JIVARATNAM *v.* MURUKESU *et al.*

1895. *September 10.*

D. C., Jaffna, 25,089.

Thésawaḷamai—*Husband and wife*—Muthusam—Thediathettum—*Land bought by husband with money inherited by him—Separate property of husband.*

According to the *Thésawaḷamai* of Jaffna, money inherited by a husband and converted into land does not form part of the *thediathettum*. Such land should be treated as his separate property, if the money can be ear-marked.

IT was alleged in the plaint that upon the death of one Tamotharam, his executor, Selvanayagam, sold the land belonging to the deceased to one Suppramanian Chetty, and that the latter re-sold it to Selvanayagam in his private capacity; that the price paid for it by Selvanayagam was part of money which he inherited from his mother; that he possessed the land till his death in June, 1894, and that thereupon his executor sold it to the plaintiff. Plaintiff now complained that defendant had unlawfully ousted him, and he prayed for a declaration of title, restoration of possession, and damages.

The defendant admitted the sale of land by Suppramanian Chetty to Selvanayagam, but denied that he bought the property out of *muthusam* inherited from his mother.

He pleaded that Selvanayagam bought it out of money acquired by him and his first wife Tángamuttu, a daughter of one Appa Chetty; that when Appa Chetty died intestate, his heir leased his share to the first and third defendants (the second defendant being the wife of the first). The defendants denied having ousted plaintiff from the half share to which Selvanayagam was entitled.

The District Judge framed the following issues:—Was this land sold on the 15th of June, 1883, to the late Selvanayagam during the lifetime of his wife Tangamuttu, or after her death.

And he refused to accept another issue suggested by plaintiff's counsel, viz., whether the land in question was purchased from money inherited by Selvanayagam from his mother or with money belonging to the joint acquired estate of Selvanayagam and his wife Tangamuttu.

He made order as follows:—"I refuse to add this issue. There "is no provision of the *Thésawaḷamai* known to me, providing "that if a person inherit cash or movable property, and after- "wards purchase a land with the cash or price of the movable "property, such acquired land becomes part of the *muthusam*, or

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"inherited estate. I hold that the *muthusam* is the property "in the state in which it is inherited, and that the profits, &c., "realized and re-invested cannot be held to create a new class of "*muthusam*, and so on indefinitely.

"This land, it is admitted, never formed part of Selvanayagam's "parent's estate, but was bought by him during his wife's life. "He may, or he may not, have had a right to set-off when "dividing the estate of himself and wife against the wife's share "a sum of money brought into their joint account as *muthusam* "cash. The fact that he called this *muthusam* money in the deed "of purchase, to which the wife is not a party, will not affect the "right of the wife's heirs to have this land treated as a joint asset.

"It strikes at the root of the *Thésawaḷamai* to suppose that a "man or woman can after marriage go on trading without "community in the proceeds of their *muthusam* property The "rights in those original properties remain sole rights, but all "acquired property derived from them, by re-investment, "exchange, accumulation, &c., pass into the joint account, subject "as already remarked, to the original claim for the *muthusam*, "as it was when the joint partnership as man and wife was "undertaken."

Plaintiff appealed against this order refusing the suggested issue.

26th August, 1895. *Rámanáthan, S.-G.*, appeared for appellant and cited Mutukistna's *Thésawaḷamai, pp. 33, 130, 182, 260, 325.*

Sampayo, for respondent.

Cur. adv. vult.

10th September, 1895. WITHERS, J.—

We have to decide an interesting point in the customary law of Jaffnapatam, and it is this. Is land which has been acquired by one of the spouses during wedlock with money bequeathed under a will and received during wedlock to be regarded at the death of that spouse as his or her separate and exclusive property devolving on his or her heirs at customary law? The different kinds of property when speaking of married persons are well known. What is brought into the marriage by the husband is called *muthusam* property, what is brought in by the wife is called *chidanam* (*stri-dhanam*) translated dowry property.

The one is the husband's separate property, to which the sons succeed; the other the wife's, to which the daughters succeed. What is acquired (*thedapatta*) during wedlock is called (*thediathettum*) acquired property. Acquired property is not further

defined in the *Thésawaḷamai*. It is regarded as joint estate of the spouses, and is divided among the sons and daughters on the death of the surviving parent.

Chapter IV., section 3, of the above Code declares that a gift of land to either spouse is to be regarded as separate property of the spouse who has received the gift, though if alienated during the marriage no compensation is to be made out of the other spouse's estate. Only the proceeds (? profits) of the land are to swell the *thediathettum*. The same rule is applied to slaves and cattle or anything else which may be increased by procreation, with this difference, that the progeny remains the property of the spouse presented with the original slave or animal.

Were donated land, slaves, and cattle excluded from the *thediathettum* because of the importance of such kinds of property to the fortunate owner of them ?

But what of a bequest of money converted into land by the donee ?

Is this within the principle of that rule ?

In *Toussaint v. Vesentipulle* and others (1856), reported in *Mutukistna, p. 325*, the then District Judge held that a bequest of money came within the principle of the section just referred to.

This was (apparently) an action by a creditor of a husband to recover a debt contracted by the latter during coverture, and he sought to levy a sum of money as assets of the *thediathettum*, and so available for his writ.

It was contended that this was not a pure bequest of money, but payment for services rendered by the wife, who however claimed it as separate property by donation.

The Supreme Court set the judgment aside, being of opinion that the creditor appellant was entitled to draw the money for his judgment debt. No reason was given in the judgment.

It may have been that the Supreme Court considered the money to be compensation, and therefore money acquired by the wife for domestic services rendered by her, and not to be a free unearned gift. The distinction is important in view of the opinion of Judge Wood, given in 1848, that "the only property in which both "spouses have a material interest and is in common is the "property (? rents, incomes, and profits) arising from each of their "respective properties" (the *muthusam* and *chidanam*), or "what "is acquired by their own exertions during their marriage." This opinion received the sanction of Sir Anthony Oliphant, C.J., in *Valliama v. Loopen* (*Mutukistna, p. 260*).

It was held by Judge Price in the case of *Sanmogam v. Sinnecooty* (*Mutukistna, p. 33*) that a parcel of land "bought with

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"money hereditary property of the deceased," one Sangarapillai during his marriage with his first wife, did not form part of their *thediathettum*, but was his separate property devolving according to the country law. This was affirmed in appeal by Sir Charles Marshall, C.J.

It does not appear from the report what was meant by "heredi-"tary property," whether *muthusam*, oddly enough translated "hereditary property" in *Mutukistna, p. 1* (in which case there could be no doubt that the land if acquired by capital money would be regarded as *muthasam* and separate estate), or money to which the husband succeeded as next of kin. If the latter, the decision seems to me to be in favour of the Solicitor-General, who cited it. If it was acquired during marriage by descent, why did it not fall into the *thediathettum ?*

It could be excluded only because it was a free gift and not acquired by the executors of either spouse, or the production of the profits, or income, or revenue of the separate property of either spouse.

It really comes to this, that according to the *Thésavaḷamai* as interpreted by decisions, the separate property of spouses is that which either party brings to the marriage or acquires during the marriage by inheritance or donation made to him or her particularly, while common property is restricted to the rents, revenue, and income of their separate estate, and what is acquired by the exertions of the spouses.

The Solicitor-General, if I understood him rightly, carried his argument to this length; and though at the time I was not prepared to assent to that view of the law, I am inclined to do so now, in view of the second case above mentioned. As, however, it was assumed for the purposes of argument, and for that purpose only, that plaintiff's predecessor in title bought the land in question with his mother's legacy, the case must go back for that question of fact, *inter alia*, to be determined, for unless the money can be ear-marked, so to speak, the plaintiff's case on that point fails.

Set aside and send the case back for trial, with the opinion of this Court that the land is to be treated as the separate property of the purchaser if he purchased it with money specially donated to him by his mother, but not otherwise.

BROWNE, J.—

I agree. Some previous owner of my copy of Mutukistna's work has corrected the text on page 261 into, "is the *profits* "arising from each of their respective properties," which would seem to be more in accordance with the sense and principle.

The precedents cited by the Solicitor-General from pages 182 and 267 certainly show that investments or transmutation of the character of the property will not affect the rights which belonged to it in its original character, and the decision on page 130 would appear to have proceeded upon the consideration that the fund out of which the lands were purchased was not ear-marked.