Present : **Moseley J. and Keuneman A.J.**

CHELLIAH *et al. v.* SINNATAMBY *et al.*

114—D. C. Jaffna, 10,226

Thesawalamai—Thediatetam property—Death of one spouse—Right of administrator to sue for the property—Assignment by surviving spouse of chose-in-action after death of other spouse.

Where one of two spouses subject to the *Thesawalamai* dies, the whole of the *thediatetam* property vests in the administrator for purposes of administration.

Where a person obtains from a surviving spouse an assignment of his share of a chose-in-action, the assignment is subject to the right of the administrator to claim the whole of the chose-in-action for purposes of administration.

Velupillai v. Arumugam (*3 Times of Ceylon L. R. 18*) followed.

APPEAL from a judgment of the District Judge of Jaffna.

N. Nadarajah (with him *S. Soorasangaran*), for third defendant and added-defendants, appellants.

P. Navaratnarajah, for plaintiffs, respondents.

December 21, 1937. KEUNEMAN A.J.—

The plaintiffs in this case were the administrators of the estate of Thangamuttu, who had been married to the third defendant. By bond 13,294 of January 13, 1931, the first and second defendants bound themselves to pay to Thangamuttu and her husband the third defendant the sum of Rs. 500 and hypothecated certain properties for securing that sum. Incidentally, the translation of this document is not accurate in so far as it suggests that the first and second defendants undertook to pay "to him". The deed has been read by the Supreme Court Interpreter Mudaliyar, and it seems clear, and is admitted that the undertaking was to pay "to them". Nothing however turns upon this error, as all parties appear to have accepted the position that the bond was in favour of Thangamuttu and the third defendant her husband. It was held in the case and it is not disputed in appeal that Thangamuttu and the third defendant were subject to the *Thesawalamai* and that this bond was *thediatetam* or acquired property of the spouses.

The plaintiffs sued the first and second defendants on this bond in this action. They also joined the third defendant, averring that the amount advanced on the said bond was money belonging to Thangamuttu, which had been raised on the said date by mortgaging her dowry property. They stated that the debts still remained unpaid and the amount due on the bond was required for discharging this debt. The first and second defendants did not deny their liability on the bond and did not file answer. The third defendant alone filed answer, averring that he was entitled to one-half of the amount due on the bond and that he had assigned his interest to the added defendants on a bond 664 of July 13, 1935. It is admitted that this bond was executed after the death of Thangamuttu.

On the trial date, only the plaintiffs and the third defendant and added defendants appeared. It was agreed that added defendants be added as parties because they had obtained an assignment of whatever interest the third defendant had in the bond before action was filed and the learned District Judge allowed this and the case went to trial on the following issues:—

(1) Was the entire sum lent on the bond the property of the deceased?
(2) Even if not, and the property, is property earned during the marriage as the defendants say, did the assignees derive any right by obtaining an assignment after the death of deceased?
(3) In any event, are the plaintiffs in their representative character entitled to recover the entirety for distribution in the administration case?
(4) Was the money received as a loan on bond 13,292 of January 13, 1931, obtained by the deceased for payment to the third defendant for money which the third defendant had spent on her father's account at her request?

Apart from the third issue, it is difficult to understand how the matters raised in these issues came to be tried in this action and at this stage. Neither Counsel for appellant nor Counsel for respondent could support the relevancy of these issues. But a great deal of time has been spent on the examination and determination of these issues. The position finally arrived at was that the bond sued upon was *thediatetam*. I

consider the first, second and fourth issues irrelevant at this stage of the case and hold accordingly. The questions decided under those issues may be raised on any subsequent proceedings. The only real question which could be determined was whether the plaintiffs were entitled to bring this action. The learned District Judge in the result gave judgment for plaintiffs with costs, subject to the rider that the amount of the decree be primarily appropriated for the payment of the joint bond given by Thangamuttu and her husband, third defendant.

From this finding the third defendant and the added defendants appeal. A preliminary objection has been taken to the appeal on the ground that although the petition of appeal was stamped on the footing that there were two distinct appeals, stamps were supplied for the certificate of appeal and the Supreme Court decree on the footing of only one appeal. It was argued that in reality there should have been two distinct appeals.

I cannot agree with this contention. The third defendant and the added defendants had the same Proctor appearing for them in the District Court. The grounds on which they base their appeal, and the relief they ask for is the same. I think that they are entitled to join in the one appeal.

The substantial point taken in the appeal was that as the bond sued upon was in the names of both Thangamuttu and the third defendant, the plaintiffs as administrators, were only entitled to sue for the recovery of half the amount or alternatively, that the decree for the whole amount should be not in favour of the plaintiffs only but in favour of the plaintiffs and the added-defendants.

The learned District Judge in giving judgment for the plaintiffs depended on the case of *Velupillai v. Arumugam*[1]. In this case Bertram C.J. considered the effect of section 22 of Ordinance No. 1 of 1911 which applies to the present case also and stated:—

> "Under the *Thesawalamai* there arises between the husband and wife in all property acquired during the marriage of partnership by operation of law. All such property from the moment of its acquisition is the common property of the two spouses. On the death of either of the spouses one half remains the property of the survivor and the other half vests in the heirs of the deceased, subject to its liability to be applied for payment of debts contracted by the spouses or either of them".

The learned C.J. went on to consider the English law of partnership and doubted whether there is any material difference between a surviving partner under the English law and a surviving spouse under the *Thesawalamai* and thought that *prima facie* under the *Thesawalamai* a surviving spouse might be considered competent to sue or give a discharge for the joint debt. He was of opinion, however, that section 38 of Ordinance No. 1 of 1911, had affected the situation and that in consequence the law applicable to this point was the Roman-Dutch law. He added:—

> "I take it under the pure Roman-Dutch law half of the chose-in-action would vest immediately in the wife. She could sue for and give a discharge in respect of her half share of the debt, though she would no doubt be accountable to any creditor of the estate.

[1] *3 T. L. R. 18.*

"But this position is modified in two ways: firstly, by a series of cases culminating in the decision of the Full Court in *Cantlay v. Elkington*[1]. It was there held that when one of two spouses died, *married in community*, the entirety of the common estate vests in the administrator of such deceased spouse for purposes of administration . . . . When the estate exceeds Rs. 1,000 in value . . . . the situation is further modified by the operation of section 547 of the Civil Procedure Code, which bars an action for the recovery of any debt due to an estate which exceeds in value the sum of Rs. 1,000 unless grant of probate or letters of administration shall have been issued.

"If the law thus developed be applied to the present case it becomes clear that for the purposes of administration the whole of the *thediatetam* would vest in any administrator ultimately appointed and that the wife as a person on whom a share of the *thediatetam* devolves at her husband's death could not, at any rate in a case where the entire estate exceeds Rs. 1,000 sue for the recovery of her interest from the debtor unless probate or letters of administration had been issued".

It should be noticed in the present case that the subject of the suit is also a chose-in-action. It is clear that the estate was of such value that letters of administration should have been obtained. In the case reported in *Velupillai v. Arumugam* (*supra*) a debtor who claimed that he had paid a half share to a surviving spouse was held not to have been discharged, but was compelled to pay the whole amount of the bond to the administrator of the deceased spouse. I am of opinion that any person who obtains an assignment from a surviving spouse, after the death of the deceased spouse, as in the present case, is also subject to the right of the administrator to claim the whole of the chose-in-action for the purposes of administration.

The decision in the case of *Velupillai v. Arumugam* would accordingly apply to the present case. Counsel for appellants seeks to differentiate that case and the earlier cases on which it depends. In the first place it is argued that this rule is applicable where the chose-in-action was originally only in the name of the deceased spouse, and that it has no application where the chose-in-action was in the name of the surviving spouse, or in the names of both the deceased and the surviving spouse. We are not immediately concerned with the case where the chose-in-action stood in the name of the surviving spouse alone at the termination of the community or partnership and that case may well be left for determination when it arises. In the present case, the mortgage bond was in the name of both spouses. If we compare the case of *Velupillai v. Arumugam* we find that the facts are stated thus by Bertram C.J.: "In this case a husband and wife in the Jaffna Peninsula acquired as part of their *thediatetam* a mortgage bond for Rs. 500". This is compatible with the spouses having either obtained a mortgage bond in their names or with their having obtained an assignment of a bond in their names.

Again in none of the cases cited is any point made of the fact that the property was actually in the name of one spouse or the other; or in the names of both. Bertram C.J. rested his decision on the broad proposition that when one of two spouses dies married in community, the entirety of

[1] *9 N. L. R. 168.*

the common estate vests in the administrator of such deceased spouse for purposes of administration. This proposition he took over from the language of the Judges in *Cantlay v. Elkington* (*supra*). In this case the proposition in similar language appears to have been adopted by Lascelles C.J., Middleton and Wood Renton JJ. In fact these Judges themselves take this proposition over from two earlier cases, *Perera v. Silva*[1] and *Nonohamy v. Perera*[2]. As regards *Perera v. Silva* the broad proposition was accepted by Burnside C.J., but Lawrie J. may be regarded as not having given his assent to the proposition. In *Nonohamy v. Perera*, however, both Judges, Burnside C.J. and Withers J., accepted this, and it was subsequently endorsed in the case of *Cantlay v. Elkington*. I think it is too late now for us, even if we had the power to do so, to base our decision on a narrower ground.

Emphasis was also laid on the language of Burnside C.J. in *Nonohamy v. Perera* : "I am of opinion that administration is necessary on the whole estate of *which an intestate may die possessed* and not simply on the value of the deceased's share of the community". At any rate, in a case like the present where the bond stood in the names of both spouses, I think it is not possible to argue that the deceased spouse was not possessed of the assets at the time of her death.

It was also argued that under the Roman-Dutch law the position of a husband was very different from that of the wife, and that the rule propounded only applied to the case of the devolution of the Common estate on the death of the husband. On this point, again, the language of the decisions does not support the proposition. The only Judge in this series of cases who comments on this difference is Wood Renton J. in *Cantlay v. Elkington* (*supra*). The language of the other Judges covers the case of any spouse dying possessed of a common estate. I do not myself think that the point argued has force.

In substance then, the judgment of the learned District Judge is right and I affirm it and dismiss the appeal. I have already held that the findings on issues 1, 2 and 4 are irrelevant at this stage of the proceedings, and have reserved to the parties, the right to make any claims they may have in a proper proceeding. It follows that the rider is also necessary. Undoubtedly, however, the administrator will have in a proper proceeding to account for all moneys recovered by him.

As regards costs, the respondents are entitled to the costs of this appeal. The order for costs in the Court below as against the first and second defendants is not involved in this appeal and will stand. The learned District Judge has awarded to plaintiffs the costs of the contest against the third defendant. I thing a good deal of time has been unnecessarily spent in the case on issues 1, 2 and 4 and that the plaintiffs and the third defendant were equally to blame for this. In the circumstances I order that the plaintiffs should be entitled only to half the costs of the contest in the Court below against the third defendant.

MOSELEY J.—I agree.

Appeal dismissed.

[1] 2 *C. L. R. 150.*

[2] 2 *C. L. R. 153.*

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