

1944

Present: Hearne and Soertsz JJ.

SEENIVASAGAM, Appellant, and VAITHYLINGAM, Respondent.

34—D. C., Point Pedro, 1,653.

Thesawalamai—Donation of Thediathetam property by husband—Conveyance by wife of her share after death of husband—Conflict of title.

Under the *Thesawalamai* the husband is not entitled to donate more than half the *thediathetam* property.

Where the husband donates the entire property and the donee retains the property, and where, after the death of the husband, wife gives a transfer of her share to another the conveyance is good as against the donee from the husband.

A PPEAL from a judgment of the District Judge of Point Pedro. The facts appear from the argument.

N. Nadarajah, K.C. (with him *M. M. K. Subramaniam* and *V. K. Kandaswamy*), for the defendant, appellant.—One S. died in February, 1941, leaving three sons, namely, the plaintiff, the defendant and another, and a daughter who had been given in marriage. By deed D 1 of 1938 he had transferred to the defendant all the properties which had been acquired during the subsistence of his marriage. The trial Judge has found that the transfer was by way of donation. After the death of the husband the wife gave her half share of the same properties to the plaintiff who now claims title to it in this action.

The point at issue is whether a husband governed by the *Thesawalamai* can donate the entirety of the *thediathetam* property without the consent of the wife. It is settled law that he can mortgage or sell the entirety—*Seelachchy v. Visuvanathan Chetty*¹. He can also give it by way of dowry to his daughters. The question, however, whether he can donate more than his half share of the *thediathetam* is left in doubt. It was held in *Parasathy Ammah et al. v. Setupulle*² that he could not do so. But that case was later considered in *Seelachchy v. Visuvanathan Chetty* (*supra*) where Bertram C.J. and de Sampayo J. were inclined to take the view that such a donation is not *ipso facto* void. See also *Tankamuttu v. Kanapathipillai*³. In *Iya Mattayar v. Kanapathipillai et al.*⁴ the dissenting view of Garvin J. in *Seelachchy v. Visuvanathan Chetty* was adopted. Other cases which have a bearing on the point are *Sangarapillai v. Devaraja Mudaliyar et al.*⁵ and *Avichy Chettiar v. Rasamma*⁶. It is submitted that there is no difference in principle between the right to mortgage or sell and the right to donate. The decision of four Judges in *Sangarapillai v. Devaraja Mudaliyar et al.* (*supra*) removes the foundation of the view of Garvin J. in *Seelachchy v. Visuvanathan Chetty* (*supra*).

When the wife's share of *thediathetam* has been transferred by the husband, the wife or any one claiming through her, cannot follow the property against the alienee, and her only remedy, if any, is to claim compensation from the estate of the husband. This view which is

¹ (1922) 23 N. L. R. 97.² (1872) 3 N. L. R. 271.³ (1923) 25 N. L. R. 153.⁴ (1928) 29 N. L. R. 301.⁵ (1936) 38 N. L. R. 1.⁶ (1933) 35 N. L. R. 313.

definitely expressed by de Sampayo J. in *Seelachchy v. Visuvanathan Chetty (supra)* and *Tankamuttu v. Kanapathipillai (supra)* finds support in the provision of the law in the second half of section 5 of Part IV. of the *Thesawalamai* Regulation (Cap. 51).

On a question where the *Thesawalamai* is silent the Roman-Dutch law will apply—*Puthathamby et al. v. Mailvakanam et al.*¹. The *Thesawalamai* is silent as to the right of the husband to donate more than half of the *thediathetam*. Under the Roman-Dutch law donations, though excessive and immoderate, made by the husband to third parties will hold good against the wife unless there has been clear fraud on the part of the husband—Nathan's *The Common Law of S. Africa* (1904 ed.), Vol. I, p. 227; *Weerasooriya et al. v. Weerasooriya et al.*². No fraud has been proved in the present case.

H. W. Thambiah, for the plaintiff, respondent.—The points in question have already been considered in a number of decisions—*Parasathy Ammah et al. v. Setupulle*³; *Sampasivam v. Manikkam et al.*⁴; *Ponnachchy v. Vallipuram*⁵; *Iya Mattayar v. Kanapathipillai et al. (supra)*. Section 20 of Ordinance 1 of 1911 (Cap. 48) only restates the previous law—*Sangarapillai v. Devaraja Mudaliyar et al. (supra)*. It is now well established that one-half of the *thediathetam* vests in the wife, and the husband cannot donate it.

Even where the *Thesawalamai* has no express provision, the Roman-Dutch law is not applicable in a case which can be decided by general principles deduced from the *Thesawalamai*—*Chanmugam et al. v. Kandiah et al.*⁶.

N. Nadarajah, K.C., replied.

Cur. adv. vult.

July 26, 1944. HEARNE J.—

The plaintiff and the defendant are brothers. Their father had transferred during his lifetime to the defendant the properties described in the plaint. These had been acquired during the subsistence of his marriage with Ponnachchy, the mother of the parties.

The trial Judge held that at the time of the transfer the father was not indebted to the defendant, and that the transfer was by way of donation. I accept this finding of fact. Ponnachchy conveyed her half share of the *thediathetam* to her son, the plaintiff, by deed P 5. In these circumstances the rights of the two brothers under the rival deeds depend upon the answers to two questions. (1) Is a husband governed by the law of the *Thesawalamai* entitled to deal with the whole of the *thediathetam* property by way of donation? (2) If he does so, what is his wife's remedy? Is her share irretrievably lost?

The first question was answered in the negative as far back as 1872. In *Parasathy Ammah v. Setupulle (supra)* it was held that, "although the husband had the right . . . to manage and dispose of property

¹ (1897) 3 N. L. R. 42.

² (1910) 13 N. L. R. 376.

³ (1872) 3 N. L. R. 271.

⁴ (1921) 23 N. L. R. 257.

⁵ (1923) 25 N. L. R. 151.

⁶ (1921) 23 N. L. R. 221.

belonging to the community by way of sale, he had no power to donate anything beyond half of the property". The correctness of the law on this point was not questioned in *Sampasivam v. Manikkam*¹.

In *Seelachchy v. Visuvanathan Chetty*², it was decided by the majority of the Judges, on different grounds, that a *bona fide* purchaser acquired good title (in that case the transfer was a gift to a son from whom the defendant had purchased *bona fide*), but both of the Judges, who took this view, approved the decision in *Parasathy Ammah v. Setupulle* (*supra*) in no uncertain terms. Bertram C.J. said that "the decision must be accepted as correctly stating the law" while Garvin A.J. said, "Express authority . . . is to be found in the case of *Parasathy Ammah v. Setupulle*, where it was held in an action by the widow to vindicate her title to property donated by her husband that she was entitled to judgment for half the property, inasmuch as by the Tamil customary law the donor could only dispose of half the property". The binding authority if this case can hardly be questioned now.

In regard to the 2nd question there is authority for the view that a wife's remedy is to claim compensation from her husband's estate and "not to claim against an alienee from her husband a half share in any specific property". *Tankamuttu v. Kanapathipillai*³. It was stated by de Sampayo A.C.J. that this was what the majority of the Judges had decided in *Seelachchy v. Visuvanathan Chetty* (*supra*) but, clearly, this is not the case. Bertram C.J. expressly reserved the point, while Garvin A.J. thought that "if the husband has not the power to dispose of more than one half, the wife is entitled to contend that she has not been divested of her title to a half share of her husband's deed of gift". This view of the matter commended itself to Dalton J. in a judgment with which Lyall Grant J. agreed in *Iya Mattayar v. Kanapathipillai et al.*⁴ and if I may say so with respect, strongly commends itself to me.

The position, as it appears to me is this. If a husband donates the whole of the *thediathetam* property to a son and the donee conveys it to a *bona fide* purchaser, the latter acquires good title and the wife's only remedy is a claim for compensation. If, however, the donee retains property conveyed to him and, as in this case, after the death of the husband, the wife gives a transfer of her share to another son, that conveyance is good against the husband's donee. Her remedy is not *only* by way of a suit for compensation. She can assert her claim to her half share against the husband's donee and the transferee from her can do the same.

The Judge followed *Parasathy Ammah v. Setupulle* and *Iya Mattayar v. Kanapathipillai* and correctly held that the decision in *Seelachchy v. Visuvanathan Chetty* was not applicable to the facts of the case before him. In doing so and in giving judgment in favour of the plaintiff-respondent, he was, in my opinion, right. I would dismiss the appeal with costs.

SOERTSZ J—I agree.

Appeal dismissed.

¹ (1921) 23 N. L. R. 257.

² (1922) 23 N. L. R. 97.

³ (1923) 25 N. L. R. 153.

⁴ (1928) 29 N. L. R. 301.