

KUNTI SHANTI *v.* KARAM SINGH.

[Civil Jurisdiction (Jenkins, Acting C.J.) August 23, 1939.]

*Separation Agreement—Marriage between Indians—female party to separation agreement a minor over fifteen years of age—Marriage Ordinance, 1918—s. 42—Indian female may marry without any consent if 15 years of age—whether agreement may be repudiated by minor—no provision for maintenance—wife guilty of adultery—whether agreement offends public policy.*

Kunti Shanti an Indian female married Karam Singh in March, 1936 and in June 1938 entered into an agreement for separation (after admitting to her husband that she had committed adultery). She was at the date of the separation agreement aged 20 years and 8 months. The agreement provided that the husband would not be compelled to pay maintenance. She sought to have it set aside on the grounds that at the date of the agreement she was a minor and that she was induced to sign the agreement by a representation that her maintenance was provided for.

**HELD.**—(1) An Indian woman of or above the age of fifteen years has full capacity (in Fiji) to enter into a binding agreement for separation.

(2) A separation agreement which contains no provisions for maintenance is not contrary to public policy in cases where there has been adultery on the part of the wife.

Cases referred to :—

(1) *McGregor v. McGregor* [1888] 21 Q.B.D. 424 ; 57 L.J.Q.B. 591 ; 52 J.P. 772 ; 4 T.L.R. 760 ; 27 Dig. 230.

(2) *Marshall v. Marshall* [1879] 5 P.D. 19 ; 48 L.J.P. 49 ; 39 L.T. 640 ; 27 Dig. 220.

(3) *Hart v. Hart* [1881] 18 Ch.D 670 ; 50 L.J.Ch. 697 ; 45 L.T. 13 ; 27 Dig. 241.

(4) *Wilson v. Wilson* [1854] 5 H.L. Cas. 40 ; 23 L.J. Ch. 697 ; 10 E.R. 811.

ACTION claiming rescission and cancellation of a separation agreement. The facts are fully set out in the judgment.

*R. A. Crompton*, for the plaintiff.

*Said Hasan*, for the defendant.

JENKINS, Acting C.J.—In this case the plaintiff claims rescission and cancellation of a separation agreement dated the 16th June, 1938, made between her and the defendant, her husband. The agreement cites that the parties were married at Lautoka in the Colony of Fiji on the 6th day of March, 1936, that there is no issue of the marriage, and that unhappy differences have arisen between the parties and they have agreed in consideration of their mutual stipulations and agreements herein contained to live separate and apart from each other in future. Then follow the four usual operative clauses :—

(1) and (2) That the parties shall live apart and not molest each other.

- (3) That the wife will keep the husband indemnified against all debts and liabilities she may contract.
- (4) That on resumption of cohabitation the agreement shall become void.

There is no provision for maintenance and in clause 2 the wife agrees that she will not compel the husband to allow her any maintenance.

The wife claims rescission and cancellation of the agreement on the following grounds :—

- (1) That on the 16th June, 1938, the date of the making of the agreement, she was a minor and had no independent legal advice as to the purport and effect of the said agreement.
- (2) That the defendant had falsely represented that he had provided for the maintenance of the plaintiff and for the continuance of her education at the Dilkusha Methodist Mission School at Davuilevu and that in order to obtain her admission into the said school it was necessary for her to enter into the agreement.

The plaintiff also set out in the statement of claim :—

Paragraph 6.—On the day of the signing of the said agreement the defendant deserted the plaintiff by leaving her on the Government Road outside the said Dilkusha School.

Paragraph 7.—The plaintiff has no means.

Paragraphs 8 and 9.—That the plaintiff has commenced an action for maintenance against the defendant in the Resident Magistrate's Court, Suva, and that the plaintiff believes that the defendant intends to rely, inter alia, for his defence in the said action upon the said agreement of the 16th June, 1938.

The first point to be considered is the effect of the agreement of the plaintiff being a minor. The plaintiff was born on the 13th October, 1917, so that on the 16th June, 1938, she was aged 20 years 8 months. Counsel for the plaintiff argued that the common law concerning capacity of infants to enter into contracts applies to this agreement and that the agreement is voidable. Counsel for the defendant argued that the common law concerning capacity of infants does not apply to this case, because by s. 42 of the Marriage Ordinance 1918 an Indian female of the age of 15 years or over can marry without any consents.

The said s. 42 provides as follows :—

Marriageable  
age in case of  
Indians.

“ 42. If at any time hereafter notwithstanding anything contained in s. 23 of this Ordinance any immigrant being in the case of the male sixteen years of age or upwards and in the case of the female thirteen years of age or upwards desires to contract marriage it shall be lawful to solemnize marriage between them under any of the provisions of Part I of this Ordinance. Provided always that if the female shall be under the age of fifteen years the written consent of the father

if alive and in the Colony or he being dead or absent from the Colony of the Agent-General shall first be obtained. Provided further that the Agent-General may give the required consent in any case where the father is incapable of giving or unreasonably or from undue motives refuses or withholds such consent. For the purposes of this section the expression "Agent-General" shall include any sub-agent of immigration or inspector of immigrants".

Under the provision of the legislature an Indian female is free to contract marriage without any consents whatsoever, if she has attained the age of fifteen years. It is now submitted by counsel for the plaintiff in this case that although at the age of fifteen she is free to contract marriage, yet at the age of 20 years 8 months she is not free to enter into a separation agreement. I am unable to accept that contention. There is no disability on an infant married woman to sue for divorce; as a matter of procedure such married woman sues by her next friend, but the object of having a next friend is to give security for costs to the defendant. (R.S.C. Order 16, rule 16.)

There was a time when an agreement for separation between husband and wife was considered contrary to public policy. That opinion was rendered untenable by the decision of the House of Lords in *Wilson v. Wilson*, and since that decision, it is clear that such an agreement cannot be said to be against public policy. (*McGregor v. McGregor*, 21 Q.B.D. 430). And it is in the highest degree desirable for the preservation of the peace and reputation of families that such agreements should be encouraged rather than that the parties should be forced to expose their matrimonial differences in a Court of Justice. (*Marshall v. Marshall*, 5 P.D. 23.) An infant married woman can bring divorce proceedings, but rather than that such proceedings should be brought it is desirable that she should have power to enter into a separation agreement if both parties agree. Both parties have power to enter into the marriage; the greater includes the less, and therefore, they have power to enter into a separation agreement. I accordingly hold that the plaintiff had power to enter into the agreement of the 16th June, 1938.

The second ground is that the agreement should be rescinded because it was entered into upon false representations made by the defendant. The parties were married at Lautoka in the Colony of Fiji on the 8th day of March, 1936, but they did not live together until December, 1937. Immediately after the marriage in March, 1936, the plaintiff says she lived with her parents at Lautoka, that three-and-a-half months after the marriage her husband was sentenced to 18 months imprisonment with hard labour for forgery, and she did not live with him until he came out of gaol in December, 1937. The parties did not live together immediately after the marriage because as the wife said in evidence: "The defendant wished to give me more education." The husband actually tried to get the plaintiff admitted for further education to a Lautoka Mission and a Ba Mission but without success, the reason being that they would not take married women.

The parties lived together at Ba as husband and wife from December, 1937, until some date early in June, 1938. On that date the defendant says when he returned from his work to his house at about 8.30 p.m. he saw a man running away from the house just after he knocked, that shortly afterwards his wife opened the door and on his questioning her about the man she confessed adultery and asked for his forgiveness, that as she was ill, he then took her to hospital, and on coming out of hospital she agreed it would be best for them to part, that they should go to Suva and have a separation agreement drawn up and that she would go to Dilkusha.

The wife disputes this story in several particulars. She says that the adultery took place not at defendant's house, but at the house of the adulterer, one Bakshi Singh, the owner of a store in which defendant worked. She also alleges that the defendant forced her to write the letter. She also alleges that the adultery took place in April, 1938, and not in June, 1938, and that defendant forgave her and lived and cohabited with her until she went to Dilkusha. The plaintiff further alleges that the adultery was with the connivance of the defendant, that he knew it was going to take place, and that he was outside on the verandah while it did take place. The plaintiff admits the adultery and she also admits that at the time it took place she was unaware of the alleged connivance of the defendant. As to this connivance she says : " I learned later that he had consented to the adultery, I learned it from other people." I am unable to accept this evidence ; it is hearsay ; no witnesses have been brought to prove the connivance which plaintiff alleges those witnesses know. I accept the story of the defendant. The letter in question reads as follows. (It was written in Hindustani ; the following is an agreed translation):—

“ Respected husband :

I, a unfortunate sinner, bow down my head at your feet and with folded hands requests for forgiveness for the mistake that I have made, for which I repent very much. Forgive me, like you have been forgiving me, for the adultery Bakshish Singh committed with me. I trust and hope that you will forgive me. Bakshish Singh forcibly lifted and took me. I was standing near the kitchen door. First he pulled me and then he lifted and took me inside the room and then closed the door. I said : leave me, he is attending to the lamp. He said no, I've sent him to get beer. I then said leave me otherwise I will tell him. He said there is no harm, tell him. I will take my blame on my head. In the meantime you came. Hoping that you will forgive. In future I will not commit such a mistake.

Yours,

KUNTI SHANTWATI.”

The plaintiff said in evidence : “ I asked for forgiveness and he asked me to put it down in writing. He dictated the words to me.” I am unable to accept the plaintiff's evidence on this point ; the tenor of the letter is against the probability of such dictation, and I accept defendant's version that the letter was written freely and presented to him by the wife on his return to the house the second day after the adultery.

As to the date of the adultery I hold that it was early in the month of June, and that the parties went together to Suva to have a separation agreement drawn up, as soon as the wife was fit to travel.

The separation agreement was drawn up by Mr. Grahame, solicitor. The plaintiff is an intelligent woman, and gave the following evidence concerning the drawing up of the agreement : " Mr. Grahame explained the agreement to me. He explained I was under no compulsion to make it. He explained to me my rights as a married woman. He explained the consequences of entering into the agreement. I signed the agreement because I thought I was going to school. There was no mention in the agreement of my going to school. Mr. Grahame spoke to me independently of the defendant. I did not tell Mr. Grahame that my husband had provided for the maintenance and continuance of my education at Dilkusha. I did not tell Mr. Grahame that it was necessary to enter into a separation agreement in order to obtain admission into the said school. The agreement was explained to me in English and also in Hindustani ".

Now at the end of clause 2 of the agreement the plaintiff agrees that she will not " compel the said Karam Singh to allow her any maintenance ". The plaintiff understood this. Why did she not ask for the alleged maintenance and continuance of education at Dilkusha to be put in the agreement ? She said in evidence she did not do so because she trusted the defendant. I am unable to accept her story. She had previously been to Dilkusha as a student before she was married. She knew the place and I am of opinion that she thought, when she was found in adultery by her husband and he would not forgive her, that she could obtain work at Dilkusha. I find that there was no misrepresentation by the defendant on the making of this agreement ; it was entered into by the plaintiff with a full realization of its terms and import ; it was carefully explained to her by the solicitor, Mr. Grahame, and is, therefore, in that respect a good and valid agreement.

Can it be said, however, that this agreement is bad because it offends against public policy, in that it makes no provision for the maintenance of the wife ? On page 487 of the 3rd edition of Montague Lush on The Law of Husband and Wife is the following passage :—

" It is, in fact, no longer considered to be contrary to public policy to recognize and enforce agreements between husband and wife to separate and live apart, when the agreement is entered into to provide for an actual and immediate separation. And not only are the property provisions of an agreement for separation no longer the only valid and intergral parts of it, but an agreement to separate and execute a deed will be enforced though the deed contains no covenant to pay an annuity on either side, or other provision as to property. Thus it has been held that though the wife by her misconduct may have forfeited her right to the stipulated annuity, the husband may still be compelled to execute a deed not containing such a covenant. (*Hart v. Hart*, 18 Ch.D. 670, 683). It is indeed impossible to see how such a covenant can be essential to an agreement or deed of separation. It is only inserted to adjust the relative positions of the parties

“ as to property, and if no adjustment is required in any particular  
 “ case, and if the main part of the agreement, that relating to the  
 “ separation, is perfectly legal and valid in itself, how can it be  
 “ affected by the absence of any covenant to pay an annuity or  
 “ other provision as to property ”.

S. 7 of the Summary Jurisdiction (Married Women) Ordinance 1928 reads as follows :—

“ No order shall be made under this Ordinance on the application  
 “ of a married woman if it shall be proved that such married  
 “ woman has committed an act of adultery. Provided that the  
 “ husband has not condoned or connived at or by his wilful neglect  
 “ or misconduct conduced to such act of adultery ”.

I have found that the married woman in this case has committed an act of adultery and that the husband has not condoned or connived the adultery. There is no evidence that he conduced to it.

In a former case of a separation agreement between Indian spouses heard in this Court in 1934, *Munia v. Jagannath*, such an agreement was set aside as being contrary to public policy because it contained no provision for the maintenance of the wife. The present case, however, differs materially from that case. In the present case the wife admits the adultery and is not entitled in law to maintenance. The agreement, therefore, in this respect merely sets out the law affecting the rights of the parties. The agreement does not set out the adultery. It sets out merely that unhappy differences have arisen between the parties and it sets out that there shall be no maintenance, and that is the legal position because of the adultery. It is not necessary for me, therefore, to examine the further points set out in paragraphs 6 to 9 of the statement of claim.

I find that the agreement is a valid agreement and the plaintiff's claim therefore fails .

As regards costs, this action is brought by the plaintiff in *forma pauperis* : There will accordingly be no order for costs.

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## GANDA SINGH v. KARTAR SINGH & ORS.

[Civil Jurisdiction (Jenkins, Acting C.J.) September 22, 1939.]

*Land (Transfer and Registration) Ordinance, 1933—notice of judgment registered against mortgagee's interest in land—whether a mortgage is an estate or interest in land—mortgage the subject of an agreement for sale and purchase of a half interest—whether equitable interest takes priority over registered judgment—whether registered interest will be postponed on grounds of laches.*

In November 1933 one Indar executed a mortgage of a Native lease ; the mortgage was duly registered and, by several registered transfers, one Esur eventually became the registered mortgagee. On 20th January 1937 Esur transferred an undivided half share in the mortgage to one Massa : the transfer was duly registered on 23rd January, 1937.