the defendant, and the award of damages on this cause of action must stand.

On the first cause of action however it was submitted on the defendant's behalf that the written promises of marriage on which the plaintiff relied were all, except the last, made while he was a minor ; and the last written promise, which was dated 20th July 1951, was made after he attained majority but when he was a married man, for he had got married to another woman on 31st May 1951. It is not disputed that all the promises which the defendant made while he was a minor are not actionable. As regards the last one, it was contended that it was invalid because at the time he made that promise he was a married man.

This legal objection was not taken at the trial but it seems to me to be a point of law which is a point of law and nothing else, and can therefore be raised for the first time in appeal. No disputed question of fact can arise in the circumstances of this case. The defendant's Counsel relied on *Viljoen v. Viljoen* [1] where Sutton J. held that an action for breach of promise cannot be founded on a promise made by a man who was already married. The reason is that as marriage was not possible between the parties, an action cannot therefore be based on the contract to marry. The following passage from a monograph on "*Breach of Promise and Seduction in South African Law*" by Mr. Justice Van den Heever, a Judge of the Appellate Division of the Supreme Court of South Africa, is to the same effect: "Since a subsisting marriage is an absolute impediment to marriage, a married person cannot contract a valid engagement even if the agreement contemplates fulfilment only after the impediment has ceased to exist."

It would, however, have been different if the action had been brought on the ground of the deceit which the defendant practised on the plaintiff, and the consequent injuria suffered by her. Such an action was held to lie in the judgment already cited. See also Wessel's *Law of Contract in South Africa, 2nd edition, Vol. 1, S.458.* The English law on this point is different, for it was held in *Shaw v. Shaw* [2] that an action for damages for breach of promise of marriage brought by a woman against a man who was married at the time he made such promise was maintainable, unless she knew that he was already married. In the latter event the contract would be void as being contrary to public policy.

I think we should follow the Roman Dutch Law on this matter and in that view the plaintiff's claim on the first cause of action must fail. I would therefore vary the judgment under appeal by reducing the damages awarded to a sum of Rs. 1,500. I would, however, award the plaintiff her costs in both Courts.

DE SILVA, J.—I agree.

Judgment varied.

[1] *(1944) C. P. D. 137.*

[2] *(1954) 3 W. L. R. 265.*