

1956 *Present : Palle, J., and Weerasooriya, J.*

V. AIYADURAI *et al.*, Appellants, and KATHIRASIPILLAI,
Respondent

S. C. 123—D. C. Jaffna, 5,475

Thesavalamai—Issue by more than one marriage—Property acquired during first marriage—Succession thereto—Cap. 51, Part I, ss. 10, 11, 14.

Under Thesavalamai, when a man has issue by more than one marriage, the children of the first marriage succeed ultimately to the whole of the property acquired by him during the subsistence of that marriage.

APPEAL from a judgment of the District Court, Jaffna.

C. Thiagalingam, Q.C., with C. Renganathan, V. Arulambalam and V. K. Palasuntheram, for the defendants-appellants.

S. J. V. Chelvanayakam, Q.C., with A. Nagendra, for the plaintiff-respondent.

Cur. adv. vult.

¹ (1948) 39 C. L. W. 32.

² (1948) 50 N. L. R. 181.

³ (1950) 51 N. L. R. 213.

April 24, 1956. PULLE, J.—

By our judgment dated the 13th March, 1955, the case was remitted to the District Court to enable the parties represented at the hearing of this appeal to adduce evidence as to whether the land which is the subject matter of the action was mudusom property in the hands of Vaithinather. The record has been returned with the fresh evidence. The finding of the learned Judge on that evidence is that the land was not mudusom property in the hands of Vaithinather but acquired by him during the subsistence of his marriage with his first wife Akilandam.

It is not necessary to discuss the reasons for the finding beyond stating that the evidence supported it and learned counsel for the plaintiff was not in a position seriously to challenge it.

In the course of the argument which preceded the earlier judgment it was submitted on behalf of the appellants that if the property in suit had been acquired by Vaithinather during the subsistence of his first marriage then only the children of that marriage would have been entitled to inherit it and not the plaintiff who was a child of the fourth marriage. It appeared to us that this submission was accepted by learned counsel for the plaintiff as a correct statement of the law, but after the record was received back he intimated to us that if the finding on the fresh evidence that the property had been acquired by Vaithinather were affirmed he would contend that, on the death of Vaithinather's first wife, one half of the property devolved on the children of the first marriage and that upon the death of Vaithinather the remaining half devolved equally on all his children.

Learned counsel on both sides relied on the provisions of the Thesavalamai (Cap. 51) in support of their respective contentions. It may perhaps be convenient at this stage to mention that it was frankly conceded by counsel on behalf of the plaintiff that he could cite no authority for the proposition which he put forward and that, on the contrary, two cases appearing in *Mutukisna*, namely, *Walliamme v. Maylwagenam* of 1823, p. 16, and *Sangerepulle Sanmogam v. Sinnecooty* of 1834, p. 33, rather supported the appellants' contention that where there are issue by more than one marriage the children of the first marriage succeed ultimately to the whole of the property acquired during that marriage.

Several sections of the Thesavalamai (Cap. 51) were minutely analysed and discussed at the second argument before us. Section 10 in Part I referred to by the counsel for the plaintiff deals with the division of property acquired during the first marriage of a woman who marries a second time after the death of her husband. There is nothing in this section which lends support to the contention of plaintiff's counsel or is inconsistent with the position taken up by the appellants.

We are in entire agreement with the counsel for the appellants that the provisions laid down in section 11 turn essentially on the principle that half the acquired property belonging to a wife devolves on her children

immediately on her death ; but if the surviving spouse dies after contracting a second marriage, the devolution of the remaining half of that acquired property of the husband is restricted to the children of the first marriage. It is also our opinion that the first paragraph of section 14, which was strongly relied on by counsel for the plaintiff as supporting his contention, refers only to the father's *mudusom* property, and not to his half share of any property acquired during the first or a subsequent marriage the devolution of which is fully dealt with in section 11.

We hold with the appellants that on the death of Vaithinather no share whatever devolved on the plaintiff in her capacity of daughter of Vaithinather by his fourth marriage. It is not disputed that Pethachipillai, the daughter of Saravanamuttu—who was the eldest child of Vaithinather by his first marriage—succeeded to a share of the property as the sole heir of her father. On Pethachipillai's death the plaintiff became entitled to a share of the property inherited by Pethachipillai. The appellants' answer to this part of the claim is that since about 1890 the entire land had been possessed in two distinct blocks, one of 54 lachams on the north and other of 50 lachams to the south (which includes a portion in extent 10 lachams given to a temple) and that Pethachipillai's interests were confined exclusively to the southern block and that the plaintiff was likewise, as heir of Pethachipillai, confined to the southern block.

The learned trial Judge has in his judgment dealt with the claim of the appellants that the northern block was exclusively possessed by them and that they had acquired a title thereto by prescriptive possession. He rejected this claim. The reasons given by him are, in the light of our decision that no share in the property passed by intestate succession from Vaithinather to the plaintiff, not tenable.

The learned Judge says in one place,

“ She (the plaintiff) was a co-owner of the property along with the other children of Vaithinather ”, and in another, .

“ The plaintiff having been co-owner with the predecessors in title of the defendants, they must prove an ouster by themselves more than 10 years before the date of this action or one by their ancestors.”

The plaintiff's case has been viewed from the angle that as far back as, at least, 1885 she, then being a child of tender years, succeeded to a share of the property in suit on the basis that it was *mudusom* property of her father Vaithinather whereas in fact she acquired for the first time an interest in the land about sixty years afterwards on the death of Pethachipillai. The appellants' claim is that at the time of Pethachipillai's death the division into two portions had been complete and was amply recognized in documents.

As far back as 1885 one sees from the dowry deed D4 in favour of Sinnathangam, a daughter of Vaithinather by his first marriage, an attempt to localise the undivided one fifth share of the whole land granted

by the deed. In deed D1 of 12th December, 1890, a similar attempt was made to localise an extent of 40 lachams to the south, of which a $\frac{1}{2}$ share was the subject of a dowry deed in favour of another daughter of Vaithinather by his first marriage named Nagupillai. D6, dated 13th December, 1890, is a sale to Sanmugam, the husband of Nagupillai, of an extent of 30 lachams described as bounded on the east by the land of Sinnathangam (i.e. the land acquired by her on D4) and on the south by the land of Wagupillai and Saravanamuttu. It is not without significance that on the same day as D6 a mortgage was granted by D22 of the northern block the southern boundary of which was described as the "common land belonging to Nagupillai wife of Kathirigamar Sanmugam and Vythinather Saravanamuttu". The extent of 30 lachams acquired by Sanmugam on D6 was subsequently sold by D10 of 3rd October, 1899, to Kanapathipillai, who transferred the same by D11 of 24th December, 1906, to his wife Sinnathangam. According to the appellants, their predecessor in title Sinnathangam thus became the sole owner of the entire defined northern block of 54 lachams. By deed D14 of 1924 Nagupillai dedicated a $\frac{1}{2}$ share of these 40 lachams to a temple. The description in the deed of the area of 40 lachams is consistent with the contention of the appellants of a permanent division of the land into one northern and a southern block. The appellants find further support from the inventory D2 dated 1st May, 1919, filed in the testamentary case of Saravanamuttu (the father of Pethachipillai under whom alone the plaintiff can claim a share) in which the intestate is said to have died possessed of an undivided $\frac{3}{5}$ share of the land in extent 50 lachams. The northern boundary of this extent is given as the property of Sinnathangam. The inventory P2 made by the plaintiff herself in Pethachipillai's testamentary case describes her interests as—

"an undivided 40 lms. v.c. out of all that piece of land called Muthesanthirayanvalavu in extent 50 lms. v. c."

The trial Judge's finding on the issue whether the land was possessed dividedly giving rise to title by prescription has been largely influenced by the alleged admission that the property being mudusom in the hands of Vaithinather the plaintiff succeeded on Vaithinather's death equally with the other children. The position at present is fundamentally different and the evidence adduced by the appellants to prove a division has greater force than on the basis on which the Judge viewed that evidence.

In our opinion the appeal succeeds with costs both here and below. The plaintiff's action will be dismissed but the right is reserved to her in any future proceeding to vindicate her interests in the southern block.

WEERASOORIYA, J.—I agree.

Appeal allowed.