MANIKKAVASAGAR

v.

KANDASAMY AND OTHERS

SUPREME COURT.
SHARVANANDA, C.J., COLIN-THOMÉ, J. AND ATUKORALE, J.
S.C. APPEAL 1 & 2/85–C.A. 517/78.
D.C. COLOMBO–890/PO.
JANUARY 29, 1986 AND FEBRUARY 6, 1986.

Thediathetam–Matrimonial Rights and Inheritance (Jaffna) Ordinance No. 11 of 1911 as amended by Ordinance No. 58 of 1947 (ss. 19 and 20)–Separate estate–Burden of proof–Ownership and devolution of thediathetam–Succession.

Only property acquired by a 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, and profits arising during the subsistence of the marriage from the separate estate of that spouse should be categorised as thediathetam. The separate property of a spouse is that which he or she had brought to the marriage or acquired during the marriage by conversion, inheritance or donation made to him or her. Property purchased out of moneys of the separate estate of the spouse (mudusom or dowry) would continue to be part of such separate estate.

The burden of proving that property acquired during wedlock is thediathetam is on the party asserting it. Such party must prove that the consideration for the acquisition did not form any part of the separate estate of the acquiring spouse.

Money paid on a life insurance policy on death is not thediathetam because the marriage had ceased to exist when the right to the money arose. The money has to be paid in terms of the policy to the heirs of the insured or the nominee of the insured, as the case may be.

Neither under Thesawalamai nor under the Matrimonial Rights and Inheritance Ordinance No. 11 of 1911, as amended by Ordinance No. 58 of 1947, is the surviving spouse an heir of the deceased spouse. However, the amending Ordinance No. 58 of 1947 provides statutorily that half of the undisposed thediathetam belonging to the deceased spouse will devolve on the surviving spouse.

Section 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance of 1911, which sets out the incidents of thediathetam, was declaratory of the Law of Thesawalamai. Since that section has been repealed by amending Ordinance No. 58 of 1947, one has to look for the incidents of 'thediathetam' to the Thesawalamai.

It is basic to the concept of "thediathetam" that both spouses are equally entitled to it from the moment of the acquisition. An undivided half of the "thediathetam" vests automatically by operation of law on the non-acquiring spouse from the moment of acquisition. Under no circumstances can a husband donate the wife's half share of the

"thediathetam". However the half share of thediathetam to which a wife is entitled is subject to the marital power of the husband to sell or mortgage it for a consideration, such power being referable to his status as manager or sole or irremovable attorney of the wife. On the death intestate of either spouse one half of the "thediathetam", which belonged to the surviving spouse and which had not been disposed of remains the property of the survivor and the other half belonging to the deceased spouse devolves on the heirs of the deceased spouse. In terms of section 20 of the amending Ordinance No. 58 of 1947 half of this half will in the event of the deceased spouse dying intestate devolve on the surviving spouse so that the surviving spouse will then become entitled to 3/4th share of the thediathetam.

Observations of Gratian, J. in *Kumaraswamy v. Subramaniam 56 N.L.R. 44 at 47* dissented from.

Cases referred to:

(1) *Jivaratnam v. Murukesu–(1815) 1 N.L.R. 251.*
(2) *Avitchy Chettiar v. Rasamma–(1933) 35 N.L.R. 313.*
(3) *Nalliah v. Ponnammah–(1920) 22 N.L.R. 198.*
(4) *Akilandanayaki v. Sothinagaratnam–(1952) 53 N.L.R. 385, 397 (DB).*
(5) *Ponnammah v. Kanagasuriyam–(1916) 19 N.L.R. 257.*
(6) *Poothuthamby v. Valupillai–2 Times 95.*
(7) *Shanmugalingam v. Amirthalingam–41 C.L.W. 59.*
(8) *Parasathy Ammah v. Setupulle–(1872) 3 N.L.R.271.*
(9) *Seelachchy v. Visuvanathan Chetty–(1922) 23 N.L.R. 97, 121, 122.*
(10) *Sampasivam v. Manikkam–(1921) 23 N.L.R. 257.*
(11) *Ponnachchy v. Vallipuram–(1923) 25 N.L.R. 151.*
(12) *Iya Mattayer v. Kanapathipillai–(1928) 29 N.L.R. 302.*
(13) *Seenivasagam v. Vaithylingam–(1944) 45 N.L.R. 409.*
(14) *Kumaraswamy v. Subramaniam–(1954) 56 N.L.R. 44, 47.*
(15) *Sangarapillai v. Devaraja Mudaliyar–(1936) 38 N.L.R. 1 (F.B).*
(16) *Attorney-General v. Hatford–12 Q.B.D. 224.*
(17) *Murugesu v. Kasinather–(1923) 25 N.L.R. 201.*
(18) *Subramaniam v. Kadirgamam–(1969) 72 N.L.R. 284 PC.*
(19) *Murugiah v. Jainudeen–(1954) 56 N.L.R. 176, 181 PC.*
(20) *Arunasalam v. Ayadurai–(1967) 70 N.L.R. 165.*

APPEAL from judgment of the Court of Appeal.

R. Manickavasagar with *N. Mahendran* for petitioner-appellant in S.C. 1/85 and respondent-respondent in S.C. 2/85.

A. Mahendrarajah, P.C. with *S. Mahenthiran* for respondent-appellant in S.C. 2/85 and respondents-respondents in S.C. 1/85.

March 13, 1986.

SHARVANANDA, C. J.

One Ramanathan Thuraiappah died on 29.6.1973, intestate and issueless and leaving his widow, the petitioner-appellant in S.C. Appeal No. 1/85 (hereinafter referred to as petitioner). The 1–6th respondents-appellants in S.C. appeal 2/85 (hereinafter referred to as respondents), are his sisters and brothers and his deceased brother's two children. All parties in this case are persons governed by the Thesavalamai.

The question that arises for determination in this appeal is the mode of devolution of the estate of the deceased in terms of the Matrimonial Rights & Inheritance Ordinance (Jaffna) No. 1 of 1911, as amended by Ordinance No. 58 of 1957.

The petitioner applied for and was granted Letters of Administration. According to the petition filed the estate of the deceased consisted of the following movable and immovable properties:–

(1) An allotment of land at Clifford Place, valued at Rs. 19,000.00.
(2) A motor car valued at Rs. 10,000.00.
(3) A savings deposit in the Bank in a sum of Rs. 10,572.87.
(4) A life insurance policy of Rs. 10,000.00.
(5) A current account in the bank in a sum of Rs. 227.24.

The petitioner married the deceased on 21.1.1961. She claimed that the entire estate of her husband was thediathetam or acquired property, and that she was entitled to 3/4th share of the same. She conceded the balance 1/4th to the respondents, who are the intestate heirs of her deceased husband. The respondents on the other hand claimed that the entirety of the deceased's property was "separate property" of the deceased and hence the entirety of it devolved on the respondent-appellants as intestate heirs and that no portion of the property devolved on the petitioner-appellant. After inquiry the District Judge held that all the assets disclosed in the petition were 'thediathetam' and that the petitioner was entitled to 3/4th share of the same whilst the respondents were entitled to the balance 1/4th share. From this order the respondents appealed to the Court of Appeal. The Court of Appeal held that the District Judge was in error in holding that the petitioner was entitled to 3/4th share of the estate of

the deceased and that the respondents only to a 1/4th share of it. The Court of Appeal concluded that 1/2 share of the estate of the deceased devolved on the respondents. From the judgment of the Court of Appeal both petitioner and the respondents have appealed to this court and both their appeals were heard together.

At the hearing of the appeal both in this court and in the Court of Appeal the respondents did not contest that the motor car, the savings deposit and the money in the current account could be considered thediathetam property, but maintained that the Clifford Place property and the money payable on the Insurance Policy formed the deceased's separate property which according to them, devolved on them without any co-sharing with the petitioner. Counsel for the respondents also contended that in any event the widow was entitled to only a 1/2 share of the thediathetam property and not to 3/4 share as held by the District Judge.

The first question that arises for consideration is whether the Clifford Place property and the proceeds of insurance are the diathetam property. Thediathetam has been defined differently from time to time.

Under the old Thesawalamai property acquired during the marriage was denominated thediathetam or acquired property. Thediathetam under the Thesawalamai consisted of the profits arising from the mudusam property of the husband and from the dowry of the wife and all properties acquired by either of the spouses by their earnings during marriage. It was only profits derived from the property of the spouses or property acquired by the earnings of either spouse during marriage that could come within the concept of thediathetam. The Thesawalamai restricts thediathetam to what was acquired during wedlock. But property acquired subsequent to the marriage by one of the spouses and paid for with money which formed part of his or her separate estate, was regarded as a property of the spouse who purchased it and did not constitute thediathetam property. The separate property of the spouse was that which he or she had brought to the marriage or acquired during the marriage by inheritance or donation made to him or her. If properties were purchased out of moneys inherited by the husband, they did not form thediathetam property. It was held in *Jivaratnam v. Murukesu* (1) that money inherited by a husband and invested by him in land did not form part of

thediathetam. Thus property acquired by a spouse out of funds which formed part of his or her separate estate retained the character of the money invested and was not regarded as thediathetam.

Thesawalamai also obligated the sons to bring into the common estate (and there to let remain) all that they have gained or earned during the whole time of their bachelorship; so that all the earnings that the sons had made prior to their marriage were not regarded as their separate property but were regarded as part of the thediathetam of their parents. It is only earnings or profits made by them after marriage that would become their thediathetam property – Thesawalamai 1.1.7.

Section 19 of the Matrimonial Rights & Inheritance (Jaffna) Ordinance No. 11 of 1911, defined thediathetam of any husband or wife as follows:

Section 19 –

"The following property may be known as thediathetam 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;"

The above section 19 defined what property should constitute thediathetam of each spouse. This section included, in the category of thediathetam property which was not designated thediathetam under the law of Thesawalamai.

In *Avitchy Chettiar v. Rasamma* (2) a Divisional Bench of the Supreme Court ruled that in terms of the definition of thediathetam, property acquired by a wife during the subsistence of the marriage out of money which formed part of her dowry or separate estate is thediathetam property.

Thus while under the law as it obtained prior to the enactment of the Ordinance No. 1 of 1911, property acquired during subsistence of such marriage by one of the spouses and paid for with money which formed part of his or her separate estate was regarded as property of the spouse who purchased it and did not become thediathetam property, in view of the construction placed on the statutory definition

set out in section 19 of Ordinance No. 1 of 1911 by the Supreme Court in *Avitchy Chettiar's case (supra)*, the law after the enactment was declared to be that in the case of parties married subsequent to the coming into operation of Ordinance No. 1 of 1911, even though the land is purchased in the name of the wife with her dowry money, yet as the land had been acquired for valuable consideration during the subsistence of the marriage, it would be stamped as thediathetam of the spouse, common to both parties. This view of the law was alien to the concept of thediathetam as conceived by the customary law of the Tamils and there was agitation for the restoration of the old concept of the law, as expounded by Sampayo, J. in *Nalliah v. Ponnammah* (3).

In this case Sampayo, J. stated that–

> "It is well settled, I think that if the money by which acquisitions are made during marriage can be earmarked or traced back to the mudusom of the husband or the wife, the acquisition should not be considered part of the common property, but would partake of the nature of the source from which they sprang..... I think, therefore, that the money which the husband had saved out of his earnings before his marriage belonged to him for his separate estate, whether it is strictly called mudusom or not. The circumstance that it was invested during marriage does not change its character. Even if he invested it in the purchase of property during marriage and not on mere loans I think, in view of the principle of the decision on this point, the property would receive the character of the money invested and would not be regarded as thediathetam." (pp. 198 and 204).

The amending Ordinance No. 58 of 1947 was enacted to restore the old concept of thediathetam. The new definition of thediathetam–

> "restores for the future the more traditional conception of thediathetam, which had unmistakably, even though carelessly, been altered by legislative intervention in 1911." *Akilanadanayaki v. Sothinagaratnam* (4)–per Gratiaen, J.

The new section brought the concept of thediathetam in line with Sampayo's exposition.

Section 5 of the Matrimonial Rights & Inheritance Amending Ordinance No. 58 of 1947, repealed section 19 of the principal ordinance and substituted the following definition of thediathetam:

"No property other than the following shall be deemed to be thediathetam 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 from the separate estate of that spouse."

See the Matrimonial Rights & Inheritance (Jaffna) Ordinance Chap. 58 of Vol. 3 of the Legislative Enactments.

The new section 19 involved an amendment of the concept of "separate estate" of husband or wife as defined in sections 6 and 7 of the Matrimonial Rights & Inheritance (Jaffna) Ordinance No. 1 of 1911. They were also amended by Ordinance No. 58 of 1947. The amended sections read as follows:–

Section 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, of 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*, and shall not be liable for the debts or engagements of her husband, unless incurred, for, or in respect of the cultivation, upkeep, repairs, management, or improvement of such property or for or in regard to any charges, rates or taxes imposed by law in respect thereof....."

Section 7–

"All movable or immovable property to which any husband married after the commencement of this ordinance may be entitled at the time of his marriage, or, which he 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 he may have been so entitled or which, he may so acquire or become entitled to,

shall, subject and without prejudice to the trusts or any Will or settlement affecting the same, belong to the husband for his separate estate....."

In the present case the land at Clifford Place was purchased by the deceased on Deed of Transfer No. 1290 of 11th June 1973 (P3), for a sum of Rs. 28,875. The deed says that the money was paid by the deceased Thuraiappah and that the property was conveyed to him. In the attestation clause the notary certifies that the consideration was paid in cash in his presence by the purchaser to the vendor. Apart from the production of the Deed of Transfer (P3) no evidence has been led by the petitioner or by the respondents as to how the consideration came to be provided: whether the consideration came from the separate estate of the deceased or from savings after his marriage. The petitioner was the best person who could have testified to the source of the consideration. Be that as it may, the question arises on whom the burden of proof lies to establish that this land was or was not the thediathetam of the deceased. The petitioner contended successfully in the lower courts that the burden of proof rested on the respondents to prove that the consideration formed or represented part of the separate estate of the deceased and that it was not thediathetam. The respondents, on the other hand contend that the burden lies on the petitioner to establish that the consideration for the purchase of the land did not form or represent any part of the separate estate of the deceased. The Court of Appeal states in its judgment that:

"the petitioner-respondent has proved by the production of deed No. 1290 dated 10.3.73 that the Clifford Place property was purchased for valuable consideration and that by the production of the marriage certificate of the deceased and death certificate of the deceased, that this acquisition was during the subsistence of their marriage. The respondents have not adduced any evidence that the consideration for this purchase came from the separate estate of the deceased. Further in the case of *Ponnammah v. Kanagasuriyam* (5) it has been held that all property purchased during subsistence of the marriage is presumed to be acquired property until the contrary is proved. Therefore I hold that the Clifford Place property was thediathetam property."

I do not agree with this process of reasoning. The Court of Appeal was in error in applying the ruling re burden of proof in *Ponnammah v. Kanagasuriyam (supra)* to the facts of the present case. That was a

case decided under the original Thesawalamai. An analysis of the relevant sections of Thesawalamai tends to show that property purchased after the date of marriage could be presumed to be acquired property until the contrary is proved. This presumption stems from the provision in the Thesawalamai (Art. I, Section 1, Clause 7), that a son before marriage and during the lifetime of the parents could not hold for himself any property gained or earned during the time of his bachelorhood; it formed part of the common estate of his parents. So that at the time of marriage a husband would commence married life only with mudusom as his separate property without being entitled to the moneys earned by him prior to the marriage. Hence apart from what could be identified as such separate property, all that is acquired during the pendency of the marriage could legitimately be presumed to have been bought out of the profits of his separate property or earnings after marriage (In that era there was no question of a woman earning prior to her marriage). The Jaffna Matrimonial Rights & Inheritance Ordinance has by its definition of thediathetam impliedly abrogated that provision of Thesawalamai, viz. Part I, Section 1, Clause 7, which was the basis for such presumption. The son's earnings during his bachelorhood formed no more his parents' thediathetam but remained his separate property. Sections 6 & 7 of the Ordinance include in the concept of separate property–

> "all movable and immovable property to which any husband or woman married after the commencement of this ordinance may be *entitled at the time of his* or her marriage."

So that under the present law it is possible for a spouse to enter on his/her married life while being entitled to movable or immovable property by way of mudusom/dowry and his/her earnings prior to marriage. In *Nalliah v. Ponnammah (supra)* it was held that money which a husband had saved out of his earnings before his marriage belonged to him for his separate estate.

According to the definition of thediathetam, in the new section 19, only such property which has been established to have been acquired by the deceased spouse during the subsistence of the marriage for valuable consideration, *such* consideration not forming or representing any part of the separate estate of the spouse, can be deemed to be thediathetam. Any person who claims any property to be thediathetam has to establish that the property was acquired for the kind of consideration which would qualify it to be categorised as

thediathetam property – such consideration not forming or representing any part of the separate estate of that spouse – the negative allegation forms an essential part of the petitioner's case. Hence the burden of proving that the land is thediathetam rested on the petitioner who asserts it to be so. She had to prove as part of the probanda that the consideration did not form or represent any part of the separate estate of the deceased spouse who acquired it in his name.

Section 101 of the Evidence Ordinance provides that –

"whoever desires any court to give judgment as to any legal right dependant on the existence of facts which he asserts, must prove that those facts exist."

In my view the Court of Appeal has misdirected itself in holding that the burden of establishing that the land at Clifford Place, was not the thediathetam of the deceased rested on the respondents. It was the petitioner who asserted that the said land was thediathetam of the deceased. And it was for her, in terms of section 101 of the Evidence Ordinance, to establish all the elements of thediathetam to succeed in her claim. The petitioner has failed to show that the land at Clifford Place was thediathetam property. Hence in my view, it has to be held that it was part of the separate estate of the deceased and as such the petitioner will not be entitled to any share therein. The respondents inherit the entire land in accordance with the rules of inheritance in part III of the Ordinance.

The second point to be decided is whether the proceeds of insurance amounting to Rs. 10,000 was thediathetam property or separate property of the deceased. The policy has not been produced, but it has been described as a Life Insurance Policy and hence the money on the policy would have become payable either on maturity or on surrender or on the death of the insured. In this case, as the money was paid into the estate of the deceased, it would appear that the money did not become payable during the lifetime of the deceased. The money on the Insurance Policy was not acquired by the deceased during the subsistence of the marriage with the petitioner as the marriage had ceased to exist with the death of the insured and hence it could not be deemed to be thediathetam.

The Court of Appeal has held that the premium paid on the insurance comprises valuable consideration and therefore the money payable under the policy became property acquired for valuable

consideration. I cannot agree. Life Insurance is a contract by which the insurer agrees to pay a given amount upon the death of the person whose life is insured or upon the maturity of the policy in consideration of the payment of certain sums called premia. In terms of this contract a sum of Rs. 10,000 became payable to the deceased's estate under the insurance policy. Since it had not become payable during the lifetime of the deceased but became payable on the event of the death of the insured, it was not acquired by the deceased during his lifetime. I hold that the sum of Rs. 10,000 representing the proceeds of the life insurance was not thediathetam of the deceased.

I do not agree with the view of the law expressed *in Ponnammah v. Kanagasuriyam (supra)* and *Poothuthamby v. Valupillai* (6) that the premium paid on insurance policies should be considered thediathetam. Since insurance is a matter of contract the destination of the proceeds of the insurance will have to be decided in terms of the policy of insurance. The insurance monies were paid on his death and form an asset of the estate of the deceased. Since the policy did not mature in the life-time of the deceased the moneys due on the policy became payable to the heirs of the deceased on the death of the deceased. The judgment in *Ponnammah's case (supra)* and *Valupillai's case (supra)* were based on the concession of parties that the totality of premium paid should be regarded as thediathetam. These cases cannot be considered authority for the contention that the premium paid should be considered thediathetam. The insurance money is payable in terms of the policy to the administrator on behalf of the heirs in proportion to their entitlement. (See *Shanmugalingam v. Amirthalingam* (7)). I therefore hold that the money payable under the policy would not constitute thediathetam and the petitioner will not be entitled to any share thereof on that basis. Then the question arises whether she can claim a pro rata share as an intestate heir of the deceased. Neither under the Thesawalamai nor under the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911 is the surviving spouse an intestate heir of the deceased. The Amending Ordinance No. 58 of 1947 though it provides that half of the undisposed of thediathetam belonging to the deceased spouse will devolve on the surviving spouse, purposefully avoids describing that spouse as an heir of the deceased. It is significant that it states that the other half shall devolve on the heirs of the deceased spouse. The surviving spouse is not granted the status of an heir of the deceased

by the law and hence the petitioner cannot claim to come into the category of heirs entitled to share in the proceeds of the insurance policy.

For the determination of the claims of the petitioner on one hand and of the respondents on the other hand, as to their share in the thediathetam property of the deceased consisting of the motor car, savings deposit and money in the current account, one has to consider the legal incidents attaching to thediathetam and the devolution of thediathetam. According to the customary law of Thesawalamai, thediathetam is common to both spouses; they are both co-owners of the thediathetam. The concept that thediathetam is common estate of the spouses to which both are equally entitled is basic to the customary law of Thesawalamai. An undivided half of the property vests automatically by operation of law on the non-acquiring spouse and under no circumstances can a husband donate more than half the land acquired during the marriage–*Parasathy Ammah v. Setupulle* (8). In *Seelachchy v. Visuvanathan Chetty* (9) Garvin, J., who was in a minority held that thediathetam property, at the time of acquisition by the husband vested by operation of law, equally on his wife. He followed *Parasathy Ammah v. Setupulle (supra)*, and held that–

> "that the donor-husband would not have the right to gift the entirety of the acquired property and the wife was not legally divested of her title to half share of the thediathetam by her husband's death or gift."

This view of Garvin, J., that a husband could not donate more than his 1/2 share of the property acquired during the subsistence of his marriage has been followed in *Sampasivam v. Manikkam*, (10).

In *Ponnachchy v. Vallipuram* (11) it was held that even though the property is acquired by a wife during the marriage and the deed is executed in her favour it vests by law in both spouses and that the husband as the non-acquiring spouse could donate 1/2 share of the property.

Dalton, J. in *Iya Mattayer v. Kanapathipillai* (12) expressly adopted with approval the reasoning and conclusion of the dissenting judgment of Garvin, J., *Seelachchy's case (supra)*. Again in *Seenivasagam v. Vaithyalingam* (13), the Supreme Court held that under the Thesawalamai the husband is not entitled to donate more than 1/2 the

thediathetam property. The view that the non-acquiring spouse automatically becomes entitled to 1/2 share of thediathetam was accepted in *Kumaraswamy v. Subramaniam* (14). This view is founded on the basis that both spouses are equally entitled to the thediathetam from the moment at which it was acquired even though it was acquired by one spouse only.

The other legal incident of thediathetam is that the 1/2 share of thediathetam to which a wife was entitled was subject to the marital power of her husband to sell or mortgage it for consideration. This marital power is referable to his status as the Manager or "sole or irremovable" attorney of the wife – Per MacDonald, C. J. in *Sangarapillai v. Devaraja Mudliyar* (15). It is not correct to state that this power of the husband proceeds from the enjoyment of dominium of the wife's half share.

The Jaffna Matrimonial Rights & Inheritance Ordinance No. 1 of 1911, "which represents the conclusions formed by the Committee specially appointed to inquire into the body of customary law known as Thesawalamai" (Vide Garvin, A. J., in *Seelachchy v. Visuvanathan Chetty (supra))* declares the law relating to thediathetam in section 20 as follows:

Section 20 (1) "The thediathetam 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."

Section 20 (2) "Subject to the provisions of the Thesawalamai 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 the 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 marriage or separation a mensa et thoro, each shall take for his or her own separate use one half of the joint property aforesaid."

Counsel for the petitioner submitted that the aforesaid section 20 is declaratory of the customary law of Thesawalamai and that this section enacted in statutory language the fundamental concept of Thesawalamai that thediathetam of each spouse shall be property common to the spouses and they both shall be equally entitled thereto. This section does not change or alter the incidents attaching to thediathetam as found in the Thesawalamai.

An Act is said by Blackstone to be declaratory–

"where the old custom of the realm is almost fallen into disuse or become disputable, in which case Parliament has thought proper, in perpetuum rei testimonium and for avoiding all doubts and difficulties to declare what the law is and ever hath been (1 cumm. 86)."

It was held in the case of *Attorney General v. Hatford* (16), that if an Act is in its nature a declaratory Act, the argument that it must not be construed, so as to take away previous right is not applicable. Where an Act is in its nature declaratory, the presumption against construing it retrospectively is inapplicable for the reason that the Act does not create a new right or obligation or alter existing rights or obligations. The Act states what the law has always been.

I agree with Counsel for the petitioner that on this test, section 20 does not enact any new law; it renders in a statutory form what has always been conceived to be the customary law. It re-states the law relating to thediathetam. It does not effect any alteration or amendment respecting the nature of thediathetam.

Garvin, J. in *Seelachchy v. Visuvanathan Chetty* (supra) described the aforesaid section 20 as–

"An explicit declaration of the law in the sense in which it was, so far as I am able to judge, always understood."

In *Murugesu v. Kasinather* (17) Garvin, A. J. with whom Jayawardena, A. J. "entirely agreed" applied the provisions of section 20 to determine the rights of parties where property was acquired by the husband prior to the death of the wife, in 1908 prior to the enactment of the Jaffna Matrimonial Rights & Inheritance Ordinance of 1911. He held that by operation of law the title to one half of the property became vested in her heirs. This course was adopted as section 20 was declaratory of existing customary law and hence was retrospective in operation.

The Amending Ordinance No. 48 of 1947 repealed the aforesaid section 20 and substituted a new section in its place in the following terms–

Section 20; "On the death of either spouse one half of the thediathetam belonging to the deceased spouse and has not been disposed of by Last Will or otherwise shall devolve on the surviving spouse and the other half shall devolve on the heirs of the deceased."

The Privy Council in *Subramaniam v. Kadirgamam* (18) observed at 291:

> "The new section 20, in contrast to the former section 20 of the Principal Ordinance does not deal with any legal incidents which were thereafter to attach to thediathetam as newly defined, other than its devolution upon the death of a spouse intestate."

Since section 20 of the principal ordinance has been repealed and the new substituted section does not deal with the incidents of thediathetam, one has to look for the incidents which attach to thediathetam outside the amended Ordinance. It was contended by Counsel for the respondents that since the original section 20 has been repealed one cannot look back into the customary law of Thesawalamai or to the repealed section 20 for the nature of thediathetam but one has to decide the rights of parties on the basis that the new section 20 is exhaustive of the law relating to thediathetam. His process of reasoning was based on the assumption that the original section 20 repealed the relevant provisions of the Thesawalamai and that, since that section 20 has now been repealed by the amending ordinance, section 6(1) of the Interpretation Ordinance stood in the way of revival of the customary law. Section 6(1) of the Interpretation Ordinance (Cap. 2) provides:

> *Section 6(1):* "Whenever any written law repealing either in whole or part a former written law is itself repealed, such repeal shall not, in the absence of any express provision to that effect, revive or be deemed to have revived the repealed written law."

Counsel urged that in view of the rule of interpretation contained in section 6(1), one cannot fall back on the Thesawalamai and apply the rule of equal entitlement of the spouses to the thediathetam. I cannot agree with this submission that the repeal of the original section 20 has the effect of obliterating the customary law of Thesawalamai.

I agree with the Counsel for the petitioner that the original section 20 was declaratory of the law. It had not enacted a new law nor repealed the relevant provisions of the Thesawalamai. It only elucidated or clarified the law relating to thediathetam.

Section 6(1) of the Interpretation Ordinance to which Counsel for the respondent made reference would apply only if the said section 20 had repealed the relevant provisions of Thesawalamai and that section, in turn, is repealed.

Since, in my view, the original section 20 which has been repealed by the amending ordinance did not repeal the Thesawalamai but declared the customary law and did not change or alter the law, the rule of interpretation contained in the aforesaid section 6(1) will not apply.

> "While the repeal of a statute which abrogates the former statute does not revive the former statute, the repeal of a statute that was declaratory of the common law does not necessarily abolish the common law." Crawford–Statutory Construction at page 655 footnote.

In this perspective the customary law survives the repeal of the declaratory provision.

Section 40 of the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911 provides–

> "So much of the provisions of the collection of customary law known as Thesawalamai.....as are inconsistent with the provisions of the ordinance are hereby repealed."

Thus provisions of the Thesawalamai as are not inconsistent with the provisions of the Ordinance survive to supplement the latter.

Since the new section 20 has not referred to or dealt with the incidents of thediathetam, the provision of Thesawalamai which postulated that thediathetam of each spouse shall be property common to the two spouses, both being equally entitled thereto therefore continues to be operative in spite of the repeal of the old section 20, as it is not inconsistent with the provisions of the amended Matrimonial Rights and Inheritance Ordinance of Jaffna.

Old section 20 is not inconsistent with any provisions of Thesawalamai. In fact, it adopts and incorporates the relevant rule of Thesawalamai.

Though original section 20 has been repealed by the amending ordinance, it has not been substituted theretofore by some new provision dealing with the subject matter of the repealed section. The new section 20 provides for the devolution of thediathetam which belonged to the deceased spouse. It does not declare and regulate the rights inter vivos of the spouses in regard to thediathetam. It states

that "one half of the thediathetam *belonging to the deceased spouse* and has not been disposed of by Last Will or otherwise, shall devolve on the surviving spouse and the other half shall devolve on the heirs of the deceased spouse". It does not demarcate what is the thediathetam which belonged to the deceased spouse. Under the law of Thesawalamai the surviving spouse was not an intestate heir of the deceased spouse. The new section 20 represents a departure in this respect from the customary law of Thesawalamai. It expressly provides that one half of the thediathetam belonging to the deceased spouse "shall devolve" on the surviving spouse.

Though the new section 19 substitutes a new definition of the "thediathetam of a spouse" for the definition of "thediathetam of any husband or wife" in the repealed section 19, like the repealed section it does not spell the rights of the spouses in relation to the thediathetam. The repealed section 20 meted the entitlement of the spouses to the thediathetam defined by old section 19. The new section 20, without apportioning the shares of the spouses to the thediathetam as defined by section 19, deals with the devolution of the thediathetam which belonged to the deceased spouse. It is to be noted that while section 19 refers to *"thediathetam of a spouse"* section 20 speaks of *"thediathetam belonging to a deceased spouse."* The distinction in language is significant. It reflects a conceptual difference. It supports the argument that the basic attribute of thediathetam, viz: common ownership of the spouses inheres in the thediathetam as defined by new section 19. "Belonging" denotes entitlement. Under Thesawalamai, as stated earlier thediathetam of a spouse meant thediathetam acquired by the spouse to which by operation of law both spouses became equally entitled—half share of it belonging to the acquiring spouse and the other half belonging to the non-acquiring spouse—from the moment of acquisition. Even though the property was acquired by one spouse one half of it vested automatically on the other spouse. In my view, though the old section 20 has been repealed, the incidents of thediathetam referred to therein have not been abrogated but continue to attach to the thediathetam as defined by new section 19. That part of the customary law of Thesawalamai dealing with the incidents of thediathetam are not affected by the repeal of old section 20.

The presumption against radical alteration of the law also militates against the proposition contended for by counsel for the respondents. The concept that thediathetam of a spouse is property common to

both spouses is far too firmly entrenched in the jurisprudence of the law of Thesawalamai to be jettisoned except by unequivocal express legislation and not by a side wind. The following passage in Maxwell's Interpretation of Statutes, 12th Ed. page 78–79, which was quoted with approval by the Privy Council in *Murugiah v. Jainudeen* (19), tends to support the submission that the new sections 19 and 20 were not intended to make and do not make the fundamental alteration in the customary law of Thesawalamai that would be involved in the acceptance of the proposition that under the new sections 19 and 20 the thediathetam would belong in its entirety to the acquiring spouse.

> "One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication..... It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law, without expressing its intention with irresistible clearness."

I do not agree with the following obiter dictum of Gratiaen, J. in *Kumaraswamy v. Subramaniam (supra)* that–

> "The repeal of the old section and the substitution of the new section 20 have the following effect:–
>
> (*a*) If either spouse acquires thediathetam on or after the 4th July 1947, no share in its 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.
>
> (*c*) If the non-acquiring spouse predeceases the acquiring spouse, the thediathetam property of the acquiring spouse continues to vest exclusively in the acquiring spouse; the new section 20 has no application because the *thediathetam* of the acquiring spouse never belonged to the non-acquiring spouse."

This enunciation was not necessary for the decision of the case as Gratiaen, J., himself states "the new sections 19 and 20 have no bearing on the present problem." With all respect to that eminent Judge, I would state that the above propositions do not represent the law. In that case Gratiaen, J. had no occasion to examine the law on the question in issue in the present case.

Thus on the above construction of the law a non-acquiring spouse becomes vested with title to half the acquisition from the moment of the acquisition and also inherits half of the other half which belonged to the deceased spouse if the latter dies intestate, without having disposed of his or her half share. On the basis of the above analysis of the law it has to be held that half of the items of the deceased's thediathetam i.e., motor car, savings deposit of Rs. 10,572.87 and half of Rs. 227.24 lying in the current account, did not fall into the estate of the deceased, as they belonged by operation of law to the petitioner, the widow, and of the half that belonged to the deceased, half of it devolved on the surviving spouse. Accordingly the petitioner is entitled to half of the deceased husband's half share in addition to her own half-share of the above items of thediathetam. I note that Sivasubramaniam, J., in *Arunaslam v. Ayadurai* (20), has held that after the amendment of 1947, title to 3/4th share of thediathetam property was in the surviving spouse and title to the balance quarter was in the intestate heirs of the deceased spouse. He appears to have computed the extent of shares in the thediathetam belonging to the spouses on the same basis as I have done.

I therefore, declare that the petitioner is entitled to three fourth of the items, viz. the motor car, savings deposit and money lying in current account, and that the 1st, 2nd and 3rd respondents who are the sisters of the deceased and the 4th respondent who is the brother of the deceased and the 5th and 6th respondents who are the children of the deceased brother Poothathamby Thuraippa, inherit the balance quarter share of the said items. I also declare that the respondents are entitled by way of inheritance of the separate estate of the deceased to the entirety of the land No. 37, Clifford Place to which the deceased became entitled on Deed No. 1290 dated 11.6.1973 and that the petitioner is not entitled to any share therein. The respondents are also entitled to the sum of Rs. 10,000 representing the proceeds of insurance. Though the 2nd respondent has not appealed from the judgment of the District Court she will be entitled to the benefit of these declarations.

I set aside the judgment of the Court of Appeal and of the District Court and allow the appeals of both petitioner-appellant in S.C. No. 1/85 and of the respondent-appellants in S.C. No. 2/85 to the extent involved in the above declaration.

In the circumstances of this case parties will bear their own costs in all the courts.

COLIN-THOMÉ, J.—I agree.

ATUKORALE, J.—I agree.

Appeals allowed as indicated in judgment.