

1951

*Present : Dias S.P.J. and Gunasekara J.*RASAMMAH, Appellant, and KARTHIGESU *et al.*, Respondents*S. C. 229—D. C. Jaffna, 3,159**Thesavalamai (Cap. 51)—Part IV, Clause 1—Wife living in separation—Right to transfer dowry property without consent of husband.*

Under the Thesavalamai a married woman has no capacity to transfer her dowry property without the consent of her husband even when the spouses are living in separation.

**A**PPPEAL from a judgment of the District Court, Jaffna.

*S. J. V. Chelvanayakam, K.C.*, with *C. Vanniasingham* and *G. C. Niles*, for the 4th defendant appellant.

*H. V. Perera, K.C.*, with *H. W. Tambiah* and *A. Nagendra*, for the plaintiff respondent.

*Cur. adv. vult.*

October 16, 1951. GUNASEKARA J.—

This is an action for declaration of title to land. The property in question, which is 2 *lachams* in extent, is depicted as lot 1 in plan Z. Together with a further extent of 2 *kulies* out of the adjoining lot 2, it forms the northern half of Periyavalavu which was at one time owned by the fourth defendant-appellant's mother. This northern half of Periyavalavu was part of the dowry given to the appellant by her parents in September, 1909, when she married one Ponniah; and the southern half (consisting of the rest of lot 2 and lots 3 and 4) formed part of her sister's dowry. On the 26th February, 1919, by the deed P 1, the appellant purported to transfer the eastern half of the northern half of Periyavalavu to the plaintiff respondent's father Murugar Krishnapillai for a consideration of Rs. 300 and on the 6th April, 1919, by the deed P 2, the western half for Rs. 150. Krishnapillai died in October, 1930. By that time the value of the property appears to have been greatly enhanced by the erection of buildings on it. It had been mortgaged by Krishnapillai and at the time of his death the mortgage was held by one Subramaniam, to whom it had been assigned. On the 3rd October, 1932, the property was sold with the sanction of the court in the administration of Krishnapillai's estate to enable the executor to pay the mortgage debt and the other debts of the estate and testamentary expenses. The sale was by public auction and the property was bought by Subramaniam for Rs. 15,750. On the 11th March, 1933, he transferred it to the plaintiff subject to a life interest in favour of the plaintiff's mother Ledchumipillai in consideration of a sum of Rs. 16,000 paid to him by the latter. Ledchumipillai died in 1935 and the plaintiff claims that he is now the absolute owner of the property.

The main issues in the action relate to the validity of the transfers P 1 and P 2 and prescriptive possession. On both matters the learned District Judge held in favour of the plaintiff-respondent.

The appellant and her husband Ponniah had entered into a deed of separation in 1916 and at the time of the execution of P 1 and P 2 she was living with Krishnapillai as his mistress. Ponniah died on the 23rd December, 1927. It is contended for the appellant that P 1 and P 2, which were executed in Ponniah's lifetime, were executed without his consent, and for that reason conveyed no title to Krishnapillai. The learned District Judge holds that they were executed without Ponniah's consent, but that his consent was not necessary, for the reasons that he and the appellant were living in separation from each other and that they had agreed in the deed of separation that neither of them "should claim any right or title whatsoever to the property of the other."

It is agreed that the appellant and Ponniah were persons to whom the *Tesawalamai* applied. Mr. Chelvanayagam contends that under that law a married woman had no capacity to transfer her dowry property without the consent of her husband even though they were living in separation. In support of this contention he relies on the following statement of the law in Part IV, Clause 1 of the *Tesawalamai* (Cap. 51):

"When husband and wife live separately on account of some difference, it is generally seen that the children take the part of the mother and remain with her. In such a case the husband is not at

liberty to give any part whatsoever of the wife's dowry away; but if they live peaceably he may give some part of the wife's dowry away. And if the husband on his side wishes to give away any part of his hereditary property which he has brought in marriage, he may then give away one-tenth of it without the consent of the wife and children, and no more; but the wife, being subject to the will of her husband, may not give anything away without the consent of her husband."

Mr. Perera contends that what is dealt with here is the subject of gifts and not sales, and also that the statement regarding the wife's disability relates only to a disability when the spouses are living together. I agree with the first of these contentions but not with the second. Part IV is entitled "Of a Gift or Donation" and the heading of Clause 1 is "In what cases a gift may or may not be made where a husband and wife live separately". The clause, as I understand it, confines itself to the topic so described and states the extent of each spouse's rights to give away property when they "live separately on account of some difference". When they so live separately the husband may not give away any part of the wife's dowry (though he may give away some part of it "if they live peaceably") and even of his own hereditary property he may not give away more than a tenth part without the consent of his wife and children. Apparently, the reason for these restrictions on the husband's right to "give away" his own property and a part of his wife's dowry is that when spouses live in separation "it is generally seen that the children take the part of the mother and remain with her". As for the wife, she may not give away anything without the consent of her husband, for the reason that she is "subject to the will of her husband".

There appears to be no reason for construing the expression "being subject to the will of her husband" to mean "when she is living with her husband and therefore subject to his will" rather than "because she is subject to the will of her husband". It seems to me that the latter is not only its more obvious meaning but also the only meaning it can bear if the statement regarding the wife is one relevant to the topic that is dealt with in the clause. Thus, the rule that a wife "may not give anything away without the consent of her husband", even when they are living in separation, appears to follow from a more general rule that because she is subject to the will of her husband she may not alienate her property at all without his consent. That there is such a general rule of the Tesawalamai is recognised in the case *Chellappa v. Kumarasamy*<sup>1</sup>, where Ennis J. and de Sampayo J. held that under that law a married woman is not competent to deal with her immovable property without the concurrence of her husband. Although that was not a case of spouses who were living in separation the question of the validity of a deed executed by the wife without the husband's concurrence was decided on the broad ground that "the disability of a married woman is the same under Tamil customary law as under the general law prevailing in the Island". (*Per de Sampayo J.*) I do not think that the decision in *Ramalingam v. Puthathai*<sup>2</sup>, which is relied on by Mr. Perera, is in conflict with this view. The question there

<sup>1</sup> (1915) 18 N. L. R. 435.

<sup>2</sup> (1899) 3 N. L. R. 347.

was whether a deed whereby a wife who was separated from her husband purported to sell land was invalid for the reason that it was not signed by the husband as well. It appeared that she was "compelled to sell the lands to procure herself maintenance", and Withers J. held that that circumstance implied her husband's assent. That case is therefore no authority for the proposition that the husband's consent is not necessary for the validity of a sale by the wife when they are living in separation.

It was contended by Mr. Perera that if the question as to the validity of the transfers P 1 and P 2 fell to be decided under the Roman-Dutch Law they must be held to have been voidable merely and not void. As the *Tesawalamai* itself provides a rule for the decision of the question, it is not necessary to consider this argument. The District Judge's finding that the two deeds were executed by the appellant without her husband's consent was not canvassed in appeal and I hold that having been executed without his consent they conveyed no title to Krishnapillai.

The learned District Judge's finding on the issue of prescription is that he is satisfied that the plaintiff has acquired a prescriptive title to the premises. It is contended for the appellant that the learned Judge has failed to give adequate consideration to the evidence in support of the appellant's case on this issue.

[His Lordship then discussed the evidence relating to prescription, and concluded :—]

There appears to be no sufficient ground for reversing the learned Judge's finding on the question of prescription. I would therefore dismiss the appeal with costs.

DIAS S.P.J.—I agree.

*Appeal dismissed.*

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