1950 *Present:* **Nagalingam J.**

KATHIRITHAMBY *et al.*, Appellants, and SUBRAMANIAM, Respondent

S. C. 153—C. R. Point Pedro, 449

Thesavalamai—*Property purchased by husband—Marriage in 1931 or 1932—Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), sections 19 and 20*—Thediatheddam—*Retrospective effect of amending Ordinance No. 58 of 1947—Sections 2 and 7—Construction of statutes—Interpretation Ordinance (Cap. 2), section 5—Appeal dismissed without judgment—Validity as judicial precedent.*

Ordinance No. 58 of 1947 amending the Jaffna Matrimonial Rights and Inheritance Ordinance is retrospective in its operation and has effect from the date of the passing of the main Ordinance in 1911. *Satchithanandan v. Sivaguru (1949), 50 N. L. R. 293* followed.

Under the new sections 19 and 20, *thediatheddam* is regarded as a species of property which, though not forming part of the separate estate of the spouse in whose name such property may stand, yet loses the character of its being common to both spouses, which was of the essence of the nature of *thediatheddam* property under the *Thesavalami*.

Where the appeal in a case is dismissed without reasons being given it is incorrect to treat the judgment of the lower Court either as a judgment of the Supreme Court or as a judgment which has any binding effect on the Supreme Court.

[1] *(1923) 23 N. L. R. 481.*

APPEAL from a judgment of the Court of Requests, Point Pedro.

The defendant, a Jaffna Tamil, purchased a ½ share of a land by a deed of 1934. He was married to plaintiff's sister in the year 1931 or 1932 and the wife died in 1940. It was contended on behalf of the plaintiffs that as the land was acquired during the subsistence of the defendant's marriage it fell under the category of property known as *thediaheddam* and that on the death of their sister, the defendant's wife, they inherited a half of the acquired land.

H. W. Tambiah, with *S. Sharvananda*, for plaintiffs appellants.

S. Subramaniam, with *P. Navaratnarajah*, for defendant respondent.

Cur. adv. vult.

May 23, 1950. NAGALINGAM J.—

The construction of certain provisions of the Jaffna Matrimonial Rights and Inheritance Ordinance, Cap. 48, as amended by the Jaffna Matrimonial Right and Inheritance (Amendment) Ordinance, No. 58 of 1947, is involved on this appeal. The facts which give rise to the dispute briefly are that the defendant, a Jaffna Tamil, purchased a ½ share of the land the subject-matter of this action by a deed of 1934 (P1). He was married to sister of the plaintiffs in the year 1931 or 1932 and the wife died in 1940.

The case for the plaintiffs is that the property having been acquired during the subsistence of the defendant's marriage it fell under the category of property known as *tediatetam* and that on the death of their sister, the defendant's wife, they inherited a half of the acquired land; and as the defendant, has prevented them from possessing their share they bring this action for the recovery of consequential damages.

The case of the plaintiffs is rested upon a reading of sections 19 and 20 as first enacted in the main Ordinance. It cannot be gainsaid that if those provisions applied, the property in question having been acquired for valuable consideration during the subsistence of the marriage, the property fell under the category of *tediatetam* as defined in section 19 and that on the death of the wife by virtue of section 20, a half share thereof vested in the plaintiffs as heirs of the deceased spouse.

The defendant, however, contends that these provisions so much relied upon by the plaintiffs have been abrogated by the amending Ordinance and that the new sections 19 and 20 substituted by it for the old provisions should alone be looked at for the purpose of deciding the rights of parties. In regard to this contention, the plaintiffs join issue with the defendant and assert that the amending Ordinance which found a place in the Statute book only in 1947, that is to say about

seven years after the death which gives rise to this piece of litigation, has no application, as their rights had become crystallized before the passing of the amending Ordinance and that any attempt at determining their rights by reference to the amending Ordinance would militate against the well-accepted principle that the legislature cannot be deemed to have intended to impair or interfere with rights already accrued and vested.

The contest may therefore be stated in the form of a question, viz., whether the amending Ordinance is prospective or retrospective in its operations.

This question, I may say at once, is concluded by authority. In the case of *Satchithananda v. Sivaguru* [1] I had occasion to consider this point and I reached the view that the amending Ordinance was restrospective in its operation. My brother Windham agreed with me. That being a two Judge case, even if I were disposed to differ from the view then taken, it is not open to me to do so as that case is binding on me sitting alone. Mr. Thambiah, however, invites me at least to reserve the point for consideration by a fuller bench on the ground that another judgment of this Court is in conflict with the case of *Satchithananda v. Sivaguru* [1]. He refers to the case of *Sothinagaratnam v. Akilandanayaki et el.*[2] The appeal in that case was dismissed without a judgment. Where a judgment of a lower Court is affirmed without reasons being given by this Court it is incorrect to treat the judgment of the lower Court either as a judgment of this Court or as a judgment which has any binding effect on this Court. The further circumstance referred to by Mr. Thambiah that the point of law had been argued at great length in this Court is again no argument to treat a judgment of a lower Court as having any greater weight than that it is in fact a judgment of an inferior Court. Various reasons may have actuated this Court in affirming the judgment of the lower Court but not necessarily those given in the lower Court. Only when this Court expressly adopts a judgment of the lower Court as its own can the judgment of the lower Court be treated as being invested with that character whereby it is enabled to be regarded as a pronouncement having a binding effect on this Court. I do not therefore think that there is any conflict of authority on this point so far as this Court is concerned, for there is only the judgment of this Court on the point.

In reality the further argument of this question has revealed the existence of another approach to the solution of this problem and which to my mind is even far more conclusive than the arguments upon which the decision in the case of *Satchithananda v. Sivaguru* [1] was based. It was not sufficiently realized in the course of the argument in that case that the amending Ordinance No. 58 of 1947 in section 2 thereof expressly refers to the Jaffna Matrimonial Rights and Inheritance Ordinance as "the principal Ordinance" and in every one of the subsequent sections by which amendments are introduced the term "principal Ordinance" continues to be used. Now the term "principal

[1] *(1949) 50 N. L. R. 293.*

[2] *S. C. No. 55/D. C. Jaffna No. 3092, S. C. Min. 3-11-48.*

Ordinance " is not used in the amending Ordinance as words of ordinary connotation but as a term of art. The words " principal Ordinance " have been impressed with a special meaning by the Interpretation Ordinance Cap. 2, section 5 whereof runs as follows :—

> " Where any Ordinance is declared to be passed to amend any other Ordinance, the expression ' the principal Ordinance ' shall mean the Ordinance to be amended, and *the amending Ordinance shall be read as one with the principal Ordinance* "

The words italicized are of special significance in this context. The mind of the Legislature is clearly disclosed in regard to the effective date of the operation of this amending Ordinance by its use of the term " principal Ordinance " in the amending Ordinance. To contrast this amending Ordinance with another Ordinance viz., Ordinance No. 60 of 1947, which is in itself an Ordinance amending an earlier Statute, viz., the prevention of frauds Ordinance, Cap. 57, the Legislature did not in that amending Ordinance refer to the earlier statute which it sought to amend as the " principal Ordinance ". The reason for this distinction is not unimportant and in fact very substantial. What, then, is the meaning to be given to the words that the " amending Ordinance shall be read as one with the principal Ordinance " ? The plain meaning of these words is that the amendments should be incorporated into the main Ordinance and read as if they had been enacted at the time that the main Ordinance itself was framed before an attempt is made to construe or give effect to them ; it certainly would be doing violence to these words if the amending Ordinance were to be treated as a separate piece of legislation to be construed without reference to the main Ordinance. I have not come across any case either local or of the English or Indian Courts where these identical words have received judicial interpretation. There is, however, an old English case which comes very close to the subject-matter in hand. That is the case of *Attorney-General v. Pougett* [1] where the facts were that by a Statute of George III an export duty was imposed upon hides of 9*s*. 4*d*. but the statute omitted to mention whether the duty so imposed was in respect of any specified weight. To remedy this omission an amending Ordinance was passed in the same reign by which the words " per cwt." were added after 9*s*. 4*d*. The question that arose was whether the duty at 9*s*. 4*d*. per cwt. was to be levied in regard to hides that had been exported before the enactment of the amending Ordinance or whether the duty was merely a sum of 9*s*. 4*d*. on the full quantity of hides exported on one occasion by an exporter without reference to the weight. Chief Baron Thomson in giving judgment said: " The duty in this instance was in fact imposed by the first Act, but the gross mistake of omission of the weight for which the sum expressed was to have been payable occasioned the amendment made by the subsequent Act, but that had reference to the former statute as soon as it passed and they must be taken together as if they were one and the same Act ".

I think the words " the amending Ordinance shall be read as one with the principal Ordinance " which in themselves are plain have the

[1] *(1816) 2 Price 381.*

same meaning that Chief Baron Thomson intended to convey by the words, " they (the main and amending Ordinances) must be taken together as if they were one and the same Act ".

If, therefore, the proper method of construing the amendments introduced by the amending Ordinance is to construe them after incorporating them into the main Ordinance and then reading both Ordinances as if they were one, the reason for the enactment of section 7 which was left in some obscurity in *Satchithananda v. Sivaguru* becomes obvious. Section 19 is in Part 3 of the main Ordinance which part deals with inheritance ; section 14, which is the very first section of this part, expressly declares that the subsequent sections, of which sections 19 and 20, it will be observed, are two, should apply to the estates of persons who die after the commencement of the Ordinance, provided they fall under one or other of the following two classes :—(1) unmarried persons (2) married persons who were married subsequent to the Ordinance. If the new sections 19 and 20 are therefore substituted in the principal Ordinance and read in the light of the provisions of section 14, nothing can be clearer than that the operation of the new sections 19 and 20 extends to the two categories of persons set out above, that is to say, these sections would have operation in respect of estates of the aforesaid classes of persons dying after 17th July, 1911, the date of the commencement of the main Ordinance. In this view of the date of commencement of operation of the new amending sections 19 and 20, the reason for the enactment of section 7 in the amending Ordinance by which the amendments were excluded from having effect on certain decided cases is plainly understandable. But for this saving clause, even the decided cases would have come within the ambit of the amendment. The policy of the Legislature not to interfere with decided cases even where it sets out to declare the law as distinct from enacting new law is well established and is an old one. Commenting on retrospective statutes, Craies observes in his Treatise on Statute Law [1] that " Acts of this kind like judgments decide like cases pending when the judgments are given but do not reopen decided cases ".

Furthermore, the amending Ordinance cannot but be regarded as a piece of legislation declaratory in its nature. After the main Ordinance had become law in 1911, the construction of section 19 as it then stood came up for consideration in the case of *Nalliah v. Ponniah* [2]. Notwithstanding the wording of that section 19, both the lower Court and this Court gave effect to the well-known principle of *Thesawalamai* that where propertey is acquired by either spouse during the subsistence of marriage with his or her separate property, the property so acquired continued to have its separate character and did not fall under the category of *tediatetam* property. This judgment, however, came up for review in the Divisional Bench case of *Avitchi Chettiar v. Rasamma* [3] and the Divisional Bench took a contrary view and held that provided the property was acquired during the subsistence of the marriage by either spouse, such property became *tediatetem* irrespective of the fact that the consideration paid for such purchase may have been the separate

[1] *1907 ed. p. 332.*

[2] *(1920) 22 N. L. R. 198.*

[3] *(1933) 35 N. L. R. 313.*

property of one of the spouses. This Divisional Bench case introduced for the first time a new notion foreign to *Thesawalamai* in regard to what is known as *tediatetam* and caused and continued to cause no little discontent among the people of Jaffna. It was to remove this discontent that the amending Ordinance was passed. Looked at from the historical point of view, too, it is easy to see why the operation of the amending Ordinance should be coeval with the main Ordinance. If the new section 19 of the amending Ordinance was enacted to restore the old conception of *tediatetem*, which it undoubtedly does, can one think of any sound reason for the Legislature deciding to perpetuate the erroneous notion of *Thesawalamai* embodied in the earlier section 19 even in regard to persons who may have died between 1911 and 1947, the dates of the passing of the main and the amending Ordinances respectively. I can think of none. The amending Ordinance has the effect of declaring what was always the law and its operation therefore cannot be confined to any period subsequent to when it became law. The case of *Attorney-General v. Theobold* [1] is an authority for the proposition that where a statute is in its nature declaratory the presumption against construing it retrospectively is inapplicable.

The object of the Legislature in enacting that the amending Ordinance should be read as one with the principal Ordinance would have been better achieved had it not used the word " repealed " in enacting the new sections 19 and 20 but used some such word as " abrogated " instead, for then the apparent conflict that arises by using the word " repealed " which word has a special significance as set out in section 6 of the Interpretation Ordinance and referred to in *Satchithananda v. Sivaguru* [2] would not arise.

There is another difficulty that may be said to arise by reason of the language used in section 7 of the amending Ordinance. That section uses the phrase " prior to the date on which this Ordinance comes into operation ". If the amending Ordinance is to have effect from the date when the principal Ordinance came into operation, then the phrase can make no sense. On the other hand, if the phrase is to be deemed to refer to the date when the amending Ordinance was passed as the effective date of operation of the amendments, then all the calculated pains taken by the Legislature to refer to the main Ordinance as the principal Ordinance would have been an irksome toil it had set itself all to no purpose, and it would follow that the studied use of the words " principal Ordinance " would be equally meaningless. This conflict and these absurdities would be avoided if the phrase is read to mean " prior to the date on which this Ordinance becomes law ". This construction would also carry into effect the intention of the Legislature in passing the amending Ordinance.

Having regard to these considerations, I am confirmed in the view that I expressed in the case of *Satchithananda v. Sivaguru* [2] that the amending Ordinance has retrospective effect and has effect from the date of the passing of the main Ordinance in 1911.

[1] *(1897) 24 Q.B.D. 527.*

[2] *(1949) 50 N. L. R. 293.*

If the main Ordinance as amended applies, then by virtue of section 19 (new) the property purchased by the defendant becomes his *tediatetem*, for there is no evidence that the consideration paid for the purchase came from his separate estate. In passing, I might observe that the position would be the same even if the old section 19 applied. The real obstacle to the plaintiffs' success in this case is section 20 (new). Both the new sections 19 and 20 speak of " *tediatetem* of a spouse ". Under the *Thesawalamai, tediatetem* was property belonging in common to the two spouses though it may have been acquired by one of the spouses and the meaning of the term under *Thesawalamai* is correctly set out in the old section 20 (1). Now for the first time under the new sections 19 and 20 *tediatetam* is regarded as a species of property which though not forming part of the separate estate of the spouse in whose name such property may stand, yet loses the character of its being common to both spouses, which was of the essence of the nature of *tediatetam* property under the *Thesawalamai*. By reason of the loss of the common or joint character of the *tediatetam* property consequences of a far reaching character bringing about a revolutionary change in the law of inheritance result. The change itself is expressly embodied in the new section 20, which runs as follows:—

> " On the death of either spouse one half of the *thediatheddam* which belonged to the deceased spouse, and has not been disposed of by last will or otherwise, shall devolve on the surviving spouse and the other half shall devolve on the heirs of the deceased spouse ".

It will be noticed that it is *tediatetam* property *which belonged to the deceased spouse* that would devolve in respect of a half share thereof on the surviving spouse and the other half share on the heirs of the deceased spouse. The new section 19 having already used the phraseology " *thediatheddam of a spouse* " the idea underlying that term is carried forward in section 20 when it concerns itself only with the devolution of *tediatetam* property *belonging to the deceased spouse*. If, therefore, the surviving spouse has *tediatetam* property belonging to him or her, that *tediatetam* property, unlike under the old *Thesawalamai*, does not become subject to devolution at the dissolution of marriage, and in effect becomes, as a result of the dissolution of marriage, the separate property of the surviving spouse to which the heirs of the deceased spouse can lay no claim. The property in this case is not property that belonged to the deceased spouse—the deed of conveyance is in favour of the defendant. The property, therefore, is at best *tediatetam* of the defendant—and this *tediatetem* property did not fall into the category of property that was subject to devolution at the date of the death of the defendant's wife, but continued to be vested in regard to the entirety thereof in himself. In view of the foregoing, it cannot be said that any share of the property claimed by the plaintiffs devolved on them by reason of the death of their sister.

For these reasons the plaintiffs' appeal fails and is dismissed with costs.

Appeal dismissed.