The Provisional Military Government
of Socialist Ethiopia
SUPREME COURT

Addis Ababa

Civil Appeal No. 1202/73
Tir 17, 1974 Eth. Cal.

Judges 1.
2.
3.

Kenna Dagim - Appellant
Woubie Amdie - for Respondent

The case was adjourned on the request of both parties to settle their dispute out of court by conciliation and to submit the result to the Court when they had come to an agreement. Since the parties have now informed the Court that they have not reached any agreement, we have given the following decision, after a careful consideration of the case.

Decision

The appellant had instituted an action in the *Awraja* Court against his fiancee, the latter's father and mother jointly. The ground of the action is a breach of the contract of betrothal without any reasonable ground. The appellant had demanded the return of presents received by his fiancee, and the payment of Birr 1050.00 as compensation for the expenses and the moral prejudice he had suffered. The *Awraja* Court had decided in favour of the plaintiff for the payment of Birr 1050.00 and the return of the presents by the present respondent.

The mother of the first defendant against whom the judgement was passed had appealed to the High Court against this decision. The High Court had quashed the judgement of the *Awraja* Court and remanded the file back to the latter, basing its decision on Art. 723(1) for re-trial by family arbitrators.

We on our part have examined the case carefully. The High Court had quased the judgement of the *Awraja* Court, reasoning that a breach of a contract of betrothal should be submitted and decided in the first instance by the family arbitrators. It had based its decision on the provision of Art. 723(1). This Article provides that disputes arising out of a betrothal or a breach of betrothal shall be submitted to the arbitration of the persons who were the witnesses to the contract of betrothal. But the scope of application of this provision should be seen in relation to the purpose of family arbitration and the provisions stipulated under Chapter 2 of the Civil Code concerning betrothal. The law provides that cases concerning marriage should be submitted in the first instance to the family arbitrators. The aim of the law in providing this is to deter the easy dissolution of marriage, to make the necessary effort to settle the conflict of persons who have agreed to marry each other, and to reconcile the disputing spouses, and, if there is no success in reconci-

ling them, it is to keep the family secret within its own circle. We fail to accept that this aim is fully applicable to those who have agreed to marry each other but have not yet established a family. The betrothed have only agreed to marry each other but have not yet established a family. Because they have not yet established a family, there is no family secret that should be kept from being open to the public. If there is any secret at all, it is not of such a nature that should be given weight. Betrothal can be assimilated with contract but not with marriage. Because betrothal is more contractual in character, it cannot be taken as a well-established social institution, and it cannot be said that any dispute arising out of betrothal should always be submitted in the first intance to the family arbitrators. This can be under stood from the provisions of Arts. 573(2) and 576. In relation to a breach of betro thal and compensation for the moral prejudice it entails, Art. 573(2) provides that, in establishing the amount of the indemnity and who is qualified to require it, *the Court* shall have regard to local custom. And Art. 576 provides that all *actions* based on breach of betrothal shall be barred if not instituted within one year from the day when the betrothal has been broken. As provided under Art. 573(2), it is the *Court* and not the family arbitrators which is given power to determine the amount of the indemnity and who is qualified to require it. The use of the word "actions" in Art. 576 indicates that disputes arising out of betrothal may be instituted in court in the first instance. What is to be submitted to the family arbitrators is a *petition*, and not an action. If all disputes arising out of betrothal were to be submitted in the first instance to the family arbitrators, using the word *Court* under Art. 573(2) and selecting the word *actions* under Art. 576 would have been unnecessary. But when we say this, we do not mean that all disputes arising out of betrothal can be submitted, or shall be submitted to the Court. So as not to render Art. 723(1) a useless provision, it should be interpreted in a way that it may not conflict with Arts. 573(2) and 576, making a clear identification as to the content of the dispute arising out of betrothal, and as to what remedy is required, is necessary before going on to the merits of the case. If the request of the party is against the refusal of the other party to conclude marriage, and the former is seeking reconciliation so that their contract of betrothal would continue to be effective (in other words, if it is a request for an attempt to reconcile them so that they would be able to conclude their marriage), undoubtedly such a case should be submitted in the first instance to the family arbitrators, in accordance with Art. 723(1). But if the request is for the payment of expenses incurred, the return of presents and payment of compensation for moral prejudice because of the other party's breach of a contact of betrothal without good cause, there is no reason why such a case may not be submitted in the first instance to the Court. We do not think such a case should be submitted to the family arbitrators. The request relates to the breach of a contract without good cause. There is no request for reconciliation, nor is it to bring the parties into agreement so that they would conclude the marriage.

In the case at hand, the financee of the appellant had previously made her position clear: she does not want to conclude marriage with the former. The appellant's request too is not for reconciliation and for the conclusion of marriage

with her. He requested the payment of the expenses he incurred, for the return of the presents and for the payment of compensation for the moral prejudice he suffered because his fiancee and her parents breached the contract of betrothal without good cause. There is no reason why such a case should be submitted to the family arbitrators. In the case at hand, it is the mother of the fiancee and not the latter who is found responsible for the breach of the contract of betrothal and against whom the decision was made for the payment of the expenses and the compensation for the moral prejudice the appellant suffered. The litigation between the appellant and the mother of his fiancee who is the present respondent relates to the payment of money. So, for what reason should such a case be submitted to the family arbitrators ?Therefore, the decision of the High Court which quashed the Awraja Court's decision by stating that the dispute of the parties should be first submitted to the family arbitrators is not found proper, and is thus quashed. We hereby order that the Righ Court proceed with the substance of the case and give the decision it finds appropriate. A copy ofthis decision should be sent to the High Court, so that it shall act as decided.

INTERPRETATION OF CODE PROVISIONS
A CASE COMMENT ON CIVIL APPEAL NO. 1202/73

By Worku Tafara*

In Civil Appeal No. 1202/73 reported in this issue, the Supreme Court by misinterpreting Art. 723 (2) (reproduced hereunder) reversed the decision of the High Court which, in a case appealed to it from the *Awraja* Court, had held that courts, pursuant to Art. 723 (1), lack jurisdiction to entertain, in the first instance, a claim for damages for breach of a contract of betrothal. Looked at casually, the case resolves a simple question of procedural law as to who has jurisdiction over a dispute of breach of a betrothal contract: the courts? or the family arbitrators? When looked at in more depth, however, it involves issues of much more importance, and is relevant to standing rules of interpretation of code provisions, which call for some comment.

In this latter aspect the case raises at least the following three consecutive questions:

1. Was resort to interpretation of Art. 723(1) necessary, in view of the demonstrable clarity of the provision?
2. Was the interpretation offered in the judgement sound, considering the basis on which it was made?
3. Is the result arrived at desirable, on the basis of the Court's interpretation of the provision?

This comment will attempt to answer these questions in the order they are presented as briefly as possible.

It is a standing rule of interpretation that, where the words of a code provision (or law) are clear, there is no room for applying any principles of interpretation.[1]

It follows from this that a code provision or any law requires interpretation only when it is ambiguous, silent, contradictory or unreasonable.[2] Art. 723(1), which the Court subjected to interpretation in this case, has none of these defects.

Book II Title IV Chapter 9 of the Civil Code differentiates between the jurisdiction of courts and that of family arbitrators, as regards the category of disputes arising from a betrothal contract, Arts 722 and 723(1) assign specific disputes for the cognisance of courts, and other disputes for the cognisance of family arbitrators, as follows:

---

*Assistant Professor, Faculty of Law, Addis Ababa University.

[1]G. Williams, *Learning the Law* (5th edit., 1954), p. 87.

[2]G.Krzeczunowicz, "Statutory Interpretation in Ethiopia", *J.Eth. Law*, Vol. 1 (1964), pp. 315-132

> Art. 722. Only the Court is competent to decide whether a betrothal has been celebrated or not, and whether such betrothal is valid.
> Art. 723(1). Disputes arising out of a betrothal or *out of breach of a betrothal shall be submitted to the arbitration* of the persons who have been the witnesses to the contract of betrothal (emphasis added.

The import of the contents of these two provisions is crystal clear:Where the dispute relates to the very existence or the validity of a betrothal contract,it is to be presented to and resolved by the courts and the courts only.Where the dispute is on any other matter involving betrothal, includinbg breach of a betrothal contract, it is to be presented to and resolved by the family arbitrators. Wherever the legislatorhas intended to derogate from these otherwise clear provisions,it has done so expressly. It is, for instance, provided that the Court may exercise jurisdiction over disputes designated to family arbitrators when the arbitrators fail to make their decision within a reasonable time.[3] and on appeal in restricted situations.[4] Otherwise, the courts are barred from exercising jurisdiction over suits, of which the present case is a suitable example, the cognisance of which is expressly or implicitly precluded.[5] In view of the foregoing, therefore, there was no compelling reason to resort to interpretation to establish the meaning of Art. 723(1).

The Court, however, by juxtaposing Art. 723(1) with Arts 573(2) and 576, has seen a contradiction between the former and the latter provisions, and has found it necessary to interpret the otherwise clear provision of Art. 723(1) in the light of these latter two provisions.

Art. 573(2) states, "In establishing the amount of indemnity and who is qualified for requiring it, the *Court* (emphasis added) shall have regard to local customs", and Art. 576 states, "All *actions* (emphasis added) based on breach of betrothal shall be barred if not instituted within one year from the day when betrothal has been broken."

The Supreme Court reasoned that the use of the word *Court* in Art. 573(2) and the use of the word *actions* in Art. 576 signifies that courts too can exercise jurisdiction over disputes arising out of betrothal contract, despite the express designation of jurisdiction to family arbitrators by Art. 723 (1). Had it not been so, it is emphasised by the Court, the words "family arbitrators" would have been used in lieu of the word „court", and the word "petition" would have been used in lieu of the word "action". This reasoning seems to be based on the mistranslated English text of the code. In the official Amharic text, the word "courts" in Art. 573 (2) is translated by the word ዳኞች meaning *judges*,and not ፍርድ ቤት meaning *courts*.The original French text also uses the word "judge" in lieu of the word "court". This being the case there is no real contradiction between Art. 573(2) and Art. 723(1).

---

[3]Eth. Civ. Code Art. 737.

[4]Eth. Civ. Code Art. 736.

[5]Eth. Civ. Pro. Code Art. 4.

The instruction given in Article 573(2) is addressed to the tribunals or judges of both family arbitration and the courts. The family arbitrators will apply this provision while exercising their jurisdiction on such cases in the first instance, and the courts will apply the same provision when exercising their appellate jurisdiction or jurisdiction in the first instance in the restricted situations authorised by law.

The reasoning made by drawing distinctions between the phrases "bringing action" (Art. 576), "submitting disputes" (Art. 723(1)' and "submitting petition" (Art. 727) is also not tenable. The Court's reasoning here is that family arbitrators entertain "petitions," አቤቱታ "and not "actions," ክስ "The use of the word "actions" in Art. 576, therefore indicates that disputes over breach of betrothal contract can be brought before the courts in the first instance. It is submitted that these phrases are often interchangeably used, and they mean one and the same thing, i.e. presentation of claim. When a person who claims to be entitled to obtain a divorce seeks divorce, for instance, his claim is identified as a "petition for divorce", irrespective of whether he presents his claim to the family arbitrators or, in default of family arbitrators, to the Court. On the other hand, the word "petition" is to our knowledge never used for claims of damages, even when the claim is presented to family arbitrators. If these phrases have any relevance towards the designation of anything other than presentation of claims, then they might designate the nature of the claim rather than the forum authorised to entertain it.

Even if we were to say there is contradiction between the wording of Art 573(2) and Art.576 on the one hand, and of Art. 723(1) on the other, the former provisions cannot be used to alter the clear meaning of the latter provision. The former two provisions, juxtaposed with Art. 723(1), have nothing to say about jurisdiction. Art. 573(2) deals with the manner of assessment of damages and determination of the party entitled to seek it. Art. 576 merely establishes a period of limitation. On the other hand, Art. 723(1) deals with specific question of who has jurisdiction on a dispute over a breach of betrothal contract. If we are to follow the standing rule of interpretation, "Lex specialis derogat generalis", it is the former two provisions that should be interpreted in the light of Art. 723 (1), when the question to be resolved by such interpretation is one of jurisdiction, and not the other way round. Thus interpreted, the word "court" or "judge" in Art. 573(2) will have no meaning other than the forum (or judges of the forum) that has jurisdiction under Art. 723(1), and the word "actions" in 576 will have no meaning other than presentation of the claim before such tribunals.

There is no disagreement with the statement of legislative intent and the purposes of the law enunciated by the Court. As stated by the Court, the purposes of assigning jurisdiction to family arbitrators is to facilitate reconciliation and to shelter family secrets from being publicized. But we cannot fully agree with the statement of the Court that these purposes will not be served when the relief sought is one for the return of presents and payment of damages for breach of a betrothal contract. In establishing the cause of the breach of the betrothal contract and the party responsible for the breach, allegations and counter-allegations may be made by the

prospective spouses against each other, and matters better left within the family circle may be exposed to the public. Also, the possibility of reconciling the parties through the initiative of family arbitrators cannot be excluded outright in such cases. Even if we agree that such possibilities are minimal, and, although wherevere the law assigns jurisdiction to family arbitratos, the purposes of doing so may not be fully served, the law does not sease to be applicable unless such application leads to a grossly unreasonable result. The resolution of disputes arising from breach of a betrothal contract by arbitrators will not usually be so unreasonable. Indeed, the intention of the legislator is quite clear. It is to protect the family from its very inception to its very end from the possible harms outlined by the Court. It has for this reason tried to keep the resolution of certain categories of family disputes (where complicated interpretation of law is not involved), including breach of betrothal, within the family circle. Had it not been so, betrothal contracts would have been covered by the legal regime governing obligations in general, or would have been included in the section of the code governing special contracts. The fact that it is included within the section of family law indicates that the family in its formative stage deserves the same protection as in its latter stages. The Court's identification of betrothal with contract law rather than with the family law is, therefore, not quite in accordance with the way in which the code is organized and legislated.

Lastly, if the Supreme Court's ruling in this case is to be followed, the answer to the question of who has jurisdiction over a dispute involving a breach of betrothal contract will depend on the type of relief sought by the claimant, and on whether the purposes intended to be served by resort to family arbitration will be served or not, rather than on the clearly expressed allocation of jurisdiction made by Art. 723(1) of the Civil Code. This is neither workable or desirable. It is unworkable because it puts the cart before the horse; Full appreciation of these criteria cannot be had before the adjudicating body takes cognisance of the case and pleadings are exchanged. It is undesirable because it creates an unnecessary uncertainty in the law, which will lead to wasteful procedural contentions.