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Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wood Renton.

WEERASOORIYA *et al. v.* WEERASOORIYA *et al.*

D. C., Galle, 8,919.

Husband and wife—Gift by husband in fraud of the community—Action by heirs of wife to set aside gift—Is administration necessary?

The Roman-Dutch Law allows a husband who is married in community of property to make gifts of the common property; and his gifts, although extravagant, will be valid against his wife; but if the object of the gift is to deprive his wife of the right which she would otherwise have on his death to a half of the common property, it is a fraud on her rights, and she or her heirs can claim to have it revoked so far as she has been thereby defrauded.

An action by the heirs of a deceased wife to set aside a deed of gift granted by the husband, on the ground that the gift was a fraud on the community, was held not to be an action to recover property within the meaning of section 547 of the Civil Procedure Code.

"What they are seeking to set aside is a deed of gift; if that is done, then, after an administrator is appointed, they or the administrator may be able to recover the property; but if they fail in this action, there is perhaps nothing to administer."

THE facts are fully set out in the judgment of the Chief Justice.

Sampayo, K.C. (with him *H. A. Jayewardene*, for the defendants, appellants.—Even under the Roman-Dutch Law children of a married man and unmarried woman are not prohibited from

taking from their father by will or by donation. Those born of a married man and unmarried woman are not considered to have been born in adultery. See *Van Leeuwen Cens. For. 3, 4, 39; Karonchihamy v. Angohamy;*[1] *Wickremenayaka v. Perera.*[2]

Donations by the husband, though excessive and immoderate, are good, unless a clear fraud on the community was intended by the husband. See *1 Nathan 227; Voet 23, 2, 54, 55.*

Bawa, for the plaintiffs, respondents.—It is not necessary for the plaintiffs to argue that gifts to adulterine bastards are bad. They are concerned with the wife's half share only.

Lewishamy v. De Silva [3] is a direct authority in favour of the plaintiffs; a deed of gift in fraud of the community is liable to be set aside under the Roman-Dutch Law.

The considerations which apply to wills apply to *donationes mortis causa;* now neither spouse can deal with property of the other spouse by will. Counsel cited *1 Maasdorp 200.*

Sampayo, K.C., in reply.—*Donatio mortis causa* is not like a will on all points. There is no authority for the proposition that a person who cannot make a will cannot make a *donatio mortis causa.* Counsel cited *Sinirisamy v. Nonis, Uduma Levvai v. Mayatin Vava.*[5]

If the husband is gifting away all the community property, the law gives the wife the right to obtain an injunction or a *separatio bonorum;* the husband has otherwise an unfettered right of disposition.

There is no proof that the wife had not sufficient property left after making the gifts.

Cur. adv. vult.

October 12, 1910, HUTCHINSON C.J.—

The plaintiffs seek in this action a declaration that two deeds of gift, No. 2,877 dated October 12, 1883, and No. 3,370 dated August 6, 1896, are invalid, and should be cancelled. They say that they and the 16th defendant are the children of the 1st defendant by his wife Nonababa, to whom he was married in community; that (paragraph 6) the defendants numbered 2, 3, 5, 6, 7, 8, 9, 10, 11, 13, and 15 are the illegitimate children of the 1st defendant by a woman called Balahami and two other women, with whom he lived in adultery during his wife's life; that the 1st defendant and his said wife were entitled to the properties mentioned in the plaint; that by the deed No. 2,877 he gave some of those properties to some of the defendants; that by the deed No. 3370 he gave the whole of the said properties to the 2nd, 3rd, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 13th, and 15th defendants; that Nonababa died intestate on January 31, 1908, leaving as heirs to her half of the common property the plaintiffs and the 16th defendant; and they allege that

[1] *(1896) 2 N. L. R. 276 (280).*
[2] *(1908) 11 N. L. R. 177.*
[3] *(1906) 3 Bal. 43.*
[4] *(1903) 3 Bal. 24.*
[5] *(1907) 10 N. L. R. 347.*

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the deeds are invalid for want of acceptance, and on the ground that they are in favour of illegitimate children begotten in adultery.

An answer was filed for 1st, 2nd, 5th, and 7th to 14th defendants, which was afterwards adopted on behalf of the 15th defendant. They said that the action is not maintainable until administration is taken out to the estate of Nonababa, which is over Rs. 1,000 in value; they denied that Nonababa and the 1st defendant were ever married, and denied the allegations in paragraph 6 of the plaint; and they asserted that the donees under deed No. 3,370 were the legitimate children of the donor and his lawful wife, Balahami.

The 4th defendant is the husband of the 3rd, the 12th is the husband of the 11th; and the 14th is the husband of the 13th. No answer was filed by the 3rd, 4th, 6th, or 16th defendants. The 6th defendant was said to be resident out of Ceylon, and was never served with the summons.

At the trial it was argued that deed No. 2,877 was revoked by No. 3,370, which included all the lands in No. 2,877. The contest was therefore only as to No. 3,370. On the issues of fact the District Court found that Nonababa was the lawful wife of the 1st defendant, married to him in community of property, and that the plaintiffs are his children by her, and that Balahami was not his wife; and those findings are not seriously questioned. The other issues were:—

(1) Is the action maintainable for want of administration?
(2) Is it maintainable without a prayer for declaration of title?
(5) Are the deeds invalid for want of acceptance?
(6) Or because the donees were adulterine bastards?
(7) Or because they were a fraud on the community?

The District Court answered the 1st and 2nd in the affirmative, and held that deed No. 3,370 was "bad as regards one-half of the property concerned, on the grounds that the donees are adulterine bastards and that it is a fraud on the community." He accordingly decreed that deed No. 2,877 be cancelled, and that deed No. 3,370 be declared invalid and cancelled as regards one-half of the property concerned. The 1st to 15th defendants appeal; but I would draw the attention of the District Court to the fact that there is no proxy for the 6th defendant, and that the decree and the order for payment of costs are probably not binding on him. The foundation of the plaintiffs' claim is that they and the 16th defendant are the heirs of Nonababa, and as such became entitled on her death to one-half of the common property. The learned Judge says that in this action they are not seeking to recover the property. They could not in this action claim to recover it, because the half of it is much beyond the value of Rs. 1,000, and no administration has been taken out to Nonababa. What they are seeking is to set aside a deed of gift; if that is done, then, after an administrator is appointed, they or the administrator may be able to recover the property; but if they fail in this action, there is perhaps nothing

to administer. That view is in accordance with the decision in *Lewishamy v. De Silva*,[1] and the ruling of the District Court on the first issue was right. And the ruling on the 2nd and 5th issues has not been questioned.

Mr. Sampayo, for the appellants, has contended that, assuming that Nonababa was, and that Balahami was not, the wife of the 1st defendant, the law does not prohibit a gift by a married man to his bastard children born to him by an unmarried woman whilst his wife was living. The District Judge has, however, decided the case, in effect, on the ground that this gift was " a fraud on the community," that is, a fraud on the wife's rights in the common property; and I think that his judgment should be supported on that ground.

The impugned deed, which is in English, recites that " in consideration of the love and affection which I bear towards my children," naming them, " I do hereby give and grant *donatio mortis causa* unto the said " donees the properties described in the schedules, to hold in equal shares, subject to the following conditions: (1) That the donor reserves to himself the right to sell, mortgage, or otherwise dispose of the property during his life; (2) that the donees and their heirs shall be entitled to and possess the property after his death; (3) that the donees shall not sell, mortgage, or otherwise alienate the property or any part of it to any one but among themselves. It is therefore a deed of gift, revocable by the donor during his lifetime, and not taking effect at all until his death; so that, although it is not a *donatio mortis causa* as the donor calls it, it is in substance a will.

The husband has the power to manage and to dispose of the common property, and Voet, on the *Pandects*, *23*, *2*, *54*, says that a gift by him, although immoderate and savouring of lavishness and prodigality, is upheld, " unless it appears that a husband who was thrifty enough in other respects, and not given to useless extravagance, acted with liberality at the last moment of his life so as to commit a fraud upon his wife or upon her heir, and without any other probable reason for his gift. If, for instance, he gave a considerable part of his patrimony to his own nearest relations, such as the children by a former marriage or others, or if he bestowed the gift upon a stranger at a time when his wife was ill or at the point of death, or supposing that there were other circumstances from which a presumption of fraud was quite clear. In such cases it is right that the wife or her heirs should be relieved. And upon the dissolution of the marriage the wife or her heirs first deduct (from the estate) so much as was unreasonably consumed in liberality, or if after the payment of the debts there is not enough left, then the wife or her heirs can have recourse to the *actio Pauliana* in order to revoke the donation so far as the wife has been thereby defrauded." This statement is recognized as good law, and reproduced in other authorities, such as *Nathan 1*, *227*.

[1] *(1906) 3 Bal. 43.*

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By deed No. 2,876 dated October 12, 1883, the donor, reciting that he had four children by his wife Nonababa (viz., the plaintiffs and the 16th defendant), and that since his wife's desertion he had been living with Balahami and had several children by her, and that he wished to give all his property between his legitimate and his illegitimate children, gave certain lands to each of his four legitimate children to belong to them after his death, and reserving to himself the right to sell or mortgage or otherwise dispose of them during his life. By deed No. 2,877 dated the same day he made similar gifts of other lands to his illegitimate children by Balahami. Then by deed No. 3,370 he gave to his illegitimate children all the properties included in both the earlier deeds, and also some jewellery and furniture. So that it seems that the two earlier deeds were in effect, though not in express terms, revoked by No. 3,370; and that by the latter deed he purported to give his illegitimate children practically "all his property."

This deed seems to me to be exactly such a one as, according to Voet's statement of the law, can be attacked by the wife or her heirs by an action such as this. The husband (who has died since this action was instituted) gives by it practically the whole of his property to his illegitimate children after his death. It is in effect, if not in form, a will; and his only object in making it must have been to benefit his illegitimate children at the expense of his wife and her heirs; to deprive her of the right which she would otherwise have had to half of the common property which remained on is death. It does not appear to me to matter whether the donees were his illegitimate children or strangers. If I rightly understand the Roman-Dutch Law on this subject, it allows a husband who is married in community of property to make gifts of the common property; and his gifts, although extravagant, will be valid against his wife; but if the object of the gift is to deprive his wife of the right which she would otherwise have on his death to a half of the common property, it is a fraud on her rights, and she or her heirs can claim to have it revoked so far as she has been thereby defrauded.

I think that the appeal should be dismissed with costs. If the 6th defendant is not bound by the decree, the District Court can amend the decree in that respect.

WOOD RENTON J.—

The plaintiffs-appellants, alleging themselves to be the legitimate children of the 1st defendant-appellant and a woman Nonababa, sue in this action for the cancellation of two deeds of gifts, Nos. 2,877 and 3,370 executed by the 1st defendant-appellant in favour of the 2nd to the 15th defendants-appellants, who according to the respondents, are adulterine bastards of the 1st defendant-appellant. The grounds on which cancellation is claimed are: (1) that the gifts, being to adulterine bastards, are invalid in law; and (2) that, apart from that, they were a fraud by the 1st defendant-appellant, who was

married to Nonababa in community, of her rights in the common property. The defendants-appellants denied that the 1st defendant-appellant had been married to Nonababa at all; and they alleged that, in any case, the action could not be maintained without administration to her estate, and also that the respondents' claim was prescribed. The following issues were framed at the trial:—

(1) Is the action maintainable for want of administration?
(2) Is it mintainable without a prayer for declaration of title?
(3) Was first defendant married to Nonababa, mother of plaintiffs?
(4) Was first defendant married to Balahami ?.
(5) Are the deeds invalid for want of acceptance ?
(6) Or because the donees were adulterine bastards ?
(7) Or because they were a fraud on the community ?
(8) Is plaintiff's claim barred by prescription ?

On all these issues the learned District Judge found in favour of the respondents. Without admitting the correctness of the learned Judge's decision that the first defendant-appellant was lawfully married to Nonababa, Mr. de Sampayo argued his case on the basis that that finding was correct, and confined his argument to the two points which I have already mentioned, namely, (1) the invalidity of the gifts on the ground that the donees were adulterine bastards and (2) fraud on the community. It is, in my opinion, unnecessary to deal with the first of these points, for I think that the learned District Judge's decision can be, and ought to be upheld on the second. It is admitted that by Roman-Dutch Law a husband married in community has full power to alienate *inter vivos* the common property. This power is subject, however (see *Burge, 2nd ed., vol. III., chapter IX., p 463 et seq.*) to various checks in favour of the wife. The relations between the spouses could be controlled to some extent by stipulations in the marriage contract, and where it appeared during the marriage that the husband was spending the common or his wife's property and reducing her to poverty, she might claim *separatio bonorum* at law, and an interdict by the Court placing the husband and his property under *curatela* on the ground of his being a spendthrift. In addition to these remedies, Voet describes another which was available to the wife or her heirs on the dissolution of the marriage (*Voet, lib. XXIII., tit. 2, s. 54*). It may be desirable to quote what Voet says on this subject in his own language:—

Ex donatione mariti, licet illa immoderata, licet ad profusionem atque prodigalitatem spectans, uxori apud Hollandos vicinasque gentes damnum inferri, verius est. Nam si et Venere et aleâ absumta per maritum uxori noceant, nocere magis debent effuse et sine satis gravi causâ donata, cum turpior, majoreque cum uxoris injuriâ conjuncta sit dissipatio patrimonii scortis facta, quam modum excedens ac justam non habens causam donatio: nisi appareat, maritum, in cæteris parcum satis, nec inutili deditum profusioni, in fraudem

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uxoris, aut heredum ejus liberalitatem majoris momenti sine ullâ probabili donandi causâ exercuisse; dum vel proximioribus ex suo latere, liberis puta prioris thori, aliisve cognatis notabilem patrimonii partem dedit, vel etiam extraneo prorsus donatario contulit eo tempore, quo uxor jam infirma vel morti vicina erat, vel aliæ adsunt circumstantiæ, ex quibus præsumtio fraudis abunde elucescit: tunc enim uxori vel heredibus ejus succurri æquum est, eatensus saltem, ut soluto matrimonio prius tantundem deduat uxor aut heredes ejus, quantum liberalitate sine causâ facta consumtum est, aut, si deducto ære alieno non tantum supersit, Pauliana uxori ejusve heredibus actio accomodetur ad revocandum donationem quatensus uxori fraudi fuit.

In support of this observation Voet refers to the following authorities: *Ita fere post multos allegatos Rodenburch de jure conjugum, tit. 2, cap. 1, num. 10, 11. D. Joh. â Someren de jure novercarum, cap. 4, num. 1, 2, 4, 5. Abr. â Wesel de connubial. con. Societ., tract 2, cap. 3, num. 47 et seqq. Groenewegen ad. pr: Instit. quib. alien. licet vel non. num. ult.*

I have been unable to obtain access to any of these authorities except, through the kindness of Mr. de Sampayo himself, to Groenewegen and A. Wesel. I do not see that the former helps us much as to fraud on the community. The latter deals with the subject in *tract 2, chapter III., s. 48*, in the following terms.

Quod si e contra in fraudem uxoris donoverit maritus, quo uxorem, ejusve hæredes quæstibus stante matrimonio factis interverteret, veluti si, uxore jam infirma, et morti vicina, multum donatione largitus fuerit: si cuncta bona, vel maxima eorum partem donaverit, utique intelligendus erit maritus fraudanæ uxoris consilium habuisse. 1. omnes 17, § Lucius ff. quæ in fraud. credit. Igitur accomodanda erit uxori revocatoria actio, adinstar Paulianæ, vel quandoque directa rei vindicatione ei concedetur.

In Nathan's *Common Law of South Africa, s. 392*, also, fraud on the community is dealt with, and a reference is given to a case, *Linde v. Beyers*,[1] which is unfortunately not available to us in Ceylon, where the law as to fraud on the community would seem to have been discussed. On these authorities Mr. de Sampayo argued (1) that the remedy belonged to the wife alone, and that where, as here, she had not complained, no right of action survived to her heirs; (2) that such an action as the present would only be maintainable where there had been on the husband's part an active intention to defraud the wife of her share of the common property, and that no such intention was disclosed by the evidence; and (3) that, in any event, it was only where there was not enough left in the estate after payment of debts to satisfy the wife's claim that she or her heirs had a right of action, and that that right of action was merely a right to revoke the donation to the extent to which she had been defrauded out of her property. Mr. de Sampayo contended that, even if we were against him on the first and second

[1] *1 S. C. 411.*

points, all that the Roman-Dutch Law authorized us to do was to send the case back for an inquiry as to whether or not there was any room under the circumstances for the application of the remedy with which we are here concerned.

As regards the right to bring the action, I can see no ground in any of the few texts that I have been able to find on the subject for holding that it did not belong to the heirs even if the wife had not chosen to avail herself of it. Voet distinctly says that it does belong to the heirs alternately with the wife, and it seems reasonable that this should be the case, inasmuch as a fraud on the community in favour of third parties necessarily imports a prejudice to the lawful heirs.

We were referred by Mr. de Sampayo, in support of his argument that fraudulent intention on the husband's part was necessary, to the section in Voet (s. 55) immediately following that in which he specifically deals with the subject. Mr. de Sampayo relied on the following passage:—

Porro sicut donando maritus uxori suæ nocere potest, ubi non apparet manifestum uxoris fraudandæ propositum, ita longe magis non acquirendo id, quod acquirere potuisset.

I do not think, however, that any of the Roman-Dutch writers on this subject can have meant to do more than to hold that mere improvident expenditure on the husband's part would not constitute a fraud on the community, and that it is a necessary element in the composition of that wrong that all the circumstances should point to the husband's intention to deprive the wife of what is her due. I think that here, as in other departments of the law, fraudulent intention may be established as a necessary inference from all the circumstances of the case. The following passage from A. Wesel, which immediately precedes the one already quoted, seems to me to throw some light on the subject:—

Quid enim si maritus donaverit ob id ipsum, quod existimaret e re societatis fore, communitatique quam maxime conducere, ut devinctum haberet eum, in quem donationem confert, licet in eo eventus expectationi non responderit? Evidens namque est maritum id omne egisse administrandi animo, non frustrandi, cum liberalitatem jucundiorem debitor gratus, clariorem ingratus faciat ut dicebat Plinius in Panegyr. Trajan.

If this view of the law is correct, I think that there are abundant circumstances in the present case from which an inference of fraud may be deduced. I do not agree with Mr. de Sampayo that we are bound to exclude from consideration circumstances occurring after the execution of the deeds, with which we are here concerned, in determining whether or not the 1st defendant-appellant intended to defraud his wife. We are entitled, I think, to take account of his conduct as a whole, both before and after the date of the execution of the deeds, for the purpose of determining what his real intention was. Moreover, I think that in deciding this question the ordinary legal distinction between motive and intention must be kept in view. If the circumstances taken as a

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whole point to the conclusion that the 1st defendant-appellant intended to defraud his wife of her share in the common property, it is quite immaterial what his motive for doing so may have been. If I am right on that point, then the facts to which Mr. de Sampayo called our attention, namely, the long separation between husband and wife, the affection borne by the 1st defendant-appellant to his illegitimate children, and the fact that he was not on friendly terms with some at least of his legitimate children, although they may have constituted a motive for what he did, will not prevent his act from being a fraud on the community, if it appears that he was aware of his wife's rights, and that he meant to deprive her of them. The fact, too, if it be a fact, that a considerable proportion of the property dealt with in the deeds here in question was brought into community by the husband himself will not suffice to negative fraudulent intention. He must be taken to have been aware that under the law his wife had an eventual interest in that property also. If we eliminate these considerations, then it seems to me that the 1st defendant-appellant's disposal in favour of his illegitimate children of practically the whole property in common, his disinherison for the most part of his legitimate children, his denial subsequent to the execution of the deeds in question of their status as such, with his failure to give evidence at the trial, constitute circumstances which justify a court of law in holding that the execution of these deeds is a fraud on the community. I should perhaps mention at this stage that in the case of *Lewishamy v. De Silva* [1] it was impliedly held by Lascelles A.C.J. and Middleton J. that in such a case as the present, where a marriage in community was contracted prior to Ordinance No. 15 of 1876, an action for fraud on the community will lie in the Courts of the Island.

The only other point that has to be dealt with is Mr. de Sampayo's argument that in any case the plaintiffs-respondents are only entitled to an inquiry as to the extent of the prejudice suffered by them in consequence of the execution of the deeds, whose cancellation is sought in these proceedings. No issue was raised on this point at the trial, nor, so far as I can see, was any suggestion made that any property had been left other than that dealt with in the deeds out of which the respondents' claim could be satisfied. I do not think that we ought to allow this point to be raised at the stage which the litigation has now reached. It was admitted at the trial that the deed No. 2,877 had been revoked by the deed No. 3,370, as the latter included all the lands comprised in the former. It is, therefore, admittedly only with the cancellation of the present deed that we are concerned in this action. I agree to the order proposed by His Lordship the Chief Justice.

Appeal dismissed.

[1] *(1906) 3 Bal. 43.*