

1944

Present: Soertsz and Hearne JJ.

THARMALINGAM CHETTY, Appellant, and ARUNASALAM  
CHETTIAR, Respondent.

5—D. C., (Inty.) Jaffna, 562.

*Thesawalamai—Malabar Tamils—Local law—Applicable to Tamils of Northern Province.*

The appellant was born in Jaffna of parents, who were natives of Ramnad, in South India, but who had settled permanently in Jaffna.

*Held*, that the appellant was governed by the *Thesawalamai*.

The *Thesawalamai* is applicable to Tamils of Ceylon, who are inhabitants of the Northern Province.

*Spencer v. Rajaratnam* (16 N. L. R. 321) followed.

**A** PPEAL from a judgment of the District Judge of Jaffna. The facts appear from the argument.

*N. Nadarajah, K.C.* (with him *H. V. Perera K.C.* and *H. W. Thambiah*), for the appellant.—The appellant is the administrator in respect of his deceased wife's estate, and the respondents are the father and mother of the deceased. The question is whether the finding of the trial Judge that the appellant is governed by the *Thesawalamai* is correct. The appellant was born in Jaffna, and is 42 years old. His parents, although they settled in Jaffna, were both born in, and natives of, Ramnad, South India.

The *Thesawalamai* cannot be applicable to the appellant. According to sections 2 and 3 of Ordinance No. 18 of 1806 (Cap. 51) that Code would be applicable only to those who were the Tamil inhabitants of Jaffna in 1806 and their descendants. They form a close group or community like the Kandyan. This could be implied also from sections 17 and 18 of Part I. of Cap. 51. Difficulty of proof is not a material objection because it exists as regards the Kandyan Sinhalese too. It is well settled that no person who is not a Kandyan can ever become a Kandyan—*Williams v. Robertson*<sup>1</sup>; *Wijesinghe v. Wijesinghe*<sup>2</sup>; *Kapurahamy et al. v. Appuhamy et al.*<sup>3</sup>; *Mudiyanse v. Appuhamy et al.*<sup>4</sup>; *Punchihamy et al. v. Punchihamy, et al.*<sup>5</sup>. Similar exclusiveness would attach to those governed by *Thesawalamai*.

Alternatively, *Thesawalamai* applies only to Tamils from Malabar who have come and settled in Jaffna. This question is considered to some extent in *Chetty v. Chetty*<sup>6</sup> and *Savundranayagam, et al. v. Savundranayagam et al.*<sup>7</sup>. Sections 2 and 3 of Cap. 51 expressly refer to Malabar inhabitants. The Dutch meant what they said when they used the word "Malabar", for they were widely travelled and knew the difference between the people of Malabar and the people of the Coromandel Coast. The footnote appearing in *Tillainathan et al. v. Ramasamy Chetty et al.*<sup>8</sup> is incorrect. It is a historical fact that the people of Malabar were and should still be regarded as Tamils and that Malayalam is only a Sanskritised form of the Tamil language. The Tamils contemplated by the *Thesawalamai* are the Malabar Tamils. The *Thesawalamai* is based on the *Marumakkathayam* law of Malabar. Women under the general Hindu law cannot own property—*Mayne on Hindu Law (10th Ed.)*, p. 763. It is not so in Malabar. The *Thesawalamai* laws relating to adoption, pre-emption, *otti* mortgages, the rights of women to own property &c., were all peculiar to the Malabar people and not to all Tamils. The evidence given by the Travancore lawyer in this case is quite clear on these points. See also Lewis Moore's *Malabar Law and Custom (3rd ed.)*, particularly the chapters dealing with Adoption, Quasi-Marriage Customs, and Land Tenures. Some writers refer to *Thesawalamai* as applicable to "Malabar or Tamil inhabitants". See, for example, p. 737 of Lorenz's Translation of Van Leeuwen's commentaries. "Tamil inhabitants" would, in such a context, mean Tamils from Malabar.

S. Nadesan (with him C. Chellappah), for the respondents.—The expression "Malabar inhabitant" is synonymous with the expression "Tamil inhabitant". The question whether a person, provided he is a Tamil is a permanent inhabitant of Jaffna is a question of fact. The Kandyan law, to which reference has been made, is, unlike *Thesawalamai* a personal law. *Spencer v. Rajaratnam et al.*<sup>9</sup> contains a full discussion of the law on all these points.

H. W. Thambiah replied.

*Cur. adv. vult.*

<sup>1</sup> (1886) 8 S. C. C. 36.

<sup>2</sup> (1891) 9 S. C. C. 199.

<sup>3</sup> (1910) 13 N. L. R. 321.

<sup>4</sup> (1913) 16 N. L. R. 117.

<sup>5</sup> (1915) 18 N. L. R. 294.

<sup>6</sup> (1935) 37 N. L. R. 253.

<sup>7</sup> (1917) 20 N. L. R. 274.

<sup>8</sup> (1900) 4 N. L. R. 328 at 333

<sup>9</sup> 16 N. L. R. 321.

July 28, 1944. SOERTSZ J.—

Counsel for the appellant sought to controvert the generally accepted view that the *Thesawalamai* applied to Tamils inhabiting the Northern Province, and to contend that, in reality, it applied not to all Tamil inhabitants of that province, but only to such of them as were descended from the *Malabar* Tamils who were inhabitants of Jaffnapatam at the time the Dissawe Isaakz's collection of customs was given full force by the Regulation of 1806, or if that be regarded as too rigid a restriction, then, alternatively, to those *Malabar* Tamils, and to other *Malabar* Tamils who had since become inhabitants of the peninsula. For these contentions, Counsel relied, almost entirely on the fact that in section 3 of the Regulation, it is stated that:

“ All questions between Malabar inhabitants of the said Province, or wherein a *Malabar* inhabitant is defendant shall be decided according to the said customs.”

He characterised as fanciful and depreciatory of the historical acumen of the Dutch, the view expressed by the trial Judge that the Dutch fell into the error of mistaking all the Tamil inhabitants of Jaffna as Malabars, as they resembled in physiognomy, dress and habits, the people whom they found on the Malabar Coast and that they so came to employ the term Malabar indiscriminately for all Tamils who had come to Jaffna from the territories of the Chola and Pandiya Kingdoms as well. Counsel submitted that the Dutch were well informed in these matters and that they, with a full and correct appreciation of the facts, deliberately, made the *Thesawalamai* applicable only to the Malabar Tamils. If this contention of Counsel is correct, it would mean that the prevailing view is as erroneous as it is inveterate. I do not think the facts compel us to such a conclusion. It would appear that by 1706, the year in which Governor Simons commissioned the Dissawe Isaakz to collect “ The Jaffnapatam ancient customs and rules according to which persons of this province are in the habit of recovering in Civil matters, &c.,” there were residents in the Province of Jaffna—Tamils who had come from the Malabar, Chola and Pandiya Kingdoms—but all of them probably displaying a preponderant Malabar bias in the matter of customs in consequence, perhaps of the majority of them, or the most influential of them, being of Malabar origin. It is difficult to read such well known authorities as Lewis Moore, Mayne and others without being convinced of the Malabar origin of most of the customs collected by Isaakz as radically different from the customs appertaining to the general Hindu Law which obtained in other parts of the Deccan, and that fact leads almost inevitably to the inference that even those Tamils who had come from other parts of India such as the Coromandel Coast adopted the Malabar customs. When the question is considered in that way it is easy to understand why in the Regulation of 1806 which gave full force to the collection made by Isaakz in 1706, it is shortly described as a collection of the customs of the Malabar inhabitants. It is worthy of note that in the reproduction of this collection in the appendix to *Van G. Leeuwen's* commentaries, the translator speaks of it as a collection of “ customs, usages, institutions according to which Civil Cases were decided among

the Malabar or Tamil inhabitants, &c." Likewise Thomson in his *Institutes of the Laws of Ceylon 1866* (calls) the collection "*Thesawalamai or Tamil Country Law*". Again in *Thillainathan v. Ramaswamy Chettiar*<sup>1</sup>, Bonser C.J. refers to it as a collection of "The ancient customs of the Tamil inhabitants of the Province of Jaffna". In *Marshal v. Savari*<sup>2</sup>, Clarence J. with whom was associated Dias J., said, "We are clearly of opinion that the devolution of the land must be decided according to the Thesawalamai . . . . The persons concerned . . . . were all Tamils living in the Mannar District, a portion of the Northern Province". These views have been consistently followed in the later cases. To mention one, there is the well known case of *Spencer v. Rajaratnam*<sup>3</sup>, in which Ennis J. made the observation that "the Thesawalamai are not the customs of a race or a religion common to all persons of that race or religion in the Island; they are the customs of a locality and apply only to *Tamils of Ceylon who are inhabitants of a particular province*".

The words I have underlined appear to me, if I may say so respectfully to state the position concisely and correctly. The *Thesawalamai* applies to Tamils with a Ceylon domicile and a Jaffna inhabitancy. Both questions, that of domicile and inhabitancy depend ultimately on questions of fact, and in this case, the evidence supports strongly the findings of the trial Judge, that the father of the appellants, although he came from India, settled in this Island, *animo manendi et non reverendi*, and that he, his wife and his son, the appellant and the appellant's wife were inhabitants of the Northern Province.

I would dismiss the appeal with costs.

HEARNE J.—I agree.

*Appeal dismissed.*

