IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Peya Korale Gedara Leelawathie
Ugagama, Kaikawala

C.A. No. 633/97(F)
D.C.Mathale–4677/MR

Plaintiff

Vs.

Galwatte Gedara Nishantha Udayakumara
Udagama, Kaikawala.

Defendant

AND NOW BETWEEN

Galwatte Gedara Nishantha Udayakumara
Udugama, Kaikawala.

Defendant-Appellant

Vs.

Peya Korale Gedara Leelawathie
Udagama, Kaikawala.

Plaintiff- Respondent

Before : **A.H.M.D. Nawaz, J**
&
H.C.J. Madawala, J

Counsel : Lasith Chaminda with Hemamala Kumari for the appellant

Argument on : 10/05/2016

Decided on : 29 / 07 /2016

H. C. J. Madawala, J

The defendant-appellant preferred this appeal against a judgment dated 18-12-1996 by the Learned District Judge of Matale. The plaintiff-respondent instituted action in the District Court of Matale No. 4677/MR praying for an order for damages worth Rs. 100,000/- against the appellant on a cause of action as pleaded in the plaint that the appellant had breached a promise of marriage given to the respondent. The appellant did not file an answer but participated at the trial and cross-examined the respondent. At the end of the trial, judgment was delivered by the Learned District Judge on 12/12/1996 as prayed for by the respondent in her plaint. Being aggrieved by the said judgment and the decree, this appeal has been preferred to this court by the appellant and written Submissions tendered to court.

According to the journal entry dated 9/6/2014 notice issued on the Attorney-at-Law of the plaintiff respondent has been returned and undelivered with an endorsement as follows,

"Passed away"

AAL. Mr. Warusawithana filed the returned notice with an endorsement.

Thereafter the plaintiff-respondent has been absent and unrepresented. Notices have been duly issued to the plaintiff- respondent and has been returned.

According to the journal entry dated 9/10/2015 it has been recorded that the plaintiff- respondent has passed away and court has directed the defendant appellant to take steps regarding the deceased plaintiff- respondent. However this error has been rectified on 14-01-2016 and notices has been issued to the plaintiff-respondent who has failed to appear in court. Case was fixed for argument

thereafter and on 10/05/2016 in the absence of the plaintiff- respondent who has been unrepresented the defendant- appellant moved to dispose this case by way of written submissions tendered to court.

Section 19 of the Marriage Registration Ordinance imposed a restriction in cases of breach of promise of marriage "..... no action shall lie for the recovery of damages for breach of promise of marriage, unless such promise of marriage shall have been made in writing."

Further the case of **C.V. Udalagama, Appellant V. Iranganie Boange 61 NLR 27** states as follows,

" does P.1, read in conjunction with the letters D 7 and D 8, constitute a 'written promise' within the meaning of the proviso to section 19 (3) ? The ordinance does not declare that oral promises of marriage are null and void; it merely renders them unenforceable unless they be evidenced in writing. It is settle law that an action for damages lies if, in a letter addressed by the defendant to the plaintiff, there is either confirmation or at least an unqualified admission of a subsisting and binding oral promise of marriage."

"Jayasinghe v. Perera , Missi Nona V. Arnolis and Karunawathie v. Wimalasuriya (1903)9 NLR pg 62 , (1914) 17 NLR pg 425, (1941) 42 NLR 390"

On a perusal of the written submissions tendered to court we find that the Learned counsel for the defendant-appellant has submitted that there are errors and /or misdirection in the judgment of the Learned district Judge. It was also submitted that the Learned District Judge had erred in law holding that, the appellant was in breach of a promise to marry when there is no written promise to marry, Secondly the Learned District Judge had erred and / or misdirected both in law and /or facts by failing to consider that a promise of marriage, if at all given by a married person to another

who knows that the other married person was contra bonos mores. Section 20 of the General Marriage Ordinance No 19 of 1907 contemplates that:

"No suit or action shall lie in any court to compel the solemnization of any marriage by any reason of any promise or contract of marriage, or by reason of seduction of any female, or by reason of any cause whatsoever"

In the common law, which recognized the specific performance of a promise to marry, in the Modern Law of Sri Lanka the only sanction for breach of promise is the availability of a right to claim damages. As to what constitutes a promise in writing has been considered by several judicial decisions. In **Udalagama v. Boange 61 NLR 25** the Privy Council held that:

"that documentary evidence which does not in express or other unequivocal terms contain promise to marry is insufficient to prove a promise in writing even though it may afford evidence of an oral promise to marry. The writing required to satisfy the ordinance must contain an express promise to marry or confirm a previous oral promise to marry, i.e., admit the making of the promise and evince continuing willingness to be bound by it"

In the present case there had not been any such promise in writing that has been produced at the trial. The only evidence produced was the oral evidence as to a promise of marriage. It was contended that this evidence is not sufficient for the respondent to obtain a judgment for damages against the appellant on breach of a promise of marriage.

In the case of Jonathan **Joseph v. June De Silva 1990(2) SLR pg 175**, it has been held that,

A seduction case must be decided on the preponderance of evidence. The failure of the defendant to refute on oath the testimony of the plaintiff given on oath can be treated as corroboration depending on the circumstance of the particular case. Whether a fact is considered proved or not is dependent upon the belief of the evidence. Where on the uncorroborated evidence of the plaintiff if the court is satisfied she is speaking the truth, and the allegation of sexual intimacy seems

probable such as to make it prudent to accept its existence, it can be held to be proved depending on the circumstances of the case.

It was also contended that the Learned District Judge erred and / or misdirected in law and facts decreeing that, the appellant was in breach of a promise to marry with the respondent thus ordering further that, the appellant should pay Rs. 100,000/= to the respondent.

It was submitted that the respondent was forced to admit at the cross-examination that, it was respondent who fell in love with the appellant and the appellant was married person at that time.

On a perusal of record we find that the appellant-respondent who had participated at the proceedings has not tendered to court any document, that he is a married man. Marriage Certificate has not been tendered to court, although he has participated at the trial. He has not filed any answers. He has not given any evidence in oath. The plaintiff-respondent had in her evidence stated as follows,

"මේ විත්තිකරු කසාද බැඳලා මම බැඳලා නැහැ. වෙනත් කෙනෙක් බැඳලා ඔහු ඉන්නවා." Which indicates that the plaintiff-respondent had knowledge that the respondent –appellant is a married man.

"මම මෙම සම්බන්ධය ඇති කර ගත්තේ මගේ කැමැත්තෙන්,ඔහු සමග අඹුසැමියන් වශයෙන් ජීවත් වීමට එකග වුනා. මම විත්තිකරු සමග විවාහ වෙන්න උත්සාහ කලා.95 දී තමයි විත්තිකරුට කිව්වේ."

However I find that there is no written document what so ever for the plaintiff–respondent to prove that the appellant has promised to marry her. Although the plaintiff's evidence is corroborated the appellant has not given any evidence or disproved the plaintiff version. The plaintiff–respondent has failed to prove this action by not forwarding any documentary evidence. In a seduction case which is a Civil Case it has been stated that it has to be decided upon the balance of probabilities. The special rule that the evidence of the plaintiff requires corroboration applies here. The process

of balancing the probabilities takes place after all the evidence has been led. If the balance is against the plaintiff she loses the case. If it is in her favour and there is no corroboration she also loses.

However under the Roman-Dutch Law an action for seduction, where as in the present case, the seduction was denied on oath by the defendant cannot succeed unless the plaintiff's evidence is corroborated. In the present case the plaintiff-respondent has failed to produce any document in support of the case.

(Judgment of Hathorn, JP, in the South African case of Jagadamba v. Boya)

However the Learned District Judge in his judgment had stated as follows,

"විත්තිකරු විසින් පැමිනිලිකාරිය රවටා ඇය විවාහ කර ගන්නා බවට දුන් පොරොන්දුව මත අඹු සැමියන් වශයෙන් ජීවත් වී ඇයව විවාහ නොකර සිටීම නිසා පැමිනිලිකාරියට දරුවෙක් ලැබී ඇත. විත්තිකරු දැනට එම ලමයාට නඩත්තු ගෙවන බව හෙලිදරව් වේ. පැමිනිලිකාරියගේ සාක්ෂිය විත්තිකරු විසින් අභියෝගයට ලක් කර නැත. එම නිසා පැමිනිල්ලේ සාක්ෂි පිලිගනු ලබයි."

The defendant in this action has cross-examined by the plaintiff that, it was the plaintiff who fell in love with the appellant and the appellant was a married person at that time. However he had not given any evidence on oath.

In the case of Udalagama v. Boange 61 NLR pg 25 the Learned Appeal Court Judge has stated that the proviso of Section 19 of the Marriage Registration Ordinance does not declare that oral promises of marriage null and void; it merely renders them unenforceable unless they be evidenced in writing.

In the present case although there is an oral evidence of breach of promise of marriage, it has not been corroborated and there is no written document to prove same. The appellant was married a

person at the time when she fell in love with him. The Learned District Judge has failed to consider in his judgment that the appellant was a married man. As 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. Vide **K.A. Chandrasena v. Karunawathie 57 NLR pg 298**

According to the reasons given above we find that the Learned District Judge has failed to consider that there is no documentary evidence apart from the oral evidence given on oath by the plaintiff-respondent.

Accordingly we hold that the plaintiff-respondent has not proved her case of breach of promise of marriage. The Learned District Judge has erred in law. We find that the child born is maintained by the father. However according to the reason given above as this case has not in proved on a balance of probabilities, we set aside the judgment of the Learned District Judge.

Appeal is allowed without cost.

JUDGE OF THE COURT OF APPEAL

A.H.M.D. Nawaz, J

I agree.

JUDGE OF THE COURT OF APPEAL