

1967 Present : Alles, J., and Siva Supramaniam, J.

S. ARUNASALAM *et al.*, Appellants, and C. AYADURAI *et al.*,
Respondents

S. C. 12/1966 (Inty.)—D. C. Point Pedro, 8184

Thesavalamai—Thediatheddham—Immovable property purchased by husband in his favour—Consideration paid out of loan raised by husband and wife jointly—Death of wife thereafter intestate—Devolution of the acquired property—Jaffna Matrimonial Rights and Inheritance Ordinance, ss. 23, 26.

A person, who was subject to the Thesavalamai, married in 1949. In 1957, during the subsistence of the marriage, he purchased a land in his favour out of monies raised by way of a loan in respect of which he and his wife were jointly and severally liable. As security for the loan, he mortgaged the property which he purchased and the wife mortgaged certain lands which she had received by way of dowry at the time of her marriage. The wife died in 1959, intestate and issueless, leaving behind as her heirs her father, two brothers and a sister.

Held, that the property bought in 1957 fell under the category of Thediatheddham and both spouses were equally entitled to it.

“ Where a property is purchased during the subsistence of marriage by a spouse subject to the Thesavalamai out of a loan raised jointly by both spouses, the property so acquired will fall under the category of Thediatheddham and both spouses will be equally entitled thereto. The fact that the security granted for the loan is a mortgage of the separate property of either spouse will not render the loan so raised the separate property of that spouse. Nor will the property purchased become the separate property of that spouse. If the property is purchased in the name of one spouse only, that spouse will hold a half share of the property in trust for the other spouse. ”

Held further, that one half of the half share of the acquired property which belonged to the deceased wife as her Thediatheddham devolved on the surviving spouse while the remaining half of that half share devolved on the heirs of the deceased. Under section 23 of the Jaffna Matrimonial Rights and Inheritance Ordinance one half of the remaining half share devolved on the father of the deceased, and under section 26 the balance half share devolved equally on the brothers and sister of the deceased.

“ Ordinance No. 58 of 1947, however, effected a vital change when it repealed the provision that Thediatheddham was property common to the two spouses and that on the death of either spouse one half remained with the survivor and the other half vested in the heirs of the deceased and introduced instead a new concept of the Thediatheddham of each spouse and provided that one-half of the Thediatheddham which belonged to the deceased spouse shall devolve on the surviving spouse and the other half on the heirs of the deceased. The Thediatheddham which belonged to the surviving spouse remained unaffected by the death of the other spouse.”

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

C. Chellappah, for the plaintiffs-appellants.

No appearance for the defendants-respondents.

Cur. adv. vult.

January 19, 1967. SIVA SUPRAMANIAM, J.—

This appeal raises the question of the rights of a husband governed by the Thesawalamai in regard to immovable property purchased by him in his favour during the subsistence of marriage out of monies raised by way of loan jointly by both husband and wife.

The 1st plaintiff who is subject to the Thesawalamai married one Sivakolunthu in 1949. In 1957 he purchased in his favour on deed P12 an undivided share out of the land which forms the subject of partition in this case. The consideration for the purchase was obtained by the 1st plaintiff and his wife Sivakolunthu raising a loan on bond P13 from certain third parties. Both spouses were jointly and severally liable on the bond. As security for the loan the 1st plaintiff mortgaged the share which he purchased on P12 and the 2nd plaintiff mortgaged certain lands which she had received by way of dowry at the time of her marriage. Sivakolunthu died in 1959, intestate and issueless, leaving behind as her heirs her father (the 8th defendant), two brothers (the 7th and 9th defendants) and a sister (the 2nd plaintiff, who subsequently married the 1st plaintiff).

The 7th, 8th and 9th defendants contend that since the loan out of which the consideration for the purchase was paid was obtained by mortgaging the dowry properties of the deceased Sivakolunthu, the consideration should be regarded as the separate property of Sivakolunthu and the 1st plaintiff consequently held the share purchased by him on P12 in trust for Sivakolunthu and that on Sivakolunthu's death the title devolved on the 7th, 8th and 9th defendants, to the exclusion of the 1st and 2nd plaintiffs. This contention has been upheld by the learned trial Judge.

In upholding the said contention the learned Judge has failed to take into consideration the following matters :—

- (i) That under the mortgage bond P13 the 1st plaintiff was himself a co-obligor and the security given for the loan consisted not only of the dowry properties of Sivakolunthu but also of the land purchased by the 1st plaintiff on P12 ;
- (ii) That the mortgage debt was paid and settled subsequently by the 1st and 2nd plaintiffs ; and
- (iii) That under s. 26 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911 (hereinafter referred to as the Ordinance) the 2nd plaintiff was also an heir to the estate of her deceased sister.

Where a property is purchased during the subsistence of marriage by a spouse subject to the Thesawalamai out of a loan raised jointly by both spouses, the property so acquired will fall under the category of Thediatheddham and both spouses will be equally entitled thereto. The fact that the security granted for the loan is a mortgage of the separate property of either spouse will not render the loan so raised the separate property of that spouse. Nor will the property purchased become the separate property of that spouse. If the property is purchased in the name of one spouse only, that spouse will hold a half share of the property in trust for the other spouse. The learned Judge was therefore wrong in holding that the consideration for the purchase of the share on P12 was the separate property of Sivakolunthu and that the 1st plaintiff held the whole of the share in trust for Sivakolunthu. Only one-half of that share was Thediatheddham which belonged to Sivakolunthu.

The next matter for decision is the question of devolution of that half share on Sivakolunthu's death. S. 20 (1) of the Ordinance, before it was amended by Ordinance No. 58 of 1947, provided that "the Thediatheddham of each spouse shall be property common to the two spouses, that is to say, although it is acquired by either spouse and retained in his or her name, both shall be equally entitled thereto", and section 20(2) provided that ". . . one half of the joint property shall remain the property of the survivor and the other half shall vest in the heirs of the deceased. . .". Ordinance No. 58 of 1947, however, effected a vital change when it repealed the provision that Thediatheddham was property common to the two spouses and that on the death of either spouse one-half remained with the survivor and the other half vested in the heirs of the deceased and introduced instead a new concept of the Thediatheddham of each spouse and provided that one-half of the Thediatheddham which belonged to the deceased spouse shall devolve on the surviving spouse and the other half on the heirs of the deceased. The Thediatheddham which belonged to the surviving spouse remained unaffected by the death of the other spouse.

One-half of the half share of the extent bought on P12 which belonged to Sivakolunthu as her Thediatheddham therefore devolved on the 1st plaintiff while the remaining half share devolved on her heirs. Under s. 23 of the Ordinance one-half of the remaining half share devolved on Sivakolunthu's father, the 8th defendant, and under s. 26 the balance half share devolved equally on the 2nd plaintiff and the 7th and 9th defendants.

After Sivakolunthu's death, the title to the extent of land purchased by the 1st plaintiff on P12 was therefore as follows :—

- 1st plaintiff....3/4th share.
- 2nd plaintiff....1/24th share.
- 7th defendant....1/24th share.
- 8th defendant....1/8th share.
- 9th defendant....1/24th share.

The learned Judge was wrong in holding that the 1st and 2nd plaintiffs were not entitled to any share of the extent purchased on P12. By deed P18 the 4th plaintiff obtained valid title only to the shares to which the 1st and 2nd plaintiffs were entitled out of the whole land.

I set aside the interlocutory decree entered in this case and direct that a fresh decree be entered on the footing of the devolution of title set out above in respect of the extent of land purchased by the 1st plaintiff on P12.

The 7th, 8th and 9th defendants will pay the plaintiffs-appellants their taxed costs of contest in the lower Court as well as their costs in appeal. All other costs will be as already determined by the trial Judge.

ALLES, J.—I agree.

Decree set aside and a fresh decree entered.

