Privy Council Appeal No. 5 of 1961

Ponnupillai, widow of Velauther Kathirgamar – – – *Appellant*

v.

Chellappah Kumaravetpillai – – – – – – *Respondent*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JULY 1963

Present at the Hearing:
VISCOUNT RADCLIFFE.
LORD MORRIS OF BORTH-Y-GEST.
LORD GUEST.
LORD PEARCE.
SIR KENNETH GRESSON.
[*Delivered by* VISCOUNT RADCLIFFE]

This is an appeal from a judgment of the Supreme Court of Ceylon dated 23rd November 1959, which reversed a judgment of the District Court of Jaffna dated 18th October 1955. The suit in which these judgments were given was one instituted by the appellant for the recovery of certain land and premises in the Jaffna District which had been transferred to the respondent by a deed, purporting to be a deed of transfer and sale, executed on the 2nd June 1954 by the appellant's daughter Sivapakkiam. Sivapakkiam died without issue on the 6th May 1955, and the appellant, as her mother, was entitled under the Law of Tesawalamai, which regulated the property rights of her family, to the succession to any land belonging to her daughter at her death. It was the purpose of the appellant's suit to establish that the purported transfer to the respondent was invalid. The trial judge upheld this claim and made an order declaring that the deed should be set aside and the appellant restored to the possession of and title to the land, subject to payment of a sum of Rs.13,500 to the respondent as compensation for moneys expended on its improvement. The Supreme Court reversed this order and directed that the appellant's suit should be dismissed.

The trial judge decided against the respondent on three separate and independent grounds. In order to appreciate their significance it is necessary to state briefly what were the facts of the case.

Sivapakkiam was married to the respondent's brother in October 1928. The parties were Tamils of Jaffna and, as such, governed by the rules of the Tesawalamai. On her marriage her mother gave her certain pieces of land as her dowry, and the land which was in dispute in the action (hereinafter called " the disputed property ") was the first item of those pieces. Sometime in 1940 or 1941 Sivapakkiam's husband became a lunatic, and in March 1949 she applied to the District Court of Jaffna for its permission to raise money on her dowry lands by way of mortgage, lease or sale. The Court's jurisdiction to give leave to a wife under the Thesawalamai regime to deal with her immovable property is conferred by a special statute, the Jaffna Matrimonial Rights & Inheritance Ordinance (C.58 of 1956), which will be referred to hereinafter as " the Ordinance ". Its provisions, the effect of which forms one of the major issues of this case, will be set out later in this Opinion: for the moment it is sufficient to say that on the 8th September 1949

the District Court made an order in general terms granting her leave to " mortgage or sell her properties without the concurrence of her husband, whichever is more profitable ".

Having obtained permission in this form Sivapakkiam entered into a series of transactions with regard to her dowry lands, the first of which was in December 1951 and the last (the disputed transfer) in June 1954. First, on 3rd December 1951, she mortgaged one of her properties for Rs.2,000; next, on 10th October 1953, she mortgaged this and others for Rs.7,000, paying off the earlier mortgage out of the proceeds and using the balance towards building shops on the disputed property. On 21st November 1953 she raised a further sum of Rs.1,500 on the same security as that of the mortgage of 10th October 1953. This money too went into the shop building. On 17th December 1953 she mortgaged the disputed property for Rs.15,000, of which some part at any rate was used towards completion of the buildings.

By these transactions Sivapakkiam had encumbered her dowry properties in order to raise money for the improvement of the disputed property by the erection on it of shops or godowns. Then, on 2nd June 1954, came the transfer by her to the respondent, under which, after reciting the mortgage of 17th December 1953 for Rs.15,000 and stating that she had agreed with him for the absolute sale and assignment to him of the disputed property " subject to mortgage " for the price of Rs.20,000, " which includes the amount due on the mortgage ", she conveyed and transferred the disputed property to the respondent " in consideration of the sum of Rupees Twenty Thousand (Rs.20,000/-) of lawful money aforesaid well and truly paid to the Vendor by the Purchaser (the receipt whereof the Vendor do hereby expressly admit and acknowledge)".

It will shortly be seen what the District Judge found to be the real nature of this purported transfer. The respondent's story, which was not believed, was that he paid Sivapakkiam Rs.4,500 on the occasion of the transfer and himself paid off the mortgage of Rs.15,000 out of a subsequent mortgage which he raised on the disputed property. No one, at any rate, suggested that she got more out of the transaction than these Rs.4,500, though the deed of transfer is so ambiguously worded that it might well be supposed that she was selling her equity of redemption for Rs.20,000.

However that may be, Sivapakkiam died on 6th May 1955 without leaving any property of any value whatsoever.

Shortly after her death the appellant instituted the present suit for the recovery of the disputed property. It was tried by the District Judge at Jaffna (P.Sri Skanda Rajah, J.) and after hearing a considerable volume of evidence, including that of the respondent, he found in favour of the appellant's claim. He regarded her as entitled to avoid the transfer to the respondent on three separate grounds.

First, he did not think that the Ordinance, properly construed, conferred on the Court jurisdiction to grant a married women the kind of general liberty to deal with her immovable property as she might think best which the order of September 1949 had purported to confer in this case. What was required by the Ordinance, he thought, was an order giving consent to a particular transaction actually proposed at the time of the order, with information before the Court as to the value of the land and the terms of the desired transaction. Consistently with this reading of the scope of the Ordinance he held that Sivapakkiam had never obtained any valid authority to transfer her land without her husband's consent and, on this ground alone, the transfer of it in June 1954 was a nullity.

Secondly, even if she had had a valid authority to part with her land by way of sale, the learned Judge held that she had not in fact made any transfer or sale in this case. Despite the respondent's evidence, he regarded the purported transfer as a sham and a nullity. He did not believe that any money at all had been paid to Sivapakkiam on the occasion of the transfer, and he returned answers to two issues framed at the hearing (issues 10(*a*) and (*b*)) to the effect that no consideration was paid by the respondent in

respect of the deed of transfer and that the transaction was not in reality a sale. It would follow, of course, that if her only authority under the Court's order was to mortgage or sell, she could not validly divest herself of her land by a voluntary deed of transfer without consideration.

Thirdly, the learned Judge decided that, even if there had been a sale, the principle of *laesio enormis* applied to the case. Sivapakkiam had parted with her land at what in English law would be called a gross undervalue and the divesting was therefore voidable as between the appellant, claiming through her, and the respondent who retained the land. The answer that he returned to issue 12 was to the effect that at the time of the purported transfer the disputed land and its appurtenances were worth more than Rs.40,000 and that the deed was liable to be set aside on the ground of *laesio enormis*. Since on any view not more than Rs.20,000 had been paid or made available for the land and the principle of *laesio enormis* is applied where the consideration is less than 50 per cent of the true value, the learned Judge's finding necessarily followed his assessment of the figures of valuation, unless some special consideration was present in the case which would bar the application of the *laesio enormis* principle.

When the matter reached the Supreme Court on appeal the two Judges who heard it (Basnayake C. J. and Pulle J.) differed from the District Judge on the question whether the Court order of September 1949 was within its powers under the Ordinance. The latter had based his opinion on this point on two separate grounds: one, which is not now material and was not advanced by the appellant before the Board, that Sivapakkiam's application had been confined to obtaining authority to lease or mortgage only, not to sell, and that the Court had therefore exceeded its jurisdiction in granting liberty to sell, and the other, as already mentioned, that a general liberty to sell or mortgage was not within the range of order that the Ordinance provided for. Their Lordships do not need to say anything as to the first ground relied on by the District Judge: but the second is plainly one of some considerable importance to those administering the Ordinance and the parallel statutory provisions of the Matrimonial Rights & Inheritance Ordinance (C.57 of 1936). As to this the Supreme Court was of the opinion that the District Judge was wrong in holding that the Court had no jurisdiction to make the order of September 1949. Their view seems to have been expressed in the following passage from the judgment delivered by Basnayake C. J. " It is the Court that is empowered to decide the extent and nature of the authority it will grant having regard to the circumstances of each case. It may be limited or unlimited as to time. It may give absolute authority for disposal or fetter the authority by restrictions and conditions. . . It may authorise a particular method of dealing with or disposing of the property, such as lease for a period, mortgage or sale or any combination of those methods ".

It admits of some doubt whether these observations are really directed to the general considerations of principle that had weighed with the District Judge in coming to his conclusion as to the true nature of the Court's jurisdiction under the Ordinance. Their Lordships must address themselves later to this point. At present what has to be noted is that, having expressed its opinion on the issue of jurisdiction, the Supreme Court treated that as disposing of the whole case in favour of the respondent and involving the dismissal of the appellant's suit. The closing paragraphs of the judgment of Basnayake C. J., with which Pulle J. agreed, run as follows:—

> " For the above reasons the judgment of the learned District Judge declaring that Deed P13A is null and void on the ground that the Order of the Court authorising Sivapakkiam to sell the land in dispute is one made without jurisdiction is reversed, and the Plaintiff's action is dismissed with costs. The Appellant is declared entitled to the costs of the appeal.
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> The opinion I have formed on the validity and scope of the order of the District Court authorising Sivapakkiam to mortgage or sell her lands makes it unnecessary for me to refer to the other questions discussed by the learned Judge."

It appears to their Lordships to be indisputable that the learned members of the Supreme Court were under a misapprehension in supposing that the appeal before them must succeed once they had arrived at the decision that Sivapakkiam enjoyed legal authority to dispose of the disputed property by way of sale. The judgment of the District Court did not stand or fall by this decision. The District Judge had found against the respondent on two separate issues which were independent of the issue as to Sivapakkiam's authority and, in truth, were only relevant on the assumption that she had the necessary general authority to sell. He had held, after hearing the evidence, that the transfer relied upon was not a sale at all, and that, even regarded as a sale, the consideration afforded was so much an undervalue as to amount to *laesio enormis* and so to render the transaction voidable. Neither of these issues was observed upon at all in the judgment of the Supreme Court; yet, if the District Judge's findings upon them are not reversed, there cannot be any case for dismissing the appellant's suit and allowing the respondent to retain the disputed property.

The appeal to the Board therefore stands in this peculiar situation. The Judge who tried the suit in the District Court made an award in favour of the appellant on three separate grounds, of which one only has been disapproved of by the Supreme Court. The appellant asks that the original judgment in her favour should be restored, since she is entitled to stand at least on the two other independent grounds, and the respondent is bound to concede that this must be so unless he can satisfy their Lordships that it would be wrong to uphold the trial Judge's decision on either of these two other grounds.

Their Lordships see no warrant for reversing his findings on either of them. On the question whether there ever was a sale at all, the evidence provided by the record is certainly thin; but it must be remembered that the Judge, after hearing the respondent's evidence, refused to believe that he had any money available for the ostensible purchase in June 1954. If he did not accept the respondent's story that he had paid Sivapakkiam money on the occasion of the transfer, it followed as a matter of course that the deed of transfer, with its purported payment and receipt of Rs.20,000, was a mere sham. And the Judge had before him certain supporting material which appeared in the course of the trial. The circumstance to which he drew attention in his judgment and which evidently weighed with him was that on 21st June 1954, after the date of the transfer and at a time when Sivapakkiam had ostensibly lost all interest in the disputed land, she signed a receipt document jointly with the respondent, acknowledging an advance payment from a lessee of one of the godowns on the land, in a form which patently recognised her as having for the future a continuing interest in the property.

Apart from that, it emerged in the evidence of Mr. Kanagasabapathy, a notary who had acted for Sivapakkiam's family, that at some date earlier in the year of transfer the respondent had come to him and asked him to attest a deed of donation of the disputed property and that he had refused to do so, because, knowing that the appellant was alive and contingently interested in her daughter's dowry lands he did not want to offend her. The deed was in fact attested by another notary, who had never before acted for Sivapakkiam or for the respondent. The deed itself, as the Judge observed, does not state in the attestation that the consideration mentioned in it had passed in the presence of the notary.

In the face of the District Judge's finding on these facts their Lordships, acting as an appellate Court, would see great difficulty in reversing it. Nor do they think that the Judges of the Supreme Court would be in any different situation, if the course were to be adopted of further prolonging these proceedings by remitting the appeal to them for their consideration of the issues hitherto not passed upon. It is however unnecessary to express a final conclusion on this point since, even if the Judge's view as to the true nature of the transfer deed could be treated as reversible, his finding upon the issue of *laesio enormis*, which is an entirely independent ground of claim, appears to them invulnerable.

This issue, to which the Judge gave careful attention, is a simple one of fact, dependent upon the evidence of land values called before and accepted

by him. There was ample evidence to support his finding that the value of the land at the date of transfer exceeded Rs.40,000: evidence from the village headman, from a retired surveyor, who was also chairman of the village committee, from a purchaser of neighbouring land. He accepted their evidence and came to the conclusion that it was " clear that the consideration of Rs.20,000 mentioned . . . is much less than half the value of the land at the time of the alleged sale . . .".

It was suggested on behalf of the respondent that further scrutiny of the evidence might show some special relationship between Sivapakkiam and the respondent in connection with the transfer that would make it inequitable to apply the principle of *laesio enormis* to the case.

She had continued to live with her husband's family after his mental breakdown and the respondent, according to him, had often helped her in her affairs: it is not at all impossible that she was ready to make a present of the land to him out of a sense of gratitude. Indeed the respondent said in one passage of his evidence " Certainly she would have preferred to give her property to me than giving it to anyone else, because I have rendered her considerable assistance during her lifetime ". These reflections however are of no assistance to a party who has to rely on a transfer or sale to support his title and who has in fact put forward a sale deed as the record of his transaction. Similarly, it was urged that a remedy based on *laesio enormis* should not be afforded if the transferor has sold deliberately at an undervalue with a clear understanding of the true values involved. But, whatever other difficulties that argument might meet with in the circumstances of this case, it depends on the assumption of a state of fact which is actually negatived by the Trial Judge's own finding. Sivapakkiam, he said, " must have been looking up to the defendant for help. It is not likely that she would have been aware of the actual value of the land at the time of [the transfer deed] even if she intended to sell the land ".

For these reasons their Lordships are of opinion that the appeal must succeed in any event, with the consequence that the District Judge's order must be restored. Since, however, both he and the Supreme Court have dealt with the question of the scope of the Court's jurisdiction under the Ordinance and have expressed conflicting opinions with regard to it, their Lordships think that it is desirable that they should themselves record their view on this matter.

The Ordinance is styled the " Jaffna Matrimonial Rights & Inheritance Ordinance " and is declared by section 2 to apply only to those Tamils to whom the Tesawalamai applies and " in respect of their movable and immovable property wherever situate ". It was first enacted on the 17th July 1911 and is now C.58 of 1956. The material sections of it which it is desirable to set out *verbatim* are sections 5, 6 and 8 and they run as follows:—

> " 5. The respective matrimonial rights of every husband and wife married after the commencement of this Ordinance in, to or in respect of movable or immovable property shall, during the subsistence of such marriage, be governed by the provisions of this Ordinance.
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> 6. All movable or immovable property to which any woman married after the commencement of this Ordinance may be entitled at the time of her marriage or which she may during the subsistence of the marriage acquire or become entitled to by way of gift or inheritance or by conversion of any property to which she may have been so entitled or which she may so acquire or become entitled to shall, subject and without prejudice to the trusts of any will or settlement affecting the same, belong to the woman for her separate estate. . . Such woman shall, subject and without prejudice to any such trusts as aforesaid, have as full power of disposing of and dealing with such property by any lawful act *inter vivos* without the consent of the husband in case of movables, or with his written consent in the case of immovables, but not otherwise, or by last will without consent, as if she were unmarried.
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> 8. If in any case in which the consent of a husband is required by this Ordinance for the valid disposition of or dealing with any property by

the wife, the wife shall be deserted by her husband or separated from him by mutual consent, or he shall have lain in prison under a sentence or order of any competent Court for a period exceeding two years, or if he shall be a lunatic or idiot, or his place of abode shall be unknown, or if his consent is unreasonably withheld, or the interest of the wife or children of the marriage require that such consent should be dispensed with, it shall be lawful for the wife to apply by petition to the District Court of the district in which she resides or in which the property is situated for an order authorising her to dispose of or deal with such property without her husband's consent; and such Court may, after summary inquiry into the truth of the petition, make such order, and that subject to such conditions and restrictions as the justice of the case may require, whereupon such consent shall, if so ordered and subject to the terms and condition of such order, become no longer necessary for the valid disposition of or dealing with such property by such woman. . . Such order shall be subject to appeal to the Supreme Court."

In considering the role of the District Court in making an order under section 8 it is necessary to remember that the Ordinance was introduced as an enabling measure with regard to a married woman's power of disposal over her property. Though section 6 gives her unrestricted power of disposition over movables, her husband's written consent is required to make valid any *inter vivos* disposition of any of her immovables.

Similar provisions in identical terms are found in the General Matrimonial Rights & Inheritance Ordinance of Ceylon, an enactment which dates back to 1876 and is now C.57 of 1956. In dealing with the purpose and significance of the husband's consent under these provisions the Courts in Ceylon appear to have laid down and accepted two propositions. First, the husband is the wife's protector with regard to proposed dealings with her property. Thus in the case of *S. A. Publina Silva Hamine v. J. A. Don Egonis Appuhamy* 2 Browne's Cases 362 it was said by Bonser C. J. at 363. " The object of requiring her husband's consent is to protect the married woman, and prevent her being inveigled into some foolish disposition of the property, and perhaps cheated out of it. It is supposed that the husband would protect the interests of his wife and see that she does not do anything foolish." It is not his interest therefore that he is to protect, it is hers. Secondly, and consistently with that conception, the husband cannot validly give a general consent to future dispositions of immovables by his wife, something that would amount to a release from his protectorship: he must consider any proposed disposition as it arises, according to its terms, and either give or withhold his consent. See *Wickramaratne v. Dingiri Baba* 2 Court of Appeal Cases 132. *Fradd v. Fernando* 36 N.L.R. 124. In the former case it was evidently the view of both members of the Court, (Wood Renton and Perera JJ.) that, to be a valid consent, the consent of the husband must be directed " with special reference to the particular disposition " of the particular property in question; while in the latter Dalton J. expressed himself as satisfied on the authorities that a husband's general consent was insufficient to constitute a consent for the purposes of the General Ordinance.

Now the liberty given by the Court's order of September 1949 was to mortgage or sell any of the dowry properties, " whichever is more profitable ", without restriction of time, price or terms. A consent as general as this would not, their Lordships think, have been valid as a husband's consent under section 6 of the Ordinance. The question is whether it is valid under section 8 when the Court acts in place of the husband.

There are two possible ways of approaching the construction of this section. One is to read it in close relation to section 6 and to regard the jurisdiction of the Court as strictly an alternative to the husband's jurisdiction for which it is substituted. This is the view already expressed by Bonser C. J. in *Hamine v. Appuhamy* supra, when he said " The Court is therefore substituted as the protector of the wife ". So regarded, section 8 would not be likely to authorise the Court to grant a dispensation of quite a different character from that required of the husband. The other approach is to read section 8 as

operating without any special reference to the nature of a husband's consent under section 6 and to treat it as authorising the Court, at its discretion, to make any order, general or special, limited or unlimited, as it may think appropriate in the circumstances to enable a wife to have free disposition of her immovable property.

There are no doubt persuasive arguments to support either construction. Certainly, the wording of section 8 is wide enough to admit of the latter approach. Nevertheless their Lordships are of opinion that the preponderating arguments tell against it. They can be marshalled as follows. First, the purpose of section 8 cannot but be in some form to give the wife the protection of the Court when she cannot have that of her husband. But, if the Court is empowered to make an order as comprehensive as one giving her liberty to dispose of her property generally, it is in truth affording her no protection at all against the occasions that come later when actual transactions take place. The Court is empowered to hold a summary enquiry into the truth of the petition and that inquiry should indeed show whether at the time of holding it the circumstances of the husband's disability do in fact exist. But, as to the wife herself, all that the Court, if minded to give her general authority, could ascertain at the time would be that she appeared to be a reasonably competent and businesslike person, and an impression so formed would be singularly ineffective as a guarantee that on some unascertainable future occasion her competence might not be defective or abused. In effect, as the trial Judge observed in this case, a general liberty such as was conferred by the order of September 1949 would have changed her status, *qua* immovables, from married woman to *femme sole*, and a change of that quality does not appear to their Lordships to be the kind of thing that section 8, as expressed, has in contemplation.

Secondly, neither the wording nor the content of section 8 seems to favour the wide reading adopted in the Supreme Court's judgment. What the section envisages in its opening is a case in which a contemplated disposition of a particular piece of property is held up through the absence of a husband's consent, and what is to follow is an application for leave to deal with that property without having to obtain the consent. The Court's order, if made, " dispenses with " his consent: and, if it is made, his consent is no longer necessary for " the valid disposition of or dealing with such property ". All this seems to tie the Court's order very closely to the husband's consent. If then the consent in his case would have to be *ad hoc* and related to a specific and particular transaction, it looks very much as if the Court's consent, given in his place, would have to be of the same order.

Thirdly, section 8 contains a list of the different circumstances in which the Court may act when the husband's consent is lacking. Almost none of the various categories could be said to describe a fixed or permanent state of affairs: most of them are plainly transitory or capable of being so. Thus a husband may be in prison under a sentence of more than two years' duration, or his place of abode may be unknown, or his consent may be unreasonably withheld from the transaction proposed. It would seem a curious jurisdiction to confer on the Court as arising out of those circumstances that it should be able, on proof of them, to emancipate the wife permanently from her husband's right or duty of protection with regard to her immovables generally. Suppose, it may well be asked, that a husband comes out of prison or recovers from lunacy, or turns up from his unknown whereabouts, or the marriage difference is reconciled, has the Court's previous order power to override the necessity of his consent with regard to some future property transaction, even though it is unwise or undesirable in itself and his objection is well-founded ? No doubt, no Court is compelled to make general orders in all circumstances. It may always limit or condition them even though the wider jurisdiction is there. That is true enough—but it does not explain how a Court, unable to foresee the future, is to distinguish the cases that call for limited orders from those that justify general orders, nor is the fact that some Judges may act prudently an argument for supposing that the Ordinance has contemplated giving authority to any Judge to act unwisely.

For these reasons their Lordships think that the view of the District Judge on this question of the Court's jurisdiction under section 8 of the Ordinance is to be preferred to that adopted by the Supreme Court. In their view an order that does not at least specify the nature of the transaction consented to, sale, lease or mortgage etc., and control in some degree the price or other financial consideration involved and the limit of time within which the transaction consented to must be effected if the consent is still to be in force, is not within the jurisdiction conferred upon the Court.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the judgment and decree of the Supreme Court dated 23rd November 1959 reversed with costs to the appellant of the appeal in that Court, and the Judgment and decree of the District Court at Jaffna dated 18th October 1955 restored. The respondent must pay the appellant's costs of this appeal.

(88115) Wt. 8052/97 90 8/63 Hw.

In the Privy Council

PONNUPILLAI, WIDOW OF VALAUTHER KATHIRGAMAR

v.

CHELLAPPAH KUMARAVETPILLAI

DELIVERED BY

VISCOUNT RADCLIFFE

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