

1966 Present : Sansoni, C.J., H. N. C. Fernando, S.P.J., and Tambiah, J.

S. VIJAYARATNAM, Appellant, and S. RAJADURAI and 2 others,
Respondents

S. C. 323/1963—D. C. Jaffna, 1404/L

Thesavalamai—Husband's power over his wife's separate property—Scope—Sale of immovable property by wife without husband's consent—Sanction of Court obtained—Contravention of terms of sanction—Effect—Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 58), ss. 6, 8, 19 (b), 20, 37.

A married woman governed by the Thesavalamai is not a *femme sole*; she is subject to the marital power of her husband. The right of the husband to give his consent to the alienation or mortgage of his wife's separate immovable property is an incidence of his marital power.

The plaintiff and the 3rd defendant are husband and wife who are governed by the Thesavalamai and were married after 1911 and before 1947. The 3rd defendant, who was living in separation since 1951, obtained permission from Court in action No. 326 to sell, without the husband's consent, certain immovable property which belonged to her. Although the Court authorised her to sell the property at a price not less than Rs. 2,500 per lacham, she sold certain lots at Rs. 500 per lacham to the 1st and 2nd defendants. In the present action the plaintiff claimed that the sale should therefore be set aside and declared null and void.

Held, that, inasmuch as the sale by the wife was not in accordance with the terms of the sanction given by Court in action No. 326, the husband had sufficient status to maintain this action.

APPEAL from a judgment of the District Court, Jaffna.

C. Ranganathan, Q.C., with *K. Sivananthun*, for the plaintiff-appellant.

S. Sharvananda, with *P. Thuraiappah* and *C. Chakradaran*, for the 1st and 2nd defendants-respondents.

Cur. adv. vult.

September 17, 1966. TAMBIAH, J.—

The plaintiff, who is the husband of the third defendant, brought this action against the first and the second defendants who are the purchasers of certain lands described in deed No. 4349 dated 26th June, 1960, attested by S. Kanagaratnam, Notary Public. The parties are governed by the Thesavalamai and were married after 1911 and before 1947.

The plaintiff averred in his plaint that the third defendant and himself were living in separation from 1951 onwards and the third defendant filed application No. 326/Misc. D. C. Jaffna, in which she prayed for permission of court to sell her land without the written consent of her husband,

for the purpose of settling her debts. It is further stated in the plaint that the plaintiff did not contest the said application as the defendant was really in need of money and the Court authorised her to sell this property at a price not less than Rs. 2,500 per lacham but the third defendant sold certain lots of lands described in paragraph 9 of the amended plaint at a price of Rs. 500 per lacham to the second defendant in contravention of the order of Court. He therefore prayed to set aside the said deed and for a declaration that the said sale was null and void.

At the trial, on a preliminary issue raised as to whether the plaintiff has a status to maintain the action, the learned District Judge dismissed the action and the plaintiff has appealed against this order.

In the course of his order the learned District Judge stated as follows :—

“ It appears to be that once the Court has permitted the wife to deal with the property without her husband’s consent and the husband has not canvassed the correctness of that order in an appropriate form, the Court has deprived the husband of any rights he has in respect of that property *qua* husband and if it is factually correct that the wife to whom permission was given to sell subject to a restriction has not observed that restriction, it is only a matter affecting the title which purchasers get on the deed—a matter in regard to which the husband has no concern and it is a matter which affects the vendor vicariously in regard to whether she is not liable to be reported for a contempt of Court—a matter in regard to which the husband who has displayed a contemptuous disregard for his wife’s welfare should have no concern. In other words the plaintiff has no cause of action in this case.”

The learned District Judge has erroneously taken the view that the plaintiff has no interest in his wife’s separate immovable property and has penalised him for disregarding his wife’s welfare.

The Counsel for the respondent contended that the plaintiff has no interest either in the separate property of the wife or in the profits arising out of it and therefore has no interest to maintain this action. He urged that after the Matrimonial Rights and Inheritance (Jaffna) Ordinance had been amended by Ordinance 58 of 1947, even the profits arising during the subsistence of the marriage from the separate estate of the wife is her separate property over which the husband has no interest whatsoever. For this proposition he relied on section 19 (b) of the Matrimonial Rights and Inheritance (Jaffna) Ordinance (Cap. 58); the relevant part of it is as follows :—

“ No property other than the following shall be deemed to be the *shediatheddham* of a spouse :

(a)

(b) Profits arising during the subsistence of the marriage from the separate estate of that spouse.”

The Counsel for the appellant contended that although this section regards the profits arising from the separate estates of a wife as her thediatheddham property, yet the title to half of it vests in her husband. It is not necessary to decide this question in view of the fact that the husband still has certain other interests over the thediatheddham and the separate property of his wife, in addition to the marital right over her.

It is an incidence of his marital right to manage the thediatheddham of his wife during the subsistence of the marriage. This view has been expressed in a number of cases. Referring to this interest Bertram C.J. in *Seelachchy v. Visuvanathan Chetty*¹ said—“It is an essential feature of the community in almost all its forms that the husband should be the manager of the common property. There is no question that this is so in the Thesavalamai. He can freely sell (*Katharuvaloe v. Menathchipille* (1892) 2 C. L. R. 132) and mortgage (*Muttukrishna* 124) the common property without the consent of his wife.”

In *Sangarapillai v. Devaraja Mudaliyar*² a Divisional Court took the view that under the Thesavalamai, the husband has the right to mortgage property, which forms part of the thediatheddham property, even after Ordinance 1 of 1911 as he had before this Ordinance was enacted. Macdonell C.J. said: “When a husband sells or mortgages part of the thediatheddham property he does so as acting for and with his wife, and the question of her being a ‘party’ to such transaction does not, it would seem, arise . . . For those purposes the husband is the person to whom alone the law looks. He is, if we care to put it that way, the sole and irremovable attorney of his wife with regard to alienations of that property by sale or mortgage.”

The marital power of the husband to alienate or mortgage the thediatheddham property of his wife is referable to the husband’s status as sole and irremovable attorney of the wife (vide the dictum of Gratiaen J. in *Kumaraswamy v. Subramaniam*³). The right of the husband to give his consent to the alienation or mortgage of his wife’s separate immovable property is an incidence of his marital power. (vide also *Naganathan v. Velaratham*⁴; *Chellappa v. Kumarasamy*⁵; *Muttukrishna*, p. 268). The amending Ordinance No. 58 of 1947 makes no alteration on this matter.

Apart from the status the husband has as “irremovable attorney” of his wife over her thediatheddham property and his marital power over her separate property, he is also an heir to half of it as a result of the operation of the amending Ordinance of 1947 which introduced certain changes. (Vide section 20 of the Matrimonial Rights and Inheritance Ordinance, Cap. 58.)

In the event of the wife dying leaving a minor child, the husband is also empowered to continue to possess not only the thediatheddham property but even her separate property and enjoy the revenue thereof

¹ (1922) 23 N. L. R. 97 at 108.

³ (1954) 56 N. L. R. 44 at 46.

² (1936) 38 N. L. R. 1.

⁴ (1953) 55 N. L. R. 319 at 320.

⁵ (1915) 18 N. L. R. 435 at 437.

until their child marries or attains majority (vide section 37 of Cap. 68). Apart from these interests which the husband has over the thediatheddham and her separate property he has also the right to manage the thediatheddham property. The rights of management have been recognised in the cases referred to earlier. It appears to be impliedly recognised by section 6 of the Matrimonial Rights and Inheritance Ordinance (Cap. 58) which makes the wife's separate property liable for the debts or engagements of her husband, if incurred in respect of the cultivation, upkeep, repairs, management or improvement of her property. He has also the marital right, to refuse to give his written consent for the sale, alienation or mortgage of the wife's property. Although a married woman, under the general law of the land, the Kandyan and Muslim law, is a *femme sole*, the married woman governed by Thesavalamai is still under the marital power of her husband. For these reasons the husband has sufficient status to maintain this action.

The plaintiff averred that the property had been sold for a sum of Rs. 500 per lacham in contravention of the order of the court which authorised the third defendant to sell it at a price of Rs. 2,500 or more. If these facts are true, then the sale is not in accordance with the order of the learned District Judge.

The ambit and scope of a court's power to interpose its authority, when the husband unreasonably withholds his consent on an application made under the provisions of the Matrimonial Rights and Inheritance Ordinance, is set out clearly in *Ponnupillai v. Kumaravetpillai*¹. In the course of his opinion, referring to section 8 of the Jaffna Matrimonial Rights and Inheritance Ordinance, Viscount Radcliffe states (at page 251) as follows :—

“ What the section envisages in its opening is a case in which a contemplated disposition of a particular piece of property is held up through the absence of a husband's consent, and what is to follow is an application for leave to deal with that property without having to obtain the consent. The Court's order if made, ‘ dispenses with ’ his consent and, if it is made, his consent is no longer necessary for ‘ the valid disposition of or dealing with such property ’. All this seems to tie the Court's order very closely to the husband's consent. If then the consent in his case would have to be *ad hoc* and related to a specific and particular transaction it looks very much as if the Court's consent, given in his place, would have to be of the same order It would seem curious jurisdiction to confer on the Court as arising out of those circumstances that it should be able, on proof of them, to emancipate the wife permanently from her husband's right or duty of protection with regard to her immovables generally.”

The *ratio decidendi* of this case shows that the Court could only give sanction to a proposed *ad hoc* sale of the property and cannot give an order to sell generally. In these circumstances a question does arise

¹ (1963) 65 N. L. R. 241 P. C.

as to whether the order given by the Court in Application No. 326/Misc. D. C. Jaffna is an order which comes within the ambit of section 8 of the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 58). On this matter however, I express no opinion.

I set aside the order of the learned District Judge dismissing the plaintiff's action, and remit the case for trial in due course. The appellant is entitled to costs of appeal but the other costs will abide the event.

SANSONI, C.J.—I agree.

H. N. G. FERNANDO, S.P.J.—I agree.

Order set aside.

