1948 *Present :* **Canekeratne and Gratiaen JJ.**

SINGARAVELU, Appellant, *and* PONNAN *et al.*, Respondents

S. C. 316—D. C. Point Pedro, 2,126

Thesavalamai—Debt of husband—Decree—Sale in execution after death of wife—Thediatetem property—Title of children not affected by sale.

First defendant who was subject to the *Thesavalamai* was married to one M. In 1926 first defendant borrowed money on a promissory note. M died in 1929 leaving as heirs her children, the second and fourth plaintiffs. Action was brought on the promissory note against the first defendant only and decree entered in 1932. At a sale in execution in 1933 the right, title and interest of the first defendant in the property in question which was *thediatetem* was sold and purchased by the second and third defendants from whom it ultimately came to the sixth defendant.

Held, that the half share which devolved on the children on M's death did not pass to the purchaser at the sale.

APPEAL from a judgment of the District Judge, Point Pedro.

E. B. Wikramanayake, K.C., with *H. Wanigatunga*, for sixth defendant appellant.

N. E. Weerasooria, K.C., with *V. Arulambalam*, for plaintiffs respondents.

H. W. Tambiah, with *S. Mahadevan*, for second and third defendants respondents.

September 17, 1948. CANEKERATNE J.—

We dismissed the appeal at the close of the argument with an intimation that reasons would be given later. The delay is partly due to the fact that some days elapsed before the record in the Kurunegala case referred to later was available.

In this action the second and fourth plaintiffs claimed one-third share of a land called Alakkadavai. The first defendant who was married to one Muththy purchased this land by deed P1 dated September 18, 1920 ; his wife died on or about June 28, 1929, and the second and fourth plaintiffs are two of the children of the marriage. It is not contended that the view taken by the learned Judge, that a half share of the land devolved on the children of Muththy on her death, is incorrect. But the appellant

contends that on D 1 dated September 24, 1934, the second and third defendants became entitled to the entire property and that he became the owner by D 2.

On December 19, 1931, the second defendant sued the first defendant for recovery of a sum of money due on a promissory note dated October 24, 1926, and on March 23, 1932, he obtained a money decree for Rs. 295 with interest and costs. In execution of the judgment in this case, the right, title and interest of the first defendant in this land was seized and sold on September 6, 1933, and purchased by the second and third defendants on D 1. The children of Muththy were not parties to this case, the judgment was one against the first defendant personally and not in a representative capacity. The general rule that a transaction between parties in a judicial proceeding would not be binding upon a third party ought to apply unless the authorities quoted at the argument on behalf of the appellants, namely, *Avitchy Chettiar v. Rasamma* [1] and *Sewakeenpillai v. Murugupillai* [2] establish the contrary. Counsel was not able to produce any authority to show that according to the provisions of the *Thesavalamai*, the whole acquired property was liable for the payment of the debts contracted by the husband.

What passes to a purchaser at a sale in execution of a decree for money is the right, title and interest of the judgment debtor, whatever that interest may be, that is, the purchaser buys the property with all the risks and defects in the judgment-debtor's title. He obtains only the precise interest and no more of the execution-debtor ; a Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the sale purporting to be made under the decree would be a nullity.

Section 20 of Cap. 48 of the Ceylon Legislative Enactments is as follows, omitting immaterial words :—

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

(2) " Subject to the provisions of the *Tesawalamai* relating to liability to be applied for payment or liquidation of debts . . . . on the death intestate of either spouse, one half of this joint property shall remain the property of the survivor and the other half shall vest in the heirs of the deceased ;"

It appears that a *communio quaestuum* takes place on the marriage of a man and woman who are subject to the Tesawalamai, there is thus a community as to the *tediatetam* or things acquired *stante matrimonio* by the spouses. If the husband and wife have, by their economy, industry or trade, acquired a sufficient sum with which they have purchased any property, such property, whether it be purchased in the joint names of the husband and wife, or in the name of the husband alone, becomes part of this community, and the title and possession pass to the husband and wife, in short, every description of property, which from its nature might be the subject of the *communio bonorum* of the Roman-

[1] *(1933) 35 N. L. R. 313.* [2] *(1940) 18 C. L. W. 49.*

Dutch law, will, if purchased by the husband or wife, *stante matrimonio* become the subject of the community of profits of the *Tesawalamai*. In *Avitchy Chettiar v. Rasamma* (*supra*) a property purchased by the wife with money given to her as her dowry by her parents was held to be included among these. Whenever the community as regards acquisition prevails, the husband and wife, and their respective estates become liable for the debts contracted by them *stante matrimonio*, and probably other debts [1].

During the joint lives of the husband and wife the husband is entitled *jure mariti* to manage and administer the common property. The husband can, the authorities show, sell or mortgage the property forming part of the *communio quaestuum* without the consent of his wife. It is clear, however, that he cannot, after the wife's death, deal with anything more than his share, for a half share vested in the heirs of the wife on her death [2]. The community is at an end by the death of either party, the separation effected by death abridges the husband's power of alienation.

On the death of K a half share of this estate remained the property of the widow subject to the provisions of the *Tesawalamai*, in respect of debts, the other half vested in the heirs of K subject to the same liability. A creditor was entitled to sue the survivor for the recovery of what was due to him—or is it only a half share ?—and to execute the judgment against the half share of the survivor. Likewise he had a right to sue the heirs of the dying spouse, provided there was adiation, but in the case of a large estate or for the recovery of a large sum he would sue the administrator or executor. Having obtained judgment against the administrator or executor he could execute it against the half share in the hands of the heirs, for the personal representative retains power to sell the property that vested in the heirs of the deceased on his death, and this includes the right of a creditor to follow the property for the payment of the debt [3]. Avitchy Chettiar took proceedings against the survivor and the administratrix of the estate of the deceased and obtained judgment, he was thus enabled to bring the whole property for sale in execution of the judgment.

In *Avitchy Chettiar v. Rasamma* (*supra*), D. C. Kurunegala, No. 13,636, in execution of a decree against the administratrix of the intestate estate of K, the property was seized and on a claim being preferred by Rasamma, his widow, it was upheld. The plaintiff then instituted an action under section 247 of the Civil Procedure Code, Cap. 86 of the Ceylon Legislative Enactments, against Rasamma, personally and as administratrix of the estate of the deceased, to obtain a declaration that the property was liable to be sold in execution of the decree. The plaintiff averred in the plaint that the husband bought Mahawatte estate with his money but obtained the deed in the name of the wife to defraud his creditors ; alternatively, that the deed was executed in her favour in trust for the husband ; alternatively, by an amendment, that the property was *tediatetam* property and liable to be sold. The defendant denied the averments. She pleaded further that it was bought out of her dowry money given to her by her parents and that the estate was her separate

[1] *See Part IX., Section 3 of Cap. 51.*
[2] *Section 22.*
(1923) 25 N. L. R. 201.
[3] *Silva v. Silva (1907) 10 N. L. R. 234.*
Gopalsamy v. Ramasamy Pulle (1911) 14 N. L. R. 238.

property. Under the law prior to the enactment of Ordinance No. 1 of 1911, a property purchased under similar circumstances " was regarded as the property of the spouse who purchased it and did not form part of the *tediatetam* property ". The trial Judge found the facts in favour of the defendant and following a decision of this Court that the old law was not changed by the Ordinance dismissed the action. The only question that seems to have been argued at the hearing of the appeal was whether the premises in question were of the character of the property which is declared by section 21 (*a*) to be *tediatetam*. It was held to be *tediatetam* and judgment was entered in favour of the plaintiff declaring the property iable to be sold in execution of the judgment. The action was against the defendant personally and as administratrix of her husband's estate.

In *Sewakeenpillai v. Murugupillai*, (*supra*) the defendant as the heiress of her sister claimed a half share of a land, bought a few weeks before her death by the husband, when it was seized in execution of a judgment against him ; the action was filed after the death of the wife. The claim was upheld and the plaintiff instituted the action to have it declared that the half share was liable to be sold in execution of the decree. The plaintiff-appellant succeeded in appeal. The judgment contains the following :—" On the death of Sangapathy one half of the property vested in the respondent but such vesting was ' subject to the provisions of the *Tesawalamai* relating to liability to be applied for the payment ' of the debt contracted by Sithambarapillai (*vide* section 22). The only question is whether under the provisions of the *Tesawalamai* the half share in question could be seized in execution of the decree against Sithambarapillai. A similar question arising under similar circumstances has been answered in the affirmative by a Divisional Bench of the Court, in *Avitchy Chetty v. Rasamma* [1]." Had the learned Judge all the facts of the case of *Avitchy Chettiar v. Rasamma* before him, it is doubtful whether he would have taken the view he did.

At the close of the argument on behalf of the appellant Mr. Tambiah desired to address us and we decided to hear him though he had no right. He referred to *Sevakeenpillai v. Murugupillai* (*supra*) and to *Katharuvaloe v. Menatchipille*.[2] It was mentioned by him that he drew attention to the latter decision at the argument in the former case. The learned Judge properly, if I may be permitted to say so, made no reference to this case inasmuch as it gave no assistance to the contention of the appellant. There it was found that " the defendant and one K. M. were married to each other in 1871 ". On a promissory note given by K M to the plaintiff in 1886, the latter obtained judgment in October 1890 and seized several parcels of land which constituted the " acquired property " of the spouses. The defendant's claim to a half share being upheld, the plaintiff brought the action to obtain a declaration " that the whole of the lands were liable to be sold in execution ". The contention of the defendant was that at the time of the institution of the action on the note and at the date of the decree therein the defendant and K. M. had been judicially separated and that apparently a half share was possessed separately thereafter. It was held that the acquired property was liable for the

[1] (*1933*) *35 N. L. R. 313.* [2] (*1892*) *2 C. L. Rep. 132*

debts incurred by the husband during coverture and " the decree of divorce could not affect " the rights of the plaintiff—or as Withers J. said " this liability could not be affected by a simple sentence of divorce ". It is necessary to bear in mind that the decree in the matrimonial action was entered before the coming into operation of the Civil Procedure Code ; in May, 1890, she obtained " a decree of divorce *a mensa et thoro* " from her husband. Under the old procedure there appears to have been a decree of divorce *a vinculo matrimonii* and a decree of divorce *a mensa et thoro* [1]. The latter would seem to be what would now be known as a decree of separation *a mensa et thoro*. Where a Court passed in those days a decree of divorce *a mensa et thoro* unless the Court made an order interdicting the husband from all interference with the wife's property and ordering a division of the common estate she continued to be a *feme covert*. As Voet states—A judicial separation *thori et honorum* and a division of the property of the husband and wife will not terminate the community nor will it, unless it be also accompanied by an interdict restraining the husband from interfering with the wife's property, in any degree abridge his marital power in the administration and alienation of it or in binding her and her property by his contracts, nor will it enable the wife to make any dispositions [2].

The fact that the word " divorce " was used to include two kinds of relief, may afford an explanation for the omission of any reference to an action for separation in section 16 of the Prescription Ordinance of 1871 (Ordinance No. 22 of 1871), now section 15 of Cap. 55 of the Ceylon Legislative Enactments—the words there being " an action for divorce ".

GRATIAEN J.—I agree.

Appeal dismissed.