1954 *Present:* **Gratiaen J. and Fernando A.J.**

K. KUMARASWAMY *et al.*, Appellants, *and* K. SUBRAMANIAM *et al.*, Respondents

S. C. 180—D. C. (Inty.) Point Pedro, 4,329P

Thesavalamai—Tediatetam—*Devolution on death of non-acquiring spouse—Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), ss. 19, 20, 21—Amending Ordinance No. 58 of 1947, ss. 5, 6—Retroactive effect.*

The rights of a wife, to whom the *Thesavalamai* appears, in respect of *tediatetam* property acquired by her husband before the Jaffna Matrimonial Rights and Inheritance Amendment Ordinance of 1947 came into operation are governed by section 20 of the principal Ordinance of 1911 and are not affected by sections 5 and 6 of the amending Ordinance. If she predeceases her husband subsequent to the date when the amending Ordinance became operative, the devolution of her share of that property is regulated solely by section 21 of the principal Ordinance because the new section 20 has no application to the case; accordingly, the entirety of her vested interest in the property passes to the children of the marriage as her heirs, to the exclusion of the husband.

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

H. V. Perera, Q.C., with *T. Arulananthan*, for the 8th to 11th defendants appellants.

Sir Lalita Rajapakse, Q.C., with *H. W. Tambiah* and *S. Sharvananda*, for the 1st defendant respondent.

July 16, 1954. GRATIAEN J.—

This is an appeal in a partition action. The only dispute which calls for our adjudication arises upon the legal consequences of certain admitted facts.

Kanagaratnam (the 1st defendant) and his wife, Rasammah, were Tamils to whom the *Tesawalamai* applies. They were married in 1915, and their property rights as *Tesawalamai* spouses were until 4th July, 1947, regulated by the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48)—hereinafter called " the principal Ordinance ".

In 1933 Kanagaratnam purchased in his own name an undivided $\frac{1}{8}$ share in the property sought to be partitioned, and in 1943 he similarly purchased an additional 1/18 share, so that the total extent purchased by him under the relevant conveyances amounted to 7/18. These shares admittedly constituted the *tediatetam* " of the husband " within the meaning of section 19 of the principal Ordinance.

The appellants are the children of the marriage, and as such were the preferential heirs of either parent under section 21 of the principal Ordinance. Rasammah died in August, 1948, after the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947 (hereinafter called " the amending Ordinance "), had passed into law.

The appellants claimed that half the *tediatetam* property purchased by Kanagaratnam in 1933 and 1943 (that is to say, an undivided 7/36 share), vested in Rasammah by operation of law immediately upon its acquisition by Kanagaratnam (section 20 of the principal Ordinance); and that this undivided 7/36 share devolved on them upon her death under section 21, whose provisions have not been repealed by the amending Ordinance. Kanagaratnam maintained in the Court below that, on the contrary, the entire 7/18 now belonged to him by virtue of an allegedly sweeping alteration which had taken place in the relevant law. This latter contention was upheld by the learned District Judge whose decision, I regret to say, is based on a misunderstanding of two recent rulings of a Full Bench of this Court.

In my opinion, the problem under consideration admits of no doubt. Rasammah's rights in respect of *tediatetam* property acquired by her husband before 4th July, 1947, were governed by section 20 of the principal Ordinance, and the provisions of sections 5 and 6 of the amending Ordinance did not operate to divest Rasammah of rights already vested in her under the earlier law—*Akilandanayaki v. Sothinagaratnam*[1], *Kandavanam v. Nagammah*[2].

Earlier controversies as to the nature of the rights of the non-acquiring spouse in *tediatetam* acquired by the other spouse before 4th July, 1947, have long since been resolved by decisions of this Court. An undivided half share in the property sought to be partitioned had automatically vested in Rasammah, as the non-acquiring spouse, by operation of law—*Parasathy Ammal v. Setupulle*[3]. The dissenting judgment of Garvin J.

[1] *(1952) 53 N. L. R. 385 F.B.* [2] *(1952) 46 C. L. W. 104.*
[3] *(1872) 3 N. L. R. 271.*

to the same effect in *Seelachchy v. Visvanathan*[1] has been consistently followed. See *Sampasivam v. Manikkar*[2], *Iya Mattayer v. Kanapathipillai*[3] and *Seenivasagam v. Vaitilingam*[4].

During the subsistence of her marriage, Rasammah's title in a half share of the *tediatetam* was of course subject to the marital power of her husband to alienate it or mortgage it for consideration. This marital power was referable to the husband's status as the manager and "sole or irremovable attorney of the wife"—*per* Macdonell C.J. in *Sangarapillai v. Devarajah Mudaliyar*[5]. It is quite wrong to suggest that the power proceeds from the enjoyment of any *dominium* over the wife's share.

The devolution of Rasammah's share upon her death in 1948 remains to be considered. *This question is governed by the relevant provisions of the principal Ordinance of 1911 as amended by the amending Ordinance of 1947.*

Dr. Rajapakse very properly informed us that he could not support the wholly untenable proposition that the entirety of Rasammah's 7/36 share of the property devolved on Kanagaratnam as the surviving spouse. He argued, however, that the case was governed by section 6 of the amending Ordinance which repealed section 20 of the principal Ordinance and substituted in its place a new section in the following terms :

> "20. On the death of either spouse one half of the *tediatetam* which belonged to the deceased spouse shall devolve on the surviving spouse and the other half shall devolve on the heirs of the deceased spouse."

He suggested that a 7/72 share in the properties passed under this section to Kanagaratnam on Rasammah's death and only the remaining 7/72 share to the appellants jointly. For the reasons which follow, I am unable to accept this argument.

In *Kannamah v. Sanmugalingam*[6], Pulle J. has effectively disposed of the theory that a single sentence (isolated from its context) of my judgment in *Kandavanam's case*[7] lends support to the proposition which Dr. Rajapakse has invited us to adopt. No necessity arose in *Kandavanam's case* to examine the precise meaning of section 6 of the amending Ordinance ; it sufficed for the purposes of that appeal to emphasise that the amending Ordinance did not retroactively divest people of any rights acquired before 4th July, 1947, under the principal Ordinance.

In order to extract the true meaning of section 6 of the amending Ordinance, we must first examine section 5 which repeals section 19 of the principal Ordinance and substitutes a new section 19 which reads as follows :—

> "19. No property other than the following shall be deemed to be *tediatetam* of a spouse :—
>
> (*a*) property acquired *by that spouse* during the subsistence of the marriage for valuable consideration, such consideration not forming or representing any part of the separate estate of that spouse ;

[1] *(1922) 23 N. L. R. 97.*
[2] *(1921) 23 N. L. R. 257.*
[3] *(1928) 29 N. L. R. 391.*
[4] *(1944) 45 N. L. R. 409 ; 28 C. L. W. 63.*
[5] *(1936) 38 N. L. R. 1 P.C.*
[6] *(1954) 55 N. L. R. 260.*
[7] *(1952) 46 C. L. W. 104 at 105.*

(*b*) profits arising during the subsistence of the marriage of that spouse ".

I shall hereafter refer to sections 5 and 6 of the amending Ordinance as " the new section 19 " and " the new section 20 " respectively.

The new section 19 gives a definition of *tediatetam* " which restores *for the future* the more traditional conception of *tediatetam* which had been unmistakably, even though carelessly, altered by legislative intervention in 1911 "—*Akilandanayake's case* [1]. Accordingly, property which would previously have constituted *tediatetam* within the meaning of the principal Ordinance in accordance with the ruling in *Avichi Chettiar's case* [2], must, *if acquired on or after 4th July, 1947*, be regarded as " separate property ".

The repeal of the old section 20 and the substitution of the new section 20 have the following effect :—

(*a*) if either spouse acquires *tediatetam* property *on or after 4th July, 1947*, no share in it vests by operation of law in the non-acquiring spouse during the subsistence of the marriage ;

(*b*) if the acquiring spouse predeceases the non-acquiring spouse without having previously disposed of such property, the new section 20 applies ; accordingly, half the property devolves on the survivor and the other half on the deceased's heirs ;

(*c*) if the non-acquiring spouse predeceases the acquiring spouse, the *tediatetam* property of the acquiring spouse continues to vest exclusively in the acquiring spouse ; the new section 20 has no application because the *tediatetam* of the acquiring spouse never " belonged " to the non-acquiring spouse.

These three propositions pre-suppose that the *tediatetam* property had been acquired after the amending Ordinance passed into law.

It thus becomes clear that the new sections 19 and 20 have no bearing on the present problem. A half share of the *tediatetam* property acquired by Kanagaratnam in 1933 and 1943 had automatically vested in Rasammah (as the non-acquiring spouse) under the old section 20, and the subsequent repeal of the old section 20 did not operate to divest her of that share. The devolution of Rasammah's share upon her death in 1948 was regulated solely by section 21 of the principal Ordinance because the new section 20 has no application to the case. Accordingly, the entirety of Rasammah's vested interest in the *tediatetam* property (*i.e.*, a 7/36 share) passed to the appellants as her heirs. The balance 7/36 continued, of course, to be vested in the 1st defendant Kanagaratnam.

For these reasons, I would allow the appeal and amend the interlocutory decree passed in the lower Court (*a*) by allotting a 7/36 share to the appellants jointly and (*b*) by proportionately reducing the share allotted to the 1st defendant—*i.e.*, by allotting only a 7/36 share to him.

[1] *(1952) 53 N. L. R. 385 at 397.* [2] *(1933) 35 N. L. R. 313.*

The appellants are also entitled to the costs of this appeal and of the contest in the Court below. In all other respects the interlocutory decree must be affirmed.

It is unnecessary for the purposes of this appeal to give a definite ruling as to the devolution of *tediatetam* property acquired *before 4th July, 1947*, if the acquiring spouse predeceases the non-acquiring spouse *after 4th July, 1947*. In such a case, it is already settled law that the new section 20 could not operate to divest the non-acquiring spouse of the half share which had previously vested in him (or her) under the old section 20. Dr. Rajapakse suggested, however, that the devolution of the half share belonging to the deceased acquiring spouse would be regulated by the new section 20—with the result that the non-acquiring spouse would then become vested with an additional ¼ share. Although I appreciate the undesirability of giving expression to any *obiter dictum* concerning the interpretation of the amending Ordinance, I desire to place on record that, as at present advised, I am quite unable to accept this theory which (so Dr. Rajapakse informs us) is at present entertained in certain quarters.

The amending Ordinance appears to me to deal only with the incidence and devolution of *tediatetam* property acquired by one or other of the spouses *on or after 4th July, 1947*. In the hypothetical case referred to, the correct view, in my opinion, is that the new section 20 would not apply, and that the half share belonging to the acquiring spouse would, upon his death, devolve on his heirs under section 21 of the principal Ordinance—whereas the other half share would continue, as before, to vest in the non-acquiring spouse. I find no indication in the language of the amending Ordinance of any intention to enlarge the rights or expectations of a non-acquiring spouse in respect of *tediatetam* property which came into existence before 4th July, 1947.

FERNANDO A.J.—I agree.

Appeal allowed.