1961 *Present :* **Weerasooriya, J., and Sinnetamby, J.**

THEIVANAIPILLAI, Appellant, *and* NALLIAH *et al.*, Respondents

S. C. 364—D. C. Jaffna, 546/L

Thesavalamai—Tediatetam—*Sale of it by wife without husband's consent—Sanction of Court obtained—Notice given to husband but no objection raised by him—Validity of sale questioned by husband in a subsequent action—Right of wife and vendee to plead* res judicata—*Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), ss. 6, 8, 19 (a), 20 (1).*

In proceedings No. D257, a married woman applied to Court under section 8 of the Jaffna Matrimonial Rights and Inheritance Ordinance to sell without her husband's written consent a land which had been acquired by her during the subsistence of her marriage and which, according to the law as it then stood, was *tediatetam* irrespective of whether it had been purchased by her with her dowry money or not. The husband, although he was served with notice of the wife's application, was absent when the Court, after inquiry, made order authorising the sale of the land without the husband's consent. After the land was sold by the wife, the husband sought in the present action to challenge the validity of the sale on the ground that the Court had no jurisdiction to sanction the sale of *tediatetam* property without his authority.

Held, that the order in proceedings No. D257 involved the finding that the land was the wife's separate property. The plaintiff in the present action was estopped by the operation of the doctrine of *res judicata* from now showing that the property in question was *tediatetam* property.

APPEAL from a judgment of the District Court, Jaffna.

C. Ranganathan, with *A. Nagendra*, for 3rd defendant-appellant.

V. Thillainathan, for plaintiff-respondent.

No appearance for 1st and 2nd defendants-respondents.

Cur. adv. vult.

May 15, 1961. WEERASOORIYA, J.—

The land which is the subject matter of this action was acquired for valuable consideration by the 3rd defendant-appellant on deed P1 of 1934 during the subsistence of her marriage with the plaintiff-respondent. The parties are Jaffna Tamils governed by the Thesawalamai. It is not disputed that they were married after the coming into operation of the Jaffna Matrimonial Rights and Inheritance Ordinance, No. 1 of 1911, now Chapter 48. P1 was executed prior to the amendment of that Ordinance by the Jaffna Matrimonial Rights and Inheritance Amendment Ordinance, No. 58 of 1947. By virtue of sections 19 (*a*) and 20 (1) of Chapter 48, as it then stood, the land acquired on P1 became the *tediatatem* of the 3rd defendant-appellant to which both she and the plaintiff were jointly entitled.

The plaintiff and the 3rd defendant thereafter mortgaged the land. The mortgage bond was put in suit and decree was eventually entered against them in a sum of Rs. 2,031 with interest and costs. In order to prevent a forced sale of the land under the decree, the 3rd defendant, who was then living in separation from the plaintiff, made on the 24th March, 1950, an application to the District Court of Jaffna in proceedings No. D 257 (1D1) for sanction under section 8 of Chapter 48 to sell it by private treaty without the consent of the plaintiff. This application (to which the plaintiff was made the respondent) proceeded on the basis that as the land had been purchased with the 3rd defendant's dowry money, it was her separate property but that the written consent of the plaintiff was necessary, as provided in section 6, before she could dispose of it. Section 8 confers a special jurisdiction on the District Court to authorise a wife, on an application made by her in that behalf, and after summary inquiry into it, to dispose of her *separate* property without her husband's consent. But as the land had been acquired during the subsistence of the 3rd defendant's marriage, it was *tediatatem* property irrespective of whether it was purchased with her dowry money or not—vide *Avitchy Chettiar v. Rasamma*[1]. In the case of *tediatatem* property the husband alone, as manager, would have the right to sell or mortgage it—*Sangarapillai v. Devarajah Mudaliyar et al.*[2] Hence no question arose of the 3rd defendant selling the land, whether with the plaintiff's consent or by obtaining the authority of the District Court under section 8 to do so without his consent.

[1] *(1933) 35 N. L. R. 313.*

[2] *(1936) 38 N. L. R. 1.*

The plaintiff though served with notice of the 3rd defendant's application was absent on the 31st May, 1950, when the District Judge after inquiry made order authorising her to sell the land without the plaintiff's consent. The order does not set out the grounds on which it was made, but the finding that the land formed part of the 3rd defendant's separate estate as it had been purchased with her dowry money is, I think, implicit in that order.

Purporting to act under the authority so given, the 3rd defendant, on the 13th December, 1950, executed deed No. 790 (P6) conveying the land to one Kanagaratnam for Rs. 3,500, and he at the same time conveyed it on deed No. 791 (P7) by way of gift to his niece, the 1st defendant-respondent, whose husband is the 2nd defendant-respondent.

The plaintiff thereafter filed this action in which he asked for a declaration that deeds Nos. 790 and 791 are null and void and of no force or avail in law, that the land dealt with on those deeds is the *tediatatem* of the plaintiff and the 3rd defendant and that the 1st and 2nd defendants and their agents and tenants be ejected therefrom and peaceful possession thereof restored to him. After trial the District Judge gave judgment for the plaintiff as prayed for holding that the land is *tediatatem* and that in regard to the earlier application made by the 3rd defendant for authority to sell it without the consent of the plaintiff, the District Court had no jurisdiction to entertain the same and, therefore, the order granting such authority was void and consequently deed No. 790 also was void and conveyed no title to the vendee. From this judgment the 3rd defendant has filed the present appeal.

With all respect to the learned District Judge, I am unable to agree with his finding that the Court had no jurisdiction to entertain the 3rd defendant's application in proceedings No. D 257, or to make the order authorising her to sell the land without the plaintiff's consent. The averments in the application were, I think, sufficient for the exercise by the Court of the jurisdiction conferred under section 8 of Chapter 48. See, in this connection, *Marjan et al. v. Burah et al.* [1] The order was, therefore, one which was binding on the parties, subject to appeal. No appeal was filed by the plaintiff against the order.

Among the changes in Chapter 48 brought about by the Jaffna Matrimonial Rights and Inheritance Amendment Ordinance, No. 58 of 1947, were the repeal of sections 19 and 20 and the substitution therefor of new ections 19 and 20. The new section 19 provides as follows—

> " 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*) ..... "

[1] *(1948) 51 N. L. R. 34 at 38.*

The land acquired on P1 would not be *tediatatem* property in terms of the new section 19 if, as alleged by the 3rd defendant, it was purchased with her dowry money. But as P1 was executed before Ordinance No. 58 of 1947 came into force, the new section 19 would not apply in determining the character of that land except on the view that the section operates retrospectively. At the time when the order in proceedings No. D 257 was made, this Court had decided in *Sachchithananthan v. Sivaguru* [1] that Ordinance No. 58 of 1947 is retrospective in operation. But in 1952 that view was held to be wrong by a Divisional Bench of five Judges in *Akilanandanayaki v. Sothinagaratnam*[2]. According to the decision in the last mentioned case the land which formed the subject matter of the application in proceedings No. D 257 would be *tediatatem* property as the character of it has to be determined on the basis of the definition of *tediatatem* in the repealed section 19 of Chapter 48. Notwithstanding that such be the legal position, Mr. Ranganathan, who appeared for the 3rd defendant, submitted that as the order of the District Court in proceedings No. D 257 authorising the 3rd defendant to sell the land without the consent of the plaintiff involved the finding that it is the separate property of the 3rd defendant, such finding, even though erroneous, not only was binding on the plaintiff in those proceedings, but also precludes him from re-agitating the same question in the present case.

Learned counsel for the plaintiff did not dispute that the order in proceedings No. D 257 involved the finding that the land is the 3rd defendant's separate property. Since the same question is sought to be raised by the plaintiff in the present case, and in respect of the same subject matter, the plaintiff would appear to be estopped by the doctrine of *res judicata* from doing so. But Mr. Thillainathan contended that as the finding referred to is a wrong decision of law, the doctrine of *res judicata* will not operate in the present case. For this contention he relied on the dictum in *Katiritamby et al. v. Parupathipillai et al.*[3] that an erroneous decision on a question of law will not prevent the Court from deciding the same question between the same parties in a subsequent suit according to law. The dictum was approved in *Gunaratne v. Punchi Banda*[4] and more recently in *Subramaniam v. Kumaraswamy et al.*[5] But while this dictum taken out of its context would appear to support the argument of Mr. Thillainathan, a fact which must not be overlooked is that in each of those cases it was also expressly stated that an erroneous decision on a question of law will operate as *res adjudicata quoad* the subject matter of the suit in which it is given, and no further. The position is made clear in the judgment of Garvin, A. J. (as he then was) in *Katiritamby et al. v. Parupathipillai et al.* (*supra*) where he emphasised that the earlier erroneous decision of law in regard to which the plea of *res judicata* was unsuccessfully raised was one given in proceedings in which the subject matter and the cause of action were different. In the present case since the subject matter is the identical land which

[1] *(1949) 50 N. L. R. 293*
[2] *(1952) 53 N. L. R. 385.*
[3] *(1921) 23 N. L. R. 209.*
[4] *(1927) 29 N. L. R. 249.*
[5] *(1955) 57 N. L. R. 130.*

figured in the earlier proceedings, it is clear that the relief claimed by the plaintiff in respect of it cannot be granted without virtually setting aside the decree in those proceedings and also nullifying the transactions embodied in P6 and P7 and which were, presumably, entered into by the parties on the faith of the conclusive effect of that decree. In my opinion the dictum in the cases mentioned cannot be accepted without the qualification to which I have drawn attention, and does not, therefore, avail the plaintiff in the present case.

The case of ***Madan v. Nana Andy***[1] is, no doubt, an exceptional one, where a decree entered in a regular action was declared void at the instance of the judgment-debtor when it was sought to be executed against him, and the plea that the decree operated as *res judicata* and was binding on him was rejected on the ground that to give effect to it would be to go counter to some statutory direction or prohibition. There is no analogy between that case and the present case.

Another case relied upon by Mr. Thillainathan is *Herath v. The Attorney General et al.* [2] where a decree in a previous action which had been entered under section 84 of the Civil Procedure Code in default of appearance on the part of a plaintiff was held by my Lord the Chief Justice not to operate as *res judicata* in a subsequent proceeding inasmuch as there had been no adjudication on the merits. A different view was expressed on the same question in *Mohamado v. Mohittihamy* [3]. That question does not, however, arise in the present case as the order in proceedings No. D 257 was not made under section 84, and any default on the part of the plaintiff in appearing in those proceedings did not relieve the 3rd defendant of the burden of establishing that the property was her separate property, or the Court from deciding that question. The order made in those proceedings was, therefore, an adjudication on the merits.

In my opinion the plaintiff is estopped by the operation of the doctrine of *res judicata* from now showing that the property in question is *tediatatem* property. The judgment and decree appealed from are set aside and the plaintiff's action is dismissed with costs in the Court below. He will also pay the 3rd defendant's costs of appeal.

SINNETAMBY, J.—I agree.

Appeal allowed.

[1] *(1949) 50 N. L. R. 476.*

[2] *(1958) 60 N. L. R. 193 at 221.*

[3] *(1921) 3 Ceylon Law Recorder 44.*