IBRAHIM
v.
ANNAMMA

COURT OF APPEAL
CADER, J., RODRIGO, J., and L.H. DE ALWIS, J.
C.A. 419/75.
D.C. MANNAR 542.
JUNE 28, 1982.

Tesawalamai – Applicability of Tesawalamai – Roman Dutch Law applies when Tesawalamai silent – Married woman's incapacity to sue without husband's assistance – Bills of Exchange Ordinance, section 29 and 30 – When consideration is not necessary.

The defendant gave a promissory note to one K.A. Mohamadu and Mohamadu endorsed it and delivered the note to plaintiff. The plaintiff is a married woman living with another man while the husband was alive and living separately.

The plaintiff sued the defendant on the promissory note for the recovery of Rs. 21,000/- and interest thereon. The defendant objected stating that the plaintiff was married to a Tamil and was resident in the Northern Province and therefore had to sue along with the husband as required under the law of Tesawalamai.

The defendant also contended that as no consideration passed between Mohamadu and the plaintiff, the plaintiff was not entitled to sue.

Held -

1. That where the Tesawalamai is silent the Roman Dutch Law applies.
2. That the plaintiff could not sue or maintain this action without being assisted by her husband or without leave of Court.
3. That as the defendant admitted that consideration passed between maker and payee it was immaterial whether consideration passed between payee and the plaintiff.

Cases referred to:

(1) *Kandiah v. Saraswathy (1951) 54 N.L.R. 137.*

(2) *Spencer v. Rajaratnam (1913) 16 N.L.R. 321*

(3) *Tharmalingam Chetty v. Arunasalam Chettiar (1944) 45 N.L.R. 414*

(4) *Marisal v. Savari 1. S.C.C. 9*

(5) *Edrich de Silva v. Chandradasa de Silva (1967) 70 N.L.R. 169*

(6) *Sinnapodian v. Sinnapulle, Muthukrishna, The Tesawalami 263*

(7) *Piragasam v. Mariamma (1952) 55 N.L.R. 114*

(8) *Annapillai v. Eswaralingam (1960) 62 N.L.R. 224*

(9) *Sabapathipillai v. Sinnatambi (1948) 50 N.L.R. 367*

(10) *Barnes v. Harward (1944) C.P.D. 203*

APPEAL from judgment of the District Judge of Mannar

S. Mahenthiran for appellant.

No appearance for respondent.

Cur.adv.vult

September 23, 1982

L.H. DE ALWIS, J.

This appeal has been referred to a Bench of three Judges under Article 140(3) of the Constitution, in view of a difference of opinion between my brothers, Cader, J., and Rodrigo, J., over the question of whether a married woman governed by the Tesawalamai could bring this action without joining her husband with her, as a plaintiff.

The respondent woman sued the appellant in the District Court of Mannar, for the recovery of a sum of Rs. 21,000/- and interest on a promissory note 'A' made by the latter in favour of one K. A. Mohamed who has endorsed the note to the respondent. The respondent is a Tamil lady residing in the Mannar District and one of the arguments urged before us by learned Counsel for the appellant was that the respondent as a legally married woman subject to the Tesawalamai is debarred from instituting this action without joining her husband as a plaintiff to the action. I shall confine my judgment to this matter alone, as my brothers could not agree in regard to it. The other question as to whether consideration passed on the promissory note both at the time it was made and when it was endorsed to the respondent, has been dealt with in the judgment of my brother Cader, J and I agree with him.

In regard to the legal capacity of the respondent to sue unassisted by her husband, the learned District Judge, has held, that the appellant has failed to establish that the marriage certificate D1 produced by the appellant related to the respondent to prove that she was a married woman subject to the Tesawalamai, and entered judgment for the respondent as prayed for.

The respondent did not give evidence at the trial and since it is the appellant who raised the objection to the respondent's capacity to institute the action without joining her husband with her as a plaintiff, the burden clearly lay on him to establish this fact.

In *Kandiah Vs. Saraswathy* (1), Dias, S.P.J., said

> "There is no presumption of law by which a Court can say, without proof, that the Tesawalamai applies to a particular Tamil who happens to reside in the Jaffna Peninsula. In the absence of such a presumption the burden of proof is on the party who contended that a special law has displaced the general Law in a given case to prove the applicability of such a special Law."

In *Spencer Vs. Rajaratnam*, (2), it was held that the Tesawalamai is not a personal law attaching itself by reason 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, among Tamils who can be said to be "inhabitants" of that Province. 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 mere fact that a man is a Jaffna Tamil by birth or descent while it is circumstance of which account must be taken in considering his real position, will not bring him within the scope of the statutory definition of the class of persons to whom the Tesawalamai applies.

The Tesawalamai Regulation No. 18 of 1806 states that the Tesawalamai applies to Malabar inhabitants of the province of Jaffna. The word 'Malabar' is not defined but it has been held to be synonymous with the Tamils of Ceylon who are inhabitants of the Northern Province. *Tharmalingam Chetty Vs. Arunasalam Chettiyar*, (3). See also *Dr. Tambiah: Law and Customs of the Tamils of Jaffna* – page 51.

In *Spencer Vs. Rajaratnam* (2) Ennis, J., observed –

> "The Tesawalamai are not the customs of a race or religion common to all persons of that race or religion in the Island:

they are the customs of a locality and apply only to Tamils of Ceylon who are inhabitants of a particular province".

In *Tharmalingam Chetty Vs. Arunasalam Chettiar* (3) Soertsz, J., approved of the observations of Ennis, J., in *Spencer Vs. Rajaratnam* (2) and said –

"The Tesawalamai applies to Tamils with a Ceylon domicile and a Jaffna inhabitancy."

In *Marisal Vs. Savari,* (4) it was held by the Supreme Court that the Mannar District is a portion of the Northern Province and that the Tesawalamai applied to the Tamils of that district.

The appellant in seeking to discharge the burden that lay on him gave evidence that the respondent was a married woman whose husband was alive and produced her marriage certificate marked D1. According to D1, the respondent's name appears as Marisal Annammah and her husband's name, as Santiagu Moththan Anthony. The appellant did not know the husband's real name but gave his nickname as 'Singham'. As far as the respondent was concerned, the appellant knew her as Marisal Annammah and said that the marriage certificate refers to her. The marriage certificate describes both the respondent and her husband as 'Ceylon Tamils' and as residents of Neruvilikkulam and Muthalaikutty respectively, which are in the Mannar District and according to the appellant, establish that they are inhabitants of the Northern Province. The respondent has not denied that the marriage certificate 'D1' refers to her and the appellant's evidence stands uncontradicted.

In *Edrick de Silva Vs. Chandradasa de Silva,* (5) H.N.G. Fernando, C.J., said:

"But where the plaintiff has in a civil case led evidence sufficient in law to prove a factum probandum, the failure of the defendant to adduce evidence which contradicts it adds a new factor in favour of the plaintiff. There is then an additional matter before the Court, which the definition in section 3 of the Evidence Ordinance requires the Court to take into acount, namely that the evidence led by the plaintiff is uncontradicted."

The respondent and her husband, according to D1, were therefore Tamils having a Ceylon domicile and an inhabitancy in the Northern Province at the time of their marriage. The question now is whether the position was the same at the time of the institution of the action.

In *Spencer Vs. Rajaratnam* (2) Ennis, J., observed that:

"In questions relating to domicile there is a presumption of law that the domicile is retained until a change is proved, but it seems to me that when the question is one of inhabitancy the presumption is not in favour of the original inhabitancy, but of the actual residence at a particular time...."

In the present case the respondent and her husband were at the time of their marriage in 1939, inhabitants of the Northern Province, and at the time the action was filed in 1973, the respondent was still living in that Province. In the caption to the plaint and in paragraph (1) of the plaint her residence is described as being within the jurisdiction of the District Court of Mannar. For over 34 years therefore, the respondent has been residing in the Northern Province and in the absence of any evidence to the contrary, it is reasonable to presume that her permanent residence continued in that province right up to the time of the action. She is now living with a Muslim man in the same province. Her husband, according to the appellant, is alive and there is no evidence that her marriage has been dissolved or that the respondent's husband has deserted her and changed his permanent residence to a place outside the limits of the Northern Province. Those are matters which are within the special knowledge of the respondent, and the burden of proving them lay on her under section 106 of the Evidence Ordinance, if she wished to establish her right to sue alone. This burden she has not discharged. As a permanent inhabitant of the Northern Province the respondent is thus subject to the Tesawalamai. The learned District Judge has erred in holding that there is no evidence that D1 applied to the respondent and that there is no proof that she is a married woman subject to the law of Tesawalamai. This finding of the learned Judge must be set aside.

The question that now arises for consideration, is whether a married woman subject to the Tesawalamai can sue alone without joining her husband with her as a plaintiff.

Under Roman-Dutch Law, a woman though she may have been of full age before marriage, on marriage she is deemed to be a minor under the guardianship of her husband. Like a minor she has, in general, no independent personal standi in judicio. She cannot institute or defend an action in her own name. Whether as a plaintiff or defendant she must proceed by or with the assistance of her husband – Lee: – An Introduction to Roman-Dutch Law, 5th Ed.

page 63. In Appendix D to his work – Professor Lee at page 421 cites Kotzé J., in *Van Eeden Vs. Kirstein* (1800) in the following terms:

> "The general rule of our law is that a married woman, being a minor, has no persona standi in judicio, and must in law proceed by, or with the assistance of her husband. To this rule only three exceptions are admitted, viz. 1st, in the case of a married woman carrying on a public trade in regard to all transactions connected with such trade; 2nd, where a woman married by ante nuptial contract has reserved to herself the free administration of her separate property: and 3rd, in a suit by the wife against the husband... I have been unable to find a single Roman-Dutch authority giving a married woman the right to appear in a civil suit unassisted by her husband, in any but the three exceptions above enumerated".

Van Leeuwen Commentaries on Roman-Dutch Law, 2nd Edition, Vol. 1 Book 1, Chapter VI, Section 7 has this passage:

> "But with regard to married women, it is almost everywhere considered that they are entirely under the guardianship and protection of their husbands... Moreover it is laid down that married women cannot appear in law without their husbands, and that judgments given against them have no force whatever."

In our country, before the passing of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876 (Cap. 57) and the Married Woman's Property Ordinance No. 18 of 1923 (Cap. 56), the contractual rights of spouses in this respect were governed by the Roman-Dutch Law – *Dr. Tambiah* ibid page 125. These two enactments, however, had no application to Kandyans, Muslims or Tamils of the Northern Province who were subject to the Tesawalamai.

Under section 5(1) of the Married Women's Property Ordinance, a married woman was capable of holding movable and immovable property, as if she were a 'feme sole' and under section 5(2), of suing and being sued in all respects as if she were a 'feme sole'. (Lee, ibid page 65, note 2). But these Ordinances did not apply to married women who were subject to the Tesawalamai and they continued to be governed by the Roman-Dutch Law on these matters, subject to the statutory modifications brought about by the Jaffna Matrimonial Rights and Inheritance Ordinance 1 of 1911, as amended by No. 58 of 1947 (Cap. 58). The Jaffna Matrimonial Rights and Inheritance Ordinance contains no provision in regard to the status of a married woman to sue or be sued in a Court of Law. Dr. Tambiah in his book referred to earlier, says at page 130:

> "It is not clear from the decisions of our Courts whether the law of Tesawalamai contained any special rule on this subject. An analysis of some decisions shows that on the ground of expediency our Courts have adopted certain rules. In a casus omissus it was natural to resort to the Roman-Dutch Law on the subject".

He refers to the District Court of Jaffna case of *Sinnapodian vs. Sinapulle*, (6), where it was held that the wife cannot be sued alone without her husband being joined. But Dr. Tambiah says – "It is not clear whether our

> "Judges were adopting the Roman-Dutch Law or following any peculiar customary rule in this matter."

He then goes on to say "whatever system of law has been adopted it is settled that a wife governed by the Tesawalamai must be associated by the husband, if they are living together".

In *Piragasam Vs Mariamma*, (7) Swan, J., took the view that a married woman governed by the Tesawalamai must either be assisted by her husband or obtain the sanction of Court to sue alone. But that was a case where it was conceded by Counsel that a married woman governed by the Tesawalamai cannot sue alone.

In *Annapillai Vs Eswaralingam*, (8), a husband to whom the Tesawalamai applied purported to donate not only his own share but also his wife's half share of the tediatetam before the date of the operation of the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947. Subsequently, in October 1955, the donee sold the property to the 3rd defendant. It was held that the donation was invalid as to the wife's share; that the wife, by reason of the donation, became co-owner with the donee; that the wife's legal relationship to the donee was such as to confer on her the right of pre-emption of the share held by the donee; and that the wife was entitled, in her own right, to maintain an action for pre-emption during the subsistence of her marriage with her husband. In such a case, the husband, if he chose to remain inactive, may be joined as a defendant. H. N. G. Fernando, J. as he then was, said -

> "It being clear law that a husband cannot validly donate the wife's half-share of the tediatetam, it would be unreasonable to suppose that a wife, although a co-owner with a person to whom the husband purports to transfer the entirety of the property, is powerless to assert her

> right either by way of vindication or pre-emption, if the husband chooses to remain inactive. In the absence of any authority to the contrary or any express provisions in the Tesawalamai debarring a wife from suing alone in such a case, I consider it only reasonable to apply in this situation the well known practice that a party who should join as a plaintiff, but refuses to do so, may instead be joined as a defendant. In this way resort may, I think, be had to the principle *'ubi jus ibi remedium'*.

In that case the husband had been joined as a defendant and the action was held to be properly consitituted. In my respectful view there was no need to resort to the principle *'ubi jus ibi remedium'*, since the husband by his wrongful act of donating his wife's half share of the tediatetam made himself liable to be sued by his wife under the third exception to the Roman-Dutch Law rule that a married woman cannot sue alone in law. Where there is a casus omissus in the Tesawalamai, recourse must be had to the Roman-Dutch Law.

In *Sabapathipillai vs. Sinnatambi* (9), the Privy Council held that where the Tesawalamai is silent, the Roman-Dutch Law is applicable. Mr. L. M. D. de Silva, P.C. in that case said:

> "The Tesawalamai is a body of customary law obtaining among the inhabitants of the Northern Province of Ceylon. Its origin has been the subject of some controversy. It was collected and put into writing at the instance of the Dutch Governor Simmons in 1706 and after the British occupation, given the force of law by Regulation 18 of 1906 which as amended by Ordinance No. 5 of 1869 is now chapter 51 of the Legislative Enactments of Ceylon. (now Cap. 63 RLE)"

The Tesawalamai and the Jaffna Matrimonial Rights and Inheritance Ordinance made no provision for a married woman to sue or be sued in a Court of law, so that according to the Privy Council decision, recourse must be had to the Roman-Dutch Law. Dr. Tambiah in his book, the *Laws and Customs of the Tamils of Jaffna,* at page 131, expresses the opinion that since the Tesawalamai does not contain any precise provisions in regard to the married woman's capacity to litigate, one should apply the Roman-Dutch Law to the matter.

There is a case reported by Marshall at page 160, where the parties were Malabar inhabitants and the action was brought by the wife,

to recover the sum of £30, being the profits of certain property which had been settled on the wife by her parents, at her marriage Having obtained judgment, she afterwards moved for execution against his person, on which motion the doubt expressed by the District Judge arose. The Supreme Court took the view that –

> "as the law admits of absolute and distinct separation of interest and property between husband and wife, the law must also provide an adequate remedy for either party whose right might be infringed by the other".

In my respectful view, the action filed by the wife against her husband was maintainable under Roman-Dutch Law, on the basis of the 3rd exception to the general rule, rather than on the ground that she was possessed of separate property. Her right to sue her husband is not confined to matrimonial causes alone, though it is more frequently exercised in those actions – Lee page 422. In Roman-Dutch Law the ability of a married woman to litigate does not follow from her right to contract, Voet, 2.4.36 and 5.1.15 referred to by Kotze' in *Van Leeuwen's Commentaries on Roman-Dutch Law*, Vol. 1, page 489. Also see Lee, ibid page 422.

The fundamental principle in Roman-Dutch Law that a married woman is denied the right to sue and be sued in a Court of law is based on the conception that she is deemed, on marriage, to be a minor under the guardianship of her husband and in my view, is independent of her right to hold separate property. Indeed, this is demonstrated by the Matrimonial Rights and Inheritance Ordinance, Cap. 57, which abolished community of property as a consequence of marriage and recognised the separate property of a wife, but nevertheless did not give her the power to sue or be sued in a Court of Law until much later, when it was expressly provided for, by section 5 of the Married Women's Property Ordinance, Cap. 56. Section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance, Cap. 58, which permitted a wife subject to the Tesawalamai to hold certain kinds of property acquired during or before her marriage, as her separate property, made no provision for her to sue or be sued in respect of them, in her own right. The property she could hold separately was limited to what she was entitled to by way of gift or inheritance or by conversion of any property to which she might have been so entitled to or might so acquire.

In the present case it is established that the respondent is a married woman governed by the Tesawalamai and that her husband is still

alive. In the absence of evidence that the marriage has been dissolved it is presumed to subsist and the respondent cannot sue alone in this action, without being assisted by her husband or first obtaining the leave of Court.

In *Barnes Vs. Harward*, (10), it was held that a married woman whose husband is confined in a mental hospital must obtain the leave of Court before instituting an action, because insanity does not dissolve the marriage.

Voet, V.1.19, (Gane's translation) however states;

> "In those cases however in which it is wrong for a woman to appear in a judicial proceeding without her husband's authority, if all the same she has appeared contrary to the prohibition of law and has come off the winner, the judgment delivered to her benefit will be valid. This is so both on the analogy of a judgement given for a minor who lacks a curator, and in virtue of the ratification which a husband can at all times effect."

In regard to minors, Voet V.1. 11 states:

> "Yet if a minor has figured in a judicial proceeding without a curator, having perchance been held to be a major by mistake and thus not having been shut out by any exception being raised to his persona, a judgement delivered against him is of no weight, but one given for him will be effective."

These passages in Voet in regard to married women and minors, appear to refer to actions instituted and prosecuted by them, without any objection being taken to their legal capacity to sue alone. If it were otherwise, the Roman-Dutch Law prohibiting a married woman, subject to certain specified exceptions, from instituting an action unassisted by her husband, would be rendered nugatory.

In the present case, on the other hand, objection was taken by the appellant to the institution of the action by the respondent without joining her husband as a plaintiff, at the very first opportunity he had, namely, in his answer, and specific issues were raised by him in regard to the maintainability of the action on that ground. Nevertheless, the respondent persisted in continuing with the action on the basis that she was entitled to sue in her own right and has now obtained judgment in her favour. The possibility of ratification by her husband, is out of the question since he does not appear to

be living with her now. In these circumstances, the action filed by the respondent on her own, is wrongly constituted and cannot be maintained. The passage in Voet V.1.19 will not avail the respondent.

Issue 5 must therefore be answered in the affirmative, issue 6 in the negative, and the consequential issue 7, though not quite correctly worded, must be answered in the negative. I accordingly set aside the judgment of the learned District Judge and dismiss the respondent's action with costs.

The appeal is allowed with costs.

ABDUL CADER, J.

The plaintiff filed this action against the defendant on a promissory note granted by the defendant to one K. A. Mohamadu which had been "endorsed and delivered... to the plaintiff for value." (para 3 of the plaint).

The defendant filed answer admitting the granting of the promissory note, but denied that any consideration passed on the said note which was granted "on trust" to Abdulla. The defendant denied that the plaintiff was an endorsee for value. He also stated that the plaintiff was a mistress of one Asankutty who was a brother of Abdulla and the note had been collusively endorsed to the plaintiff without any consideration for the purpose of instituting this action; the plaintiff is not a holder in due course and the endorsement in favour of the plaintiff was "affected with fraud, duress or force and fear or illegality." The defendant also pleaded that the plaintiff was governed by the law of Thesawalamai.

At the trial, the defendant admitted "having given to K. A. Mohamadu the pro-note." There is a further statement in the record that K. A. Mohamadu endorsed and delivered the said note to the plaintiff.

Counsel for the appellant stated that Mohamadu was not present to make this statement. Unfortunately, there was no Counsel appearing for the plaintiff. However, this is not material as the issues formed had been framed on the basis of an endorsement and delivery to the plaintiff, because no issues were framed as regards fraud, duress, force, fear or illegality.

The only issue that was raised as regards the validity of the endorsement was whether consideration passed on the said pro-note at the time the pro-note was endorsed and delivered.

As regards the averment that the pro-note was given on trust, issue No. 2 covered it. "Was consideration passed on the said pro-note."

As regards the defence taken on Tesawalamai, issues 5 and 6 were framed and my brother L. H. de Alwis, J. has dealt with it fully and I need hardly add anything to it.

As regards issue No 2: "Was consideration passed on the said pro-note", the defendant admitted: "I am prepared to pay Rs. 21,000/- and its interest." So that in evidence the defendant had abandoned that issue and his Counsel did not press this issue before us.

We are, therefore, left with the contention whether the endorsement in favour of the plaintiff was invalid for the reasons that no consideration passed for the endorsement.

As regards this question, the learned District Judge said that section 30 of the Bills of Exchange Ordinance applies and because there was no issue as regards fraud, duress etc. there is a presumption that "value has in good faith been given for the bill" and, therefore, held against the defendant. The District Judge had relied on section 30 (2):

> "Every holder of a bill is prima facie deemed to be a holder in due course.....; but if it is proved that the bill is affected with fraud, duress or force, fear or illegality, the burden of proof is shifted etc."

Counsel for the appellant has drawn our attention to section 29 which reads as follows:–

> Section 29(1):
> "A holder in due course is a holder who his taken a bill, complete and regular on the face of it under the following conditions, namely:–

(a) .....

(b) that he took the bill in good faith and for value....."

He submits that under section 29 to establish that he is a holder in due course, a holder must prove that he took the bill in good faith and for value. But section 30(2) is to the effect that there is a presumption in favour of a holder of a bill that he is a holder in due course. Therefore, while section 29 states that are the conditions under which a holder becomes a holder in due course, section 30(2) creates a presumption placing the burden on the holder to prove the conditions in section 29 when it is proved that the bill is affected by "fraud, duress, or force and fear or illegality". I see nothing

inconsistent between these two sections. When the defendant did not frame issues on fraud etc. and did not place any evidence on that contention, the learned District Judge was entitled to come to the conclusion that the plaintiff would be deemed to be a holder in due course.

Besides, what does it matter to the maker even if the payee in the note had gifted it to the plaintiff? When the defendant had not framed an issue as regards consideration between himself and Mohamadu, thereby admitting consideration as between the maker and the payee, it is immaterial that no consideration passed between the payee and the plaintiff.

It is significant that value and not valuable consideration is the term used, and the note is payable to Mohamadu's order and he had endorsed it in blank. Therefore, it became payable to the bearer who is the plaintiff in this action. I uphold the decision of the learned District Judge as against the defendant on issues 2, 3 and 4.

As regards the question whether a Tesawalamai woman can sue a third party without joining her husband, I agree with L. H. de Alwis, J. In *Annapillai v. Eswaralingam*, (8) H.N.G. Fernando, J. stated as follows:–

> "It being clear law that a husband cannot validly donate the wife's half-share of the tediatetam, it would be unreasonable to suppose that a wife, although a co-owner with a person to whom the husband purports to transfer the entirety of the property, is powerless to assert her right either by way of vindication or pre-emption, if the husband chooses to remain inactive. In the absence of any authority to the contrary or any express provisions in the Tesawalamai debarring a wife from suing alone *in such a case*, I consider it only reasonable to apply *in this situation* the well-known practice that a party who should join as a plaintiff, but refuses to do so, may instead be joined as a defendant. In this way resort may, I think, be had to the principle ubi jus ibi remedium. I would acordingly hold that the plaintiff's action was properly instituted by the joinder of her husband as a defendant".

The headnote reads as follows:

> "A husband to whom the Tesawalamai applied purported to donate not only his own share but also his wife's half share of the tediatetam before the date of operation of the Jaffna

Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947. Subsequently, in October 1955, the donee sold the property to the 3rd defendant.

Held,

(i) that the donation was invalid as to the wife's share.
(ii) that the wife, by reason of the donation, became co-owner with the donee.
(iii) that the wife's legal relationship to the donee was such as to confer on her the right of pre-emption of the share held by the donee.
(iv) that the wife was entitled, in her own right, to maintain an action for pre-emption during the subsistence of her marriage with her husband. In such a case, the husband, if he chooses to remain inactive, may be joined as a defendant.

Held further, that the question whether the 3rd defendant had any knowledge or notice of the donee's right to a half-share was of no relevance"

I am of the view that the headnote (iv) is misleading. I have emphasised the words "in such a case" because, in my opnion, the dictum of Fernando, J. is applicable only to a situation similar to what existed in that case, viz: a husband who had acted adverse to the interests of his wife against whom the wife had to obtain a declaration in her favour before she could establish her right to maintain the action against a third party within the time prescribed by para 9 of chapter 64. In such circumstances, it would defeat the purpose of the law if the wife is required to obtain the consent of her husband to join her as a co-plaintiff. The only other manner in which she could meet the requirement of the Tesawalamai law was to make him a defendant. No doubt, he was made a defendant to obtain a declaration in her favour, but just the same he was a defendant. I do not think that this judgment is an authority for the proposition that the Tesawalamai woman has been "liberated". That should await legislative action and it is not for the Courts to rectify this anomaly.

The appeal is allowed and the action is dismissed with costs in both courts.

RODRIGO. J,

I do not agree that the action should be dismissed because the plaintiff had not appeared with her husband. She had obtained

judgment without his help and in any event, in my view, it is not necessary for a Tesawalamai woman to appear by her husband. I do not propose to write a judgment giving my reasons for this view as my two Brothers have taken a different view and as this is not a final Court of Appeal.

Appeal allowed.