**SUPPLEMENT No. 4**

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[CREAN, C.J., AND FUAD, J.]

1939
July 5.

HATTIJE DERVISH v. SHUKRI VEYSI.

HATTIJE DERVISH, DRESSMAKER, OF NICOSIA,
*Plaintiff-Respondent,*
*v.*
SHUKRI VEYSI, MERCHANT, OF NICOSIA,
*Defendant-Appellant.*
*(Civil Appeal No.* 3652.)

ACTION FOR BREACH OF CONTRACT OF MARRIAGE WHERE PARTIES OF MOSLEM FAITH—JURISDICTION OF DISTRICT COURTS IN ACTIONS WHERE A RELIGIOUS MATTER INCIDENTALLY ARISES—CLAUSE 17 OF THE CYPRUS COURTS OF JUSTICE ORDER, 1927, AND SECTION 50 OF THE COURTS OF JUSTICE LAW, 1935.

*Respondent was married to an Arab of Jaffa. Contract of marriage gave power to respondent to divorce her husband. She divorced her husband exercising her right. Subsequently appellant, in the presence of witnesses, promised to marry respondent and agreed to pay £100 damages should he not carry out his promise: Respondent agreed. After some time appellant indicated he would not marry respondent. Action was brought by the respondent against the appellant in the District Court, Nicosia, for breach of promise of marriage, and £100 damages were adjudged in favour of the respondent.*

HELD *by Crean, C.J.:—*

(1) *That the subject matter of the action does not come within the definition of "matrimonial cause" as defined by the Courts of Justice Law,* 1935, *and therefore the action is not one within the jurisdiction of the Mussulman Religious Tribunals ;*

(2) *That the action is in form and substance an action for breach of contract, and therefore within the jurisdiction of the District Courts ; and*

(3) *The fact that a religious matter is incidentally involved in the trial does not deprive District Courts of jurisdiction.*

HELD *by Fuad, J.:—*

*The question whether a divorce had, in accordance with the Moslem sacred law, taken place is one within the exclusive jurisdiction of the Mussulman Religious Tribunals by virtue of clause* 17 (1) (*b*) *of the Cyprus Courts of Justice Order,* 1927, *and section* 50 (1) (*c*) *of the Courts of Justice Law,* 1935, *and therefore the District Court had no jurisdiction to hear and determine the existence or otherwise of a marriage or a divorce between parties of Moslem faith.*

*Stavrinakis* with *Fadil* for the appellant.

*N. Chrysafinis* with *Vedad* for the respondent.

The facts of the case and arguments of counsel appear sufficiently in the judgments.

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*Judgments :* CREAN, C.J.: This is an appeal from the judgment of the District Judge of Nicosia whereby damages of £100 were awarded to the plaintiff for breach of promise of marriage.

The facts alleged by the plaintiff are: that when she was a young girl of 18 she got married to an Arab from Palestine in 1934, and that she divorced this man in May, 1937. There was one child of this marriage.

After the above divorce the plaintiff met the defendant and, according to the plaintiff, he proposed marriage to her, and she accepted his offer. This agreement contained the terms that the defendant had to provide dowry for the plaintiff and, in the event of the defendant breaking his promise, he was to pay the lady the sum of £100 as damages.

The agreement was oral but the substance of it was put into the form of a letter and sent to the defendant. After this agreement the defendant visited the plaintiff in her father's house where he repeated his promise in the presence of witnesses and the plaintiff accepted it, and there and then she kissed his hand according to the custom of the country.

Subsequent to this the defendant lived with the plaintiff in her father's house as man and wife. As a result the plaintiff became pregnant, and, on the defendant being informed of that state of affairs, he expressed his unwillingness to be the father of any child, and, on the plaintiff not agreeing to the course he suggested to her about the coming baby, he left her.

The £100 damages which this lady claimed in her action before the District Judge is the actual loss suffered by her; because, as she alleges in her pleadings, she had to give up her business from which she was earning her livelihood and, in addition to that loss, she alleges she had another offer of marriage by another man, which she had to refuse.

In his defence the defendant admits that he made the acquaintance of the plaintiff but denies that he liked her, or that he proposed marriage to her. If it is true that he never made an offer to marry this lady then it follows that he never agreed to pay her £100 as damages in the event of his not carrying out the agreement.

It was submitted by the learned trial Judge that the District Court had no jurisdiction to entertain the action, as both the parties to the action were Moslems. It was argued; as a breach of promise to marry, is incidental to marriage, the matter was within the exclusive jurisdiction of the Sheri Court under section 17 of the Cyprus Courts of Justice Order, 1927. But the trial Judge held that there was an agreement to marry entered into between the parties and that the defendant committed a breach of that contract in refusing to marry the plaintiff, and so was liable for damages under the Cyprus Contract Law of 1930, and

that by agreement the sum of £100 was fixed as damages in the event of the defendant not marrying plaintiff.

In the course of the trial the plaintiff produced a document signed by the Sheri Judge authorizing the Imam to marry her to her former *husband, the Arab, and in the same document a right is given to her to* divorce herself irrevocably from him whenever she wishes.

This document was admitted in evidence without any objection, and in supplementation of it, the plaintiff gave evidence to the Court that she exercised her right to divorce herself irrevocably from the Arab. She says she did so in Jaffa in the presence of three or four witnesses and her father, who came from Cyprus for the purpose of being present.

To enable the plaintiff to succeed in this action for breach of promise of marriage it was essential for her to prove that she was divorced from her former husband, and that she was free to accept the offer of the defendant to marry her. Otherwise the contract was impossible of performance and so void, and gave her no legal right.

The plaintiff gave evidence that she divorced her former husband in May, 1937, and if that divorce were legal then it was possible for her to enter into the contract alleged herein, which was dated the 2nd of November, 1937. But counsel for the defendant argued that the production of the above document and her oral evidence supplementing it was not proof that the plaintiff was divorced, and that the Court had no power to hear such evidence as it concerned a divorce and therefore exclusively within the jurisdiction of the Sheri Court, and to prove a divorce a decree of the Sheri Court had to be produced.

The grounds of appeal are short, and are: (1) that the District Court had no jurisdiction to hear and determine the case, both parties being of the Moslem faith; (2) the District Court had no jurisdiction to determine that the plaintiff was divorced from her former husband; (3) there was no proof that the plaintiff was divorced; (4) that the plaintiff was not entitled to damages but to a return merely of presents and clothes as provided in Sheri Law; (5) that the evidence did not establish a promise of marriage and, in any event, the sum of £100 awarded as damages was not reasonable.

To decide this appeal it is necessary to refer to the sections of the Cyprus Statutes which are relevant to the exclusive jurisdiction of the Mahkeme-i-Sherié tribunals.

The first statute to be considered is the C.C.J.O., 1927, which sets out at clause 17 that from the time of this Order coming into operation the jurisdiction of the Mussulman Religious Tribunals known as Mahkeme-i-Sherié shall be restricted to the cognizance of religious matters as hereinafter mentioned, etc. And for the purposes of this clause

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" religious matters " shall mean and be restricted to the following matters and no others: Marriage, divorce, maintenance in relation to divorce, inheritance and succession, wills, and the registration of Vakfiehs.

The next relevant statute is the Courts of Justice Law, 1935, and the section of it in any way bearing on this case, is section 50. The words of it relative to the issue are as follows:—

" Save as provided in section 13 (3), nothing in this Law contained—

" 1. shall confer upon any Court by this Law established any juris-
" diction to hear and determine—
" (a) any matrimonial cause where—
" (ii) either party is of the Moslem faith and the marriage
" has been contracted in accordance with the Moslem
" Sacred Law;
" (c) any matters which under any law in force in the Colony
" for the time being are within the jurisdiction of the
" Mussulman Religious Tribunals known as Mahkeme-i-
" Sherié;

" 3. shall be construed as abrogating the principles of Ottoman Law
" in force in the Colony before the commencement of this Law
" whereby matter of family law are governed by the law of the
" religious community to which the party belongs."

The trial Judge held that he had jurisdiction to hear the case and his authority for that is the case of *Eleni Philippou v. Varnavas N. Moschovia* heard on the 16th of December, 1937, wherein, it was held by the Supreme Court that an action for breach of promise of marriage is in form and in substance an action for breach of contract and comes within section 10 of the Contract Law, 1930.

From the Law of 1927 it appears that marriage and divorce were within the exclusive jurisdiction of Mahkeme-i-Sherié as being purely religious matters. By the 1935 Law matrimonial causes were kept within the exclusive jurisdiction of the Sheri Court and any religious matter as set out in clause 17 of the Law of 1927.

The present position then, as I understand it is, that no matrimonial cause or religious matter can be heard by any Court but the Sheri Court.

Luckily the Law of 1935 has defined a " matrimonial cause " and therefore there is no difficulty in seeing if this action comes under that head. It is defined as " any action for divorce, nullity of marriage, " judicial separation, jactitation of marriage or restriction of conjugal " rights."

In my opinion the plaintiff's action comes under none of these; therefore, so far as the Law of 1935 is concerned there is no reason why the District Court should not have heard the case. That being so,

it is left now to consider if her action comes under the heading of religious matters as set out in the Law of 1927 which are: marriage, divorce and maintenance in relation to marriage and divorce.

Again, I am unable to see how the present action can be considered as one of these. It is true that the word " marriage " is used in the pleadings as her action is for breach of promise of marriage. And it is true that the word " divorce " has also been used a great deal in the hearing of the case and the arguments thereafter. But that reference is to a right of divorce which the plaintiff says she exercised in relation to her former marriage; and, though she did divorce her former husband I do not think that fact can transform this action, which is for an action for damages for breach of contract, into a divorce action.

From the record it appears that the former divorce was referred to, and sworn to, by the plaintiff; but, I gather that was only done to shew that she was a divorced woman, and therefore capable of entering into a new contract to marry. In other words, to prove that the contract to marry sued upon, was possible of performance.

I agree with the view of the learned trial Judge that the plaintiff's action is in form and substance an action for breach of contract and that it comes within the Contract Law, of 1930 and so was within his jurisdiction. The question for his decision on the point of jurisdiction was, shortly, as follows: Where the principal matter, which is an action for breach of contract herein, is *prima facie* within the jurisdiction of the District Court, does the fact that a religious matter is incidentally involved in the trial deprive the Court of jurisdiction ? As I have already said I do not think so, and from the report of the case of *Haji Araklidi Haji Symeo v. Papa Christodoulou H. Georghi*, heard in 1904, it appears the same view was held by Sir Charles Tyser, the Chief Justice. It is said by him that " it is not a true proposition of law that " in every case where the principal matter is within the cognizance of " the temporal Court, the fact that an ecclesiastical question is inciden- " tally involved in the trial will deprive the Court of jurisdiction."

As I can see no good reason why the learned Judge should not have accepted the plaintiff's oral sworn evidence and the written documentary exhibit as proof of her divorce. I do not feel disposed to interfere with the findings of the trial Judge on these questions. And on the question of damages I think in the circumstances the Judge's award is reasonable.

As to the arguments put forward by Mr. Stavrinakis for the appellant, which in effect were, that where the parties are Moslems the Contract Law does not apply, and that there are no damages payable to a plaintiff in a case such as this, I would refer to the authorities he cited from Pollock and Mulla's work on Indian Contracts and Mulla's Principles of Mohammedan Law.

The authority for the statements in these two works is the case of *Abdul Razak v. Mohammed Hussein* reported in the Indian Law Reports, 42 Bombay. And on reading the report of this case it seems clear that the analogy of the latitude allowed in England in assessing damages for breach of a contract to marry is not applicable to the breach of a promise made by the father of a Mohammedan girl to give her in marriage. All that the plaintiff is entitled to as against the father is the return of ornaments, clothes and other presents made by the plaintiff to the girl. The basis on which damages are assessed in England for the breach of a contract to marry appear to be quite different from the basis worked upon when both the parties are Mohammedans, but, in this case, the Court was saved from having to consider the distinction as the contract itself set out specifically what the damages for a breach were to be, and named the definite sum of £100 which does not appear to me to be unreasonable.

In my view, the appeal should be dismissed with costs.

FUAD, J.: This is an appeal from the decision of the District Court of Nicosia, giving judgment in favour of the plaintiff, for damages, in the sum of £100, for breach of promise of marriage.

The facts of the case are shortly as follows:—

The plaintiff was a married woman with a child and lived with her husband Rizk Hashim, of Jaffa, for about 15 months, and then returned to Cyprus where she made the acquaintance of the defendant. She alleged that in the presence of her father and others she and the defendant agreed to contract a marriage between themselves in 8 or 9 months' time, and that defendant further promised that he would give her a dowry and that in the event of his not marrying her within the time stipulated he would pay her the sum of £100 as agreed damages. Defendant admitted association with the plaintiff as his mistress but denied that he had ever promised to marry her. He alleged further that plaintiff was still married to her husband. The plaintiff alleged that exercising the right which she had reserved in herself by the marriage contract as stated in the Marriage Permit—Exhibit 1—she divorced her husband irrevocably in accordance with the Moslem Sacred Law, and that she was, therefore, a free woman at the time of the alleged promise of marriage and capable of marrying the defendant.

She alleged further that there were two divorces, one in Jaffa, Palestine, before she returned to Cyprus, and again in Nicosia in the office of an advocate.

Of course the plaintiff could not have entered into any valid agreement to marry the defendant during the subsistence of her marriage with Rizk Hashim; and in order to be able to maintain the present action for damages for breach of promise to marry, she had to prove to the

satisfaction of the Court that she was divorced from her husband Rizk Hashim.

She promptly proceeded to do so before the District Court by *producing evidence that she had the right according to the Moslem* Sacred Law to divorce her husband herself, and that she had so divorced him in accordance with that Law.

There is no dispute that both plaintiff and her husband are Moslems and the question whether a divorce had, in accordance with the Moslem Sacred Law, taken place is one within the exclusive jurisdiction of the Mussulman Religious Tribunal by virtue of clause 17 (1) (*b*) of the Cyprus Courts of Justice Order, 1927, which jurisdiction was specifically saved by section 50 (1) (*c*) of Law 38 of 1935, and therefore the District Court's jurisdiction to hear and determine the existence or otherwise of a marriage or a divorce between the plaintiff and her husband is ousted.

This was a very vital issue in the case, but even if it were a minor or incidental issue it would have made no difference as the jurisdiction of deciding such a matter is exclusively reserved to the Mussulman Religious Tribunal. The proper course, in my view, was for the plaintiff to institute proceedings before the Religious Tribunal to prove that she had the right to divorce her husband and that she had properly exercised that right in accordance with the Moslem Sacred Law. Nothing short of a decree from the proper Court could be accepted as *conclusive evidence of a divorce having taken place, if the matter is* disputed.

Assuming for one moment that the District Court had jurisdiction to try this issue then it should have added the husband Rizk Hashim as a party to the proceedings as to decide that there is a divorce between a husband and a wife in an action in which the husband is not a party is contrary to the Rules of Court and proper administration of justice.

Another point which arises is that the District Court has to apply in accordance with section 49 of Law 38 of 1935:—

(*a*) the Laws of the Colony;

(*b*) The Ottoman Laws set out in the Fourth Schedule to the extent specified therein;

(*c*) the common law and the rules of equity as in force in England on the 5th day of November, 1914, save in so far as other provision has been or shall be made by any Law of the Colony;

(*d*) the Statutes of the Imperial Parliament applicable either to the Colonies generally or to the Colony save in so far as the same may validly be modified or other provision made by any Law of the Colony.

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When one looks at the Fourth Schedule one sees that the only portions of the Moslem Sacred Law saved are: (39) The Moslem Sacred Law relating to wills, succession and inheritance, and (40) The Moslem Sacred Law relating to vakfs. Any other provision of the Moslem Sacred Law is now just as foreign to these Courts as the Canon Law of Greek-Orthodox Church which, in accordance with several Supreme Court decisions, has to be proved as a fact by experts before the District Court can take cognizance of it and apply it.

For the above reasons I am of the opinion that the appeal should be allowed, judgment set aside, and the case be remitted to the District Court to require proper proof of the existence of divorce before proceeding with the action.

*Judges of the Supreme Court having differed in opinion the judgment of the Court below stands by virtue of section* 53 *of the Courts of Justice Law*, 1935.

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1939 Nov. 9.

ANDREAS XENI v. POLICE.

[CREAN, C.J., AND GRIFFITH WILLIAMS, J.]

ANDREAS XENI, OF KATO VAROSHA, *Appellant*,

*v.*

POLICE, FAMAGUSTA, *Respondent*.

(*Case Stated No.* 3/39.)

STATEMENT OF A CASE—SUMMARY CRIMINAL JURISDICTION—DISTINCTION BETWEEN IMPRISONMENT AND COMMITTAL TO REFORMATORY—COURTS OF JUSTICE LAWS, 1935 AND 1938, SECTIONS 20(1), 23(1)(9) AND 34(4)—JUVENILE OFFENDERS LAW, 1935.

*The appellant was charged before the President, District Court of Famagusta, sitting in the Juvenile Court, with the theft of a* 10*s. note, and on his plea of guilty was committed to the Reformatory for* 9 *months. He failed to declare his intention for leave to appeal at the time sentence was passed on him, and instead of making an application asking for leave to declare his intention to appeal he made an application for leave to appeal. His application for leave to appeal not being entertained, he applied to the trial Court for leave to declare his intention to appeal notwithstanding that the seven days provided for in section* 34(2) *of the Courts of Justice Laws,* 1935 *and* 1938, *had expired. The President, District Court, refused this application as it was out of time, and appellant being dissatisfied with this decision applied for a case to be stated, upon which the President, District Court, stated a case for the opinion of the Supreme Court.*

HELD: (1) *That before a case can be stated the District Court must be exercising its summary criminal jurisdiction on the determination of an information or a complaint and the point must actually arise therein ;*

(2) *That an application for an extension of time within which to apply for leave to appeal is not a matter where the District Court exercises its summary criminal jurisdiction, as there must be a charge before the Court before it can exercise its summary jurisdiction ;*