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Present: Dalton and Lyall Grant JJ.

IYA MATTAYER *v.* KANAPATHIPILLAI *et al.*

307—D. C. Jaffna, 19,172.

Thesawalamai—Acquired property—Husband's right to transfer tediatetam *property—Vindication by heirs of their interests.*

Under the *Thesawalamai* a married man has no right to give away more than half the property acquired by him during marriage.

Parasathy Ammah v. Setuplle [1] followed.

Seelachchy v. Visuvanathan Chetty [2] explained.

THE plaintiffs sued the 1st defendant, husband of one Ponnamma, deceased, and the 2nd defendant (a transferee from 1st defendant) for declaration of title to half share of certain lands, which formed part of the acquired property of Ponnamma and to which they were entitled as her heirs. In the alternative the plaintiffs also claimed compensation from the 1st defendant for the value of the lands. The learned District Judge held that the transfer by the 1st defendant was without consideration and fraudulent. On appeal it was argued that there was a misjoinder of parties and causes of action, that the order made in the testamentary case in an application for judicial settlement of the estate of Ponnamma was *res judicata*, and that under the *Thesawalamai* the husband had a right to dispose of the whole of the acquired property or *tediatetam* and that the remedy of the wife's heirs was limited to a claim for compensation.

James Joseph, for 1st and 2nd defendants, appellants.—There is a misjoinder of parties and causes of action. The action is for the recovery of property and no other claim can be joined. Section

[1] *(1872) 3 N. L. R. 271.*

[2] *(1922) 23 N. L. R. 97.*

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35 of the Code bars this, see *Kangasabapathy v. Kanagasabai.*[1] The order in the testamentary case is *res judicata*. In the application for judicial settlement by the plaintiffs the title of these very properties was raised. The application was dismissed, and the plaintiffs cannot be permitted to raise the question of title again. Under the *Thesawalamai* the husband has an absolute right to sell or donate the whole of the *tediatetam*. It has been so held by a Divisional Bench of Three Judges in *Seelachchi v. Visuvanathan Chetty* (supra). This decision was later followed in *Tankamuttu v. Kanapathipillai.*[2] The heirs of the wife have only a claim for compensation. This rule has been well established by the *Thesawalamai* and is not affected by section 22 of the Jaffna Matrimonial Rights Ordinance, No. 1 of 1911.

Croos Da Brera (with him *Rajakarier*) for plaintiffs, respondents.—The action was to have a deed set aside on the ground of fraud, so the transferor was a necessary party (*Baronchi Appu v. Siyadoris Appu,*[3] *Gopalsamy v. Ramasamy Pulle* [4]). Both the claims are connected and are based on a joint fraud. In any event the defendants failed to appeal from the order granting leave. They cannot be heard now. The order in the testamentary case is not *res judicata*. It may bar a subsequent application for judicial settlement but cannot prevent a substantive action for declaration of title. The question of fraudulent alienation was not raised there nor had the Court jurisdiction to try it. The 2nd defendant was not a party to the application for judicial settlement. It is not therefore open to him to plead *res judicata*. His title was acquired prior to the order. A person is privy in estate for purposes of *res judicata* if his title is obtained subsequent to the decree. (*Arumugam v. Thampu,*[5] *13 Halsbury's Laws of England 343.*)

Seelachchy v. Visuvanathan Chetty (*supra*) cannot be considered a judgment of the Full Court. Bertram C.J.'s judgment is based on the ground that the defendant was a *bona fide* purchaser from the donee. De Sampayo J. was of opinion that the husband had the right to gift the entirety of the property. Garvin J. dissented and held that the husband had a right to gift only half. *Tankamuttu v. Kanapathipillai* (*supra*) mistakenly says that *Seelachchy v. Visuvanathan Chetty* is a judgment of the Full Court, and merely follows it. In *Parasathy Ammah v. Setupulle* (*supra*) the Full Court limited the husband's right of disposition to half. This case has been followed in *Sampasivam v. Manikkam.*[6] The case of *Seelachchy v. Visuvanathan Chetty* (*supra*) has been correctly interpreted in *Ponnachchy v. Vallipuram.*[7] Section 22 of Ordinance No. 1 of 1911

[1] *(1923) 25 N. L. R. 173.*
[2] *(1923) 25 N. L. R. 153.*
[3] *(1914) 4 C. A. C. 65.*
[4] *(1911) 14 N. L. R. 238.*
[5] *(1912) 15 N. L. R. 253.*
[6] *(1921) 23 N. L. R. 257.*
[7] *(1923) 25 N. L. R. 151.*

lays down clearly that the husband and wife are equally entitled to acquired property. There is no reservation of the right of disposition in the husband's favour. Any custom or rule inconsistent with this provision must be taken to be repealed (section 2). The transfer is in fraud of the community and can be set aside (*Weerasuriya v. Weerasooriya* [1]) under the Roman-Dutch law, which applies where the *Thesawalamai* is silent. *Chanmugam v. Kandiah* [2] and *Seelachchy v. Visuwanathan Chetty* (*supra*).

Joseph, in reply.

January 31, 1928. DALTON J.—

This case raises a question for decision under the *Thesawalamai*. One Ponnamma died issueless on August 9, 1921, the 2nd plaintiff being now her sole heir. The 1st plaintiff is the husband of the 2nd plaintiff. The 1st defendant is the husband of the deceased Ponnamma, the 2nd defendant being a brother of the 1st defendant. A declaration was sought to be obtained in the action that the 2nd plaintiff was entitled to a half share of the lands named in the schedule to the plaint as being *tediatetam*, or property acquired during the marriage subsisting between the 1st defendant and Ponnamma. The 1st defendant had sold the entirety of these lands to his brother, the 2nd defendant, by deed No. 346 (P 6) dated August 7, 1921, that is, two days before his wife's death. Plaintiffs pleaded that the property was acquired property and that this transfer was in fraud of the heir of Ponnamma and without any valuable consideration. In the alternative they claimed that they recover the sum of Rs. 750, half the value of the lands in question, by way of compensation.

Defendants denied that the lands formed part of the *tediatetam*, but there is a finding against them on this point which is not questioned on this appeal. The conveyance of August 7 is admitted, but is said to have been in consideration of the sum of Rs. 1,500 paid by the 2nd defendant to his brother. It was further pleaded that the matter was *res judicata*, inasmuch as the plaintiffs had applied to the District Court, Jaffna, in testamentary case No. 4,641 for a judicial settlement of the account of the estate of the deceased Ponnamma, impeaching *inter alia* the deed No. 346 and claiming that the 1st defendant should account to them for the sum of Rs. 750, half the value of the lands. This application for judicial settlement was dismissed with costs on June 5, 1924, a further question arising out of the administration being also dealt with by order of November 27, 1924, when it was held that the effect of the order of June 5 was to disallow the objections to the final passing of the account.

[1] *(1910) 13 N. L. R. 376.*

[2] *(1921) 23 N. L. R. 221.*

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With regard to the deed No. 346 of August 7, the learned trial Judge found as a fact that it was executed fraudulently and without consideration. There is ample evidence to justify the finding of want of consideration and it is not questioned on appeal. It is urged, however, that the transfer is in fact a valid and not a fraudulent one in virtue of the exercise by the husband of his marital powers. The issues, so far as this appeal is concerned, were as follows:—

(1) Was the action bad in law by reason of misjoinder of parties and causes of action ?

(2) Is not the plaintiff's claim *res judicata?*

(3) Had the 1st defendant any right to convey the half share belonging to Ponnamma?

(4) Is 1st defendant liable to pay any compensation to 2nd plaintiff, and if so, what amount?

It was admitted in the course of the argument before this Court that the real question arising on the appeal was in the issue which I have numbered (3) above. Before dealing with that question, however, it is necessary to deal shortly with the first and second points as they have also been argued.

With regard to the question of misjoinder, this was dealt with originally on objection taken by the defendants before filing their answer. The objection was based upon the fact that with the prayer for a declaration of title and for the cancellation of the deed No. 346 is joined a claim against the 1st defendant in the alternative for half the value of the land, no leave for such joinder having been previously obtained. In dismissing the objection, so long ago as December 3, 1924, the trial Judge held that the 2nd defendant was a necessary party to the action, but that leave ought to have been obtained for the joinder of the alternative claim. He held, however, that the alternative claim for compensation could be conveniently tried with the other questions to avoid multiplicity of actions, and he thereupon gave leave at that point of time, as he was entitled to do, and as he says he would have done before had application been made, subject to a direction as to the payment of costs by the plaintiffs. There was no appeal against that order, and I have heard nothing in the argument addressed to us, assuming we were correct in allowing this question to be argued at this stage, which would justify this Court in saying, on the facts here, that the trial Judge was wrong.

The issue on the question of *res judicata* was answered by the trial Judge in favour of the plaintiffs. The 2nd defendant was no party to the judicial settlement or to the application of the plaintiffs therein, the parties to case No. 4,641 (see exhibit D 2)

being the two present plaintiffs and another heir of Ponnamma since deceased, on the one side, and the 1st defendant (in his capacity as administrator) and two creditors of Ponnamma on the other. There is an allegation in the application for judicial settlement that, in addition to the lands mentioned in the inventory, Ponnamma left three lands which, it is now agreed, are those set out in deed No. 346. There is no allegation in the application, however, that 1st defendant had conveyed these lands or had dealt with them in any way or impeaching the deed No. 346, but merely that the inventory was not complete. When the application came up for hearing on June 5, 1924, the petitioners, the present plaintiffs, were not ready to proceed owing to illness. The learned trial Judge found there had been previous postponements and thereupon refused a further postponement and dismissed the application. He, however, directed that the matter be called on a subsequent date " to see what other things have to be done before closing estate " and on a further question as to the payment of funeral and *anthiraddy* ceremony expenses being raised, he held, on November 27, 1924, that the order of June 5 had the effect of disallowing these objections by the petitioners. On an examination of the proceedings in the application for a judicial settlement, which have been put in evidence in this case, for the purpose of deciding this issue it is sufficient to state that I am unable to find that any question was raised there as to any fraudulent alienation, or any alienation at all, by the 1st defendant of the three lands dealt with in deed No. 346, or to any liability on his part to pay any compensation to anyone. Had these questions been raised in that proceeding, it is highly probable, as the learned trial Judge points out, the parties would have been told that they must decide such issues in a regular action, and not in proceedings for a judicial settlement. I agree with his conclusion that the orders in the testamentary case are not *res judicata* of the plaintiffs claim.

To come to the main point in the appeal, admitting the correctness of the finding that the three lands conveyed by deed No. 346 are *tediatetam*, Mr. Joseph argues that the 1st defendant as husband of Ponnamma had full power of disposing of them as he did. The argument was to the effect that, even admitting the correctness of the findings of fact in the Court below, even if he purported to convey the three lands to his brother when his wife was dying, as he himself could not succeed to his wife's half share on his death and even if the conveyance be without consideration with the intention of depriving the heirs of Ponnamma of the lands by reason of their right of succession to Ponnamma on her death, the conveyance was a valid one, and the only right of the 2nd plaintiff, as heir to Ponnamma, was to compensation. In support

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of this argument he cited *Seelachchy v. Visuvanatham Chetty* [1] and *Tankamuttu v. Kanapathipillai.*[2] The first case was tried before a Bench of Three Judges (Bertram C.J., de Sampayo J., and Garvin A.J.). The plaintiff (the wife of Sangarapillai) a Tamil, subject to the *Thesawalamai*, brought the action to vindicate half of a valuable property at 90, Bankshall street, Colombo, on the ground that it was part of the *tediatetam*, and that it was not competent to her husband to donate more than a half share. The husband had donated the whole of the property to his son, who mortgaged the property to the defendant, who subsequently became the purchaser at an execution sale. Bertram C.J. and de Sampayo J. held that the defendant's title was good, but Garvin A.J. dissented. Bertram C.J. in his judgment discusses at length the question as to the extent of the powers of a husband to deal with the common property, and after referring to various authorities states he is inclined to believe that the balance of authority, where a husband has disposed of more than a half share, is in favour of the proposition that the wife's remedy arises only on the dissolution of the marriage by way of compensation. He goes on to point out, however, that the question has not been very fully examined and must await further elucidation in some future case. He comes to the conclusion that defendant's title was good on other grounds applying the English principles of equity, namely, that he had no notice either of the plaintiff's equitable interest or of the limitation of her husband's power to alienate what was partnership property by way of gift, was not in any way responsible to the plaintiff, and so acquired the property free of her equitable claims. De Sampayo J. on the other hand comes to the conclusion that a husband may under the *Thesawalamai* make a donation of the entirety of the common property, just as much as he may sell or mortgage it, and he upholds the defendant's title upon that ground. He was not prepared to draw any distinction between alienations by way of mortgage or sale and donations, and expresses the opinion that the explanation for such a distinction put forward by counsel, namely, that the proceeds of sales or mortgages are presumed to be expended in the interests of the community, whereas in the case of a donation there was no such equivalent brought back into the assets of the community, was merely plausible. Bertram C.J. was of opinion, however, that possibly this explanation may well be the true one. However that may be, the majority of the Court were not at one in the reasons upon which they decided in defendant's favour. It seems necessary to stress this point as in the second case cited it appears to have been assumed that the point now under consideration has been settled by the majority of the Court in a case

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

[2] *25 N. L. R. 153.*

by the Full Bench, which decision would be binding upon this Court. *Tankamuttu v. Kanapathipillai* (*supra*) was decided by de Sampayo A.C.J. and Schneider J. The parties there were subject to the *Thesawalamai*, and during the subsistence of the marriage the husband sold the land in dispute which was *tediatetam* to his aunt. After the dissolution of the marriage on account of the husband's desertion and adultery the wife brought this action for declaration of title to one-half of the land. The sale was impeached as being without consideration, and collusively executed in fraud of the wife. In the course of his judgment de Sampayo A.C.J. states that the question arising as to the extent of the remedy available to the wife under the *Thesawalamai* has, he thinks, already been decided by the Full Bench. He then refers to *Seelachchy v. Visuvanathan Chetty* (*supra*) where he adds that the majority of the Judges held 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. That, if I read that case correctly, does not accurately set out the conclusion of the majority of the Judges in the case of a donation by the husband as will appear from what I have stated above. Even, however, if it did, it is clear from both these cases that it is only a *bona fide* purchaser who is protected, and it is proved here that the 2nd defendant does not come within that category.

What then is the answer to be given to this question as to the 1st defendant's rights to donate the half share of the *tediatetam* belonging to his wife and to the further question as to the extent of the wife's remedy? I have referred to the undoubted opinion of de Sampayo J. and to the *obiter dicta* of Bertram C.J., both of which, coming from those learned Judges, must receive most weighty consideration. But the latter admits the question is one which at that time needed further elucidation; it is one which must be decided if this present claim is to be settled. The *Thesawalamai* itself offers very little assistance in ascertaining the limits of the authority of the husband in respect of the common property. It has been suggested that the law of the Hindu joint family is the source whence it derives any traces of community such as exist. Bertram C.J., however, expresses the opinion that so far as the *Thesawalamai* is concerned it is an independent development. Having regard, however, to the auspices under which this collection of laws and customs of Jaffna was composed and by whom it was composed, it is difficult to think that the provisions of Roman-Dutch law did not exercise some influence, and that the idea of a partial community of goods as in the case of *tediatetam* may not have been strengthened by if not derived from the Common law of the Dutch Government. It might be urged, however, as against

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this that the term " from ancient times " used at the commencement of the compilation is hardly consistent with this theory, having regard to the length of time the Dutch had been in Ceylon prior to 1707. There is, however, always a continuous growth and development in the law as time progresses (*cf.* section 1, paragraph 2, *re* changes effected in customs and usages in Portuguese times). Whatever that source may be, Bertram C.J. at any rate definitely expresses the opinion that in questions arising out of this community, in the absence of any express provision in the *Thesawalamai*, the principles of the Roman-Dutch law might well be adopted by analogy. I have not been able to find any provision in the *Thesawalamai* which I am able to say governs this case. The fifth paragraph of section IV. has been referred to by counsel as supporting his contention, but I have great difficulty in reading into that paragraph all that he says is there. It appears to provide for a case where both husband and wife die issueless after the husband has given away part of the acquired property without the knowledge of his wife. In such a case the relations of the wife are entitled to receive a part of the acquired property equal to that which has been given away. I am unable to derive from that paragraph alone any underlying principle, nor to read into it the wide powers of the husband and the limited remedy of the wife for which Mr. Joseph now contends. The cases collected by Muthukristna in his edition of the *Thesawalamai* referred to by Bertram C.J. in part at any rate deal with alienations by the husband with the consent of the wife. I have examined all the cases referred to by the learned Chief Justice. The reports are very brief, but if the references are correctly set out in the printed judgments I must admit I should have great difficulty in coming to the conclusion that any one of them clearly laid it down that an unauthorized alienation of acquired property by the husband was a matter to be dealt with by way of compensation.

If then the *Thesawalamai* is silent on this point, or if one is unable to gather from its provisions any satisfactory guiding principle, it must be remembered that that law has been amended by Ordinance No. 1 of 1911 in respect of the matrimonial rights of those governed by the *Thesawalamai*. By section 22 of that Ordinance it is enacted that the *tediatetam* shall be property common to both spouses and both shall be equally entitled thereto. It then goes on to provide, subject to the provisions of the *Thesawalamai* relating to the liability for the payment of debts, that, on the death of either, one-half of the property shall remain the property of the survivor and the other half shall vest in the heirs of the deceased. This latter provision is not material here, but it shows how far the ideas of the Common law are prevalent in the

Thesawalamai. I have not up to this point referred to the dissenting judgment of Garvin J. in *Seelachchy v. Visuvanathan Chetty* (*supra*), but this is a convenient point to do so, for his reference to and his reasoning based upon this Ordinance seems to me, if I may be allowed to say so, to be both clear and convincing. He points out that there appears to be no authority which explicitly declares the community subsisting between spouses subject to the *Thesawalami* to be, as regards the vesting of title, identical with that of the Roman-Dutch law, but that there are indications that that position was never doubted. Under these circumstances therefore he held that the property in dispute at the time of the acquisition by Sangarapillai vested by operation of law equally in his wife. This is the view which was also adopted in *Ponnachchy v. Vallipuram*.[1] Further on the authority of *Parasatty Ammah v. Setupulle*,[2] although the husband had the right by virtue of his marital powers to manage and dispose of property belonging to the community by way of sale, he had no power to donate anything beyond half of the property. The correctness of the law as laid down in *Parasatty Ammah v. Setupulle* (*supra*), a *rei vindicatio* action over fifty years ago was not questioned when it was followed by Schneider J. in *Sampasivam v. Manikkam*.[3] Bertram C.J. also stated that in his opinion that decision which has stood for so long must be accepted as correctly stating the law, although he was not prepared to come to a final conclusion as to the wife's remedy in the event of the husband donating more than one-half share. On due consideration I would rather agree with the conclusion come to by Garvin J. that if the husband has not power to dispose of more than one-half by way of gift, the wife is entitled to contend that she has not been legally divested of her title to a half-share by her husband's deed of gift. If there was any doubt about this prior to 1911, it seems to me that this was made clear by the Ordinance of that year to which I have referred. It was argued at the bar that section 22 of the Ordinance merely declared the old law, but whether it be so or not, it seems to me that there is no doubt about the law as it now stands. Under these circumstances, in the case now before this Court I have come to the conclusion that the trial Judge was correct in his conclusion that the 1st defendant had no right to donate more than one-half of the property included in the deed No. 346, and that the plaintiffs were entitled to the declarations they sought that the 2nd plaintiff is entitled to one-half of the lands described in the schedule to the plaint. It is not therefore necessary to answer the 4th issue. The appeal is therefore dismissed with costs.

[1] *25 N. L. R. 151.*

[2] *3 N. L. R. 271.*

[3] *23 N. L. R. 257.*

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LYALL GRANT J.—

I agree that the appellants' contention that the husband had the right to dispose of the lands held in *tediatetam* must fail. The weight of authority is against it.

I also concur with the learned District Judge's finding that the deed was executed fraudulently and without consideration.

In the circumstances I agree that the appeal should be dismissed.

Appeal dismissed.