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MICHAEL ANTONI MALTEZOU AND ANOTHER v. IOSIF LOUKA AND ANOTHER.

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

MICHAEL ANTONI MALTEZOU AND ANOTHER, *Plaintiffs-Appellants*,

v.

IOSIF LOUKA AND ANOTHER, *Defendants-Respondents.*

(*Civil Appeal No.* 3661.)

BREACH OF CONTRACT—DAMAGES UNDER SECTION 74 (1) OF THE CONTRACT LAW, 1930.

The parties signed a contract in which, inter alia, *it was stipulated that the respondent No.* 1 *was to give his daughter (respondent No.* 2) *in marriage to appellant No.* 1, *and in the event of his refusal to do so he bound himself to pay* £50 *to appellant No.* 1 *by way of penalty. A few days after the contract was signed the girl got engaged to a third person. Thereupon the appellants brought an action for the breach of the contract and claimed damages. The trial judge dismissed the action, and the appellants appealed from that decision.*

HELD: (1) *That where a man chooses to answer for the voluntary act of a third person and does not in terms limit his obligation, he is held to warrant his ability to procure that act;*

(2) *That under section* 74 (1) *of the Contract Law,* 1930, *where a contract contains a stipulation by way of penalty in the event of a breach of the contract, the party complaining of the breach is entitled to receive reasonable compensation not exceeding the amount so named.*

Liatsos for appellants.

C. D. Severis for the respondents.

CREAN, C.J.: This is an appeal from the order of the District Judge of Kyrenia dismissing the appellants' action for £50 damages for breach of promise of marriage.

The action is brought on foot of an alleged agreement whereby Maritsa Iosif Louka agreed to marry Michael Antoni Maltezou, and on foot of a written agreement whereby Iosif, the father of Maritsa, agreed to give his daughter in marriage to Michael, and bound himself to transfer to her certain lands and chattels. In the same agreement Antonis Andrea agrees to transfer to Michael, his son, certain lands. Both these transfers are to be made within one month from the date of the agreement. In the event of either of these fathers declining to do so he agrees to pay his child £30 and the costs in the event of an action being instituted on foot of the agreement.

There is a further clause in the agreement whereby Iosif Louka and his daughter make themselves jointly liable to pay £50 by way of penalty if Iosif Louka refuses to give his daughter in marriage to Michael. And in the same way Antonis makes himself liable jointly with his son Michael to pay £50 by way of damages, if he declines to give his son in marriage. A peculiarity about this written agreement is that Iosif is to pay £50 by way of penalty in case of breach and Antoni £50 by way of damages.

This written agreement is signed by both the fathers and by their children Maritsa and Michael, and it is called a document of dowry. By it, Iosif Louka unconditionally agrees to give his daughter Maritsa in marriage to Michael, son of Antonis.

A statement of claim was filed in which a breach of promise is alleged and the plaintiffs claim from Iosif and his daughter £50 as damages or otherwise for that breach.

The defence filed alleges that Maritsa agreed to marry Michael on the fraudulent representation of Michael that a previous engagement of his to marry another woman had been properly dissolved. And for that reason it is pleaded that her promise to marry is not valid. It is also alleged in the defence that the promise of marriage was mutually dissolved, and finally it is pleaded that even if such promise were broken by Maritsa neither of the plaintiffs suffered any damage and neither of them is entitled to the sum of £50 or to any other sum as claimed by them in this action. It is not said in the defence that Iosif refused to give Maritsa in marriage and therefore the defendants are not liable for their promises.

The facts are:—Michael met Maritsa during the threshing season of 1938, and evidently took some interest in her, for a short time after he spoke to her father about her. Following this conversation he sent for his own father and a meeting was held in the house of Iosif, at which Michael, his father, Iosif and his wife were present. As a result of that meeting the marriage agreement above referred to was signed, and at the same time Maritsa was asked if she wanted to marry Michael and she said that she did.

Two days after the agreement was signed Maritsa met a former friend of hers, a zaptieh called Michel, and was formally betrothed to him and and the rings of Michel and Maritsa were blessed by the priest on the same day. The priest gives evidence and says that he congratulated Michael on his giving up Maritsa and remarked at the same time to Michael that if he married this girl against her will " he would always " have a nail in his heart " and would have no happiness. Another witness called Antonis Pifani also says the same thing. We agree with these witnesses when they say that a nail in the appellant's heart would not be conducive to his comfort or happiness. But as Michael, the appellant, denies that he ever agreed to waive his right under the written agreement to marry Maritsa, we are unable to accept the evidence of these two witnesses as proof that he did so consent in the absence of a definite finding of the District Court on this issue, and there is no such finding by the judge.

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The appellant Michael and his father, the other appellant, founded their action on the promise to marry by Maritsa and the written agreement above referred to. The trial judge based his judgment entirely on the fact that it had not been proved that Iosif, the father of the girl, refused to give his daughter in marriage to the appellant Michael, that the daughter of her own accord got betrothed to another, therefore the respondent Iosif was not liable. It is argued by Mr. Liatso, counsel for the appellants, that this fact was not one of the issues for trial by the Court as it was not raised in the pleadings. And in considering this argument we notice that the pleadings raise several issues; but these do not appear to have been considered by the judge as no finding on them is set out in his judgment. He has decided the case on a question which was not raised in the pleadings.

The argument of the appellants is a very simple one. They say, they brought their action on foot of the written agreement by which Iosif agreed to give his daughter in marriage. There is no condition in the contract whereby he saves himself from liability in the event of his daughter refusing to marry the appellant Michael. The respondent does not limit his obligation in any way; such as, that he would use his best efforts to getting his daughter to marry the appellant Michael. Therefore it is submitted that there is no reason in law why he should not be held to have warranted his ability to procure this marriage, and be responsible if it does not take place.

This view of the agreement does not appear to have been considered by the District Court and it seems to us that it is a most important one.

The agreement itself bears out this argument and the evidence of Iosif shews that he considered himself the person liable for the solemnization of the marriage where he says that when he was asked if he had consulted his daughter about the marriage, he replied, " that it was his " work, and the girl's consent is of no value since he wants the marriage." The facts leading up to the arrangement of the marriage in this case are not peculiar, as Mr. Severis tells us and it seems to be agreed that the contract of marriage in the villages of Cyprus is usually made by the fathers of the parties who are to be married.

It seems to us that as there is no term in the written contract limiting the obligation of the respondent Iosif in this respect, and as there was nothing to prevent him providing against the refusal of Maritsa by it, we must hold that on his own evidence he warranted his ability and agreed unconditionally by the document to bring about this marriage, and as he failed in this, he is liable to the appellants under the contract. And though there may be no evidence that he refused to give his daughter in marriage to Michael, there is definite evidence he was

present at her religious betrothal to the zaptieh, and took no steps to stop it. From that it might be safely inferred that he concurred in his daughter's breach of the contract.

The question of damages is the next one to be considered, and as to that we are referred to section 74 of the Contract Law, 1930. This section says:—

" 74.—(1) When a contract has been broken, if a sum is named " in the contract as the amount to be paid in case of such breach, " or if the contract contains any other stipulation by way of penalty, " the party complaining of the breach is entitled, whether or not " actual damage or loss is proved to have been caused thereby, to " receive from the party who has broken the contract reasonable " compensation not exceeding the amount so named or, as the case " may be, the penalty stipulated for.

" A stipulation for increased interest from the date of default " may be a stipulation by way of penalty."

This section seems to be very applicable to this case. The contract has been broken and the sum of £50 is named in the written agreement as the amount to be paid in case of such a breach. And by this same section the party complaining of the breach is entitled, whether or not actual damage is proved, to receive from the party who has broken the contract reasonable compensation.

We do not see from the record of the case that the appellants have proved any specific damage but as their case, in our opinion, comes within the above section we think they are entitled to a reasonable sum for the inconvenience suffered by them, and fix that sum at £5.

The appeal is allowed with costs in this Court and in the Court below, and £5 is ordered to be paid to appellants as compensation.

GRIFFITH WILLIAMS, J.: This is an appeal from a judgment of the District Court of Kyrenia dismissing the plaintiffs' (appellants herein) claim for damages for breach of contract. The contract was in writing dated 18th November, 1938, and was called a document of dowry. It was a contract by which respondent Iosif Louka undertook to give his daughter Maritsa Iosif (2nd respondent) in marriage to Michael Antoni Maltezou (1st appellant), and Antonis Andrea (2nd appellant) undertook to give his son Michael aforesaid in marriage to the said Maritsa. Each of the fathers further agreed to transfer certain properties to their son and daughter respectively within one month from the date of the said agreement.

The contract included a clause that if Iosif Louka declined to give his daughter in marriage to Michael Antoni, he and his daughter would be jointly liable to pay Michael Antoni the sum of £50 by way of penalty.

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It also included a complementary clause to the effect that if Antoni (2nd appellant) declined to give his son in marriage, he and his son Michael would be jointly liable to pay to Maritsa the sum of £50 by way of damages or otherwise.

The evidence shows that the respondent Maritsa within two days of signing this contract got herself engaged to be married to a third person.

The questions for decision of the Court are:

(*a*) Was there a breach of the contract, and if so was it committed by both respondents;

(*b*) If a breach was committed was the appellant 1 entitled to be paid £50 or other damages under the contract by one or both respondents.

The whole case depends on the meaning and effect of the written contract of 18th November, 1938. This document is primarily a document of dower (as it is entitled) by which the fathers agreed to convey property to their children in view of their intended marriage. It contains a clause making the transfer of the property to their children obligatory within one month from the date of the contract, and this without any saving clause in the event of the marriage not taking place. This document, however, also embodies the agreement by both fathers to give their children in marriage, and it is on the assumption that the marriage will take effect, that the dower clauses are based. No failure in performance of the marriage is contemplated, since a definite time for the respective transfers of property is fixed; and the marriage is the ultimate consideration for the undertakings as to dower. Should the contract of marriage be broken the dower clauses could not be enforced, since the consideration for the transfers of the property would have failed.

As to the question of breach of contract dy Maritsa's father, respondent 1: Both fathers promised to give (respectively) their son and daughter in marriage, and if either of them declined to give his son or daughter, as the case might be, he undertook to pay a penalty or damages. In this colony it is customary for marriages to be arranged between the parents of the parties without necessarily the concurrence of the parties themselves, their acquiescence being presumed; and the terms in which this contract is drawn shows that in this case also no opposition from the son or daughter was contemplated. The contract does not specifically include a promise by Michael to marry Maritsa or by Maritsa to marry Michael, though both are made liable to pay jointly with their fathers a sum of £50 in the event of one of the fathers declining to give his child in marriage, from the surrounding circum-

stances, however, such a promise may be presumed; and they by signing the contract made themselves parties to it.

The effect of such promises by the fathers must, I think, be that they undertook to make themselves responsible for the fulfilment by their children of the contract of marriage. The dower clauses in the contract, which show that no possible breakdown was contemplated, support this.

What respondent 2 said in evidence—namely, that she was compelled to sign the contract, not knowing what it contained, and only under compulsion of respondent 1—is not borne out by her conduct in getting herself re-engaged to the policeman only a day or so after the contract was signed. This second betrothal seems to have been with the full approval of respondent 1 since he was present at the ceremony. There is no doubt that Maritsa treated Michael very badly, and her father seems to have willingly or out of powerlessness acquiesced in the signed contract being broken.

Mr. Severis argued that breach of promise did not apply to respondent 1, as he did not undertake to have his daughter married to plaintiff, but to give his daughter in marriage. I cannot see the distinction; they seem to me two ways of saying the same thing; and on careful perusal of the contract it seems clear that—there being no saving clause —the father warranted his ability to see that his daughter married appellant 1. The learned trial judge seems to have based his judgment on this argument of Mr. Severis as he says: " It has not been proved " by evidence that Iosif Louka has refused to give his daughter in " marriage to the plaintiff." It may be the case that respondent 1 did not in so many words refuse to give his daughter in marriage but if his undertaking was that he would give his daughter in marriage, and failed to do so, then such failure amounted in law to refusal.

Section 56 of our Contract Law is the same as section 56 of the Indian Contract Act, and some of the Indian cases decided under that Act are very illuminating. In India, as here, it is customary for fathers to contract for the marriages of their children; and in the case of *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas* (1896, 21 Bom. 23) where a father, whose daughter had at the last minute refused to consent to the marriage, declared that he could not compel her to change her mind, the judge in course of judgment said in respect of the father's promise, " The act is neither impossible in itself, nor " impracticable in the ordinary sense of the term . . . Though physical " force cannot for one moment be thought of, it is no doubt the duty " of the defendant according to the terms of his contract to use to the " utmost his persuasive powers and his position as parent in order to " induce his daughter to be married."

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Mulla at p. 332 puts the general proposition of law this way: " If a " man chooses to answer for the voluntary act of a third person, and " does not in terms limit his obligation to using his best endeavours, " or the like, there is no reason in law or justice why he should not be " held to warrant his ability to procure that act."

The father to all intents and purposes becomes a surety to the carrying out by his daughter of her promise. In the present case moreover it is clear from the evidence that the father did not use his best endeavours to bring about the marriage.

In these circumstances I cannot but hold that there has been a breach of contract on the part of both defendants, and that the plaintiffs are entitled to damages therefor under the Contract Law. By section 43 of that law, where two or more persons make a promise the promisee may compel any one of such promisors to perform the whole of the promise. In the present case since specific performance cannot be granted the remedy as claimed in the writ is damages for breach of contract. The written contract mentioned a sum of £50 payable as penalty; but that clause must, I think, be taken merely to limit the extent of liability of the promisor. Section 74 (1) of the Contract Law provides: " When a contract has been broken, if a sum is named in the " contract as the amount to be paid in case of such breach, or if the " contract contains any other stipulation by way of penalty, the party " complaining of the breach is entitled, whether or not actual damage " or loss is proved to have been caused thereby, to receive from the " party who has broken the contract reasonable compensation not " exceeding the amount so named or, as the case may be, the penalty " stipulated for."

It cannot be said in this case that the parties when they made the contract knew what damage would arise from the breach of it. Nor was the contract in existence for a sufficient length of time to have materially affected the financial positions of the parties. Indeed the lower Court has held that no specific damage arising out of the breach was proved. In these circumstances I think that the damage suffered can only have been slight, and agree that £5 compensation would be a reasonable amount to allow under section 74 (1) of the Contract Law.

Appeal allowed with costs in this Court and in the Court below, and respondents ordered to pay to appellants £5 as compensation.