Present: Ennis A.C.J. and Shaw J.

1921

TAMBIPILLAI *et al. v.* NAGALINGAM *et al.*

198–199—D. C. Jaffna, 13,660.

Tesawalamai—Death of sole child in 1906 leaving dowry property inherited from her mother—Mother's brothers and sisters entitled to succeed.

S, a Tamil subject to the *Tesawalamai*, died in 1906 issueless, and leaving no brothers and sisters.

Held, that the "dowry" property S inherited from her mother devolved on her mother's brothers and sisters, and not on the sisters only.

THE facts appear from the judgment of the Acting District Judge (Sir A. Kanagasabai) :—

A certain Sivapakium died a minor in 1906, leaving behind, amongst other properties, the lands described in the schedule annexed to the plaint, all of which she had inherited from her mother Theivanai, who was a dowried woman. The dowry deed in favour of Theivanai, No. 3,991, dated May 30, 1892 (D 4), was produced by the contesting defendants. It was executed some time before her marriage. Under the *Tesawalamai* dowry may be given before or after marriage (see *Muttukrishna's Tesawalamai, p. 123, and 18 N. L. R. 348*).

Theivanipillai had two sisters, namely: (1) Amminipillai, who was the mother of the first and second defendants; (2) Sivakamipillai, who was the mother of the fourth defendant; and a brother (3) Senthevatepillai, whose children are the second plaintiff and the fifth defendant. Amminipillai and Sivakamipillai were dowried on deeds marked D 6 and D 5, respectively. The second plaintiff claims one-sixth share of all the lands which were left behind by Sivapakium.

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The contesting defendants say that the second plaintiff and her co-heir, the fifth defendant, did not inherit any share of Sivapakium's estate which exclusively belongs to them, as their mothers were the only dowried sisters of Theivanai. It being admitted that the second plaintiff attained majority only on May 26, 1909, prescriptive rights cannot be set up by the defendants.

The following issues were framed :—

(1) Were Theivanipillai, Amminipillai, and Sivakamipillai dowried sisters ?

(2) Did one-half of Theivanipillai's daughter Sivapakium's property devolve on the children of Amminipillai and other half on the child of Sivakamipillai, or did it devolve on the children of Amminipillai, the child of Sivakamipillai, and the children of Senthevatepillai, Senthevatepillai being brother of Theivanipillai, Amminipillai, and Sivakamipillai ?

(3) Is the plaintiff's action prescribed, the same not having been brought within three years of the second plaintiff having attained majority ?

(4) Are the plaintiffs and the fifth defendant estopped by allegations made by them in petition A/1,546 marked D 1 and A/1,547 D 2 from claiming the lands described in the plaint ?

(5) Does the document dated September 3, 1918, D 3 estop the plaintiff and the fifth defendant from claiming the properties in question ?

The *Tesawalamai* does not expressly provide for the devolution of the estate of a child dying unmarried. Clause 15 of section 1 is the nearest approach to a rule of succession in such a case as has been decided in *Nagaratnam v. Muttutamby.*[1] The principle involved in that case is identical with the one involved in the present case. There, one Theivanathan, a male, died unmarried. He had on his mother's side two uncles and two aunts. Nagaratnam, who was the plaintiff in that case, and daughter of one of the uncles, claimed that her father and his brother inherited the estate to the exclusion of the aunts and their children. On the other hand, the second defendant in that case, who was a daughter of one of the aunts, claimed that the property was inherited by the aunts alone to the exclusion of the uncles. The Supreme Court decided that the property passed to the nearest relations, irrespective of sex, of the immediate ancestor through whom the property was inherited. In the present case the property was inherited by Sivapakium, and on her death it would devolve on her mother's nearest relations, who are the children of her brother and sisters. Thus, the plaintiff became entitled to one-sixth share.

The question was fully argued on both sides, and a mass of authorities has been cited, but the only case in point is the one I have just referred to. The defendant's counsel places some reliance on clauses 5 and 7 of section 1. But those clauses do not apply to this case as Sivapakium was not dowried. Moreover, so far back as 1897, it was held in *Puthatamby v. Mailvaganam*[2] that these rules only govern succession *inter se* of members of the same family, but do not provide for succession of remote relations. The omission was supplied in that and other cases from the general law of the land.

The fact that the properties in question were the *chidanem* property of Theivanai does not alter the case, for rule 15 says that the mother's nearest relations take the property derived from her.

[1] *(1915) 18 N. L. R. 257.* [2] *(1897) 3 N. L. R. 42.*

It is stated for the defence that in *Thiagarajah v. Paranchothipillai*,[1] which was a contest for letters of administration to the estate of the said Sivapakium, who was his daughter, it was only the children of Theivanai's sisters that opposed the application of her husband, Thiagarajah, for grant of administration. To that case neither the second plaintiff nor the fifth defendant was a party. The question was not discussed there whether the plaintiff and the fifth defendant, as children of a brother of Theivanai, inherited any share. All the same, clause 15 of section 1 was referred to therein as governing the case and excluding the father.

The third issue is not pressed. The defendants who raised it did not contend at the argument that the plaintiff's remedy is lost by the delay in bringing this action.

As regards the fourth and fifth issues, I hold that the documents relied on do not constitute an estoppel. It is true that the plaintiffs and fifth defendant were for a very long time under the impression that they were not heirs of Sivapakium. In fact, they acquiesced in the possession of the lands in question by the contesting defendants, who were regarded as the only heirs. Of these documents, D 1 and D 2 do not relate to the lands claimed in this case. D 3 is a document, not notarially attested, by which the parties agreed to divide certain other lands on the footing that the plaintiffs were not heirs of Sivapakium. It is also said that they omitted to claim the lands in question. But the facts relied on do not amount to anything like an estoppel under section 115 of the Evidence Ordinance, as it is not urged that any representations or omissions of the plaintiffs led third parties to enter into any contract respecting the lands in question with the contesting defendants, who have lost nothing by the conduct of the plaintiffs. Therefore, I hold that they are not estopped by their conduct or any statements made by them in the documents referred to.

It can scarcely be said that the conveyance executed by the administrator in the testamentary case regarding the estate of Sivapakium deprives the plaintiffs of their right, as the estate was not judicially settled and the plaintiffs were not parties to the testamentary case.

Theivanai's sisters were, no doubt, dowried as I have stated, but that fact does not alter the case.

The second plaintiff is entitled to the one-sixth share claimed by her in this action, and I accordingly enter judgment for her for that share. The parties will, however, bear their own costs, as the plaintiffs acted for a long time on the belief in accordance with the prevailing idea in the country that the contesting defendants were the only heirs of Sivapakium.

E. W. Jayawardene (with him *Arulanandan*), for the appellants.

Pereira, K.C. (with him *Balasingham*), for the respondents.

March 4, 1921. ENNIS A.C.J.—

This was an action for declaration of title to certain lands in Jaffna. The land in dispute was the dowry property of one Theivanipillai, who died leaving her husband and one child, a girl, Sivapakium. Sivapakium died about 1906, aged seven years.

[1] *(1909) 11 N. L. R. 46.*

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The question in the case is whether the property which had vested in Sivapakium has passed to the descendants of the sisters of Theivanipillai to the exclusion of the descendants of her brother Senthevatepillai. It was contended by Mr. Arulanandan that on Theivanipillai's death the property, under section 11 of the *Tesawalamai*, vested in her husband. This, however, cannot be regarded as a serious contention, because in 1907, on a question arising in the testamentary case dealing with the estate of Sivapakium, where Theivanipillai's husband had claimed the right to administer, this Court held that he had not that right, and that the property had passed to Sivapakium's heirs in the line of her mother. Treating this case, therefore, as a case relating to the devolution of the property of Sivapakium, the only point raised in that connection is that the case of *Nagaratnam v. Muttutamby*[1] does not completely cover the facts of this case. The learned Judge has decided this case on the principle set out in *Nagaratnam v. Muttutamby*.[1] It is true that in that case it was a question of succession to the property of a grandson who had inherited directly from his grandfather, while in the present case the inheritance is by a daughter from her mother of property which had formed part of the mother's dowry property. Had the property not passed from the mother to the child, there can be no question that under the *Tesawalamai* the mother's sisters would have inherited to the exclusion of her brother. But the property having passed to her daughter, the persons to inherit would be, according to section 1 (5) of the *Tesawalamai*, read in the light of sub-section (15), the mother's "nearest relatives." Section 30 of Ordinance No. 1 of 1911, which is to-day the law on the point for succession on deaths occurring since the date of the enactment of that Ordinance, provides that the property shall go to the brothers and sisters without any distinction. That section was probably meant to represent the law as it existed at the time of the passing of the Ordinance. It will be observed in sub-section (5) of section 1 of the *Tesawalamai* that it is only in the case of one sister dying without issue leaving a number of sisters and brothers that her property passes without a doubt to her sisters. I have expressed an opinion on this very point in the case of *Nagaratnam v. Muttutamby*,[1] and need not now repeat it. In my opinion the principle of the decision in that case covers the facts of this case. I would accordingly dismiss the appeal, with costs.

SHAW J.—I agree.

Appeal dismissed.

[1] *(1915) 18 N. L. R. 257.*