Present : De Sampayo A.C.J. and Schneider J. 1923.

TANKAMUTTU *v.* KANAPATHIPILLAI.

359—D. C. Jaffna, 16,378.

Tesawalamai—*Alienation of property by husband—Action by wife after divorce against alienee for half share of property alienated—Wife's rights.*

Where a husband subject to the *Tesawalamai* alienates a property, the remedy open to the wife is to claim compensation on the dissolution of the marriage (by divorce or otherwise) from the husband or from his estate, and not to bring an action for a half share of the property against the alienee.

PLAINTIFF, who was subject to the *Tesawalami*, was married to the second defendant. The marriage was dissolved at the instance of the plaintiff in May, 1921, on the ground of desertion and adultery of the husband. During the subsistence of the marriage, the second defendant acquired the lands in dispute in this case, and sold them in June, 1919, to the first defendant, his aunt. Plaintiff brought this action for declaration of title to one-half of the lands.

The District Judge entered judgment for plaintiff as prayed for with costs.

The first defendant appealed.

1923.

Tankamuttu v. Kanapathipillai

Balasingham, for the first defendant, appellant.—If the transfer was not a sale to first defendant, it was at least a donation. Even if second defendant donated the lands to the first defendant, the plaintiff cannot bring an action for declaration of title to the lands. Her only remedy is against her husband for compensation.

The donation is not *ipso facto* as void to the wife's half share. She must wait till the dissolution of marriage by death or divorce, and ask if she is prejudiced by the gift or sale for compensation. There is nothing to show that the wife has been prejudiced. Counsel cited *Sellachchy v. Visuvanathan Chetty*,[1] *1 Maasdorp 40*, *1 Nathan, section 392*. The wife has no greater right under the *Tesawalamai* than a wife had under the Roman-Dutch law.

E. W. Jayawardene (with him *Arulanandan*), for the plaintiff, respondent.—The District Judge has held that the second defendant intended to defraud the plaintiff. There was no genuine sale. The plaintiff can therefore bring an action for declaration of title to a half share. It is only a *bona fide* purchaser who is protected. See judgment of De Sampayo J. in *23 N. L. R., p. 121* ; the judgment of Bertram C.J. at *pp. 116* and *117*.

The second defendant could not have donated more than half.

Counsel also referred to *Opinions of Grotious 141*, *De Nicole v. Curlier*,[2] *Sampasivam v. Manikkam*.[3]

Cur. adv. vult.

May 30, 1923. DE SAMPAYO A.C.J.—

In this case we have to deal with a point arising under the *Tesawalamai* which I think has already been decided. The plaintiff was the wife of the second defendant, and on May 2, 1921, she obtained a decree of divorce on the ground of desertion and adultery which were alleged to have taken place in March and December, 1919, respectively. The second defendant, who was entitled to the lands in litigation as his acquired property purchased by him during the subsistence of the marriage, transferred them to his aunt, the first defendant, by deed dated June 2, 1919. There was a question whether the transfer was an actual sale or a deed without any consideration. The plaintiff impeaches it as a deed collusively executed in fraud of her, and with the intention to deprive her of her rights in the acquired property of the husband. She claims that the deed by the second defendant in favour of the first defendant be set aside, and that she be declared entitled to a half share of the lands, and the District Judge has granted her prayer. The question is as to the extent of the remedy available to her under the *Tesawalamai*. The general question was fully considered in

[1] *(1922) 23 N. L. R. 97.* [2] *(1900) 2 Ch. 110.*

[3] *(1922) 23 N. L. R. 257.*

Seelachchy v. Visuvanathan Chetty (*supra*) by the Full Bench, and it was there held by the majority of the Judges that the wife could not claim against an alienee from the husband a half share in any specific property, and that her right was for compensation out of the estate of the husband. In that case the transfer was a gift to a son from whom the defendant had purchased *bona fide*. But that circumstance does not alter the general principle. The following passage in the judgment of Bertram C.J. appears to me to lay down the principle to be followed :—

> " The question arises, therefore, whether the act of the husband is *ipso facto* void, entitling the wife to an immediate *rei vindicatio* action, or whether, on the contrary, she or her heirs must not wait till the dissolution of the marriage by death or otherwise for some form of compensation. In favour of the latter view is a passage in paragraph 4, section 5, of the *Tesawalamai*, where it is expressly said that if a husband without the knowledge of his wife shall have given a part of the *thediathetam* to his heirs, the matter is ultimately to be adjusted on the death of husband and wife between their respective heirs. Nothing is said about the donation being *ipso facto* void. Indeed, the contrary is implied. Further, in more than one place in the *Tesawalamai*, and in the cases collected by Muthukistna, there are passages which seem to imply that unauthorized alienations by the husband, whether of dowry or hereditary property or of acquired property, are not *ipso facto* void, but are matters to be dealt with by way of compensation."

There is one circumstance in the present case about which a word must be said. It appears that in December, 1919, the second defendant took unto himself another woman with the assistance of the first defendant who granted a promissory note to the woman. So far as I can see, this is the only foundation for the suggestion that, by the deed executed in favour of the first defendant six mouths before, the second defendant intended, in anticipation of an act of adultery and an action for divorce, to defraud his wife, the plaintiff. I am unable to agree with this view, and I think, the inference is too farfetched to be of any value. I think that the deed, even if the first defendant gave no consideration for it, must be regarded as no more and no less than a deed of gift.

In my opinion the plaintiff's action failed, and must be dismissed with costs in both counts, and the plaintiff must be left to pursue such other remedy as might be available to her.

SCHNEIDER J.—I agree.

25/15 *Set aside.*