1917.

Present: Wood Renton C.J. and De Sampayo J.

SAVUNDRANAYAGAM *et al. v.* SAVUNDRANAYAGAM *et al.*

375—D. C. Jaffna, 9,706.

Tesawalamai—*Colombo Chetty residing in Jaffna—Son born in Jaffna and married to Jaffna Tamil lady—Roman-Dutch law applicable.*

S, who was born in Jaffna, and whose father was a Colombo Chetty, who had become a permanent resident of Jaffna, was held (in the circumstances of this case) to be governed by the Roman-Dutch law, and not by the *Tesawalamai*.

THIS was an action for declaration of title to a half share of a piece of land situated in Jaffna. The plaintiffs-appellants claimed one-half by right of inheritance from their mother, who was the first wife of G. P. Savundranayagam, who, the plaintiffs averred, was governed by the Roman-Dutch law, and who married plaintiffs' mother in community of property. Savundranayagam's

father was Tissera, who was a Tamil born in Colombo—a member of the Chetty class. Tissera married Wilhelmina Jurgan Ondatjee, who was a Tamil. The plaintiffs stated that she was also a Colombo Chetty; the defendants asserted that she was "a Malabar inhabitant of Jaffna" within the meaning of that term in the Regulation of 1806. Tissera and his wife lived at Jaffna. The husband predeceased, leaving behind G. P. Savundranayagam and another, Ariyanayagam. The land in dispute belonged to Wilhelmina. Savundranayagam became a lawyer and practised at Trichinopoly, where he died in 1882. He married twice, Jaffna Tamil ladies; both marriages were prior to 1876. Plaintiffs are the children of the first bed, the defendants children of the second bed.

The following issues were framed:—

(1) Was Wilhelmina Ondatjee a Malabar inhabitant of Jaffna as contemplated in the Regulation of 1806?

(2) Was Gabriel Tissera at the time of his marriage subject to the *Tesawalamai*?

(3) What would be the effect if only one of the two spouses was subject to the *Tesawalamai*?

The learned District Judge, Dr. P. E. Pieris; after stating the facts, continued as follows:—

Plaintiffs say that Gabriel Tissera having been a Colombo Chetty was governed by the Roman-Dutch law, and therefore his son was governed by the same. The defence say that Tissera by settling in Jaffna became subject to the *Tesawalamai*, and that Savundranayagam was a Malabar, to whom the Tesawalamai applied. It further relies as an illustraiton, on the fact, which is well known, that Tamils from India settle in Jaffna, and their descendants are absorbed among the Jaffna Tamils, and are admittedly governed by the *Tesawalamai*.

By D 3 of 1824 the land to the west of land in dispute was purchased by Wijeratne Mudaliyar Bastiampulle, Madapally of Pandateripu. This fixes the fact that the purchaser was a Jaffna Tamil. The purchaser having died, his son, Wijeratne Mudaliyar, the husband of Lavinda Ondatjee (who was sister of Wilhelmina), became the owner. Wijeratne died next, and his widow, Lavinda, was appointed his administratrix. As such she, in 1845, gave a power of attorney, D 4, to her son Anthony, then living in Jaffnapatam, describing herself as of Colombo. By this she, as administratrix, authorized the attorney to sell the entirety of the land which belonged to her husband, specifically indicating that what was sold belonged to the deceased husband. It is thus clear that she was acting under the *Tesawalamai*, for otherwise, on the death of her husband, half the land vested in herself, and only a moiety belonged to the estate. In D 4 the land in dispute is described as "the property of Wilhelmina Tissera." The attorney, by D 2, sold the entirety to Wilhelmina, then the widow of Gabriel, and living in Jaffna, and described the disputed land as "the house of Tissera." Wilhelmina herself died shortly after, and her estate was administered by the Secretary of this Court, who, by D 1 of 1850, sold what Wilhelmina had bought from Wijeratne's estate to Puwarayasinghe Mudaliyar, by

1917.

Savundra-nayagam v. Savundra-nayagam

D 1. In this transfer the land in dispute is called "the land of the estate," *i.e.*, of Wilhelmina's estate. This makes it clear that the house in which Tissera had lived in his lifetime was recognized at his death as the exclusive property of his widow, the recognization being made by the official administrator of the Court, and also by the relatives of the deceased. In other words, during the lifetime of Wilhelmina, and after her death, it was recognized that her rights were governed by the *Tesawalamai*.

D 5 is the baptismal register of Savundranayagam. It shows Tissera and his wife were recognized as inhabitants of a Jaffna parish, that Savundranayagam was born in Jaffna, and was solemnly baptized. . . . . as Joshua. It is admitted that all this did not prevent a Roman Catholic priest from interfering at a later date and re-baptizing Savundranayagam as Gabriel Peter. . . . . .

Savundranayagam was a lawyer, and married before 1876. He very well knew the meaning of the Roman-Dutch law community. By his will (D 5) he disposed of all his property, including the jewels he had given to his wife in his lifetime. He certainly considered that his interests were in Jaffna, for he directed that on certain contingencies certain moneys were to be deposited with the Procurator of the Jaffna Roman Catholic Mission, with the cognizance of the Vicar Apostolic of North Ceylon, and that the Procurator or Bishop, should deal with the moneys in certain fashion. He left the entirety of the land in dispute to his second wife, and specifically declared that the second plaintiff is not entitled to any share of the property he died possessed of. Savundranayagam clearly considered himself a Jaffna Tamil, and governed by the *Tesawalamai*. It is abundantly clear that for the last seventy-five years Tissera, his wife, her sister, and the latter's husband, with their descendants, have been recognized as governed by the *Tesawalamai*. No court of law would be entitled at this time of the day to open up the question of whether such recognization was correct, and whether the action of parties for three-quarters of a century was not based on an error. I must hold that Savundranayagam was governed by the *Tesawalamai*. It is a satisfaction to know that when Simon Jurgan Ondatjee, admittedly a Chetty of Colombo, sued his father-in-law, Don John Mark Pulle Mudaliyar, at Jaffna in 1803, the heads of the caste, Thamoderam Pulle Coomarakulasooriya Mudaliyar and Virasinghe Mudaliyar, took part in the trial, which was dealt with under the *Tesawalamai*. (See *Mutukishna 225*.)

In my view the plaintiffs' action fails. In case my view is wrong, and the Roman-Dutch law should govern, then arises the question of prescription. Since 1883 the second wife and those claiming under her have possessed the entirety of the land. The first plaintiff lived with his stepmother for a considerable time, but married in 1895. From the time of his marriage he was pressing his stepmother to make some provision for him. It is quite clear that since 1895 he was aware that the title was in his stepmother, and also of the provision in the will directing the widow to make some provision for the children on their attaining majority, or at their marriage. Since 1895 the possession has thus been adverse to the first plaintiff. As for the second plaintiff, he was a major at the time of the death of his father; there has been thirty-five years' possession adverse to him, and his claim, too, must fail.

The plaintiffs' action is, therefore, dismissed, with costs.

Bawa, K.C. (with him *Arulanandan*), for plaintiffs, appellants.—Tissera was admittedly a Chetty of Colombo. His son, Savundranayagam, must be governed by the Roman-Dutch law, and not by the *Tesawalamai*. No person who is not a Malabar inhabitant of Jaffna can claim to be governed by the *Tesawalamai*. A Colombo Chetty, or a person of any other community, does not become subject to the *Tesawalamai* by residing in Jaffna. It has been held that a person who is not a Kandyan cannot acquire a Kandyan domicil by residing in a Kandyan district.

Counsel referred to *Spencer v. Rajaratnam*,[1] *Fernando v. Proctor*.[2] The non-possession of the land in question by the plaintiffs does not give prescriptive title to the defendants. The plaintiffs' stepmother was in occupation, and such possession cannot be said to be adverse to the plaintiffs.

Samarawickreme (with him *A. St. V. Jayawardene* and *Keuneman*), for defendants, respondents.—Tissera was an " inhabitant of Jaffna," and he was a Tamil or Malabar. His wife was a Jaffna Tamil. For several generations the family was governed by the *Tesawalamai*. The property in question, moreover, belonged to Tissera's wife, who was a Jaffna Tamil. Even if Tissera was not governed by the *Tesawalamai*, the estate of Tissera's wife must be governed by the *Tesawalamai*. The possession was adverse, at least since 1895.

Cur. adv. vult.

December 19, 1917. Wood Renton C.J.—

This is an action for declaration of title to a house called Ariya Lodge, situated in the town of Jaffna. The property originally belonged to the wife of Gabriel Pulle Tissera, who left two sons, Gabriel S. Ariyanayagam and Gabriel Peter Savundranayagam. The plaintiffs allege that, after Mrs. Tissera's death, Ariyanayagam and Savundranayagam divided the family property between themselves, and that, on this division, Ariya Lodge was allotted to the latter. In 1856 Savundranayagam married the mother of the plaintiffs. After her death he married again, in 1869, the defendants' mother, to whom he left the house by his last will, and who, in turn, donated it to her two sons in 1906. The plaintiffs claim a half share of the property on the basis that its devolution is governed by Roman-Dutch law. The defendants contend that Savundranayagam was subject to the *Tesawalamai*, and that, therefore, as Ariya Lodge was inherited property, he had full power to dispose of it, as he did, by will. The defendants further set up title to the house by prescription. The learned District Judge has decided both points in favour of the defendants. The plaintiffs appeal. The law applicable to the question whether Savundranayagam was or was not governed by the *Tesawalamai* is defined

[1] *(1913) 16 N. L. R. 321.*

[2] *(1909) 12 N. L. R. 309.*

1917.

WOOD RENTON C.J.

Savundranayagam v. Savundranayagam

in the decision of this Court in *Spencer v. Rajaratnam* [1]: "The *Tesawalamai* is not a personal law attaching itself by reasons of descent and religion to the whole Tamil population of Ceylon, but an exceptional custom in force in the Province of Jaffna—now the Northern Province—and in force there primarily, and, mainly at any rate, only among Tamils who can be said to be 'inhabitants' of that Province; and further, as the *Tesawalamai* is a custom in derogation of the common law, any person who alleges that it is applicable to him must affirmatively establish the fact."

The defendants have, in my opinion, failed to discharge this burden. Gabriel Tissera was a Colombo Chetty. The name of his first wife was Wilhelmina Ondatjee. There is no proof whatever that she was a Jaffna Tamil. The learned District Judge himself says that she was "a member of a large and well-known family representatives of which are to be found in various parts of the Island, claiming to be Tamils, Sinhalese, or Burghers, according to their circumstances and environment." But he reaches the conclusion that she was subject to the *Tesawalamai* by a series of elaborate but unsubstantial inferences or conjectures from the conduct of another lady of the same name, Lavinda Ondatjee, from the baptism of Savundranayagam, from his will, from the name of his brother Ariyanayagam's wife, and from the fact, which the District Judge says that it is a "satisfaction to know," that "when Simon Jurgan Ondatjee, admittedly a Chetty of Colombo, sued his father-in-law, Don John Mark Pulle Mudaliyar, at Jaffna in 1803, the heads of the caste, Thamoderam Pulle Coomarakulasooriya Mudaliyar and Virasinghe Mudaliyar, took part in the trial, which was dealt with under the *Tesawalamai*." However interesting and ingenious such speculations may be, they are not a safe basis for a judicial decision, and I do not think that the learned District Judge would have acted upon them if his attention had been directed to the principle enunciated in *Spencer v. Rajaratnam* [1]—an authority binding upon him, as it is binding upon us.

In the enthusiasm with which in this case the history of the Ondatjee family has been pursued, the question of prescription has been almost lost sight of. The burden of proof in this matter also was on the defendants, and they have not, in my opinion, in any way succeeded in discharging it. The plaintiffs' stepmother could not prescribe against them merely by her continued occupation of the family property.[2] The failure of the first plaintiff to press matters to a decision while he was living with her is perfectly intelligible, and the correspondence between him and both Mr. Muttunayagam and Mr. Tambiraja, entirely uncontradicted as it was, in so far as the latter is concerned, is inconsistent with any abandonment of his rights.

[1] *(1913) 16 N. L. R. 321.* [2] *In re Gunasekera (1890) 1 S. C. R. 64.*

I would allow the appeal, and direct judgment to be entered up in favour of the plaintiffs as prayed for, with Rs. 10 damages a month from the date of this judgment till they are restored to possession, and with all costs in this Court and in the District Court.

DE SAMPAYO J.—

I agree with the above judgment on both the points argued before us, and consider that this appeal should be allowed.

Set aside.