Present: Garvin A.J. and Jayewardene A.J. 1923.

MURUGESU *et al. v.* KASINATHER.

124—D. C. Jaffna, 16,470.

Tesawalamai—*Right of husband to deal with the entirety of an acquired property after the death of wife.*

Where a husband acquired a property during marriage, he cannot after his wife's death, leaving children, dispose of the entire property. A half share vests in the heirs of the wife on her death.

THE defendant-appellant was the administrator of the estate of his late mother, Valliammai, who was married to one Kathirkamer Arumugam. During their marriage on December 13, 1890, the piece of land in dispute in this case was purchased by them, the deed being in the name of the husband, Arumugam. Valliammai died in August, 1908. The appellant claimed one-half share of the said piece of land as the *thediathetam* of the spouses, and included the share in the inventory filed in the administration case of her estate, when the plaintiff-respondents, who claimed to have purchased the entire land from the appellant's father, Arumugam, on a deed executed after her death, namely, on October 1, 1908, brought this action for declaration of one-half share of the said piece of land inventoried by the appellant.

The learned District Judge held as follows :—

It is admitted that the vendor to the plaintiff purchased this land during his marriage with Valliammai. The conveyance, however, is in favour of Arumugam, the husband of Valliammai and vendor to the plaintiff.

It is not denied that the plaintiff, who purchased after the death of Valliammai, is a *bona fide* purchaser for value.

Mr. Duraisamy, who appeared for the plaintiff, argued, on the authority of *23 N. L. R. 97*, that, as the legal title was in Arumugam at the time of sale, the plaintiff took good title to the entire land.

Mr. Thambyah, on the other hand, argued that this was the acquired property of the spouses ; on the death of Valliammai one-half of it would, by the rules of the *Tesawalamai*, devolve on the heirs of Valliammai ; and, therefore, at the time of sale by Arumugam to the plaintiff, he had title to no more than one-half of the land, and that was all he could convey.

I am of opinion, however, that the rule laid down by the Chief Justice, being the latest pronouncement on the subject, should be followed, especially as it is intended to safeguard the interests of purchaser for value from persons having the legal title.

The heirs of Valliammai, no doubt, have their remedy against Arumugam for any loss they may have suffered in consequence of the sale to the plaintiff.

On the first, second, and seventh issues I hold in favour of the plaintiff, and direct that judgment be entered for the plaintiff, with costs.

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Balasingham, for the defendant (administrator), appellant.—On death of one spouse, half the *thediathetam* or "acquired property" vests absolutely in the children, subject to the rights of the administrator as to payment of debts, &c. On the death of the wife, the right of the husband to deal with the half share to which the wife was entitled ceases.

The law as to acquired property in the *Tesawalamai* is the same as the law as to community property under the Roman-Dutch law. Section 22 of the *Tesawalamai* Ordinance merely re-enacts the old law. See *Tesawalamai*, section 15, paragraph 2. The passage in *Sellachchy v. Visuvanathan Chetty*[1] relied on by the District Judge refers to alienation during the lifetime of both spouses, and further as to property situate outside the Northern Province. Those remarks, even if correct, have no application to this case.

E. W. Jayewardene, K.C. (with him *Joseph*), for the plaintiffs, respondents.—The husband had legal title, and those who purchased from him have good title. If the wife or her heirs are prejudiced by the sale, they have a right to compensation against the husband. They cannot claim the property sold in an action *rei vindicatio*, as was held in *Sellachchy v. Visuvanathan Chetty* (*supra*). In any case the husband had a right to sell for debts. The deeds filed show that the property was subject to a mortgage debt, and that the mortgagee was paid off with the proceeds of sale. It was held that there is a continuing community between the surviving spouse and the children, and that the surviving spouse might, under the Roman-Dutch law, sell property for payment of debts.

In any event the husband was in the position of an executor *de son tort*, and it was held in *Silva v. Salman*[2] that he may sell land for payment of debt. This is a belated application for administration after ten years. Counsel cited *2 C. L. R. 132* and *3 S. C. R. 164*.

Balasingham, in reply.

August 6, 1923. GARVIN A.J.—

The material facts in this case are as follows:—During the subsistence of a marriage between Valliammai, and a man called Arumugam, the latter purchased the land which is the subject of this action. Valliammai died in August, 1908. In October, 1908, shortly after her death, Arumugam sold this property to the plaintiffs, and it is upon this deed the plaintiffs now base their claim. I should mention that in 1905, during the subsistence of the marriage, this property was mortgaged as security for a debt of Rs. 656. Now, at the trial of the case, several issues were framed. No evidence appears to have been tendered by either side, and the indications are that the parties decided as a preliminary to argue the question of law. For the plaintiffs it was

[1] *(1922) 23 N. L. R. 97.*

[2] *(1916) 19 N. L. R. 305.*

contended that, inasmuch as the original title deed was in favour of Arumugam, Arumugam had a right to make the transfer under which the plaintiffs claim, and that whatever remedy was available to Valliammai or her heirs against him, they had no right to impeach the title which was passed by Arumugam's transfer to the plaintiffs. The learned District Judge appears to have accepted the plaintiffs' contention which he mistakenly thought was justified by some observations of Bertram C.J. in the case of *Seelachchy v. Visuvanathan Chetty* (*supra*). This case appears to me to be concluded by the provisions of section 22 of Ordinance No. 1 of 1911. That section states with reference to acquired property that upon the death of one of the spouses one-half of this joint property shall remain the property of the survivor, and the other half shall vest in the heirs of the deceased, subject, of course, to the *Tesawalamai* relating to its liability to be applied to the payment of debts. There can be no question, therefore, that upon the death of Valliammai, by operation of law, the title to one-half of this property was vested in her heirs. This disposes of the point upon which the learned District Judge bases his judgment. But Mr. Jayewardene for the respondents contends that he is entitled to hold this judgment for other reasons. He contended, in the first place, that this property had been sold by the husband for the payment of the debts of the community, and that in so acting, the husband did what he was entitled to do in law. In the second place, he argued that, in any event, the circumstances of the case show that the husband has made this transfer *bona fide* as executor *de son tort* in order to realize means to satisfy the debts of the deceased. But these are questions which must certainly be considered upon proper materials. I do not feel that the material upon the record justifies me in expressing an opinion upon these two points, and I would, therefore, set aside the judgment of the District Judge for the reasons stated by me earlier in the course of this judgment, and remit the case to the lower Court for trial of the remaining issues and for the development of the points which I have already indicated.

The costs of this appeal will be costs in the cause.

JAYEWARDENE A.J.—I entirely agree.

Set aside.