

1948

*Present : Canekeratne and Dias JJ.*VELLAIYAN, Appellant, and VALLIYAM *et al.*, Respondents*S. C. 390—D. C. Point Pedro, 2,286*

*Thesavalamai—Mortgage bond in favour of deceased—Action by one of the children—Is action maintainable during the lifetime of widow?—Chapter 51, Part I., Section 9.*

K, who was subject to the *Thesavalamai*, died leaving his widow and a number of children. The second plaintiff, one of the children, brought this action against the first, second and third defendants for a share of a mortgage debt due to K from these defendants.

*Held*, that the plaintiff could not maintain the action during the lifetime of the widow in view of the provisions of section 9 of Chapter 51.

**A** PPEAL from a judgment of the District Judge, Point Pedro.

*C. Thiagalingam*, with *V. Arulambalam*, for plaintiff appellant.

*H. W. Tambiah*, for 1st to 3rd defendants respondents.

*Cur. adv. vult.*

September 9, 1948. DIAS J.—

Sabapathy Kathiran is a person who was governed by the *Thesavalamai*. He married the 4th defendant prior to the enactment of the *Jaffna Matrimonial Rights and Inheritance Ordinance, 1911 (Chapter 48)*.

Therefore his property would devolve on his death intestate according to the provisions of the Thesavalamai (Chapter 51)—see *Chellappa v. Kanapathy*<sup>1</sup>, *Sinnathangachy v. Poopathy*<sup>2</sup>, *Swamipillai v. Soosaipillai*<sup>3</sup>.

The 1st, 2nd and 3rd defendants had borrowed a sum of Rs. 720 with interest at 12 per cent. per annum from Sabapathy Kathiran on the mortgage bond P2. On the death intestate in May, 1944, of Sabapathy Kathiran leaving surviving him his widow the 4th defendant, his daughter the 2nd plaintiff (wife of the 1st plaintiff), his married daughter the 5th defendant, and the widow and children of a deceased son (the 6th-9th defendants), has the 2nd plaintiff as an heir of the deceased the right to sue for a share of the mortgage debt from the mortgagors ?

The answer to this question depends on the construction of section 9 in Part I of the Thesavalamai (Chapter 51) which deals with the case where the father predeceases the mother. The converse case is dealt with in section 11.

In *Chellappa v. Kanapathy (supra)* Pereira J. said : “ It would be a hopeless task to attempt to answer this question by means of the collection of the laws and customs of the Tamils of Jaffna known as the Thesavalamai. It is a crude and primitive compilation which may fittingly be described in the words of Tennyson, used with reference to another collection of laws, as no other than a ‘wilderness of single instances’ .”—see also the observations of Hutchinson C.J. in *Nagaretnam v. Alagaretnam*<sup>4</sup>.

Section 9 reads as follows :—

“ 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. ”

In the case of *Sinnatangachy v Poopathy (supra)* Garvin and Akbar JJ. said : “ It is to be gathered from Rule 9, Section 1, of the Thesavalamai . . . that upon the death of a man leaving children and a widow, their mother, his property remains with the mother in whom is vested the right to apply that property or any part thereof in giving a dowry or dowries to their daughters on marriage. The son or sons take nothing so long as the mother remains alive. It is impossible to say, therefore, that in this case at the death of the deceased . . . his property devolved upon his son and daughter, or that it devolved in any particular portion. All that is clear is that the property remained with the widow, and that she had the right to apply the property, or so much of it as she thought necessary, in giving her daughter a dowry. The son, no doubt, had the right to take what was left, but even that right was suspended until the death of the widow ”.—See also *Swamipillai v. Soosaipillai (supra)* and *Thambapillai v. Chinnnetamby*<sup>5</sup>.

<sup>1</sup> (1914) 17 N. L. R. at p. 295.

<sup>2</sup> (1934) 36 N. L. R. at p. 104.

<sup>3</sup> (1947) 49 N. L. R. 83.

<sup>4</sup> (1911) 14 N. L. R. at p. 62.

<sup>5</sup> (1915) 18 N. L. R. at pp. 351-352.

If the mother, the 4th defendant, is entitled to retain possession of her deceased husband's property so long as she lives, the plaintiffs can have no present cause of action to sue for the money as their rights thereto have not accrued. I am, therefore, of opinion that the learned District Judge reached a correct conclusion on the law.

It is, therefore, unnecessary to consider the other questions raised by the appellants.

The appeal is dismissed with costs.

CANEKERATNE J.—I agree.

*Appeal dismissed.*

