1933 *Present :* **Garvin A.C.J., Dalton and Drieberg JJ.**

AVITCHY CHETTIAR *v.* RASAMMA

240—D. C. Kurunegala, 13,636

Thesawalamai—*Proprety acquired by wife out of her dowry—Is it thediathetam —Jaffna Matrimonial Rights and Inheritance Ordinance, No. 1 of 1911, s. 21.*

Under the *Thesawalamai,* property acquired by a wife during the subsistence of the marriage out of money which formed part of her separate estate, is *thediathetam* property, within the meaning of section 21 of the Jaffna Matrimonial Rights and Inheritance Ordinance of 1911.

THIS was an action brought by the plaintiff under section 247 of the Civil Procedure Code to have certain premises declared liable to be seized and sold in execution of a decree obtained against the intestate estate of one V. C. Kanagasabai. The premises were claimed by Rasamma, the widow of the deceased, as being her separate property purchased by her upon a deed bearing No. 1,669 of November 3, 1924.

Kanagasabai and Rasamma were natives of Jaffna to whom the *Thesawalamai* applied and were married on September 10, 1919. It was found as a fact that the consideration for the transfer was paid by Rasamma out of money which formed part of her separate estate, viz., the cash dowry which was given to her by her parents. The learned District Judge held that the premises were not liable to be sold in execution of the husband's debts and dismissed the plaintiff's action.

H. V. Perera (with him *Rajapakse*), for plaintiff, appellant.—The land in this case was purchased in the name of the wife with her dowry money. The marriage was after 1911 and the Thesawalamai Ordinance, No. 1 of 1911, applies. That Ordinance amends the previous law. Sections 21 and 22 govern this case. This property comes under 21 (*a*), *i.e.,* property acquired for valuable consideration during the subsistence of the marriage. The *thediathetam* of each spouse is property common to both spouses. Older decisions before the new Ordinance say that money of either spouse which is earmarked and is converted into other property remains the property of the spouse to whom the money belonged and does not become *thediathetam* (*Jiveratnam v. Murugesu*[1]). In *Nalliah v. Ponnammah*[2] it was held that the old law was not changed.

[DALTON J.—Do you suggest that the meaning of the word *thediathetam* has been changed by this Ordinance?]

Yes. The term is defined in legal phraseology which has a very definite meaning (*Thamotheram v. Nagalingam*[3]). The definition is exhaustive. All that need be ascertained is when the property was acquired and whether it was for valuable consideration. It does not matter from where the consideration comes. One cannot limit it to valuable consideration which is itself *thediathetam.* As long as community of property subsists there will be no certainty with regard to title to property if one had to inquire with what money the property was purchased.

[1] *1 N. L. R. 251.* [2] *22 N. L. R. 198.* [3] *31 N. L. R. 257.*

[DALTON J.—If a person has money before marriage and converts it into property during marriage he loses it?]

That is so. Even under the Marriage Ordinance the immovable property of the wife is hers while the movables belong to the husband. But if a wife during marriage sells her property the money will vest in the husband. Every acquisition must be out of the funds of one or other or both of the spouses. The character of such property will be the character of the fund with which it was acquired. If the character of the property acquired depends on the source of the consideration there would be no *thediathetam* at all. There is no common property at the time of marriage.

[DALTON J.—The *thediathetam* of the old law is defined in section 1.]

That does not correspond with the definition in section 21. *Thediathetam* there includes only profits arising out of property. Freedom of alienation is essential to property.

R. L. Pereira, K.C. (with him *Soertsz, K.C.*, and *Chelvanayagam*), for defendant, respondent.—Section 21 must be read with the earlier sections. These rules are merely for the purpose of ascertaining how the property is to be inherited. Property is placed within three categories, *i.e.*, from the father, from the mother and common or *thediathetam* property, for the purpose of showing how property is to devolve on the heirs. The issue in this case was whether the property was bought out of the dowry money of the defendant. This issue of law was not raised in the lower Court. The point is not taken in the petition of appeal. The law was taken for granted by the parties.

Section 21 does not contain an exhaustive definition of *thediathetam* property. It is not even a definition at all. It is for the limited purpose of inheritance and that only. Property is divided into property from the father's side and property from the mother's side. All other property is caught up by *thediathetam*. It can include all earnings and all savings made by either husband or wife. The purpose of the law is to conserve for the males what comes from the paternal side and for the females what comes from the maternal side. The legislature here intended to conserve property in the same manner as it devolved. Section 21 means property acquired for valuable consideration by either husband or wife other than property referred to in sections 19 and 20, *i.e.*, *mudusam* and *urumai* or dowry. This interpretation gives effect to the custom prevailing in the Northern Province of preserving paternal property among the sons and their descendants and maternal property among the daughters and their descendants. Property acquired from dowry money cannot be called *thediathetam* because that would be to make the three classes already mentioned interchangeable. See the judgment of Sir A. Kanagasabai in *Nalliah v. Ponnammah*[1]. The valuable consideration must itself be *thediathetam*.

Cur. adv. vult.

December 20, 1933. GARVIN A.C.J.—

In execution of a decree against the intestate estate of one V. C. Kanagasabai, deceased, the Fiscal seized an estate called Mahawatte, situated at Giriulla. The premises were claimed by Rasamma, the widow of the

[1] *22 N. L. R., at 200.*

deceased, as being her separate property purchased by her upon a deed bearing No. 1,669 of November 3, 1924. In due course her claim was upheld. The plaintiff then brought the present action under the provisions of section 247 to have the premises declared liable to be seized and sold in execution of the decree above referred to. Several issues were framed and among these the principal was based upon the plaintiff's contention that the premises in question notwithstanding that they stood in the name of Rasamma, formed part of the *thediathetam* of the spouses and was therefore liable to be taken in execution for the debts of either of the spouses. The learned District Judge has found on all these issues and has as a result dismissed the plaintiff's action. We see no reason to disturb the learned District Judge's findings on the facts nor to differ from him on the decisions he has taken save on the question whether the premises formed part of the *thediathetam* of the spouses.

Kanagasabai and Rasamma were natives of Jaffna and were persons to whom the customary law known as the *Thesawalamai* applied. They were married on September 10, 1919, after Ordinance No. 1 of 1919 came into operation. Their respective matrimonial rights must therefore be ascertained in accordance with the provisions of that Ordinance. These premises were clearly acquired during the subsistence of the marriage since Kanagasabai died in May, 1926, nearly two years after the acquisition. But it has been found as a fact that the sum of Rs. 25,000 being the consideration for the transfer was paid by Rasamma out of money which formed part of her separate estate, that money being the cash dowry which was given to her by her parents. Under the law as it obtained prior to the enactment of Ordinance No. 1 of 1911 property acquired during the subsistence of such a marriage by one of the spouses and paid for with money which formed part of his or her separate estate was regarded as the property of the spouse who purchased it and did not form part of the *thediathetam* property—see *Jivaratnam v. Murukesu*[1]. But inasmuch as Kanagasabai and Rasamma were married subsequent to the date when Ordinance No. 1 of 1911 came into operation the question must be determined with reference to the laws enacted therein.

Section 21 of that Ordinance is as follows:—"The following property shall be known as the *thediathetam* of any husband or wife:

(*a*) Property acquired for valuable consideration by either husband or wife during the subsistence of marriage.

(*b*) Profits arising during the subsistence of marriage from the property of any husband or wife".

It is then provided in section 22 that "the *thediathetam* 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. Subject to the provisions of the *Thesawalamai* relating to liability to be applied for payment or liquidation of debts contracted by the spouses or either of them on the death intestate of either spouse, 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; and on the dissolution of a marriage or a separation *a mensâ et thoro*, each

[1] *1 N. L. R. 251.*

spouse shall take for his or her own separate use one-half of the joint property aforesaid". If this property falls within either of the two heads (*a*) or (*b*) of section 21, then clearly it would be liable to be taken in execution in this case since it is liable "to be applied for payment or liquidation of debts contracted by the spouses or either of them". No question arises here as to profits arising during the subsistence of the marriage. The sole question is whether the premises in question are of the character of the property which is declared by section 21 (*a*) to be *thediathetam*. Now if the words of that sub-section be given their ordinary effect it would seem that there were two conditions which property claimed to be *thediathetam* must satisfy, first that it was acquired for valuable consideration by husband or wife, and secondly that it should have been acquired during the subsistence of the marriage.

The property which is claimed in this case by Rasamma by virtue of the deed No. 1,669 of November 3, 1924, was acquired for valuable consideration and it was acquired during the subsistence of the marriage. It was urged, however, that notwithstanding the provisions of this section property acquired for valuable consideration provided by the spouse who had acquired it out of funds which formed part of his or her separate estate was not *thediathetam* but remained his or her separate property. Counsel relied strongly upon the case of *Nalliah v. Ponnammah*,[1] in which a Bench of two Judges (De Sampayo J. and Schneider A.J.) upheld a similar contention and expressed themselves in language which indicates that they held the view that property acquired by a spouse out of funds which formed part of his separate estate "would receive the character of the money invested and would not be regarded as *thediathetam*". In view of this judgment it became necessary to have the matter argued before a larger Bench.

The question before us must, it seems to me, be settled by the interpretation of the language of the legislature. So far as it relates to the matter now before us these words are as follows:—"Property acquired for valuable consideration by either husband or wife during the subsistence of marriage". These very general words are followed by no words of limitation nor of exception. Indeed, very similar words appear in the very next section which declares that "the *thediathetam* of each spouse shall be property common to the two spouses"—and then by way of explanation,—"although it is acquired by either spouse and retained in his or her name". Once again emphasis is laid upon the fact that property acquired for valuable consideration during the subsistence of the marriage is *thediathetam*, notwithstanding that "it is acquired by either spouse and retained in his or her name". Indeed, if any question of ascertaining the intention of the legislature arises, the words of section 22 would seem to indicate the intention that notwithstanding that the property was the separate acquisition of one of the spouses it came within the definition of "*thediathetam*" so long as it was an acquisition for valuable consideration made during the subsistence of the marriage.

Whatever the law may have been prior to this enactment it is beyond question that where a matter has to be determined in accordance with its provisions the law prior thereto must be treated as repealed. Section 2

[1] 22 *N. L. R.* 198.

states that "so much of the provisions of the collection of customary law known as the *Thesawalamai* . . . . as are inconsistent with the provisions of this Ordinance are hereby repealed", and moreover the Ordinance itself purports to be an Ordinance "to amend the law relating to the Matrimonial Rights of the Tamils who are now governed by the *Thesawalamai* with regard to property and the law of Inheritance". If regard be had to the scheme of the Ordinance it is clear that in respect of the matters dealt with therein it was intended to be complete and exhaustive. The principal matters which are dealt with by the Ordinance, are (*a*) Matrimonial rights of husband and wife with reference to property, and (*b*) Inheritance. Sections 6 to 10 are concerned with the matrimonial rights of spouses. Section 6 defines the matrimonial rights of spouses with regard to property solemnized before the commencement of the Ordinance. Section 7 expressly declares that the rights of those married after the Ordinance must be governed by the Ordinance. Section 8 states what property is to be deemed the separate property of the wife and defines her rights in respect of this property. Similarly section 9 relates to the separate property of the husband. Then follow certain other provisions relating to the powers of the husband and wife and the special powers vested in District Courts to supply consent where consent is necessary in certain cases and to settle disputes between husband and wife. Then follow provisions relating to the succession to the estates by the persons affected by the provisions of the Ordinance. For the purposes of inheritance there is a different classification of property embodied in sections 17, 18, 19, 20, 21, and 22.

Now it has been urged that section 21 is not a definition of "*thediathetam,* and alternatively that if it be a definition it is a definition purely and simply for the purposes of inheritance. Section 22, in so far as it specially declares property known as *thediathetam* liable for the debts of either spouse, sufficiently indicates that what is to be known as *thediathetam* is not indicated solely for the purposes of inheritance. But sections 8 and 9 and in particular section 8 provide a complete answer to this contention. In the first place when enumerating those subjects of property which are to be regarded as the separate estate of the wife there is included property to which she was entitled at the time of her marriage and also property to which she became entitled during her marriage "except by way of *thediathetam* as hereinafter defined". There is here a statement by the legislature that section 21 embodies a definition of "*thediathetam.*" In the next place it is clear that it was so defined not only for the purposes of inheritance but also for the purpose of ascertaining at any given time of what the separate property of a wife or husband consisted, for that could only be definitely ascertained after the property which formed the *thediathetam* had been excluded from the property to which the husband or wife became entitled during marriage. It is manifest that for both these purposes it is necessary that there should be a definition of what is to be deemed *thediathetam* if the scheme of the Ordinance is to be carried into effect. If regard be paid to the scheme and purposes of the Ordinance it seems to me that it has provided such a definition in section 21, and it has done so not only for the purposes of inheritance but generally for the purposes of the Ordinance. The

scheme of the Ordinance is thus complete. The classification of property for the purposes of inheritance is followed by rules which regulate the devolution of that property. In respect of any property which does not fall within any of those classifications it is declared that the provisions of "The Matrimonial Rights and Inheritance Ordinance, 1876", shall apply. Whatever the law may have been prior to the enactment of this Ordinance there seems to be no room for any doubt that in respect of the matters specially dealt with by the Ordinance it is the Ordinance alone which is decisive.

It only remains therefore to interpret the language of the legislature as it appears in section 21. The meaning of the words used is clear and there is no reason to suppose that the legislature did not intend that these words should be interpreted in their plain and ordinary sense. Indeed, it is quite impossible to find any justification for expanding the section by the addition of words which would exclude from the subjects of property which appear to be caught up by the section all property acquired by either spouse for consideration provided by him or her from a separate estate.

In the case before us the premises were acquired for valuable consideration during the subsistence of the marriage and therefore falls within the definition of *thediathetam*.

The judgment under appeal must be set aside and decree entered in terms of the prayer of the plaint. The appellant is entitled to his costs both here and below.

DALTON J.—I agree.

DRIEBERG J.—I agree.

Appeal allowed.