1960 *Present :* **K. D. de Silva, J., and H. N. G. Fernando, J.**

ANNAPILLAI, Appellant, *and* ESWARALINGAM *et al.*, Respondents

S. C. 471—D. C. Point Pedro, 5,279/L

Thesavalamai—Tediatetam *acquired before 1947—Donation by husband of wife's share—Right of wife to sue in her own right—Pre-emption Ordinance, No. 59 of 1947—Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947.*

A husband to whom the *Thesavalamai* applied purported to donate not only his own share but also his wife's half share of the *Tediatetam* before the date of operation of the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947. Subsequently, in October 1955, the donee sold the property to the 3rd defendant.

Held, (i) that the donation was invalid as to the wife's share.

(ii) that the wife, by reason of the donation, became co-owner with the donee.

(iii) that the wife's legal relationship to the donee was such as to confer on her the right of pre-emption of the share held by the donee.

(iv) that the wife was entitled, in her own right, to maintain an action for pre-emption during the subsistence of her marriage with her husband. In such a case, the husband, if he chooses to remain inactive, may be joined as a defendant.

Held further, that the question whether the 3rd defendant had any knowledge or notice of the donee's right to a half-share was of no relevance.

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

S. J. V. Chelvanayakam, Q.C., with *S. Sharvananda*, for the plaintiff-appellant.

H. W. Jayewardene, Q.C., with *T. Arulanandan* and *L. C. Seneviratne*, for the substituted defendants-respondents.

Cur. adv. vult.

July 18, 1960. H. N. G. FERNANDO, J.—

The plaintiff and the 4th defendant are wife and husband, and persons to whom the *Tesawalamai* applies. The action is one for pre-emption of a share in a certain land which has been the subject of three transactions :—(1) By the deed 3D2 of 19th October, 1943, the 4th defendant obtained a transfer in his name of a land described as being 10¼ lms. v. c. in extent from one Vyramuttu Nagalingam and his wife, Alankaran. The description in the schedule to the deed indicates that the 10¼ lms. of land transferred was part of a larger divided extent of 16 lms. and 9 kulies. (2) On 21st June, 1944, the 4th defendant joined with

Vyramuttu Nagalingam and Alankaran in executing the deed 3D1, by which those three persons donated to the 2nd defendant an extent of about 14½ lms., comprising the 10¼ lms. dealt with by 3D2 and a further extent which had formed part of the larger divided extent of 16 lms. and 9 kulies. (3) On 26th October, 1955, the 2nd defendant (joining with her husband the 1st defendant) by 3D3 sold to the 3rd defendant either the whole or a part of the corpus which the 2nd defendant had received on 3D1, but clearly including the 10¼ lms. originally transferred to the 4th defendant by 3D2 of 1943.

The case for the plaintiff has been that the 10¼ lms. transferred to her husband by 3D2 of 1943 was property acquired by the husband during the subsistence of their marriage, and therefore *tediatetam*, and that accordingly the plaintiff became entitled to a half-share or 5⅛ lms. of the land, and her husband the 4th defendant to the remaining 5⅛ lms. On the assumption that the husband had no power to donate his wife's share and that the plaintiff remains entitled to her share, the plaintiff claims that the donation 3D1 was only effective to convey to the 2nd defendant the husband's half-share, and that, since the entire extent donated by 3D1 remained undivided, the plaintiff and the 2nd defendant had become co-owners of that extent. On this basis the plaintiff claims that she was entitled to notice of the prospective sale of the 2nd defendant's share, and for default of such notice that she is now entitled to pre-empt the share to which the 2nd defendant had title by virtue of 3D1.

A number of issues were framed at the trial, one of which raised the question whether the deed 3D2 of 1943 in favour of the plaintiff's husband, the 4th defendant, had been executed without consideration and in trust for the 2nd defendant. An affirmative answer to this issue would have disposed conclusively of the plaintiff's claims, for if the 4th defendant had been merely a trustee the land conveyed to him could not have formed part of the *tediatetam* of himself and his wife. It was also contended on behalf of the 3rd defendant (the ultimate purchaser on 3D3) that he was a *bona fide* purchaser without notice of the plaintiff's interests, although no issue on this question was framed. No evidence was led in regard to either of these two matters, nor was the trial judge invited to decide upon certain fundamental issues framed on behalf of the plaintiff, for the reason apparently that counsel on both sides were (understandably, I may say) eager to enter into the disputation of the interesting points of law which arise upon the transactions which I have mentioned. In the result, the judgment under appeal dealt only with what were regarded as preliminary issues of law, which, together with the answers given by the trial judge, are set out below :—

"*Issue 9* Is the plaintiff co-owner of the land described in the Schedule to the plaint within the meaning of the Pre-emption Act, No. 59 of 1947 ? Answer : No.

Issue 10 If not, can the plaintiff maintain this action ? Answer : No.

Issue 13 Can the plaintiff maintain this action for pre-emption during the subsistence of her marriage with her husband the 4th defendant ? Answer : No.

Issue 14 Does deed No. 19378 of 21.6.1944 executed by the 4th defendant convey title to the entirety of the extent dealt with by the said deed in favour of the 2nd defendant ? Answer : Yes.

Issue 15 If the above issues are answered in the affirmative, is the plaintiff entitled to maintain this action ? Answer : No."

The answer to issue No. 9 depends mainly on the acceptance by the trial judge of the opinion expressed by De Sampayo J., in *Seelachchy v. Visuvanathan Chetty*[1] that " a husband may, under the *Tesawalamai*, make a donation of the entirety of the acquired property just as much as admittedly he may sell or mortgage the same ". That opinion, if correct, would mean that the plaintiff's interest in the land ceased entirely upon the execution of 3D1, in which event she was never a co-owner with the 2nd defendant and therefore without status to seek pre-emption of the latter's share in the land.

De Sampayo J., did not follow the contrary decision in the much earlier case of *Parasathy Ammal v. Sethupulle*[2], although Garvin A. J., regarded that decision as express authority for the contention that under the Tamil customary law a husband could only donate half the acquired property, and although Bertram C.J., accepted the same decision as correctly stating the law. The same statement of the law had been accepted by Schneider A.J., in the case of *Sampasivam v. Mannikam*[3] which had been decided prior to *Seelachchy v. Visuvanathan Chetty*[1]. Indeed it is interesting to find that De Sampayo J., did not subsequently press his own former opinion, for he appears in his judgment in *Tankamuttu v. Kanapathipillai*[4] implicitly to accept the limitation of the husband's power to donate only his own half-share. For completeness, I should mention also the judgment to the same effect in *Iya Mattayar v. Kanapathipillai*[5] where Dalton J., carefully considered the earlier decisions, and Gratiaen J.'s clear statement in *Kumaraswamy v. Subramaniam*[6] that " an undivided half-share . . . had automatically vested in (the wife) the non-acquiring spouse, by operation of law ".

I am satisfied, therefore, that there is no longer any basis, in the decisions of this Court, for the view that a husband can under the *Tesawalamai* validly dispose by donation of his wife's share of the *tediatetam*, if the acquisition took place before the date of operation of the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947. The question whether that Ordinance has resulted in a change in the law regarding the husband's powers was given an answer by way of an *obiter dictum* in the judgment of Gratiaen J., mentioned above, but it does not arise for consideration on the facts of the present case. The learned District Judge

[1] *(1922) 23 N. L. R. 97.*
[2] *(1872) 3 N. L. R. 271.*
[3] *(1921) 23 N. L. R. 257.*
[4] *(1923) 25 N. L. R. 153.*
[5] *(1928) 29 N. L. R. 301.*
[6] *(1954) 56 N. L. R. 44.*

has held that the 3rd defendant was a *bona fide* purchaser for value; this finding is unwarranted because no evidence was led at the trial and the point was not conceded by counsel who appeared on behalf of the plaintiff. It was however submitted to us that even if the plaintiff is successful in this appeal, the case will have to be remitted to the District Court, where it will be open for the 3rd defendant to establish this point by evidence. I shall therefore proceed to consider whether the plaintiff's claim can in law be met by a finding that the 3rd defendant had in fact purchased the property without notice of the plaintiff's interests.

In *Seelachchy v. Visuvanathan Chetty*[1] the husband had donated the acquired property to his son. After the husband's death, the property was mortgaged by the son and sold in execution of a mortgage decree to one of the mortgagees who was held to be a *bona fide* purchaser. The widow instituted her action against the purchaser to vindicate her half of the property. In the course of his judgment, holding against the widow, Bertram C.J., makes certain observations which, for purposes of the present appeal, it is useful to set out in some detail. The observations were to the following effect :—

(*a*) A *Tesawalamai* husband is restricted from disposing of the common property by donation to the extent of more than one half.

(*b*) The wife has a vested right to a share in each property as it is acquired, and not merely a share in the totality of the acquisitions at the dissolution of the marriage. " The idea of a community in all systems seems to be to import an *ipso facto* co-proprietorship in all properties which fall into the community."

(*c*) The husband is the absolute manager of the community. If he ignores the limitation of his powers of donation and purports to make a gift of the whole of one of the acquired properties, his act is probably not *ipso facto* null so far as relates to the wife's share. " I am inclined to believe that the balance of authority is in favour of the proposition that the wife's remedy arises only on the dissolution of the marriage by way of compensation, and that at any rate, in the absence of express provision in the *Tesawalamai*, the principles of the Roman-Dutch law might well be adopted by analogy. The question, however, has not been very carefully examined, and it appears to me that it might well be left to be further elucidated in some subsequent case by evidence of local custom such as appears to have been frequently tendered in old *Tesawalamai* cases. It is not necessary to decide the case upon this ground, for, as I will proceed to show, even if the alienation by the husband within the local realm of the *Tesawalamai* would have been *ipso facto* void, and even though within those limits a *rei vindicatio* action from the beginning would have lain for the recovery of the property, no such action lies in the present case on grounds quite independently of the question just discussed."

(*d*) " I hold that when the plaintiff's husband purchased the property now under consideration, he acquired it, in consequence of his marriage

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

contract, subject to a constructive trust in favour of his wife, and that his wife was entitled to sue him for a formal conveyance of her interest, or, as Voet puts it, subject to a *necessitas communicandi*.

But the right so acquired by the wife could not prejudice any *bona fide* purchaser claiming from the donee of her husband, even though the gift to this donee was a breach of this constructive trust."

It is on the last of these observations that counsel for the 3rd defendant now relies for his contention that, if the 3rd defendant is shown to have purchased the property by 3D3 of 1955 in good faith and for value, the plaintiff's title to a share must be held to have passed absolutely to the 3rd defendant; if this contention be correct then the plaintiff is not a shareholder and therefore has no status to maintain an action for pre-emption.

The application by Bertram C. J., of principles derived from the English law of Trusts to the case of an alienation by a *Tesawalamai* husband of the entirety of a land forming part of the *tediatetam* has not apparently been considered in subsequent judgments of this Court; our notice was not drawn during the argument of this appeal to any later opinion in agreement with the view taken by Bertram C. J. In these circumstances I feel myself entitled to reconsider that view.

A "constructive trust" of the nature contemplated in the relevant part of Bertram C.J.'s judgment is one where the person holding the legal title or *dominium* is bound by trust law to hold the property for the benefit of another. In such a case, unless of course the express or implied terms of the trust prevent alienation, the trustee has an undoubted right to convey the legal title to a third party, who will then become the holder of the legal title, although he will himself ordinarily be bound to hold the property for the benefit of the beneficiary. The principle that a *bona fide* purchaser for value without notice of a trust will hold the legal title absolutely and free of the trust is the recognised exception to the general rule. The point which I wish to emphasise for present purposes is that a conveyance *by a trustee* can undoubtedly vest in a transferee either the same legal title held by him, or sometimes even a title freed from the trust. In the case of *tediatetam* the husband has, like a trustee usually has, unqualified power to convey the legal title by a *sale*. But (as indicated in the first part of this judgment) he has not the power to *donate* anything more than a half-share of *tediatetam* property. A purported donation of the remaining half-share cannot, in my opinion, be equated to a conveyance by a trustee for the reason that the husband does not hold the legal title to that half-share. In the case of a *sale*, the conveyance is fully effective, but only because (in the forceful language of Macdonell C.J., in *Sangarapillai v. Devaraja Mudaliyar*[1]), "the husband is the sole and irremovable attorney of his wife with regard to alienations by sale or mortgage", and "for purposes of such alienation, the wife's *persona* is merged in that of the husband." If a husband's right to sell his wife's share flows from his possession of a

[1] *(1936) 38 N. L. R. 1.*

status equivalent to that of an attorney in the modern law, then clearly he cannot be regarded as the holder of the legal title to the wife's share. The purpose of a power of attorney to sell is to confer a power of sale upon a person *who has not the legal title*, so that the status of an attorney is quite inconsistent with the status of an owner. In *Kumaraswamy v. Subramaniam*[1] Gratiaen J., pointed out that it was quite wrong to suggest that the husband's power of alienation proceeds from the enjoyment of any *dominium* over the wife's share. Both Bertram C.J., (in his observations set out at (*b*) above) and Macdonell C.J., appear to acknowledge that by operation of law a *Tesawalamai* wife acquires a title to *tediatetam* property. Section 20 of Chapter 48 expressly provided (prior to 1947) that the *tediatetam* shall be property common to the two spouses, both of whom shall be equally entitled thereto. This concept of community of property, where the husband as the manager and head of the community has the power to sell his wife's interests, cannot in my opinion fairly be equated to that of a trust, where the title is vested solely in a trustee subject to obligations existing in favour of other persons.

It seems to me, therefore, that where *tediatetam* property is donated by a husband, the donee acquires legal title only to the husband's half-share and the wife continues to remain vested with her half-share, the effect of the conveyance being to constitute as between the donee and the wife the relationship of co-owners, and not the relationship of trustee and beneficiary. Indeed this proposition was implicit in Bertram C.J.'s own observation that a husband can validly donate only a half-share. Since the donee has title only to a half-share, it is in my view unreasonable to hold that, if the donee subsequently purports to sell the entirety of the property, he is a trustee of the other half-share. If the donee himself is not a trustee of the wife's share, no question can subsequently arise as to whether a purchaser from him is or is not bound by the trust.

Bertram C.J.'s opinion (though not acted upon in *Seelachchy v. Visuvanathan Chetty*[2]) that " the wife's remedy arises only on the dissolution of the marriage by way of compensation " is also adverse to the plaintiff's case. In this view the wife would not have the right to vindicate her half-share even from a donee to whom her husband has transferred the entirety of an acquired property ; and if her only right is to seek compensation from her husband or his legal representative after the marriage is dissolved by death or divorce, then clearly the wife could not be regarded as a co-owner with the donee for the purposes of the law of pre-emption. In his judgment in *Tankamuttu v. Kanapathipillai*[3] De Sampayo J., regarded *Seelachchy v. Visuvanathan Chetty*[2] as having decided that this right to compensation is the only remedy available to the wife. But as Dalton J. pointed out in *Iya Mattayer v. Kanapathipillai*[4], the opinion of Bertram C.J., now under consideration, was expressed only by him, and was not utilised even by him to decide *Seelachchy v. Visuvanathan Chetty*[2]. Garvin J., obviously disagreed with that opinion while

[1] *(1954) 56 N. L. R. 44.*
[2] *(1922) 23 N. L. R. 97.*
[3] *(1923) 25 N. L. R. 153.*
[4] *(1928) 29 N. L. R. 301.*

De Sampayo J., did not refer to it. With great respect, I am in agreement with the reasons stated by Dalton J., for his conclusion against the view that an unauthorised donation of acquired property by the husband can give rise only to a claim for compensation.

In *Iya Mattayer v. Kanapathipillai*[1] the husband on 7th August, 1921, had purported to sell all the *tediatetam* lands to his brother. The transfer was obviously designed to deprive the wife's heirs of the right to inherit her half-share, for it was executed only two days before the death of the wife. It therefore amounted to a conveyance without valuable consideration, and was fairly equated to a *donation* to the brother. The wife's heir, her daughter, thereafter claimed the wife's share or, in the alternative, a sum of Rs 750/- (being half the value of the land) as compensation. After examining the earlier decisions, Dalton J., held that the husband had no right to donate more than one half of the property, and that the daughter was entitled to a declaration of title (as against the donee) to the other one half. We see here that although the husband had purported to alienate full title before his wife's death, the wife's heir was held entitled to vindicate a half-share after her death. This could only be on the basis, firstly, that the wife was entitled to the half-share at the time of her death, and secondly, that immediately prior to her death she had the right to vindicate that share in an action against the donee: unless she had enjoyed both these rights, the right of vindication could not have been transmitted to her heir. It is clear to me that the judgment of Dalton J., expressly decided in favour of the wife the question which I am now considering. The only difference in the present case is that here there has been a further purported alienation by the donee. But if, as I hold, the alienee cannot claim the benefit of the privilege which the Trust law affords to a *bona fide* purchaser without notice of a trust, that difference does not affect the wife's right to vindicate her share.

The following questions arise on issue No. 9 : firstly, was the donation invalid as to the wife's share, secondly, did the wife by reason of the donation become a co-owner with the donee, and thirdly, was her legal relationship to the donee such as to confer on her the right of pre-emption of the share held by the donee ? For the reasons stated above, these questions have all to be answered in favour of the plaintiff. I would further hold that the fact that the 3rd defendant may have had no knowledge or notice of the plaintiff's right to a half-share is of no relevance.

The next problem for consideration upon the issues decided by the trial judge is presented by Issue No. 13, and it is two-fold in nature. In so far as this issue raises the question whether the wife's remedy is restricted to a claim for compensation and does not include a right to vindicate her share from the donee or a subsequent alienee, I have already decided the question in favour of the plaintiff. But Mr. Jayewardene has argued another question which seems also to arise on the same issue,

[1] *(1928) 29 N. L. R. 301.*

namely, the question whether the wife can sue in her own right, or whether on the other hand her claim to pre-empt the outstanding share should not be preferred by her husband on her behalf, or else by both husband and wife as joint plaintiffs. Here again Mr. Jayewardene has relied on the rights of management conferred on the husband by the customary law, in virtue of which he has been described as the "irremovable attorney". Mr. Jayewardene referred to two decisions noted in Muttukrishna's Notes on the *Tesawalamai*. The decision noted at page 263 is not relevant, for what was decided was that a wife cannot maintain an action against the husband to recover her dowry property unless she first obtains a divorce. The decision noted at page 264 was in a case where the acquired property apparently consisted of an *otty* mortgage and the wife sued the husband and the other *otty* holders to recover her share of the *otty* money. The decision that she could not maintain such an action is in accord with the principle that the husband as manager has the sole right to invest *tediatetam* moneys, and, therefore, the sole right to decide whether and when to sue for recovery. The reverse situation arose in *Sangarapillai v. Deveraja Mudaliyar* [1] where it was held that the husband had the sole right to mortgage *tediatetam* property and that it was unnecessary to join the wife in an action upon the mortgage bond. Macdonell C.J., while referring to the husband's right of sale or mortgage, was careful to guard himself against any expression of opinion with regard to *donation* by the husband of the wife's half-share. These cases only serve to establish the proposition that the husband is the proper person to sue or be sued when he makes *authorised* investments of, or executes *authorised* encumbrances over, acquired property.

Muttukrishna, at page 258 has a note of a case where the husband successfully sued his wife for a declaration that he was jointly entitled with the wife to a property purchased by the wife solely in her name, thus showing at least that the wife is competent *to be sued* in respect of acquired property held in her name. It is difficult to reconstruct the facts from a note in Muttukrishna, but there is a case noted by him at page 16 where a wife sued her husband and another in relation to property alleged to constitute acquired property of the spouses. A had first married B leaving a daughter, who was married to D and who had died leaving an infant child. A had contracted a second marriage to C. It would appear from the note that C sued her husband A and also A's son-in-law D in order to assert rights to property acquired by A prior to his second marriage. The suit by the wife seems to have been unsuccessful, in that the Court decided that D, as the guardian of his wife's infant child, held all the dowry property of B as well as half of the property acquired prior to the second marriage. The legal problems presented by the facts of this case were referred to Commissioners for report—an indication that the case was probably contested with care. But no question appears to have been raised as to the competency of the wife to litigate with her husband and a third party in her attempt to assert her rights in acquired property.

[1] *(1956) 33 N. L. R. 1.*

It being clear law that a husband cannot validly donate the wife's half-share of the *tediatetam*, it would be unreasonable to suppose that a wife, although a co-owner with a person to whom the husband purports to transfer the entirety of the property, is powerless to assert her right either by way of vindication or pre-emption, if the husband chooses to remain inactive. In the absence of any authority to the contrary or any express provision in the *Tesawalamai* debarring a wife from suing alone in such a case, I consider it only reasonable to apply in this situation the well-known practice that a party who should join as a plaintiff, but refuses to do so, may instead be joined as a defendant. In this way resort may, I think, be had to the principle *ubi jus ibi remedium*. I would accordingly hold that the plaintiff's action was properly instituted by the joinder of her husband as a defendant.

In the result the issues with which I have dealt have to be answered as follows :—

Issue No. 9 : " Yes "

Issue No. 10 : The question does not arise.

Issue No. 13 : " Yes "

Issue No. 14 : " No "

Issue No. 15 : The question does not arise.

The plaintiff's appeal is allowed, and the case is remitted to the District Court for trial on the other issues. But I must repeat that the question whether the 3rd defendant was a *bona fide* purchaser for value is of no relevance and should not be agitated. To avoid possible misunderstanding, I should point out once more that this judgment relates to property acquired *before* the Amending Ordinance No. 58 of 1947 came into operation.

Although I have for convenience referred in this judgment to the 3rd defendant, he died after the decree appealed from was entered, and the defendants 3A, 3B, and 3C were substituted in his place. These defendants must pay to the plaintiff the costs of the past proceedings in the District Court and the costs of this appeal.

K. D. DE SILVA, J.—I agree.

Appeal allowed.