

1951

*Present: Swan J. and de Silva J.*VELUPILLAI *et al.*, Appellants, and MANOMANY,  
Respondent*S. C. 43—D. C. Point Pedro, 2,751*

*Thesavalamai—Spouses living in separation—Thediatheddam acquired by one spouse—  
Right of such spouse to entirety of it—Jaffna Matrimonial Rights and  
Inheritance Ordinance.*

Where a wife who was subject to the *Thesavalamai* eloped from her husband and the latter acquired certain immovable property with his own money during the period of separation—

*Held*, that a spouse is entitled to the entirety of *thediatheddam* property acquired by such spouse at a time when the spouses were living in separation. It is within the power of such spouse to deal with the entirety of such property to the exclusion of the other.

**A** PPEAL from a judgment of the District Court, Point Pedro.

*C. Thiagalingam, K.C.*, with *W. D. Thamotheram*, for the defendants appellants.

*V. Arulambalam*, for the plaintiff respondent.

*Cur. adv. vult.*

May 4, 1951. DE SILVA J.—

This is an action *rei vindicatio*. The plaintiff in this suit claims title to a half share of the land described in the schedule to the plaint and damages. The defendants who are husband and wife deny her title to any share of the premises and claim the entirety of the land for themselves. The learned District Judge who tried the case entered judgment for the plaintiff as prayed for, but without damages. The defendants

appeal therefrom. The point that comes up for determination is one that is of some importance under the law of *Tesawalami* by which the parties to the suit are governed. Put shortly, the chief point in issue is whether or not a spouse is entitled to the entirety of *tediatetam* property acquired by such spouse at a time when the spouses were living in separation and whether or not it is within the power of such spouse to deal with the entirety of such property to the exclusion of the other.

No difficulty arises where the general principles apply, for they have been considered in the various judgments of this Court. The facts of this case which are admitted are as follows:—One Sundarampillai married the plaintiff before the 17th July, 1911, that is the date on which the Matrimonial Rights and Inheritance Ordinance (Jaffna) came into operation. In fact it was admitted by Counsel for the parties that they were married in the year 1903. The plaintiff eloped with one Gunasekara on the 6th November, 1912, with whom she left for Malaya where she remained till she returned to Ceylon on the 4th March, 1931. She went through a form of marriage with Gunasekara on the 5th August, 1927 (*vide* Marriage Certificate filed marked D 5). In this marriage certificate the plaintiff was described as a spinster and Gunasekara as a bachelor. This form of marriage appears to have been gone through by these two persons at Matale in Ceylon. According to her evidence given in the District Court, Jaffna, in case No. 7,213, D4, the plaintiff, since she eloped with Gunasekara to Malaya in 1912, had come back to Ceylon in 1920 and 1927 with Gunasekara, and finally in 1931, alone. It was in 1927, on her second visit to Ceylon after the elopement, that she went through this form of marriage with Gunasekara. According to her evidence given in the same case Gunasekara died on the 22nd May, 1929, in Malaya. Sunderampillai, the legally married husband of the plaintiff, whom she deserted in 1912, would appear to have taken a woman unto himself named Sivapathi after his wife had left the Island. The second defendant in her evidence in this case has stated that so far as she was aware Sunderampillai was married to Sivapathi. A child named Savunderammah was born of this union. Sunderampillai upon deed No. 6,179 of the 26th May, 1926, P1, purchased the entirety of this property, a half share of which is now claimed by the plaintiff being the share that she would be entitled to as Sunderampillai's wife. The marriage between Sunderampillai and the plaintiff was not dissolved during the life-time of Sunderampillai. Sunderampillai died in the year 1939. Before his death Sunderampillai donated this property to his daughter Savunderammah upon deed No. 9,773 of 1930, D2. Savunderammah upon deed No. 11,344 of 26th November, 1944, D1, conveyed a divided extent of 1½ lachams of this land together with another land which adjoins it to the 2nd defendant.

The case went to trial on various issues. Issue No. 3 is the most important one. It runs thus, "Is this property the separate property of Sunderampillai for the reason that it was purchased during the separation from the plaintiff?". The position now is briefly this. Sunderampillai and his wife the plaintiff who were married in 1903 separated in the year 1912. Since then they never lived together as husband and

wife. The plaintiff renounced the marriage tie for good when she eloped with Gunasekara in the year 1912. She further, in the year 1927, went through a form of marriage with Gunasekara calling herself a spinster. Gunasekara died in the year 1929. Even in this case she calls herself the widow of Gunasekara. Sunderampillai, after his wife deserted him, lived with a woman named Sivapathi, by whom he had a child named Savunderammah. So that it is clear that, from the year 1912, plaintiff and her legally married husband had nothing whatever to do with each other. In fact when giving evidence in D. C. Jaffna Case No. 7,213, the plaintiff stated that Sunderam was her cousin, and that she stayed on Attabage Estate, an estate near Gampola, with her husband who was an apothecary. Sunderam was also in the same estate where Gunasekara was, but she did not know in what capacity. When giving evidence in that case the plaintiff did not even state that she was married to Sunderam. It is obvious that although the separation between Sunderampillai and plaintiff was not mutually arranged before she eloped with Gunasekara, the parties would appear to have reconciled themselves to the position that they were no longer husband and wife. Each of them went his or her own way. It has been argued both in the Court below and here that the property having been acquired after the separation, the title to it did not vest in both the spouses but remained the separate property of the husband who acquired it. In support of that proposition we have been referred to an old case reported in *Mutukisna's Tesawalami*, page 181. The facts of that case are shortly these. The plaintiff and the 1st defendant were wife and husband. They did not live happily together and for ten or eleven years before action was filed there was little communication between them, seeing each other only at intervals and on those occasions quarrelling and separating again. The plaintiff, the wife, supported herself and her children without any assistance from the husband the 1st defendant. While thus separated the plaintiff purchased one of the lands in suit with her own money derived partly from her dowry property, and partly with money of her sister's. The original Court held that the property having been acquired by the plaintiff during her separation from her husband she alone was entitled to the land. That judgment was affirmed in appeal.

The facts of the case that we are considering are more weighty in favour of the person who acquired the property than those considered in that case for the reason that Sunderampillai and his wife had no communication whatsoever and had nothing to do with each other after 1912. This case was followed by Ennis A.C.J. and Porter J. in *Chellappa and another v. Valliamma and another*<sup>1</sup>. The head note runs thus:—"Where husband and wife, who are subject to the *Tesawalami*, have been living separately, by mutual consent, the husband has the right to deal, by way of donation, with the entirety of the property acquired by him during the separation". These two cases were cited in the original Court and the learned District Judge appears to have laid emphasis on the words "by mutual consent", in regard to separation. But I do not think that mutuality regarding separation could:

<sup>1</sup> (1923) 1 *Times of Ceylon Law Reports*, p. 276.

have taken place in this instance before such separation for the plaintiff eloped with Gunasekara. I do not think that one can conceive of a husband and wife mutually agreeing that the wife should elope with a man. But it is sufficient to say that after her elopement renouncing the marriage tie, parties reconciled themselves to the situation created by her act. So that we have in this case the elements perhaps in a greater degree, than those considered in *Nagatta v. Nagappen and another* in *Mutukisna's Tesawalami*, page 181, and in *Chellappa and another v. Valliamma and another (supra)*.

I may say at this stage that plaintiff did not get into the witness box and give evidence. She called no evidence whatsoever except producing a certain document, that is, the deed of transfer upon which Sunderampillai acquired this property in the year 1926. The oral evidence given by 2nd defendant stands uncontradicted. No evidence was led by the plaintiff to show that her dowry property was utilised by Sunderampillai to acquire this property, and, it is reasonable to hold that Sunderampillai had purchased this property with his own money in the year 1926, fourteen years after his wife had left him and gone to Malaya. Various authorities have been cited to us and the two cases referred to by me are in point. I think the principle laid down in those two cases is based on the spirit of the *Tesawalami*. It is not necessary to consider the much mooted point whether the husband who has the right to manage the *tediatetam* property may have the right to donate or to convey for valuable consideration or mortgage, &c., the said property.

The conclusion I arrive at is that this was the separate property of Sunderampillai he having acquired the same by purchase with his own money during the period in which the spouses lived in separation. That being so, he had the right to dispose of it in any manner he liked. The donee Savunderammah from the year 1930 possessed this property till she sold it in 1944 to the 2nd defendant who paid Rs. 15,000 as consideration for this land and another.

There is no evidence before Court that the 2nd defendant was any other than a *bona fide* purchaser for valuable consideration. The 2nd defendant in her evidence stated that as far as her knowledge went Sunderampillai was married to Sivapathi, and that they lived as husband and wife. The plaintiff all throughout appears to have ignored her lawful husband except when she came to Court to claim a half share of what her husband had acquired. There is no evidence whatsoever that the plaintiff ever possessed any share of the land before she came to Court or asserted title thereto.

I therefore would answer issue No. 3 in the affirmative. On the question of prescription too it has to be answered in favour of the 2nd defendant. The plaintiff's action is dismissed both here and in the Court below with costs.

SWAN J.—I agree.

*Appeal allowed.*