1957 *Present:* **Weerasooriya, J., and Sansoni, J.**

DURAIRAJAH *et al.*, Appellants, *and* MAILVAGANAM *et al.*, Respondents

S. C. 232— D. C. Jaffna, 141/M

Vendor and purchaser—Thesavalamai—Husband and wife—Sale of land by them—Covenant to warrant and defend title—Liability of the wife—Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), as amended by Ordinance No. 58 of 1947, ss. 6, 19.

Where several vendors enter into a covenant to warrant and defend title to a land conveyed by them, and the title is subsequently questioned by a third party in an action, it is incumbent on the vendee to give notice to warrant and defend title to each of his vendors whom he seeks to hold liable under the covenant.

Accordingly, where a husband and his wife governed by the law of Thesavalamai sell immovable property belonging to the wife, notice to warrant and defend title must be given to the wife separately if she is to be held liable. In such a case, notice to the husband cannot, by virtue of section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance, be construed as notice to the wife as well.

APPEAL from a judgment of the District Court, Jaffna.

C. Renganathan, for the defendants-appellants.

N. Nadarasa, with *S. Sharvananda*, for the plaintiffs-respondents.

Cur. adv. vult.

May 16, 1957. WEERASOORIYA, J.—

The plaintiffs-respondents sued the defendants-appellants in this action to recover a sum of Rs. 5,400 as damages sustained by reason of the failure of the defendants to warrant and defend title to the land described in the schedule to the plaint in terms of their covenant in deed P1 of 1953 on which they purported to transfer the land to the plaintiffs for valuable consideration. After trial judgment and decree were entered in favour of the plaintiffs in a sum of Rs. 4,950 and costs as against both defendants and from this judgment and decree the defendants have appealed.

The 1st defendant is the husband of the 2nd defendant. On deed P3 of 1952 the 2nd defendant purchased the land in suit from one Iyampillai. P3 contains a recital that the 2nd defendant stated that the purchase price of Rs. 1,500 represented a portion of her dowry money. It is common ground that the defendants are governed by the law of *Tesawalamai*, and although no specific issue was raised on the question whether this property is her separate property, the answer to it would have a bearing on the following two of the issues on which the case went to trial and which are the only issues material to this appeal:

"(4) Was notice to warrant and defend title duly given to the defendants in case No. 11429 D. C. Jaffna ?

(5) If not, is the plaintiffs' action maintainable ? "

At the hearing before us the appeal of the 2nd defendant only was pressed by Mr. Renganathan. As conceded by him, even if this property is the 2nd defendant's separate property the 1st defendant would be liable in damages under his covenant in P1 to warrant and defend title in view of the answers of the trial Judge to the two issues set out above, the correctness of which answers, in so far as they affect the case of the 1st defendant, was not canvassed by Mr. Renganathan.

Shortly after the execution of P1 certain persons as the trustees of the Vaitheeswaram Temple filed D. C. Jaffna Case No. 11429 against the plaintiffs for declaration of title to the land in suit and for ejectment and damages on the basis that the land was the property of the temple. The evidence of Proctor Visuvanathan, which the trial Judge has accepted, is that on the filing of that action the 1st plaintiff and the 1st defendant retained him to appear for the defendants in the action and that while the 1st defendant did not intervene as a party he rendered such assistance as he could in the defence of it. Judgment was however given in favour of the plaintiffs in that case and on the advice of counsel no appeal was preferred against it. The 1st plaintiff eventually paid a sum of Rs. 1,000 in full settlement of the damages and costs awarded. Apart from the evidence of the 1st plaintiff, the conduct of the 1st defendant as spoken to by Proctor Visuvanathan clearly indicates that the 1st plaintiff had given him notice of the filing of case No. 11429 and that the purport of the notice was that he should warrant and defend the title conveyed on P1. We see no reason, therefore, to interfere with the finding of the trial Judge that notice to warrant and defend title was duly given to the 1st defendant.

Where several vendors have entered into a covenant to warrant and defend the title conveyed by them, the law is clear that in the event of the vendee being involved in litigation in which that title is questioned it is incumbent on him to give notice to warrant and defend title to each of his vendors whom he seeks to hold liable under the covenant, *Subramaniam et al. v. Sivaguru* [1]. The notice need not, however, be in writing and it would be sufficient if such notice could be implied from the surrounding circumstances as having been given orally.

The question that arises in the present case is whether the notice that has been held to have been given to the 1st defendant can be construed as a notice to the 2nd defendant as well. The 1st plaintiff in his evidence did not say that a separate notice was given to the 2nd defendant. The position taken up by him at the trial seems to have been that since the defendants are governed by the law of *Tesawalamai* the 1st defendant as the husband is the manager of the 2nd defendant's property and therefore notice to the 1st defendant alone was sufficient. It was on this basis that the learned trial Judge gave judgment against the 2nd defendant. He also took the view that under the law of *Tesawalamai* the husband is the agent of his wife.

It was held in *Sangarapillai v. Deverajah Mudaliyar* [2] that in the case of husband and wife who are governed by the *Tesawalamai* " the husband is the sole or irremovable attorney of the wife " in respect of *tediatatem*

[1] *(1941) N. L. R. 124.* [2] *(1936) 38 N. L. R. 1.*

property and that as such he had the power to alienate or mortgage it for valuable consideration. In that case, however, the questions that arose for decision were in regard to the correct interpretation of sections 19 and 20 of The Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48) prior to their amendment by Ordinance No. 58 of 1947. Section 20 (in its unamended form) provided that the *tediatatem* of each spouse shall be property common to either spouse and that although it is acquired by either spouse and retained in his or her name both shall be equally entitled thereto. But, as pointed out by Gratiaen, J., in *Kumarasuamy et al. v. Subramaniam et al.* [1], the amending Ordinance introduced a fundamental alteration in regard to the vesting of title in the non acquiring spouse to *tediatatem* property acquired by the other spouse and he expressed the view that such property, if acquired by one spouse after the date on which that Ordinance came into operation, must be regarded as the separate property of the acquiring spouse subject, however, to the devolution of the same on the death of the acquiring spouse under section 20 (as amended by that Ordinance). On the view expressed by Gratiaen, J., it would seem doubtful whether the decision in *Sangarapillai v Devarajah Mudaliyar* (*supra*) and earlier decisions relating to the husband's marital power over the *tediatatem* property of his wife apply in so far as such property has been acquired after the amending Ordinance No. 58 of 1947 came into operation. But it is not necessary to decide the point in the present case since I am of the opinion that on the evidence adduced at the trial it is not possible to hold that the land in suit is the 2nd defendant's *tediatatem* property as defined in section 19 as amended by Ordinance No. 58 of 1947, which governs the case since P1, which is the 2nd defendant's source of title, was executed after that Ordinance had come into operation.

As I have already stated, no issue was raised whether this land is the 2nd defendant's separate property and it was, no doubt, for that reason that no evidence was adduced at the trial as specifically relevant to that question. Even if the statement imputed to the 2nd defendant in the recital in P3 that the purchase price represented a portion of her dowry is disregarded as being merely hearsay (the 2nd defendent not having given evidence) there seems to be no ground in view of the definition of *tediatatem* property in the amended section 19 to hold that it has been estabished that the land is property of that description. While the subsequent deed P1, under which the defendants purported to convey to the plaintiffs the title acquired on P3, contains a recital that the 1st defendant also was " seised and possessed " of the land, I do not think that much value can be attached to it in view of its equivocal nature. It is also possible that the recital, in so far as it relates (if it does relate) to the title of the 1st defendant in the land conveyed, was based on an incorrect understanding of the legal position in regard to property acquired by the 2nd defendant after the coming into operation of Ordinance No. 58 of 1947.

The question whether the requisite notice to warrant and defend title was given by the 1st plaintiff to the 2nd defendant when he gave such

[1] (*1954*) *56 N. L. R. 44.*

notice to the 1st defendant must, therefore, be decided on the basis that the land in suit is not the *tediatatem* property of the 2nd defendant and is her separate property.

Mr. Nadarasa for the plaintiffs addressed to us the submission that under the *Tesawalamai* the husband is the manager of even his wife's separate property and, therefore, the agent of the wife for the purpose of any notice required to be given in respect of such property. (I use the expression " separate property " here as meaning separate property other than *tediatatem* property acquired after Ordinance No. 58 of 1947 came into operation and which, according to Gratiaen, J., in *Kunaraswamy et al. v Subramaniam et al.* (*supra*), would also be a species of separate property). The submission of Mr. Nadarasa is, however, in the teeth of section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48) from the terms of which it is clear that in the case of immovable property forming the wife's separate estate she has full powers of managing it or of leasing or mortgaging it independently of her husband whose written consent is necessary only for a transfer of it.

I hold, therefore, that the notice given to the 1st defendant to warrant and defend title is not a notice to the 2nd defendant. The judgment and decree of the Court below as against the 2nd defendant must accordingly be set aside and the plaintiffs' action against her dismissed with costs in both Courts.

In regard to the judgment and decree as against the 1st defendant, it was pointed out by Mr. Renganathan that on the findings of the trial Judge the amount of damages payable should be Rs. 4,750 and not Rs. 4,950. This was conceded by Mr. Nadarasa. The decree appealed from will be varied by substituting Rs. 4,750 in place of the sum of Rs. 4,950. Subject to this variation the appeal of the 1st defendant is dismissed with costs.

SANSONI, J.—I agree.

Appeal of 1st defendant dismissed.

Appeal of 2nd defendant allowed.

1956 *Present :* Sinnetamby, J., and L. W. de Silva, A.J.

PODIMENIKE KUMARIHAMY, Appellant, *and* ABEYKOON BANDA, Respondent

S. C. 408—D. C., Kegalle, 8,661

Kandyan Law—Donation—Services to be rendered by donee—Revocability of gift.

In a Kandyan deed of gift executed in 1929 by a father in favour of his daughter in consideration of services already rendered, the donor enjoined on the donee the performance of future services not merely during his life time but also after his death. In 1931 the donor revoked the gift. The donee rendered services to the donor continuously till a few weeks before the donor's death in 1940.