[Privy Council]

1969 *Present :* **Lord Morris of Borth-y-Gest, Lord Hodson, Lord Upjohn, Lord Wilberforce and Lord Diplock**

V. K. SUBRAMANIAM, Appellant, *and* K. KADIRGAMAN, Respondent

Privy Council Appeal No. 8 of 1969

S. C. 280/63 (F)—D. C. Point Pedro, 6471

Thesavalamai—Tediatetam—*Devolution on death intestate of non-acquiring spouse—Jaffna Matrimonial Rights and Inheritance Ordinance (prior to amendment by Ordinance No. 58 of 1947)—Sections 6, 7, 19, 20, 21 and 22—Sections 19 and 20 as amended by Ordinance No. 58 of 1947—Whether Amending Ordinance has retrospective effect—Interpretation Ordinance, s. 6 (3)—Wills Ordinance, s. 7.*

Where a half share of *tediatetam* property acquired by a husband had already automatically vested in his wife (as the non-acquiring spouse) by virtue of the provisions of Sections 19 and 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance of 1911, the subsequent repeal of Sections 19 and 20 by the Amending Ordinance No. 58 of 1947 did not operate retrospectively so as to divest the wife of that share. And if the wife dies intestate after the date when the Amending Ordinance No. 58 of 1947 came into operation, the devolution of her share upon her death is regulated solely by Sections 21 and 22 of the old Ordinance and not by the new Section 20 of the amended Ordinance.

Kumaraswamy v. Subramaniam (56 N. L. R. 44) approved.

APPEAL from a judgment of the Supreme Court.

M. P. Solomon, for the substituted defendant-appellant.

Walter Jayawardena, Q.C., with *R. K. Handoo* and *George Candappa*, for the plaintiff-respondent.

Cur. adv. vult.

October 6, 1969. [*Delivered by* Lord Diplock]—

This appeal is about land which was acquired by a husband, the original defendant, at various dates between 1919 and 1945 during the subsistence of his marriage with a wife who died intestate in 1948. Her administrator is the plaintiff in the action. The husband died during the lengthy pendency of this action and his son by an earlier marriage was substituted as defendant.

Husband and wife were Tamils originating from the Jaffna area and the law which governed their matrimonial rights and inheritance is known as *Thesawalamai.* At the date of acquisition of the various parcels of

1*——J 9347—2,275 (12/69)

land which are the subject of this suit *Thesawalamai* was regulated by the Jaffna Matrimonial Rights and Inheritance Ordinance of 1911 (herein called "the Principal Ordinance"); but on 4th July 1947 after the land had been acquired and before the death of the wife the Principal Ordinance was amended.

Under the customary law of *Thesawalamai* as it was before 1911 profits arising from the separate estate of either spouse during the subsistence of the marriage and property acquired out of those profits were known as *tediatetam*. It is unnecessary for the purposes of the present appeal to consider precisely what property was comprised in *tediatetam* before 1911 or what were the legal incidents attaching to it. Section 19 of the Principal Ordinance defined what property should *thereafter* constitute the *tediatetam* of each spouse and section 20 provided what legal incidents should attach to it.

Section 19 of the Principal Ordinance was as follows:

"19. The following property shall be known as the *tediatetam* 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."

Paragraph (*a*) of this section brought within the definition of the expression "*tediatetam*" as used in that Ordinance property which was not included in *tediatetam* under the customary law of Thesawalamai. It is common ground that the land which is the subject of dispute fell within this extended definition though it would not have been included in the *tediatetam* of either spouse under the previous customary law. It would have been the separate property of the husband.

Section 20 of the Principal Ordinance was as follows:

"20. (1) The *tediatetam* 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.

(2) Subject to the provisions of the *Tesawalamai* 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 mensa et thoro*, each spouse shall take for his or her own separate use one-half of the joint property aforesaid."

It is common ground that the effect of sub-section (1) of this section was to vest in the non-acquiring spouse from the moment of acquisition an undivided half-share in the property acquired by the other spouse during the subsistence of the marriage. Sub-section (2) provided *inter alia* for the devolution of this half-share upon the death intestate of each spouse. Although referred to indifferently in the section as " joint-property " and " property common to the two spouses ", section 7 of the Wills Ordinance provides in effect that property owned jointly shall be held in common and in particular that the undivided share of a deceased co-owner shall form part of his estate.

It follows from this that the wife acquired an immediate undivided half-share in each of the parcels of land to which this appeal relates from the moment at which they were acquired ; and that this proprietary right had vested in her before 4th July 1947. It is not in their Lordships' view necessary to consider the precise legal incidents attaching to it under the Principal Ordinance save to note that her undivided half-share would have devolved upon her heirs upon her death intestate.

Upon 4th July 1947 during the wife's lifetime, Ordinance No. 58 of 1947 (herein called " the Amending Ordinance ") came into force. Among the amendments to the Principal Ordinance it repealed sections 19 and 20 and substituted therefor new sections in the following terms :

> " 19. No property other than the following shall be deemed to be the *thediatheddam* of a spouse :
>
> (*a*) Property acquired by that spouse during the subsistence of the marriage for valuable consideration, such consideration not forming or representing any part of the separate estate of that spouse.
>
> (*b*) Profits arising during the subsistence of the marriage from the separate estate of that spouse."
>
> " 20. On the death of either spouse one half of the *thediatheddam* which belonged to the deceased spouse, and has not been disposed of by last will or otherwise, shall devolve on the surviving spouse and the other half shall devolve on the heirs of the deceased spouse."

The new section 19 excluded from the definition of *tediatetam* property which had previously been included in the definition of the same word in the former section 19 of the Principal Ordinance. It is common ground that the land which is the subject of this appeal did not fall within the new definition of *tediatetam*. The new section 20, in contrast to the former section 20 of the Principal Ordinance does not deal with any legal incidents which were thereafter to attach to *tediatetam* as newly defined other than its devolution upon the death of a spouse intestate. Important amendments to earlier sections, 6 and 7, of the Principal Ordinance,

however, altered the legal incidents attaching during a spouse's lifetime to property which fell within the new definition of *tediatetam*, though in their Lordships' view it is unnecessary for the purpose of the present appeal to consider those alterations in detail.

It is a potential source of confusion that the single expression "*tediatetam*" has been used to describe property falling within a definition of which the scope has been different at different periods viz. before the Principal Ordinance was enacted in 1911; between 1911 and 4th July 1947; and after 4th July 1947. Property such as the land at present in suit which was correctly described as "*tediatetam*" during the period from 1911 to 4th July 1947 may cease to be entitled to that label after the latter date. But the loss of the label does not divest either spouse of the proprietary rights in the land which had already vested in them by virtue of its status as "*tediatetam*" at the date at which it was acquired before the definition of "*tediatetam*" was altered by the Amending Ordinance. This was the decision of the Supreme Court of Ceylon composed of five judges in *Akilandanayaki v. Sothinagaratnam* [1]. In that case it was held that section 6 (3) of the Interpretation Ordinance prevented sections 19 and 20 of the Amending Ordinance from affecting any proprietary right of a spouse which had been already acquired under the repealed sections 19 and 20 of the Principal Ordinance before the date of their repeal.

It has not been contended in the present appeal that the decision in the *Akilandanayaki case* was wrong. Their Lordships accept it as correct. It therefore follows that at the date of her death in 1948 the wife was still entitled to an undivided half-share in the land in suit. But in their Lordships' view it would no longer be correct after the 4th July 1947 to attach either to the land in suit or to her half-share in it the label "*tediatetam*". It is common ground that the land in suit itself did not fall within the definition of "*tediatetam*" in the new section 19 because it was acquired by the husband for valuable consideration which formed or represented part of his separate estate. Neither in their Lordships' view did the wife's half-share in it fall within the new definition because her half-share was not acquired by her for valuable consideration nor was it profits arising during the subsistence of the marriage. The new section 20, which applies only to property within the new definition of "*tediatetam*" in section 19, accordingly did not apply either to the land or to the wife's half-share in it which had vested in her before the Amending Ordinance was passed.

How then did her half-share devolve upon her death intestate? By the date of her death section 20 of the Principal Ordinance had been repealed and could no longer affect the devolution of her half-share. But

[1] *(1952) 53 N. L. R. 385.*

it formed part of the property to which she was entitled at the date of her death. Its devolution was accordingly regulated by the general provisions as to inheritance contained in sections 21 *et seq* of the Principal Ordinance none of which was amended by the Amending Ordinance. As the deceased wife left children surviving her the relevant sections are sections 21 and 22, which are in the following items :

> " 21. Subject to the right of the surviving spouse in the preceding section mentioned, the right of inheritance is divided in the following order as respects (*a*) descendants, (*b*) ascendants, (*c*) collaterals.
>
> 22. Children, grandchildren, and remoter descendants are preferent to all others in the estate of the parents. All the children take equally *per capita* ; but the children or remoter issue of a deceased child take *per stirpes*."

Under these sections the wife's half-share in the lands in suit devolve upon her children upon her death intestate and the plaintiff as administrator of her estate is entitled to recover her share from the estate of her husband who is now also deceased.

In so deciding their Lordships are following the decision of the Supreme Court of Ceylon in *Kumaraswamy v. Subramaniam*[1] about other land in respect of which the plaintiff claimed that the deceased wife had similar proprietary rights to those asserted in the present appeal. The grounds of that decision were succinctly stated by Gratiaen J. at p. 47 as follows :

> " the new sections 19 and 20 have no bearing on the present problem. A half share of the *tediatetam* property acquired by [the husband] in 1933 and 1943 had automatically vested in [the wife] (as the non-acquiring spouse) under the old Section 20, and the subsequent repeal of the old Section 20 did not operate to divest her of that share. The devolution of [the wife's] share upon her death in 1948 was regulated solely by Section 21 of the Principal Ordinance because the new section 20 has no application to the case."

Their Lordships are, in effect, asked in the present case to over-rule this decision ; but in their view its reasoning is sound and decisive of the present claim also. They will accordingly humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs of the appeal.

Appeal dismissed.

[1] *(1954) 56 N. L. R. 44.*

1**—— J9347 (12/69)