23, 1969

IN THE PRIVY COUNCIL No. 8 of 1968

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

B E T W E E N:

VISWANATHAR KANAGARATNAM SUBRAMANIAN (Executor of the lat Will of VISWANNATHAR KANAGARATNAM, since deceased) (Substituted Defendant) Appellant

10 - and -

KANAGARATNAM KADIRGAMAN (Administrator of the Estate of RASAMMAH in Case No. 400/T,D.C. Point Pedro) (Plaintiff) Respondent

C A S E FOR THE RESPONDENT

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1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon, dated the 5th February, 1966, dismissing (with a variation of the decree of the Court below) an appeal from the 20 Judgment and Decree of the District Court of Point Pedro, dated the 3rd June, 1963, whereby, in an action instituted by the Respondent (as Administrator of the estate of one Rasammah, his mother, against his father, since deceased (in whose place the present Appellant, as executor of the deceased's Will has been substituted) praying, inter alia, for a declaration that, as Administrator, he was entitled to a half-share of certain lands 30 described in the Schedule to the Plaint, that he should be placed in possession of the said half-share, and for damages until possession, it was held that he was entitled to the relief claimed.

pp.109-111

pp. 82 - 92
pp. 93 -100

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While holding that the Respondent was entitled to the said declaration of title and to damages, the Supreme Court was of the view that as the Defendant and his children were the heirs of the said Rasammah (the said Defendant's second wife who had predeceased him) and were, therefore, co-sharers, an order of ejectment could not be granted against them, the appropriate remedy being partition. It, therefore, varied the Decree of the District Court by deleting that portion thereof which ordered that the present Respondent should be placed in peaceful possession of the said lands.

pp.110-112

2. All the parties to these proceedings are Jaffna Tamils to whom the Tésawalamai (Tamil Customary Law) and the Jaffna Matrimonial Rights and Inheritance Ordinance (C.48) (which was enacted in 1911 and is hereinafter also referred to as "the principal Ordinance") apply.

Sections 2, 5 and 14 of the principal Ordinance are as follows:-

"2. This Ordinance shall apply only to those Tamils to whom the Tésawalamai applies."

"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".

Inheritance

"14. The following Sections of this Ordinance shall apply to the estate of such persons only as shall die after the commencement of this Ordinance, and shall be then unmarried, or if married, shall have been married after the commencement of this Ordinance."

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3. Sections 19, 20 and 21 of the principal Ordinance, as originally enacted in 1911, were as follows:-

"19. The following property shall be known as the tediatêtam of any husband or wife -

(a) property acquired for valuable consideration by either husband or wife during the subsistence of marriage;

(b) profits arising during the subsistence of marriage from the property of any husband or wife."

"20. (1) The tediatêtam of each spouse shall be property common to the two spouses, that is to say, although it is acquired by either spouse and retained in his or her name, both shall be equally entitled thereto.

(2) Subject to the provisions of the Tesawalamai relating to liability to be applied for payment or liquidation of debts contracted by the spouses or either of them on the death intestate of either spouse, one-half of this joint property shall remain the property of the survivor and the other half shall vest in the heirs of the deceased; and on the dissolution of a marriage or a separation a mensâ et thoro, each spouse shall take for his or her own separate use one-half of the joint property aforesaid.

"21. Subject to the right of the surviving spouse in the preceding section mentioned, the right of inheritance is divided in the following order as respects (a) descendants, (b) ascendants, (c) collaterals."

4. In 1947, by the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance (No.58 of 1947),

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for the said Sections 19 and 20, as originally enacted, the following new Sections 19 and 20 were substituted:-

"19. No property other than the following shall be deemed to be thediatheddam of a spouse:

"(a) property acquired by that spouse during the subsistence of the marriage for valuable consideration, such consideration not forming or representing any part of the separate estate of that spouse;

"(b) profits arising during the subsistence of the marriage of that spouse.

"20. On the death of either spouse one-half of the thediatheddam which belonged to the deceased spouse shall devolve on the surviving spouse and the other half shall devolve on the heirs of the deceased spouse."

5. The repeal of the old Sections 19 and 20 as originally enacted (see paragraph 3 hereof) and the substitution therefor in 1947 of the new sections 19 and 20 (see paragraph 4 hereof) was, in previous partition proceedings between the parties to the present suit relating to different property (Case No.4329/P), held by the Supreme Court, in its Judgment in that case, dated the 16th July, 1954, to have the following effect:-

p. 287 pp.22-39

"(a) if either spouse acquires thediatheddam property on or after the 4th July, 1947, no share in it vests by operation of law in the non-acquiring spouse during the subsistence of the marriage;

"(b) if the acquiring spouse predeceases the non-acquiring spouse without having previously disposed of such property, the new Section 20 applies accordingly, half the property devolves on the survivor and the other half on the deceased's heirs;

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"(c) if the non-acquiring spouse predeceases the acquiring spouse, the thediatheddam property of the acquiring spouse continues to vest exclusively in the acquiring spouse; the new Section 20 has no application because the thediatheddam of the acquiring spouse never 'belonged' to the non-acquiring spouse.

"These three propositions presuppose that the thediatheddam property had been acquired after the amending Ordinance passed into law [1947].

"It thus becomes clear that the new Sections 19 and 20 have no bearing on the present problem" (which in that case, as in this, was concerned with the devolution of thediatheddam property acquired prior to the enactment of the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No.58 of 1947).

6. The main question for determination on this appeal appears to be identical with, or similar to, that which was decided by the Supreme Court in the said Case No.4329/P viz. as to whether or not the said amendments of the law introduced in 1947 operate retrospectively so as to affect the devolution of thediatheddam property acquired prior to 1947.

The question has been answered in the negative by the Supreme Court in the said Case No.4329/P and in the present suit. In the Respondent's respectful submission the question is deserving of a similar answer by the Board. pp. 285-288

7. The facts, briefly stated, are as follows:-

The Respondent (hereinafter referred to as "the Plaintiff"), as Administrator of the estate of his mother, Rasammah, wife of Visuvanathar

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Kanagaratnam (the original Defendant, in whose place, subsequent to his death, the present Appellant has been substituted) instituted these proceedings in 1959 in the District Court of Point Pedro against the said original Defendant.

In this Plaint, dated the 14th September, 1959, the Plaintiff said inter alia:

p.18, l.28 to p.19, l.18

"3. The Defendant above named married the said Rasammah in or about 1916 and is governed by the law of Thesavalamai as amended by Chapter 48 of the Legislative Enactments of Ceylon" [i.e. the principal Ordinance].

"4. During the subsistence of the said marriage the Defendant purchased for valuable consideration the lands described in the Schedule hereto and the said lands constitute the thediatheddam property of the Defendant and the said Rasammah.

"5. The said Rasammah was by operation of law vested with a title to a half-share of the said lands and died in or about 1948 entitled to the said half-share.

"6. A half-share of the said lands is vested in the Plaintiff as Administrator of the estate of the said Rasammah.

. . . . . .

"8. The Defendant is since the death of the said Rasammah in possession of the said lands and is denying the right of the Plaintiff as Administrator to possess a half-share on behalf of the said estate causing thereby damages of Rs.3,000/- per annum from date hereof till the Plaintiff, as such Administrator, is placed in possession of the said half-share.

. . . . . .

"10. The Plaintiff further pleads that the Proceedings, Judgment, Decree and Order in Case No.4329 of the District Court of Point Pedro operates as res judicata.

8. The Plaintiff's prayer was as follows:- Record

"(i) That he, as such Administrator, be declared entitled to a half-share of the said lands. p.19, ll.20-30

"(ii) That the Plaintiff, as such Administrator, be placed in peaceful possession thereof.

"(iii) That the Defendant be ordered to pay the Plaintiff, as such Administrator, Rs. 3,000/- per annum as damages from date hereof till the Plaintiff is placed in peaceful possession of the said lands.

"(iv) For costs . . . . . ."

9. By his Answer, dated the 10th February, 1960, the original Defendant denied averments made in the Plaint and, on matters relevant to this appeal, said: pp. 56-57

"2. ..... this Defendant while admitting that he married Rasammah in or about 1916 states that the estate of Rasammah is governed by Chapter 48 as amended by Ordinance 58 of 1947". p.56, ll.18-20

Subsequent to the filing of his Answer the original Defendant died, and his death having been reported to the District Court on the 22nd September, 1960, an Order was made by that Court on the 9th December, 1960, for the substitution of the present Appellant in place of the deceased. p.4, l.13 p.4, l.20

In a further Answer, dated the 21st June, 1961, the substituted Defendant (present Appellant) repeated the original Defendant's said statement that Rasammah's estate was "governed by Chapter 48 as amended by Ordinance No.58 of 1947." pp. 59-60 p.60, ll.8-11

10. Of the several Issues framed in the suit those which now appear to be relevant were answered thus by the learned District Judge:- pp. 88-92

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p.88, ll. 13-16 "1. Did the deceased Rasammah become vested with the title to a half-share of the lands described in the Schedule to the Plaint by operation of law."

Answer: "Yes".

p.88, ll. 17-19 "2. Is the Defendant in wrongful possession of the half-share of the said lands?"

Answer: "Yes".

p. 88, ll. 20-22 "3. What damages is the Plaintiff, as the Administrator of the estate of Rasammah, entitled to recover from the Defendant?" 10

Answer: "Rs. 2,500 per annum from date of Plaint as agreed".

p. 88, ll. 23-25 4. Do the Proceedings, Decree and Order in Case No. 4329 of this Court operate as res judicata?"

Answer: "Legally No. But the principles decided apply".

p. 88, ll. 26-28 "5. Were the rights of Rasammah referred to in the Plaint governed by Chapter 48 as amended by Ordinance 58 of 1947." 20

Answer: "No."

p.88, ll.29-32 "6. Were the lands referred to in the Plaint purchased by the Defendant during the subsistence of his marriage with the said Rasammah?"

Answer: "Yes - as admitted."

pp.82-92 11. By his Judgment, dated the 3rd June, 1963, incorporating the said Answers to Issues, the learned District Judge found in favour of the Plaintiff as is stated in paragraph 1 hereof. 30

The learned Judge said that it was common ground that -

p.83, l.35 to p.84, l.2 "(a) Rasammah married Kanagaratnam the original Defendant in 1916 and that she died on 20.8.48;

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"(b) all the lands described in the Schedule to the Plaint were purchased during the subsistence of the said marriage between the years 1916 and 1946;

"(c) the Plaintiff in this case" [present Respondent] "is the Administrator of the estate of the said Rasammah;

"(d) the Defendnat and Rasammah were governed by the law of Thesavalamai; and

"(e) the income from the one half-share of the lands described in the Schedule to the Plaint is Rs. 2,500 per annum."

In the view of the learned District Judge the main issue in the case was -

"whether deceased Rasammah became vested with the title to a half-share of the lands described in the Schedule to the Plaint, by operation of law. It is admitted that they were governed by the laws of Thesavalamai." p.84, ll.3-6

12. The learned District Judge then referred to, but did not accept, the argument advanced on behalf of the Defendant that the provisions of the said new Sections 19 and 20 which, in 1947, had been substituted for the original Sections 19 and 20 in the principal Ordinance (see paragraph 4 hereof) were applicable to the devolution of the property which had been acquired by the acquiring spouse (i.e. the original Defendant) prior to 1947 - and Rasammah, therefore, was not vested with any rights in respect of the said property. p.84, ll.7-31

Giving his reasons for rejecting the said argument, the learned judge said:-

"One has to take into consideration the fact that Ordinance 1 of 1911" [the principal Ordinance, as originally enacted] "was in operation till July, 1947. Rasammah was already vested with a half-share of her husband Kanagaratnam's acquired property. p.84, ll.32-40

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"The Supreme Court has definitely held that Ordinance No.58 of 1947 has no retrospective effect. In 55 N.L.R. 260 it was held that half the thediatheddam property acquired by a husband vested in the wife immediately under Section 20 of Ordinance 1 of 1911.

It was also held that the amending Ordinance No.58 of 1947 does not operate so as to affect title to property which had already vested in a spouse prior to the date of amendment.

p.84, l.41 to p.85, l.6 "Case No.4329/P of this Court went up in appeal and is reported in 56 N.L.R. 44. The Plaintiff and the substituted Defendant in this case were also the Plaintiff and Defendant in Case No.4329. It was in respect of a land bought by Kanagaratnam" /the original Defendant in the present suit/ "during the subsistence of marriage with Rasammah. In this case his Lordship Justice Fernando (sic Gratiaen J.) observed - 'in my opinion the problem under consideration admits of no doubt Rasammah's rights in respect of thediatheddam property acquired by her husband before 4th July, 1947, were governed by Section 20 of the principal Ordinance, and the provisions of Sections 5 and 6 of the amending Ordinance did not operate to divest Rasammah of rights already vested in her under the earlier law."

13. Continuing, the learned District Judge said:-

p.85, ll.7-15 "It thus becomes clear that the new Sections 19 and 20 have no bearing on the present problem. A half-share of the thediatheddam property acquired by Kanagaratnam in 1933 and 1943 had automatically vested in Rasammah (as the non-acquiring spouse) under the old Section 20 and the subsequent repeal of the old Section 20 did not operate to divest her of that share. The devolution of Rasammah's share upon her death in 1948 was regulated solely by Section 21 of the principal Ordinance because the new Section 20 has no application in this case. Accordingly the entirety of Rasammah's vested interests passed to her heirs.

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"Though the Supreme Court had already made a finding on this point, and what is more between the same parties in this case, yet learned Counsel for Defendant, perhaps not satisfied with the decision, re-agitated the same issue over again and at length. Perhaps he strongly feels that there is another view to take in this question and another way of looking at the problem as enunciated by him, but this Court is bound by the decisions of the Supreme Court. p.85, ll.16-22

"Thus I hold that Rasammah became vested with title to a half-share of the lands described in the Schedule to the Plaint by operation of law. Hence the Defendant has been in wrongful possession of the said half-share, except the few lands possessed by the Plaintiff." p.85, ll.22-25

14. On the point as to whether or not, the decree of the Supreme Court in the said earlier case No.4329/P operated as res judicata in the present proceedings, the learned District Judge said:-

"On the question of estoppel, as stated by me earlier, as the lands bear different names and the capacity of the substituted Defendant is that of Executor of the Last Will of the deceased Defendant, the Decree in Case No. 4329 for land called Nitchinganollai does not operate as res judicata in this case. But nevertheless the principle decided applies in toto." p.88, ll.1-5

15. A Decree in accordance with the Judgment of the learned District Judge was drawn up on the 3rd June, 1963, and against the said Judgment and Decree the substituted Defendant appealed to the Supreme Court on the several grounds stated in his Petition of Appeal, dated the 10th June, 1963. pp. 93-100 pp.101-109

Among such grounds was the following:-

"(c) The Appellant humbly submits that the learned Additional District Judge could not have held that a half-share of the said lands vested in Rasammah inasmuch as the estate of Rasammah was governed p. 105, ll. 10-14

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by Ordinance No.58 of 1947" /the amending Ordinance/ "as Rasammah died on 20th August, 1947".

pp.109-110 16. By their Judgment, dated the 5th February, 1966, the learned Judges of the Supreme Court (Tambiah and Sri Skanda Rajah JJ.) dismissed the appeal, with costs; and a variation of the Decree of the District Court, as stated in paragraph 1 hereof.

17. Delivering the main Judgment of the Supreme Court, Tambiah J. (with whom Sri Skanda Rajah J. agreed), on grounds substantially similar to those which had influenced the learned District Judge, found in favour of the Plaintiff. He said, inter alia:-

p.110, ll.1-3 "It is in the case of the Plaintiff, who is the Administrator of the estate of Rasammah, that a half-share of these properties has been vested in the heirs of Rasammah.....

p.110, ll. 7-9 "The Defendant took up the position that although the parties were governed by the law of Thesavalami, as amended by Ordinance No. 58 of 1947 it had a retrospective effect.

p.110, ll. 10-13 "The learned District Judge has held against the Defendant on this point since this matter is covered by the decision of a Court of five Judges. As the same point was decided between the same parties in an earlier case, it was not possible for Mr. Jayawardene" /Senior Counsel for the Defendant-Appellant/ "to press this point in appeal.....

p.110, ll. 20-32 "The uncontradicted evidence in the case is that the Defendant is in possession of all these lands and has denied the title of the Plaintiff. Therefore the Plaintiff is entitled to bring this action for further declaration of title and damages. Mr. Jayawardene also contended that as the Defendant and the children are the heirs of Rasammah they are co-owners and therefore an order of ejectment cannot be granted in this case. The proper action should be a partition action. This contention is sound. We delete that part of the decree in paragraph 3 which is as follows:-

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'It is further ordered and decreed that the Plaintiff as such Administrator be placed in peaceful possession thereof.'

"Subject to this alteration, the decree will stand. The appeal is dismissed with costs."

18. A Decree in accordance with the Judgment of the learned Judges of the Supreme Court was drawn up on the 5th February, 1966, and against the said Judgment and Decree this appeal is now preferred to Her Majesty in Council, the Appellant having obtained leave to appeal by Orders of the Supreme Court, dated the 8th May, 1966, and the 20th July, 1966. pp.111-112 pp.114-116

In the Respondent's respectful submission, the appeal should be dismissed, with costs throughout, for the following, among other,

R E A S O N S

(1) BECAUSE the amendments of the principal Ordinance enacted in 1947 do not, and were never intended to, operate retrospectively so as to affect the devolution of thediatheddam property acquired prior to 1947 or to interfere with rights that had become vested by operation of law.

(2) BECAUSE the main question that arises for determination on this appeal has, in accordance with the law of Ceylon, been correctly decided by the Supreme Court in prior proceedings between the parties from which decision there was no appeal.

(3) BECAUSE the Law of Ceylon, as interpreted and applied by the Supreme Court in this case, has been accepted in Ceylon as correct for several years and, in accordance with the doctrine of stare decisis, it would be contrary to practice to disturb titles to land which, for many years, have been based on the said interpretation.

(4) BECAUSE Rasammah's rights to a half-share of the thediatheddam property acquired by her husband during the subsistence of their marriage

vested in her immediately upon the acquisition by him of the said property, were unaffected by the subsequent amending legislation of 1947, and the devolution of her share was regulated solely by Section 21 of the principal Ordinance notwithstanding that at the date of her death in 1948 the 1947 amendments had become effective.

(5) BECAUSE it would be contrary to the law of Ceylon to deny to the Plaintiff the relief which the Courts below, for good and sufficient reasons, have awarded him. 10

E. F. N. GRATIAEN

R. K. HANDOO

No. 8 of 1968

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF CEYLON

B E T W E E N:

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(Substituted Defendant) Appellant

- and -

KANAGARATNAM KADIRGAMAN
(Administrator of the Estate of Rasammah in Case No.400/T,D.C. Point Pedro)
(Plaintiff) Respondent

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