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Present: Ennis J. and De Sampayo J.

TAMBAPILLAI *et al.* *v.* CHINNATAMBY *et al.*

268—D. C. Jaffna, 7,815.

Tesawalamai—*Right of father to give a deceased mother's property in dowry to the daughters to the exclusion of the sons.*

Under the *Tesawalamai* a husband can, after his wife's death, allocate to the daughters by way of dowry all the property of the deceased wife, to the exclusion of the sons. The property may be so allocated even though a marriage is not actually in view.

THE facts are set out in the judgment of De Sampayo J., as follows:—

The land which is the subject of this partition action admittedly belonged to Tangachchi by right of purchase. Tangachchi was married to Sittampalam, and died intestate in 1885, leaving her husband and five children, namely, a son, Chelliah, and two daughters (the fourth and second defendants in this case), and two other sons who need not be specifically named for the purpose of this appeal. The plaintiffs claim a fifth share by purchase in 1910 from Chelliah, and in their plaint they allot to the second and fourth defendants each a fifth share. The second and third added parties, however, intervened and claimed a two-third share, allowing the remaining third share to the second defendant. Their case is that Sittampalam in 1889 gifted to the fourth defendant as dowry a two-third share of the land, which has now come to them through certain conveyance, and that the remaining third share was similarly dowried to the second defendant. There is no dispute as to the execution of these dowry deeds by Sittampalam, but the plaintiffs question their validity, on the ground (1) that the fourth and second defendants being minors at the time, and the occasion for the gifts not being any contemplated marriage, the gifts in their favour are not dowry, though they are so called in the deed, but ordinary donations, and (2) that Sittampalam could not give dowries to the daughters in derogation of the son's rights by inheritance from their mother Tangachchi. The same points are urged before us on behalf of the plaintiffs, who appeal from the District Judge's judgment in favour of the added parties.

Balasingham, for the appellants.—A father cannot give in dowry to one daughter more than her proportionate share of her deceased mother's property. In *Murugesu v. Vairavan*[1] the surviving

[1] 2 *Bal.* 141.

parent was held not to have the power even to give a divided share in dowry to one of several children. The share given in that case did not exceed the child's share, and yet the surviving parent was held not to have the power to give it on one side as a divided portion. In *Vallaiammapillai v. Ponnampalam* [1] it was held that where the father and mother were dead the relations of the daughter could not apportion to her more than her child's share. Although the case does not refer to the right of a surving father, the principle involved is the same, as the words of sub-sections 11 and 12 are the same.

Under section 11 the father is to give a dowry: there is nothing in the sub-section to indicate that he can give anything more than a child's share. He may give something out of his own property if he thinks that the child's share is not enough. But he cannot deprive another child of his or her inheritance. [De Sampayo J.—The next paragraph shows that the father may give what he likes to a daughter; for it is only "*if anything remains* of what had been given to the relations with the children, as above stated," that the sons come in for a share.] The words "*if anything remains*" do not suggest that the father has the power to deprive a son of his inheritance. The words may refer to cases where all or most of a son's share was spent on his education and maintenance. It has been held in *Chellappa v. Kanapathy*[2] that all the children inherit equally. [Ennis J.—That case shows that a father may allocate to a daughter more than her share.] That point was not the point argued in that case. The observations on this point are purely *obiter*. In *Nagaretnam v. Alagaretnam* [3], also, the decision does not rest solely on this point.

The right claimed is a departure from the ordinary law of inheritance, and unless there be a clear provision in the *Tesawalamai* to that effect it ought not to be upheld. It is significant that there is not one case in Muttukisna's *Tesawalamai* to support the proposition contended for by the respondent. The only case which supports that view (*Nagaretnam v. Alagaretnam* [3]) was decided so recently as 1911. Where a larger share is given, it is given out of the father's own property; brothers join in the deed of dowry if their property is to be included.

In this case the dowry was not given in contemplation of marriage. It was given long before any particular marriage was arranged. Even if a father had a right to give more than a daughter's share by dowry, he can only do so when the daughter is about to marry.

Wadsworth (with him *Arulanandam* and *Joseph*), for respondents, referred to D. C. Jaffna, 8,529 [4].

Cur. adv. vult.

[1] *(1901) 2 Br. 234.*
[2] *(1914) 17 N. L. R. 294.*
[3] *(1911) 14 N. L. R. 60.*
[4] *S. C. Mins., Feb. 9, 1914.*

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The points for determination on the appeal are: (1) whether under the *Tesawclamai* a husband can, after his wife's death, allocate to the daughters by way of dowry all the property of the deceased wife to the exclusion of the sons; and (2) whether he can make a valid assignment by way of dowry when no marriage of a daughter is in contemplation. Clause 11 of section 1 of the *Tesawalamai* answers, in my opinion, the first point. That clause says that the father remains on the mother's death in full possession of the estate. Should he wish to marry again he is to make provision for the children by setting aside the *whole of the property* brought in marriage by his deceased wife and half the property acquired during his first marriage. When the children are grown up and able to marry he is to give dowry to the daughters from the property he has already set apart for the children and from his own hereditary property. The clause proceeds to say that the sons take the remainder "if any remains."

The father, then, has the right to dispose of the whole of the deceased wife's property in dowry to the daughters, and the sons take nothing unless something remains after the daughters have been dowried. This view finds support in the judgment of Pereira J. in *Chellappa v. Kanapathy*.[1]

The same clause, also, it seems to me, answers the second point. The dowry may be given when the daughters are "able to marry." Clause 3 also throws light on the second point. That clause speaks of dowry being enlarged in order that the daughter may make "a better marriage." It would seem that the dowry, then, may be given before marriage.

In my opinion the decree is right, and I would dismiss the appeal with costs.

DE SAMPAYO J.—

[His Lordship set out the facts, and continued]:—

I have never understood dowry under the *Tesawalamai* to mean the same thing as a marriage settlement. It is undoubtedly the duty of the father or the mother, as the case may be, to settle the daughters in marriage and to give a dowry in that connection. But I do not know that the customary law prevents the parents from determining beforehand what they shall give to the daughters as dowry and from gifting to them the destined property, even though a marriage may not be actually in view. There is nothing in the *Tesawalamai* to show that such previous apportionment is wrong; and, on the contrary, it seems to me that the *Tesawalamai* contemplates it, in order that marriages, which it is the object of the dowry system to promote, may be brought about.

[1] *(1914) 17 N. L. R. 294.*

I think that instances of this kind are not uncommon. Mr. Balasingham for the appellants, however, says that in such cases no question has arisen, because the donees have accepted the dowries. I do not think that under the *Tesawalamai* dowries require to be accepted in the same way as a gift under the Roman-Dutch law. However that may be, there is no doubt that the fourth defendant accepted the gift in her favour. She married in 1891, that is to say, two years after the date of the dowry deed, and she and her husband, by deed dated June 16, 1894, reciting the title under the dowry deed, sold the two-third share to Vairamuttu Sittampalam, through whom the added parties claim title. There cannot be stronger evidence of acceptance than dealing in this manner with the property dowried.

The main point urged on this appeal, however, is that the father Sittampalam had no right to dispose of the entire land in dowry to his two daughters. It is clear from clauses 9, 10, 11, and 12 of section 1 of the *Tesawalamai* that it is not only the right but the duty of the surviving parent to give dowry out of his or her property, or out of the property of the deceased parent, or out of both. This cannot seriously be disputed; but it is contended that, since on the death of a parent the children at once inherit the deceased's property, the surviving parent cannot give out of the deceased's property anything more than the daughter's own share of inheritance, for otherwise the shares already vested by law in the other children would be taken away from them. This, I think, involves a misconception of the principle underlying the provisions of the *Tesawalamai* in question. That principle appears to me to be similar to the Hindu idea of "undivided family." The administration of the entire estate is in the sole control of the parent, who has the power to apportion such part of the deceased parent's property to the daughters in respect of dowry as he or she in his or her discretion thinks proper, and to possess the balance of the deceased parent's property, if any, until the sons grow up and are competent to administer the same. When the surviving parent is the father, clause 11 of section 1 of the *Tesawalamai* states the matter too clearly to admit of any difficulty. For, after laying down that the father should furnish the dowry of the daughters out of the deceased mother's property, the acquired property of both, and his own inherited property, it provides as follows: "This being done, and *if anything remains* (of the mother's property), and if the son or sons have acquired a competent age to administer *what remains*, they then take and possess the same, without dividing it until they marry..... But *should there remain nothing* of the mother's property and of the (mother's) half of the property acquired during marriage, the sons, whether young men or married, must do as well as they can until their father dies." I have italicized the above words in order to emphasize the fact that it is within the power of the father

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to give the whole of the deceased mother's property as dowry to the daughters, and thus to deprive the sons of any share. The whole passage and various other characteristic provisions of the *Tesawalamai* show that there is no such thing as a vested right by inheritance, and that, even if such language is permissible, the children can be divested of that right at the will of the parent. The case of *Murugesu v. Vairavan*,[1] cited on behalf of the appellants, is no authority to the contrary. For in that case it was the mother who survived and who gave the dowry; and the point, in fact, decided there was that the mother could not divide the land and give a defined portion to a daughter so as to make the division last beyond her own life. Moreover, that is a single Judge decision, and I venture to think that it is not in accordance with the *Tesawalamai*. In this case, however, an entire property was given to the two daughters by deeds executed on the same day; and also there is nothing to show that there was no other property of the mother's which remained to the sons. On the other hand, the right of the surviving parent, whether father or mother, to give to the daughters as dowry such portion of the deceased's property as he or she may think fit to the exclusion of the sons, is affirmed in *Nagaretnam v. Alagaretnam*.[2] and also, so far at least as the father's power is concerned, in *Chellappu v. Kanapathy*.[3] I may also refer to the unreported case D. C. Jaffna, 8,529,[4] which was decided on the same footing. Counsel for the appellant also relies on *Vallaiammapillai v. Ponnampalam*.[5] That case was cited in *Nagaretnam v. Alagaretnam*,[2] but was not followed. Moreover, whether it was rightly decided or not, it related to a case where both the parents were dead, and where the "friends" mentioned in clause 12 of the *Tesawalamai* purported to apportion as dowry such share as prejudiced the rights of inheritance of the other minor children of the deceased. For these reasons I think that the judgment of the District Judge is right, and the appeal should be dismissed with costs.

Appeal dismissed.

[1] *2 Bal. 141.*
[2] *(1911) 14 N. L. R. 60.*
[3] *(1914) 17 N. L. R. 294.*
[4] *S. C. Mins., Feb. 9, 1914.*
[5] *(1901) 2 Br. 234.*