

1960

Present : Basnayake, C.J., and Sansoni, J.

PONNIAH and another, Appellants, *and* PARAMANATHAR
and others, Respondents

S. C. 445—D. C. Jaffna, 10594

*Thesawalamai Regulation, Part I, para 10—Death of a woman after second marriage
—Devolution of her property.*

Under Part I, paragraph 10, of the Thesawalamai Regulation, on the death of a woman who has married a second time, leaving sons by the first marriage and a daughter by the second, the property she received as dowry on her first marriage goes exclusively to the sons of that marriage.

APPEAL from a judgment of the District Court, Jaffna.

C. Thiagalingam, Q.C., with V. Arulambalam and T. Parathalingam,
for 1st and 2nd Defendants-Appellants.

C. Ranganathan, with S. Sivarasa and K. Palakidnar, for Plaintiffs-
Respondents.

S. J. V. Chelvanayakam, Q.C., with N. Kasirajah, for 3rd and 4th
Defendants-Respondents.

September 6, 1960. BASNAYAKE, C.J.—

The only question for decision on this appeal is whether under the Thesawalamai on the death of a woman who has married a second time, leaving sons by the first marriage and a daughter by the second, the property she received as dowry on her first marriage goes exclusively to the sons of that marriage.

Shortly the facts which are not in dispute are as follows :— Theivanai and her husband Aiyamperumal by deed No. 2644 dated 29th December 1884 (P1) attested by Ramasethar Vaitiyalingam, Notary Public, gifted the land in suit among others to their daughter Thangamuttu wife of Muthalitamby Velupillai as dowry. Muthalitamby Velupillai died leaving him surviving three sons Ponniah, Sinniah and Sabapathy, and his wife Thangamuttu. She then married Kanthar Velupillai by whom she had a daughter Annammah. Thangamuttu died intestate in 1904 leaving the three sons by the first marriage and the daughter by the second. The latter was seven years old at the time of her mother's death. In 1920 one of the sons Sabapathy died unmarried and intestate. Annammah

married Sinnatamby Kanapathipillai in 1912. She was dowered by her father on that occasion. The dowry consisted of movable and immovable property. The latter was conveyed by deed No. 4672 of 3rd September 1912 (1D4) attested by Kanapathiar Subramaniam, Notary Public. The learned District Judge has held that on Thangamuttu's death her sons inherited one half of the land in suit and her daughter the other half.

Learned counsel for the appellant submits that the learned District Judge is wrong. He contends that on the death of Thangamuttu the land in suit passed to her three sons to the exclusion of all others. He bases his contention on the provisions of the Thesawalamai Regulation. It is common ground that as Thangamuttu died before 1911 the year in which the Jaffna Matrimonial Rights and Inheritance Ordinance came into operation, the question arising for decision in the instant case is governed by the Thesawalamai Regulation and not by that Ordinance (s. 40). Learned counsel relies on paragraph 10 of Part I of the Regulation under the heading "Of Inheritances and Succession to Property". That paragraph and paragraph 9 deal with cases of succession to parental property. They are as follows :—

" 9. If the father dies first leaving one or more infant children, the whole of the property remains with the mother, provided she takes the child or children she has procreated by the deceased until such child or children (as far as relates to the daughters) marry; when the mother, on giving them in marriage, is obliged to give them a dowry, but the son or sons may not demand anything so long as the mother lives, in like manner as is above stated with respect to parents.

" 10. Should, however, the mother marry again and have children by her second marriage, then she does with the daughters as is above stated with respect to parents. But it is to be understood that if she has daughters by her first husband she is obliged to give them, as well as the daughters by her second husband, their dowries from her own *doty* property; and if the son or sons marry or wish to quit her, she is obliged to give them the hereditary property brought in marriage by their father and the half of the acquired property obtained by the first marriage, after deducting therefrom the dowry which may have been given to the daughters.

" If the mother of whom we have just spoken also dies, the sons, both of the first and second marriage, succeed to the remaining property which the mother acquired by marriage; besides which such son or sons are entitled to the half of the gain acquired during the mother's marriage with his or their father, and which remained with the mother when he or she married, and provided that therefrom are also to be paid the debts contracted by her or their father when alive.

" But if any part of that property is diminished or lessened during the second or last marriage, then the second husband, if he still be alive, or if he be dead, his son or sons, are obliged to make good the deficiency, either in kind or in money, in such manner as may be agreed upon.

“ On the other hand, the son or sons of the second marriage are entitled to the hereditary property brought in marriage by his or their father, and also to the property acquired during marriage, after all the debts contracted by him shall have been paid from the same. ”

Paragraph 9 deals with the case of the father dying while the mother survives. Paragraph 10 deals with the case of a surviving mother who marries a second time. The first limb of that paragraph prescribes the mother's obligations in regard to her children both sons and daughters. The second limb regulates the succession, on her death, to the property acquired by marriage, which remains after she has given dowries to her daughters. According to it the sons both of the first and second marriage succeed to that property if any remains. The instant case is one that falls within the ambit of the words “ If the mother of whom we have just spoken also dies, the sons, both of the first and second marriage, succeed to the remaining property which the mother acquired by marriage ; ”. It was contended that where the mother dies leaving an unmarried daughter, as in the instant case, she is entitled to a share even though she has on her marriage subsequently been dowered by her father. We are unable to find any support for this in the Regulation.

The learned District Judge has wrongly applied the decision in *Murugupillai v. Poothatamby*¹ to the facts of the instant case. That case decides that upon the death of a father who has married a second time, his ancestral property goes one half to the issue of the first bed and one half to the issue of the second bed whatever be the number of children of the different unions. The instant case is not one of a father who has married a second time but of a mother who has married a second time. The case of *Chellappa v. Kanapathy et al.*² and the instances cited by learned counsel from Mutukishna's *Thesewaleme** are not in point. We hold that the property in suit passed on her death in 1904 to the sons of Thangamuttu to the exclusion of her daughter Annammah.

We therefore set aside the judgment and order dated 6th August 1957 and the interlocutory decree entered in accordance with that finding and direct that the rights of parties be determined in accordance with our decision.

Learned counsel for the appellant has drawn our attention to an omission in the decree in regard to the description of the land which is not in accord with that in the Schedule to the plaint. We direct that the omission be supplied in the decree that will be entered, so as to exclude the right of way and water-course referred to in the Schedule to the plaint.

The appellant is entitled to costs both here and below.

SANSONI, J.—I agree.

Appeal allowed.

¹ (1917) 20 N. L. R. 204.

² (1914) 17 N. L. R. 294.

* pp. 48, 132, 146, 147.