1943 *Present* : **Howard C.J. and Keuneman J.**

KANDIAH *et al.*, Appellants, *and* TAMBIPILLAI, Respondent.

288—D. C. Batticaloa, 126.

Agreement to marry—Covenant to give dowry—Covenant to pay liquidated damages—Divisibility of covenants—Doctrine of severance.

Plaintiffs, who are husband and wife, sued the defendant, who is uncle of the second plaintiff upon an agreement, which contained the following clauses :—

(1) The first plaintiff should marry the second plaintiff within six months of the execution of the agreement ;
(2) That the defendant in consideration of the said marriage should give in dowry to the plaintiffs the premises specified therein and Rs. 300 on the date of their marriage, and Rs. 200 on the execution of the said agreement ;
(3) In the event of the defendant failing to give the second plaintiff in marriage to the first plaintiff, the defendant should pay to the first plaintiff the sum of Rs. 500 as and by way of liquidated damages ;
(4) In the event of the first plaintiff failing, refusing or neglecting to marry the second plaintiff, the first plaintiff should pay to the defendant the sum of Rs. 500 as and by way of liquidated damages.

Held, that the agreement was a combination of several distinct covenants and that clauses (1) and (2) independent of clauses (3) and (4) form a separate compact and accord, which is valid and enforceable.

APPEAL from a judgment of the District Judge of Batticaloa. The facts appear from the head-note.

H. V. Perera, K.C. (with him *A. S. Ponnambalam* and *R. A. Kannangara*), for the plaintiffs, appellants.—The agreement in question contains not one promise but different distinct promises although they are all set out in one document. Clause (2) is clearly severable from clauses (3) and (4). It is a legally enforceable promise, the consideration for it being marriage. It is independent of, and can stand apart from, the other clauses which are alleged to be repugnant to the law. The doctrine of severability is discussed in *Putsman v. Taylor* [1]. The District Judge has misapplied the judgment in *de Silva v. Juan Appu* [2] ; *Bastiampillai v. Rasalingam* [3] ; and *Kennedy v. Steenkamp* [4]. The agreement now sued on is essentially different from a marriage brokage contract. This case falls within the reasons for the decisions in *Fernando v. Fernando* [5] and *Abdul Hameed v. Peer Cando et al* [6].

N. Nadarajah, K.C. (with him *E. B. Wikremanayake* and *G. Thomas*), for the defendant, respondent.—The agreement should be read as a whole. Clause (1) is the main contract on which the other clauses depend. It is illegal for a parent or any one *in loco parentis* to contract to give his

[1] *L. R. (1927) 1 K.B. 637 at 640.*
[2] *(1928) 29 N. L. R. 417.*
[3] *(1936) 38 N. L. R. 89.*
[4] *S. A. L. R. (1936) C. P. D. 113.*
[5] *(1899) 4 N. L. R. 285.*
[6] *(1911) 15 N. L. R. 91.*

daughter in marriage. It restricts the freedom of choice of the daughter and is therefore, contrary to public policy. This is the basis of the judgments in *de Silva v. Juan Appu* (*supra*) and *Bastiampillai v. Rasalingam* (*supra*). Clause (2) is a claim based on clause (1) and cannot be dissociated from the question of marriage. Clause (3), too, which is clearly unenforceable cannot be separated from clause (2). The two clauses refer to the same point and are intended for the same purpose, namely, of securing the marriage. As regards the doctrine of severability, severance is an act of the parties, not of the Court—*Putsman v. Taylor* (*supra*).

H. V. Perera, K.C., replied.

Cur. adv. vult.

November 9, 1943. HOWARD C.J.—

In this case the plaintiffs appeal from the decision of the District Judge of Batticaloa dismissing their action with costs. The plaintiffs are husband and wife and claim from the defendant who is the uncle of the second plaintiff by virtue of an agreement whereby the defendant undertook to transfer to the plaintiffs a certain piece of land and also to pay them a sum of Rs. 300 in the event of the first plaintiff marrying the second plaintiff. The plaintiffs who were duly married averred that the defendant had paid a sum of Rs. 200 on the execution of the said agreement and a further sum of Rs. 25 out of the said sum of Rs. 300. The plaintiffs, therefore, claimed the transfer of the land mentiond in the agreement and the balance due out of the said sum of Rs. 300, namely, Rs. 275. The learned Judge decided as a preliminary issue that the agreement was illegal, contrary to public policy and hence unenforceable at law.

The agreement contained the following clauses :—

(1) That the first plaintiff should marry the second plaintiff within 6 months of the execution of the agreement.

(2) That the defendant in consideration of the said marriage should give in dowry to the plaintiffs the premises specified therein and Rs. 300 on the date of their marriage, and Rs. 200 to the first plaintiff on the execution of the said agreement.

(3) In the event of the defendant failing to give the second plaintiff in marriage to the first plaintiff, the defendant should pay to the first plaintiff the sum of Rs. 500 as and by way of liquidated damages.

(4) In the event of the first plaintiff failing, refusing or neglecting to marry the second plaintiff, the first plaintiff should pay to the defendant the sum of Rs. 500 as and by way of liquidated damages.

The learned Judge held that clauses (3) and (4) are illegal and contrary to public policy and that the various clauses of the agreement were so interdependent that he was not prepared to hold that it was divisible. In *de Silva v. Juan Appu*[1] it was held by Schneider and Garvin JJ. (Dalton J. dissentiente) that a contract by which a brother promises to give her minor sister in marriage before a specified date and undertakes absolutely that, if his promise remains unfulfilled by that date, he will pay a sum of money, is invalid. This case was followed by Abrahams C.J., and Fernando A.J. in *Bastiampillai v. Rasalingam*[2] where it was

[1] *29 N. L. R. 417.*

[2] *38 N. L. R. 89.*

held that a promissory note granted in consideration of a promise by a father to give his daughter in marriage to the maker of the note is invalid for illegality of consideration. In this case it was argued that, as the father promised to give a dowry, there was legal consideration to support the validity of the promissory note. It was held, however, that, if any part of the consideration for a promise is illegal, that promise cannot be enforced. There can be no severance of the legal from the illegal part of the consideration. No doubt on the authority of the two cases I have cited a promise by a person to pay a sum of money in the event of his failing to give his niece in marriage is opposed to public policy and a claim based on it is unenforceable. Clause (3) was, therefore, invalid. I do not, however, think that the same considerations apply to clause (4). It is not necessary to decide on the invalidity of either clauses (3) or (4), if the agreement is divisible. The rule, as laid down in *Pickering v. Ilfracombe Railway*[1] is set out in the *18th Edition of Anson on Contract at p. 240* as follows :—

> "Where you cannot sever the illegal from the legal part of a covenant the contract is altogether void, but where you can sever them, whether the illegality be created by statute or common law, you may reject the bad part and retain the good."

It is apparent from the author's comments that the application of the rule is a matter of considerable difficulty. There is however, no doubt that if any part of the consideration for a promise is illegal, that promise cannot be enforced. As Abrahams C.J. said in *Bastiampillai v. Rasalingam* (*supra*) there can be no severance of the legal from the illegal part of the consideration. In this connection I would refer to *Lound v. Grimwade*[2]. The difficulty arises when a legal consideration supports promises, some of which are legal and others illegal. In *Pigot's case*[3] we find the rule set out as follows :—

> "It is unanimously agreed in *14 H. 8. 25, 26,* &c. that if some of the covenants of an indenture, or of the conditions endorsed upon a bond are against law, and some good and lawful ; that in this case, the covenants or conditions which are against the law are void *ab initio,* and the others stand good."

This rule was followed in the case of *Kearney v. Whitehaven Colliery Co.*[4] where the following passage occurs on page 711 from the judgment of Esher M.R. :—

> "If the consideration, or any part of it, is illegal, then every promise contained in the agreement becomes illegal also, because in such a case every part of the consideration is consideration for the promise. But suppose there is nothing illegal in the consideration ; then upon that valid consideration may be several promises or liabilities. If any one of those be in itself illegal, then it cannot stand, not because the consideration becomes illegal, but because the promise itself is illegal. It is a bad promise which cannot be supported by the consideration. But the other promises which are good and legal in themselves remain, and can be supported by the good consideration."

[1] *L. R. 3 C. P. 250.*
[2] *39 Ch. D. 605.*
[3] *77 E. R. 1179.*
[4] *(1893) 1 Q. B. 700.*

In the same case Lopes L.J. said as follows on page 713 :—

> "But where there is no illegality in the consideration, and some of the provisions are legal and others illegal, the illegality of those which are bad does not communicate itself to, or contaminate, those which are good, unless they are inseparable from and dependent upon one another."

The difficulties with regard to the rules that govern the doctrine of severance is apparent from a perusal of the judgments of the Court of Appeal in *Attwood v. Lamont* [1]. The majority of the Judges in this case. Younger and Atkin L.JJ. laid down the following principle at page 593 :—

> "The doctrine of severance has not, I think, gone further than to make it permissible in a case where the covenant is not really a single covenant but is in effect a combination of several distinct covenants. In that case and where the severance can be carried out without the addition or alteration of a word, it is permissible. But in that case only."

In later cases with respect to covenants in restraint of trade, the test suggested seems to be whether the parties have themselves made a clear severance in the contract. In this connection we have been referred to the case of *Putsman v. Taylor* [2]. The head-note in this case is as follows :—

> "A promise may be enforceable notwithstanding that the promisor has in the same document made promises, supported by the same consideration, which are void, provided that the severed parts are independent and that not the kind but only the extent of the promisor's obligations will be changed by the partial enforcement. Agreements in restraint of trade form no exception to this rule.
>
> The defendant was employed by the plaintiff, a tailor carrying on business at three places, A, B, and C in Birmingham, as manager and cutter. The defendant, in consideration of the employment, promised that on the determination of his agreement he would not for five years (1) set up as a tailor himself, (2) enter into the employment of a named neighbouring trade rival, (3) be employed in any capacity with any tailor carrying on business in A, B, or C.
>
> *Held*, that the promise not to take service with any tailor in A could be severed from the other promises and enforced, in that it did not affect the original effect and meaning of the agreement—namely, to protect the plaintiff against an improper use by the defendant of the knowledge which he had acquired in the plaintiff's service—but only limited the scope of its operation."

The following passage appears from the judgment of Salter J. on the doctrine of severability :—

> "The doctrine of severability is not confined to contracts of service, nor to contracts in restraint of trade. If a promise claims the

[1] *(1920) 3 K. B. 571.* [2] *(1927) 1 K. B. 637.*

enforcement of a promise, and the promise is a valid promise and supported by consideration, the Court will enforce the promise, notwithstanding the fact that the promisor has made other promises supported by the same consideration, which are void, and has included the valid and invalid promises in one document. But if the promise sought to be enforced is invalid, as being in undue restraint of trade or for any other reason, the Court will not invent a valid promise by the deletion, alteration, or addition of words, and thus enforce a promise which the promisor might well have made, but did not make. The promise to be enforceable must be, on the face of the document, a separate promise, a separate compact, the subject of separate consideration and accord, the performance of which is independent of the performance of any other promises which the promisor may have made. If the promise is a separate promise and valid, the Court will enforce it. Whether it is separate or not depends on the language of the document. Severance, as it seems to me, is the act of the parties, not of the Court."

It only remains to apply to the facts of the present case the principles formulated in the cases I have cited. The consideration for the defendant's promise on which he is sued is the first plaintiff's promise to marry the second plaintiff. This consideration was legal. Applying the tests referred to by Salter J. in *Putsman v. Taylor* (*supra*) I am of opinion that the defendant has made promises which are obviously separate. If the third and fourth clauses are ignored, the change does not give to the agreement a meaning and object different in kind, but only in extent. The severance does not alter the original meaning and effect of the agreement which was to ensure to the plaintiff's a dowry on marriage. It merely limits the extent of the agreement. The promise to transfer the land and to pay a sum of Rs. 300 contained in clause (2) is on the face of the document a separate promise by the defendant. To use the words of Younger L. J. in *Attwood v. Lamont* (*supra*) the whole agreement is not a single covenant but a combination of several distinct covenants. Clauses (1) and (2) together form a compact and accord separate from clauses (3) and (4). The performance of this separate compact is independent of the performance of the compact contained in clauses (3) and (4). Being a separate promise and valid, the Court will enforce clause (2).

In these circumstances the order of the learned District Judge must be set aside and the case is remitted to him for further trial. The plaintiffs are awarded costs in this Court and the Court below.

KEUNEMAN J.—I agree.

Appeal allowed.

1943 *Present* : **Howard C.J., Keuneman and de Kretser JJ.**

In re A PROCTOR.

In the Matter of a Rule issued under Section 17 of the Courts Ordinance.

Proctor—Convicted of escaping from lawful custody—Offence not involving moral turpitude—Suspension from practice—Courts Ordinance, s. 17.

The respondent, a Proctor of the Supreme Court was charged and convicted of the offence of escaping from lawful custody, when he was being detained under the Defence (Miscellaneous No. 3) Regulations.

On a rule issued against him to show cause why he should not be removed from the roll of Proctors, he expressed regret for his action and submitted testimonials as to his previous honesty and good character.

Held that, as the offence of which he was convicted was not one involving moral turpitude, suspension from practice for two years was a sufficient punishment.

THIS was a rule issued against the respondent, a Proctor of the Supreme Court.

J. Mervyn Fonseka, K.C., S.-G. (with him *H. H. Basnayake,* Crown Counsel), in support of the Rule.

N. Nadarajah, K.C. (with him *C. S. Barr Kumarakulasingham, H. W. Jayewardene,* and *G. T. Samarawickreme*), for the respondent.

Cur. adv. vult.

November 4, 1943. HOWARD C.J.—

This is a motion by the Attorney-General under section 17 of the Courts Ordinance calling upon the respondent, a Proctor of the Supreme Court, to show cause why his name should not be removed from the roll of Proctors. The respondent was on January 19, 1943, in the Magistrate's Court, Kandy, charged with the following offence :—

> "That on April 8, 1942, at Kandy, he, being a person lawfully detained in the custody of the Superintendent of Prisons, Kandy, did escape from such custody, and that he has thereby committed an offence punishable under section 220A of the Penal Code."

The respondent pleaded guilty to this offence and was sentenced to six months' rigorous imprisonment. In an affidavit the respondent states that on or about June 18, 1940, he was arrested on a Detention Order issued by His Excellency the Governor under Regulation 1 of the Defence (Miscellaneous No. 3) Regulations and was detained in Kandy. That he was at liberty from April 8, 1942, until November 7, 1943, on which date he was rearrested at Nugegoda. That when he left the jail he was suffering from a serious constitutional disease which is getting worse and worse and that he was unnerved by the apprehension shared by all around him that Ceylon was in danger of invasion. The respondent further expresses his regret for an act which he now realizes was improper and for having fallen short of the high standard required of members of his profession. If an opportunity is offered him, he promises to make every endeavour in the future to conform to the best traditions of the profession. He also states that he has a wife and one young child and his only means of support have been his earnings as a Proctor. The respondent has also

filed affidavits from Sir Ratnajoti Saravanamuttu, Sir Solomon Dias Bandaranaike, Messrs. Blaze, Pinto and Abeyesekere, Proctors practising at Badulla, Mr. Wanigasooriya, Additional District Judge, Galle, and Mr. Amerasekere, Proctor, Colombo, testifying to his honesty in his professional and private dealings and to his previous good character. Sir Ratnajoti Saravanamuttu also states that he is a sincere man with strong political convictions.

We have recently had occasion to consider the principles on which we should take action in respect of a Proctor who has been convicted of a criminal offence. *In re Brito* ' it was held that the Supreme Court has a discretion and will inquire into the nature of the offence and will not, as a matter of course, strike a Proctor off the roll merely because he has been convicted. We have to consider whether the respondent is fit to remain a member of an honourable profession. Having regard to what he has done, can it be said that no Proctor should be called upon to enter into that intimate intercourse with him which is necessary between two Proctors even though they are acting for opposite parties ? Our duty is to regard the fitness of the respondent to continue in the profession from the same angle as we should regard it if he was a candidate for enrolment.

A Proctor as an officer of the Supreme Court is part of the machinery for the due administration of justice. His action, therefore, in escaping from Kandy Jail even though his detention was not after conviction on a criminal charge, but under the Defence Regulations as a measure of security, was most reprehensible. As an officer of the Court he has shown a deplorable example. The offence for which he was convicted is, however, not one involving moral turpitude. He has expressed his regret and produced testimonials as to his previous honesty and good character from citizens of standing and repute. In these circumstances we do not consider that his conduct calls for such drastic action as removing his name from the roll of Proctors. Such action would entail the loss of his livelihood. At the same time we cannot pass over the conduct of the respondent with a mere admonition and we, therefore, suspend him from practising as a Proctor for a period of two years from the date of this order.

KEUNEMAN J.—I agree.

DE KRETSER J.—I agree.