1960 *Present :* Sinnetamby, J., and L. B. de Silva, J.

A. SEENIVASAGAM, Appellant, *and* S. SUBRAMANIAM and others, Respondents

S. C. 587/58 (A-B)—D. C. Jaffna, 26/P.

Thesavalamai—Acquired property—Right of surviving spouse to give it to a daughter as dowry—Scope—Cap. 51, Part 1, ss. 5, 9.

Where a man who is subject to the law of Thesavalamai dies leaving acquired property, the surviving spouse is not entitled to donate by way of dowry to a daughter, who had married once before, any share of the acquired property which has devolved on the other children.

APPEAL from a judgment of the District Court, Jaffna.

C. Ranganathan, for Plaintiff-Appellant.

V. Arulambalam, with *C. Chellappah*, for 2nd to 4th Defendants-Respondents.

Cur. adv. vult.

December 7, 1960. SINNETAMBY, J.—

The plaintiff brought this action to partition a land called Sadavakkai-yadi depicted in Plan X, filed of record. He claimed ½ share and allotted to the 1st, 2nd and 4th defendants a ¼ share each. The 3rd defendant is the husband of the 4th defendant. According to the pedigree, one Vairavanathan was the original owner of this land. It was acquired property and on his death, his wife Sinnachchy became entitled to a half share and 4 children Kanapathipillai, Arumugam, Walliammai and Annapillai to the other half share. It as admitted that Annapillai was dowried and had got married during his lifetime so that the title to half the property actually remains in the 3 children. According to the plaintiff, Arumugam died and his share devolved on the plaintiff. In 1906, by Deed P3, Sinnachchy and her son Kanapathipillai transferred to Walliammai by way of dowry the entirety of the land in suit. The deed of transfer described the transferred land as " belonging to the 1st named of us (Wallaimmai) by right of acquisition share and mudusam of the 2nd named of us (Kanapathipillai) and possession ". Plaintiff's case is that the transfer to Walliammai, therefore, having regard to the recital operated only in respect of the wife's ½ share and Kanapathipillai's ¼ share and that Arumugam's ¼ share devolved on the plaintiff. Walliammai died leaving a child by the 1st bed (Saravanamuttu) whose share devolved on the 1st defendant Supramaniam. She had married a 2nd time and the children of the 2nd bed are the 2nd and 4th defendants. The plaintiff gave a ¼ share to each of these children, namely the 1st, 2nd and 4th defendants. The 2nd and 4th defendants contested the action on the footing

that Arumugam had no share left for it to devolve on the plaintiff (Seenivasagam). The contention was that the widow and son were entitled under the law of Thesawalamai to dowry a daughter, even on her second marriage, and that they having done so by executing P3, nothing remained for Arumugam to inherit. One of the points raised by the plaintiff is that Arumugam's share had vested in Seenivasagam before the dowry deed had been executed in favour of Walliammai as Arumugam had died on 2nd January, 1906, before P3 was executed. This as a proposition of law, it seems to me, is not correct. It has been so held in *Thambapillai v. Chinnatamby* [1] where De Sampayo, J. stated as follows :—

> " 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 Thesawalamai in question. That principle appears to me to be similar to the Hindu idea of ' undivided family ' . "

Later, the same Judge goes on to say that the :—

> " provisions of the Thesawalamai 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 by the will of the parent. "

I can see no difference in a case where the person seeking to dispute the parent's right is not a child but a grandchild.

There is, however, another objection taken which it appears to me should be upheld. It was contended by the learned Counsel for the appellant that while a surviving spouse can donate property by way of dowry in favour of unmarried children, he or she cannot do so in respect of a married child. The provision of the Thesawalamai which deals with this right, where the father dies first is to be found in Chapter 51, Part I, Paragraph 9. It is to the following effect :—

> " If the father dies first leaving one or more *infant* children, the whole of the property remains with the mother, provided she takes the child or children she has procreated by the deceased until such child or children (as far as relates to the daughters) marry; when the mother, on giving them in marriage, is obliged to give them a dowry, but the son or sons may not demand anything so long as the mother lives, in like manner as is above stated with respect to parents. "

It is to be observed that the mother's right is restricted to *infant* children, subject to the proviso that she " takes " that child, meaning thereby, looks after it and lives with it. What is the meaning to be attached to the word " Infant " ? One would, I believe, be justified in assuming that according to the customs and habits prevalent at that time,

[1] *(1915) 18 N. L. R. 348 at page 351.*

most girls in Jaffna married before they attaine majority. Hence, the use of the word " infant ". Be that as it may, it seems to me that this provision in regard to dowry of unmarried daughters would not, in any case, be applicable to a married child for, ordinarily, on marriage, that child would leave her parental home and become a member of the household of her husband. This also is a recognised principle of the law relating to an undivided Hindu family from which, according to De Sampayo, J., many of the provisions of the Thesawalamai are taken. In any event, whatever construction is placed on the word " infant ", it seems to me that it would not apply to a daughter who has already been given in marriage.

In the present case, it is admitted that Walliammai had married once before and it is in respect of the 2nd marriage that Deed P3 was executed. It is more than probable that on her 1st marriage, Walliammai received a dowry, and in this connection it is relevant to refer to Section 5 of the Thesawalamai. There it is stated that a parent must make good to a married couple, land gifted to them but which they lose in consequence of a law suit in the following terms :—

> " The parents . . . . are obliged to make good the loss of the land, garden or slaves . . . ., for a well drawn up and executed doty ola must take effect because it is by this means that most of the girls obtain husbands, as it is not for the girls but for the property that most of the men marry. "

In my opinion, Deed P3 did not convey to Walliammai anything more than the rights then possessed by Sinnachchy and Kanapathipillai, namely a $\frac{3}{4}$ share. The provisions of paragraph 9 referred to above do not apply as Walliammai, in my opinion, is not an *infant* child. The first defendant also had filed an appeal in this case, but because of some default in complying with rules of the procedure, his appeal has abated. However, as this is a partition case, this Court is concerned with the rights of the shareholders and it seems to me only right that the 1st defendant too should be allotted his proper share. In the result, plaintiff, 1st, 2nd and 4th defendants would be entitled to the land in equal shares.

There was a question raised in regard to possession and the learned Judge held that the 2nd and 4th defendants had the land to them exclusive of the plaintiff. He appears to have been influenced to some extent by documents 2D2 and 2D3 which were stated to be permits issued by the Village Headman to the 2nd and 4th defendants for the removal of paddy from the land in suit. But 2D2 and 2D3 do not refer to the land in suit. They are permits to remove paddy from a field situated at Maravakurichchy but on that permit the permit holder has endorsed that he has removed paddy from the land in question. This endorsement is self-serving evidence which is of no value whatever : further, it is not known when this endorsement was made.

I would accordingly set aside the judgment of the learned District Judge and direct that a decree for partition be entered in terms of the prayer to the plaint. I would allow the appellant the costs of appeal and of the contest in the Court below.

L. B. DE SILVA, J.—I agree.

Appeal allowed.