Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wood Renton.

1909. October 27.

FERNANDO *v.* PROCTOR *et al.*

D. C., Chilaw, 3,924.

Tesawalamai—*Tamil woman marrying a Malabar inhabitant of Jaffna—Nationality—Regulation No. 18 of 1806—Ordinance No. 15 of 1876, s. 2—Roman-Dutch Law.*

Where a Tamil woman, not an inhabitant of Jaffna, marries a Tamil inhabitant of Jaffna, she does not become, by the marriage, an inhabitant of Jaffna, by operation of section 2 of Ordinance No. 15 of 1876.

APPEAL by the 4th and 5th defendants from a judgment of the District Judge of Chilaw (T. W. Roberts, Esq.). The facts are fully set out in the judgment, which was as follows (June 15, 1909) :—

" The plaintiff claims half share of the land in dispute on purchase from a gentleman known as Jolly Philips dated 1907. The land belonged as dowry property to the wife of this Philips, and on her death he administered her estate after notice to her sisters and her mother. In 1907 he conveyed half this land to himself as her husband and part heir, and the rest to her other relatives in their respective shares, and on the same day he sold plaintiff his half of this land, which, as administrator, he had just conveyed to himself as heir.

" One of the deceased lady's sisters and her husband are the contesting defendants. Their case is that they are Jaffna Tamils, to whom the *Tesawalamai* applies, and that therefore plaintiff's vendor Philips inherited nothing from his deceased wife, and had no title to convey to plaintiff. The question therefore is plain. Is the Roman-Dutch Law or the *Tesawalamai* the law applicable to the present case ?

" Now, the *Tesawalamai* is on the name of it the custom of a certain country, and in the description of it given in its preamble it is the law and customs of the Malabar inhabitants of the Province of Jaffna. In the Proclamation No. 18 of 1806, from which it derives its present force, that law is similarly limited to Malabar inhabitants of the Province of Jaffna.

" It is clear on the evidence that the deceased wife of Jolly Philips was a lady descended from a Jaffna Tamil long settled in Puttalam and Chilaw, and that she was born in Puttalam and lived and died in Chilaw, and there is no proof that she ever went to the Province of Jaffna. I am unable on these facts to see how that lady can be considered to be or to have been an inhabitant of the Province of Jaffna. She was not born there, and she did not live there. She was never an inhabitant of the Province of Jaffna. It was suggested that

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Puttalam formed part of the Province of Jaffna in view of certain statements reported on page 115 of *Ramanathan's Reports, Vol. 1872–1876.* But I can find no clear foundation for this statement. It does not agree with the argument at top of the next page in regard to the Charter of 1833. And if it even was the case under that Charter and subsequent enactments, Puttalam clearly ceased to have any connection with the Northern Province, and for many years now the law of succession among Puttalam Tamils has, I believe, been the Roman-Dutch Law.

"It is equally clear on the facts that the deceased lady was, properly speaking, an inhabitant of Chilaw District. And I observe that in the matter of the division of a payment of Rs. 500 owed to the deceased lady by her sister and father, all the members of her family adopted and followed the Roman-Dutch Law, although that property was nothing other than dowry property. There is nothing in the *Tesawalamai* which explicitly makes it applicable to Jaffna Tamils living elsewhere, or applicable to any one but 'Malabar inhabitants of the Province of Jaffna.' I must hold, then, that in this case the Roman-Dutch Law applies, because the deceased lady and her sister are, though Malabar inhabitants, not of Jaffna, but of Chilaw. I would also hold that the residence of her family in Chilaw for the space of two generations constitutes Chilaw their domicile. And I find in testamentary case No. 69 of this Court that the husband of the deceased lady's sister has adopted the same view, and in 1905 taken out administration to his wife's estate as heir of half without so far raising any objection from the respondents, who are the persons defending the present case.

"It is unnecessary, then, to go fully into the facts of the case, but I will briefly discuss them for the sake of completeness. I find myself in considerable doubt of plaintiff's statement that for a year after he bought he had possession of this land, while the fifth defendant flatly denied. But the point is immaterial, and may be left there. On the plaintiff's other allegations, viz., of fact creating estoppel, I would accept plaintiff's version. Fifth defendant's denial was in this respect somewhat evasive and hair splitting. The present fifth defendant acted as agent for his wife and her mother, and his action binds them. He discussed with plaintiff the proposal that plaintiff should buy this land from the administrator, and he never told plaintiff plainly that the administrator had no right to sell nor that he would dispute the sale.

"Similarly, the mother and sisters of the deceased lady in silence allowed the widowed husband to take out administration and convey to himself half the property. They were doubtless well aware all along that he had as administrator derived title in himself as heir and obtained grant on that footing. Against that they raised no protest. Plaintiff was misled by their silence in the administration proceedings and by the fifth defendant's more positive conduct previous

to the sale into a belief that the administrator had title to sell. I think that validly estops defendants from denying his title. I find that the parties are entitled to this land in the shares given in the plaint. Enter decree for partition as prayed for and for the costs of this contention."

The fourth and fifth defendants appealed.

Walter Pereira, K.C., S.-G. (*Balasingham* with him), for the appellants.

Sampayo, K.C. (*Cooray* with him), for the plaintiff, respondent.

Cur. adv. vult.

October 27, 1909. HUTCHINSON C.J.—

The land, for the partition of which this action was brought, belonged to Susan Philips. On her death her husband took out administration to her estate; he claimed to be entitled to one-half of the land by inheritance from her, and conveyed it to himself and then transferred it to the plaintiff. If the ordinary law of inheritance applied to her estate, he was so entitled; but the appellants, the fourth and fifth defendants, assert that the *Tesawalamai* applied, and if they are right, the husband was not entitled to any share in this land, which was part of her dowry property.

The *Tesawalamai* apply to " the Malabar inhabitants of the Province of Jaffna." And Susan Philips was not and never had been an inhabitant of that Province. The Solicitor-General, however, contended for the appellants that, by virtue of section 2 of Ordinance No. 15 of 1876, on her marriage with her husband, who, he says, was a Tamil inhabitant of that Province, she also became a Tamil inhabitant of that Province. If she had been a Sinhalese, she would doubtless by virtue of her marriage with a Tamil have been thenceforth, so long as the marriage subsisted and until she married again, taken to be of the same race and nationality as her husband. But she did not become an inhabitant of the Province of Jaffna. So that whether her husband was or was not an inhabitant of that Province, the judgment of the District Court in favour of the plaintiff was right.

I think the appeal should be dismissed with costs.

WOOD RENTON J.—

The point at issue in this case may be shortly stated thus. The respondent claims a half share of the land in suit, for the partition of which he has instituted these proceedings, by virtue of a deed of transfer in his favour by one Jolly Philips, administrator of the estate of his wife, Susan Philips, part of whose dowry property the land is alleged to have been, and who died in Colombo without issue. If the rights of Jolly Philips in his deceased wife's estate are governed by Roman-Dutch Law, he was entitled to the share that

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he has disposed of. If, on the other hand, those rights depend on the *Tesawalamai*, Jolly Philips inherited no part of his wife's dowry land. The learned District Judge has held that the *Tesawalamai* does not apply to the case. I think that he is right.

Regulation No. 18 of 1806 provides that the *Tesawalamai*, "or customs of the Malabar inhabitants of the Province of Jaffna, as collected by order of Governor Simons, in 1706, shall be considered to be in full force." On the face of this Regulation, the operation of the *Tesawalamai* is restricted to persons who can fairly be said to be "inhabitants" of the Province of Jaffna, now the Northern Province. Susan Philips was not herself an "inhabitant" of that Province. Although she was of Jaffna Tamil descent, her family had long been settled in Puttalam and Chilaw. She was born in the former, and lived and died in the latter, town, and the District Judge finds that there is no proof that she ever went to the Province of Jaffna. The learned Solicitor-General argued, however, that on her marriage with Jolly Philips she became a "Tamil of the Northern Province" within the meaning of section 2 of Ordinance No. 15 of 1876. That section is in the following terms :—" Whenever a woman marries, after the Proclamation of this Ordinance, a man of different race or nationality from her own, she shall be taken to be of the same race and nationality as her husband for all the purposes of this Ordinance, so long as the marriage subsists and until she marries again. Save as aforesaid, this Ordinance shall not apply to Kandyans or Muhammadans, or to Tamils of the Northern Province who are or may become subject to the *Tesawalamai*."

Apart from the fact that this section deals in terms only with the wife and with her position during a subsisting marriage, or till a re-marriage, I do not think that a marriage between Tamils is one between persons of " different race or nationality " within the meaning of the section, even if the husband is, and the wife is not, an "inhabitant" of the Northern Province. It may be that, apart from Ordinance No. 15 of 1876, the matrimonial domicile of the spouses would, in such a case, be that of the husband. But I express no opinion on that point now ; for the evidence here does not show that Jolly Philips himself, any more than his wife, was an "inhabitant" of the Northern Province. Although his father was a Jaffna Tamil, he himself was born in Trincomalee, where his family was settled for forty-five years or more. His father was Kachcheri Mudaliyar at Trincomalee, and returned to Jaffna after he retired. It was suggested that his official absence from Jaffna did not deprive him of his legal position as an "inhabitant" of that Province. But there is nothing to prove that Jolly Philips ever acquired a right to be so described.

I would dismiss the appeal with costs.

Appeal dismissed.