1935 **Present : Poyser and Koch JJ.**

AMBALAVANAR *v.* KURUNATHAN.

125—D. C. Jaffna, 4,808.

Thesawalamai—Mortgage of tediatetam *property by husband—Mortgage suit after death of wife—Heirs of wife not made parties—Decree not binding —Jaffna Matrimonial Rights and Inheritance Ordinance, No. 1 of 1911.*

Where, after the Jaffna Matrimonial Rights and Inheritance Ordinance, No. 1 of 1911, a husband mortgaged *tediatetam* property and the mortgagee, after the death of the wife, put the bond in suit, without making the minor heirs of the wife, who were in possession, parties to the action,—

Held, that the heirs were not bound by the mortgage decree.

[1] *2 C. L. W. 122.*

APPEAL from a judgment of the District Judge of Jaffna.

H. V. Perera (with him *T. Nadarajah*), for defendants, appellants.

L. A. Rajapakse (with him *D. J. R. Gunawardene*), for plaintiff, respondent.

September 10, 1935. KOCH J.—

This appeal raises a somewhat interesting point under the law of Thesawalamai.

The facts, which are admitted, briefly are that one Nagamuttu was married to a woman called Sinnapillai, and that during the subsistence of the marriage Nagamuttu acquired the property in question under deed No. 149 of 1924. Sinnapillai died in April, 1926, but before her demise Nagamuttu mortgaged the entirety of this property in April, 1925. The mortgagee on May 18, 1927, put his bond in suit against the mortgagor, and having obtained his decree had the property sold. The purchaser is the plaintiff in this action. The claim of the plaintiff, however, is confined to 3 lachams and 13¼ kulies, as he had sold away the balance interests to a third party. The action is one *rei vindicatio* and the first four defendants are the minor children of the deceased Sinnapillai. The fifth defendant is their guardian *ad litem*. These minors have been in possession of an undivided half share of this land ever since their mother's death. They were not joined as parties in possession in the mortgage action. It is admitted that the law of Thesawalamai applies.

Nine issues were framed, the majority involving questions of law. It was agreed that the issues of law be first decided and the issues of fact later, if necessary. The District Judge on the law held that the minor defendants who are the appellants were bound by the decree in the mortgage action and gave judgment for the plaintiff who is the respondent to this appeal.

Whatever doubt or confusion there may have been in the law of Thesawalamai up to the year 1910, regarding the precise legal position of the children of a deceased spouse in relation to a mortgage that had been effected during marriage by the surviving spouse of the entirety of property acquired by him during its subsistence, the law makes that position definite and certain after the coming into operation of Ordinance No. 1 of 1911. This Ordinance is an amendment to the matrimonial rights of Tamils governed by the Thesawalamai with regard to property and the law of inheritance. The relevant section is No. 22. That section lays down that the *tediatetam* (acquired property) of each spouse shall be property common to the two spouses, and although it is acquired by either spouse and retained in his or her own name, both shall be equally entitled thereto. It further provides that 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. Language cannot be clearer. All acts material to this action have taken place after 1911, and it is common ground that under Thesawalamai like the Roman-Dutch law the husband has the right during the lifetime of his

wife to mortgage property acquired during marriage even without the consent of his spouse. The mortgage referred to *qua* mortgage would therefore be valid and would bind the half share of the wife. What would happen, however, if before the mortgage bond is sought to be enforced the wife died? Under the section I have referred to, her half share would devolve on her heirs, viz., the minor defendants, for, different from an absolute alienation, the ownership of the property had not passed to the mortgagee by reason of the mortgage. In the hypothecary action that succeeded it was necessary therefore for the mortgagee to make all persons who had vested interests parties to that action in order to obtain a binding decree against them. The minor defendants not only had vested interests to a half share but also were in actual possession of those interests.

In *Sabapathy v. Mohamed Yoosoof et al*[1] my brother Akbar J. and I held that once it was clear that there were persons in possession of the hypothecated property claiming to be there against the rights of the mortgagee, the mortgagee was bound to make them parties defendant to the action before he could obtain a binding decree against them, and this whether these persons claimed under a derivative or independent title. The principles set out in this decision applies to mortgage actions, whether instituted before or after the passing of our new Mortgage Ordinance, No. 21 of 1927.

The minor defendants (appellants) therefore not having been made parties are not bound by the mortgage decree. It follows that the plaintiff's (respondent's) title is not superior to that of the minor defendants and his action against these defendants must be dismissed. The one or two issues of fact left over are unnecessary to decide.

The Divisional Bench decision in *Seelachchy v. Visuvanathan Chetty*[2] was stressed by the respondent's Counsel as supportive of his argument that the children of Sinnapillai did not on the death of the latter succeed to rights, as the legal title was in their father under the deed in his favour. The ruling in this case does not, in my opinion, assist the respondent firstly, because the conclusion arrived at by Bertram C.J. was based on the law of Thesawalamai as it prevailed before 1911, secondly, because the point considered was as to the superiority of the title of a *bona fide* purchaser from the alienee of the husband as against that of the wife. The matter of the *bona fides* of the purchaser concluded that action. Thirdly, the majority of the Court, Bertram C.J. and de Sampayo J., were not at one in the reasons upon which they decided in the defendant's favour. This circumstance was strongly availed of by Dalton J. in *Iya Mattayar v. Kanapathipillai*[3] to assist him in not following this decision. Fourthly, Garvin J. disagreed and his views were adopted by Dalton J. in the case above referred to.

The appeal succeeds. The respondent will pay the appellants' costs in this Court and the Court below.

POYSER J.—I agree.

Appeal allowed.

[1] 37 *N. L. R.* 70.

[2] 23 *N. L. R.* 97.

[3] 29 *N. L. R.* 301