IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No. 68/2014
WP/HCCA/MT/LA Application
No: 164/2007(F)
DC Mt. Lavinia Case No. 362/98/Spl

1. Vadivelu Anandasiva.

2. Vigneshwary Anandasiva.

Both of No. 15, Alexandra Road,
Colombo 6.

PLAINTIFFS

Vs.

1. Paranirupasingham Arulrajasingham,
No. 22, Govt. Quarters,
Bambalapitiya.

2. Subramaniam Shanmuganathan,
No. 56, Vaverset Place,
Colombo 6.

DEFENDANTS

AND BETWEEN

1. Vadivelu Anandasiva.

2. Vigneshwary Anandasiva.

Both of No. 15, Alexandra Road, Colombo 6.

PLAINTIFFS – APPELLANTS

Vs.

1. Paranirupasingham Arulrajasingham,
   No. 22, Govt. Quarters,
   Bambalapitiya.

2. Subramaniam Shanmuganathan,
   No. 56, Vaverset Place,
   Colombo 6.

DEFENDANTS – RESPONDENTS

AND NOW BETWEEN

1. Paranirupasingham Arulrajasingham,
   No. 22, Govt. Quarters,
   Bambalapitiya.

1ST DEFENDANT – RESPONDENT – APPELLANT

Vs.

1. Vadivelu Anandasiva.

2. Vigneshwary Anandasiva.

   Both of No. 15, Alexandra Road, Colombo 6.

PLAINTIFFS – APPELLANTS – RESPONDENTS

1. Subramaniam Shanmuganathan,
   No. 56, Vaverset Place,
   Colombo 6.

2ND DEFENDANT – RESPONDENT – RESPONDENT

Before: **Priyantha Jayawardena, PC, J**
A.L. Shiran Gooneratne, J
Arjuna Obeyesekere, J

Counsel: M.A. Sumanthiran, PC, with Ms. Juanita Arulanandam and Ms. S Arulendran for the 1st Defendant – Respondent – Appellant

Ikram Mohammed, PC, with S. Mitrakrishnan, Ms. Tanya Marjan, Vinura Jayawardena and Reeshman Jiffry for the Plaintiffs – Appellants – Respondents

Argued on: 1st November 2021

Written Submissions: Tendered on behalf of the 1st Defendant – Respondent – Appellant on 10th November 2021

Tendered on behalf of the Plaintiffs – Appellants – Respondents on 5th August 2014 and 9th November 2021

Decided on: 21st February 2024

Obeyesekere, J

This is an appeal filed by the 1st Defendant – Respondent – Appellant [*the Appellant*] against the judgment delivered on 10th February 2012 by the High Court of the Western Province holden at Mount Lavinia, exercising civil appellate jurisdiction [the High Court]. Leave to appeal has been granted by this Court on 20th May 2014 on three questions of law, which I shall refer to in detail later; suffice to state at this point that the said questions of law would require this Court to determine on whom lies the burden of proof in establishing that a particular property is Thediathetam property, and whether that burden has been discharged by the Appellant.

In the course of writing this judgment, I have observed that the words '*Thesawalamai*' and '*Thediathetam*' have been spelt differently over the years. In order to maintain uniformity, I have opted to follow the above spellings which have been used by Chief Justice Sharvananda in **Manikkavasagar v Kandasamy and Others** [(1986) 2 Sri LR 8].

I shall commence by setting out the material facts relating to this appeal.

Money recovery action

On 30th January 1997, the Appellant filed Case No. 88/97 in the District Court of Mount Lavinia against Subramanium Shanmuganathan, who is the 2nd Defendant – Respondent – Respondent [*Shanmuganathan*], under and in terms of the provisions of Chapter LIII of the Civil Procedure Code. In his plaint, the Appellant alleged that during the period of 10th June 1996 to 30th June 1996, Shanmuganathan had issued in favour of the Appellant, two cheques drawn on the Commercial Bank of Ceylon Limited in a sum of Rs. 250,000 each, and a further cheque drawn on the same Bank in a sum of Rs. 100,000. The Appellant had stated further that he presented all three cheques to the Bank but that the said cheques were dishonoured, with an endorsement that it be referred to the drawer. As Shanmuganathan had failed to pay the said sums of money to the Appellant, although demanded through an Attorney-at-Law, the above action had been instituted seeking to recover the said sums of money.

Shanmuganathan had failed to appear before the District Court in spite of summons having been served on him. Pursuant to a report of the Fiscal that Shanmuganathan is avoiding the service of summons, and being satisfied that summons had been served on Shanmuganathan by way of registered post, the learned District Judge had entered judgment as prayed for in the plaint. Even though the journal entries available to me do not indicate that the judgment and decree were served on Shanmuganathan, the Appellant had moved and obtained from the District Court in October 1997, a writ of execution in satisfaction of the said decree, in respect of a property bearing assessment No. 348, Galle Road, Wellawatte, Colombo 6 [*the Wellawatte property*] that the Appellant claimed was owned by Shanmuganathan. The said writ was executed on 28th October 1997, and the property was seized by the Fiscal.

The Wellawatte property

It is admitted between the parties that the said property was jointly purchased by Shanmuganathan's wife, Renukadevi and his business partner, Murugesu Amirthanayagam, by Deed of Transfer No. 1369 dated 5th December 1991. In January 1993, Renukadevi and Murugesu Amirthanayagam had mortgaged the said property to Seylan Bank Limited and obtained a loan in a sum of Rs. 2 million. It is further admitted that by Deed of Transfer No. 1976 dated 31st March 1994, Murugesu Amirthanayagam transferred the half share owned by him to Renukadevi. On 24th August 1996, by Deed of Transfer No. 2326, the said property had been sold to the 1st and 2nd Plaintiffs – Appellants – Respondents [*the 1st and 2nd Respondents, or collectively, the Respondents*] who are husband and wife. The aforementioned mortgage in favour of Seylan Bank had been cancelled on 6th September 1996, with the Respondents having settled the loan.

Thus, by the time the aforementioned Case No. 88/97 was instituted by the Appellant in the District Court of Mount Lavinia in January 1997, and therefore by the time the writ was executed on 28th October 1997, the Wellawatte property was owned, *at least on the face of it*, by the Respondents.

Application under Section 241

Aggrieved by the fact that the property owned by her and her husband had been seized in order to satisfy a debt owed by Shanmuganathan to a third party [*i.e. the Appellant*], the 2nd Respondent had made an application on 6th November 1997 to the District Court in terms of Section 241 of the Civil Procedure Code, against the seizure of the property. Even though the 2nd Respondent had pleaded the aforementioned Deed No. 2326, and claimed that she had purchased the said property from Renukadevi and is a bona fide purchaser of the said property, the application was refused by the learned District Judge as the 2nd Respondent had not averred that she was in possession of the property. Accordingly, the Respondents took steps to institute action in terms of Section 247 of the Civil Procedure Code.

Action filed by the Respondents

Section 247 of the Civil Procedure Code provides as follows:

> "*The party against whom an order under section 244, 245, or 246 is passed may institute an action within fourteen days from the date of such order to establish the right which he claims to the property in dispute, or to have the said property declared liable to be sold in execution of the decree in his favour; subject to the result of such action, if any, the order shall be conclusive*."

Accordingly, the Respondents filed Case No. 362/98/Spl in the District Court of Mount Lavinia in which they named the Appellant as the 1st Defendant and Shanmuganathan as the 2nd Defendant. Shanmuganathan never participated in the said action and trial proceeded only against the Appellant. In the plaint, it was admitted that both Renukadevi and Shanmuganathan, as well as the Respondents, were subject to and governed by the Law of Thesawalamai. It was the position of the Respondents that they had paid valuable consideration to Renukadevi and that the loan that was outstanding to Seylan Bank was also settled by them. They claimed further that they were bona fide purchasers and that the property was not subject to seizure for any sums of money owed by Shanmuganathan, or in satisfaction of any decree against Shanmuganathan.

In his answer, the Appellant took up the position that Shanmuganathan continued to own half of the property in spite of the execution of Deed No. 2326 and therefore, the said property was still liable for seizure. The basis of this argument was threefold. The first was that the said property acquired by Renukadevi is Thediathetam property. The second was that accordingly, ownership in an undivided one half of the said property vested in Shanmuganathan by operation of law from the moment it was acquired by Renukadevi. The third was that even though Shanmuganathan had signed the Deed of Transfer No. 2326 in favour of the Respondents, he had done so not in his capacity as the owner of one half of the property but, as the husband of Renukadevi, to provide his written consent to Renukadevi transferring her half share in the property to the Respondents, and as such had not alienated the half share vested in him by operation of law.

While stating further that the Respondents were not bona fide purchasers of the property, the Appellant set up a claim in reconvention that Deed No. 2326 had been executed in order to defraud the creditors of Shanmuganathan and sought a declaration that the said Deed No. 2326 was null and void.

Issues before the District Court

The Respondents raised the following three issues, with their position being that they are the owners of the said property by virtue of Deed No. 2326:

1. ආර්.සී. කනගරත්නම් ප්‍රසිද්ධ නොතාරිස් තැන විසින්, 1996, අගෝස්තු මස 24 වන දින ලියා සහතික කරන ලද අංක. 2326 දරණ ඔප්පුවෙන් දෙවන පැමිණිලිකරු මෙම නඩුවට අදාල විෂය වස්තුවේ අයිතිකරු වීද?

2. එසේ නම්, ගල්කිස්ස දිසා අධිකරණයේ අංක 88/97/එස් දරණ නඩුවේ 1997.10.28 වන දින දේපල තහනමට ගැනීම වැරදි සහගත ද?

3. ඉහත සඳහන් විසඳිය යුතු ප්‍රශ්නය පැමිණිලිකරුගේ වාසියට විසඳෙන්නේ නම්, පැමිණිල්ලේ ආයාවනයේ ඉල්ලා ඇති සහන ලබා ගැනීමට පැමිණිලිකරුට අයිතියක් තිබේද?

The issues framed by the Appellant were as follows:

4. පැමිණිල්ලේ උපලේඛණයෙහි විස්තර කර ඇති සහ අංක. 1369 හා 1976 දරණ ඔප්පුව මගින්, රේණුකා දේවි, 2වන විත්තිකරුගේ භාර්යාව විසින් අත්කරගෙන ඇති දේපල, **තේසවලමේ නීතිය යටතේ, "තේඩියතේට්ටම්" දේපලක් වන්නේද**?

5. ඉහත සඳහන් 4 වන විසඳිය යුතු ප්‍රශ්නයට, "ඔව්" යනුවෙන් පිළිතුරු ලැබෙන්නේ නම්, එකි රේණුකාදේවි විසින් එකි දේපල අත්කරගත් මොහොතේ පටන් නීතිය ක්‍රියාත්මක වීමෙන් එකි දේපල ට නොබෙදූ, 1/2 ක් 2 වන විත්තිකරුට පැවරේද?

6. ගල්කිස්ස දිසා අධිකරණයේ අංක. 88/97/එස් දරණ ලඝු නඩුවේ තීන්දු, ප්‍රකාශය, 2 වන විත්තිකරුට එරෙහිව ඇතුලත් කල වේලාවේදි එකි දේපල එකි නොබෙදූ, 1/2 හි අයිතිකරු, 2 වන විත්තිකරුට වේද?

7. ඉහත විසඳිය යුතු ප්‍රශ්ණ 4, 5, 6 ට පිළිතුරු "ඔව්" යනුවෙන් ලැබුනහොත්, එකි තීන්දු, ප්‍රකාශය යටතේ පිස්කල් වරයා විසින් එකි දේපල තහනමට ගැනීම නීත්‍යානුකූල තහනමට ගැනීමක්ද?

8. 4, 5, 6, 7 ප්‍රශ්නවලට පිළිතුරු "ඔව්" යනුවෙන් ලැබෙන්නේ නම් පැමිණිලිකරුගේ නඩුව නිශ්ප්‍රභා කල යුතුද?

9. ප්‍රසිද්ධ නොතාරිස්, ආර්.ටී. කනගරත්නම් විසින් ලියා සහතික කරන ලද අංක. 2326 දරණ 96.8.24 වන දිනැති එකී ඔප්පුව ලියා සහතික කරන ලද්දේ, 2 වන විත්තිකරුගේ ණය හිමියන්ට වංචා කරනු පිණිසද?

10. ඉහත (9) වන විසඳිය යුතු ප්‍රශ්ණයට පිළිතුරු, "ඔව්" යනුවෙන් ලැබෙන්නේ නම්, එකී අංක. 2326 දරණ ඔප්පුව නීතියට අනුව, ශූන්‍ය සහ බල රහිත බවට ප්‍රකාශයක් ලබා ගැනීමට 1 වන විත්ති කරුට හිමිකම් තිබේද?

The Appellant, the Attorney-at-Law who executed Deed No. 2326, as well as the 1st Respondent and the Fiscal who executed the writ, gave evidence before the learned District Judge.

Judgment of the District Court

By his judgment delivered on 13th December 2007, the learned District Judge accepted the argument of the Appellant that: (a) the said property was in fact Thediathetam property; (b) Shanmuganathan had only consented to Renukadevi transferring her half share; and (c) Shanmuganathan had not transferred his half share in the property to the Respondents, thus leaving the Respondents with ownership to only one half of the property. The learned District Judge had also held that it was open to the Respondents to have called Renukadevi to contradict the above position that the said property was Thediathetam and that the failure to do so gives rise to the presumption in illustration (f) of Section 114 of the Evidence Ordinance that "*the court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it*".

Even though the learned District Judge had also arrived at the conclusion that the Respondents had acted fraudulently and colluded with Shanmuganathan, he had disallowed the claim in reconvention of the Appellant.

Judgment of the High Court

Aggrieved by the aforesaid judgment of the District Court, the Respondents preferred an appeal to the High Court. By its judgment dated 10th February 2012, the High Court set aside the judgment of the District Court and allowed the appeal, holding as follows:

a) The burden of proving that a property is Thediathetam property is on the party alleging so;

b) The District Court erred when it placed the burden on the Respondents;

c) The Appellant has failed to discharge the said burden;

d) Shanmuganathan does not have any right to the said property;

e) Shanmuganathan had consented to his wife Renukadevi transferring the said property to the Respondents;

f) The transfer in favour of the Respondents had been done several months prior to the institution of Case No. 88/97 by the Appellant and there was no evidence that the Respondents had acted fraudulently.

Questions of Law

Dissatisfied by the judgment of the High Court, the Appellant sought and obtained leave to appeal from this Court, on the following questions of law:

1) Have the learned High Court Judges erred in law in coming to a finding that the person claiming that certain property is Thediathetam property should establish his stance?

2) Have the learned High Court Judges erred in law in coming to a finding that the Appellant failed to prove that the said property is Thediathetam property?

3) Have the learned High Court Judges erred in law in coming to a finding that the Appellant failed to prove in the District Court that the said property is Thediathetam property?

It must be noted that the Appellant had proposed in his petition of appeal, a question of law with regard to whether Shanmuganathan had acted fraudulently by transferring the said property to the Respondents in order to defraud his creditors. Leave to appeal had however been granted only on the above three questions.

The core issue arising from the above questions of law is on whom lies the burden of proof in establishing that a particular property is Thediathetam property. This Court in **Manikkavasagar vs Kandasamy and Others** [supra] has considered the question of burden of proof in connection with Thediathetam in detail. However, the learned President's Counsel for the Appellant has sought to assail the said decision on the basis that it is *per incuriam*, and also on the basis that the peculiar circumstances of this case, where the dispute with regard to the nature of the property is not between spouses, but third parties, would render the dicta in the said case inapplicable to the present facts.

In order to address the several arguments of the learned President's Counsel for the Appellant, and in view of the changes that have occurred to the law relating to Thesawalamai and in particular to Thediathetam through legislative interventions and judicial interpretations, it is necessary to first consider the following matters:

1) Thesawalamai and its evolution.

2) Classification of property under the Thesawalamai.

3) The concept of Thediathetam as recognized by the law relating to Thesawalamai and its evolution.

4) The requirement for a wife to obtain the written consent of her husband prior to the sale of any immovable property.

5) The right of a non-acquiring spouse to own one half of Thediathetam property acquired by his/her spouse.

The Thesawalamai

The word *Thesawalamai* means the 'customs of the land'. As pointed out by Justice H.W. Tambiah, QC, in **Principles of Ceylon Law** [H.W. Cave & Company; 1972] at page 199:

> "*Thesawalamai is a special system of law applicable to the Tamil inhabitants of Jaffna. It appears to have evolved from a system of customary laws applicable to the ancient Tamils, who had a matriarchal system of society. The first wave of emigration brought the Tamils from the Malabar District of India, and they brought with them the customary usages peculiar to a society based on matriarchy. Later emigrations brought an influx of Tamils from South India, whose customs and manners were influenced by the Aryan system of society and Hindu law. While they brought certain customary laws specially suited to a patriarchal system of society, at some point of time a compromise appears to have been effected and therefore we find in Thesawalamai rules peculiar to a matriarchal system of society blended with rules based on a patriarchal pattern*."

Codification of Thesawalamai by the Dutch

During the period that they governed Jaffna, the Portuguese applied the Thesawalamai as they found it, without attempting to codify it. Zwaardecroon, who was at one time the Dutch Commander of Jaffna, referring to Thesawalamai as the native customs which governed the Tamils of Jaffna, has stated as follows, in **Memoir of Hendrick Zwaardecroon**, as translated by Sophia Pieters [Government Printer; 1911] at pp. 49-50:

> "*There are also many native customs according to which civil matters have to be settled, as the inhabitants would consider themselves wronged if the European laws be applied to them... As, however, a knowledge of these matters cannot be obtained without careful study and experience, which not everyone will take the trouble to acquire, it would be well if a concise digest be compiled according to information supplied by the chiefs and most impartial natives. No one could have a better opportunity to do this than the Dessave, and such work might serve for the instruction of the members of the Court of Justice as well as for new rulers arriving*

here, for no one is born with this knowledge. I am surprised that no one has yet undertaken this task."

Acting on this suggestion, Governor Simons entrusted the task of collecting and codifying the customs to Claas Isaaksz, the Dissawe of Jaffnapatam. As set out in **Seelachchy v Visuvanathan Chetty** [23 NLR 97 at page 99]:

"*Tesawalamai, as its name denotes, is a description of the country custom. Tesa (country) and walamai (custom). In 1704 the Dutch Governor of Ceylon, Governor Simons, directed the Disawa of Jaffna, Claas Isaaksz, to inquire into the customs of the Tamil inhabitants of Jaffna as then existed and to compile them. In consequence, after inquiry, Isaaksz submitted a description of the customs, in the Dutch language, to the Commander van der Duyn in 1707. The Commander had the same translated into the Tamil language, and delivered the translation to twelve "sensible" modeliars to peruse and revise the same. The "sensible" modeliars reported that they perfectly agreed with the usual customs prevailing at this place, and fully confirmed the same...*

In 1708 the customs were promulgated by the Dutch Governor of Ceylon and were given the force of law, and authenticated copies of the same were sent to the Courts of Justice and the Civil Landraad for their guidance.

This composition of the country customs is called the Tesawalamai."

An English translation of the said submission of Isaaksz dated 5th April 1707 that he had "*composed the Malabar laws and customs by Order of His Excellency the Governor … so far as my knowledge of the same permitted me*", the report of Van der Duyn and an extract of a letter dated 4th June 1707 by the Governor to Van der Duyn confirming that the Thesawalamai Code compiled in Dutch has been translated into Tamil by Jan Pirus, have been re-produced by Henry Francis Mutukisna in **A New Edition of the Thesawaleme: Or The Laws and Customs of Jaffna** [Ceylon Times Office; 1862], and are found in the Legislative Enactments of 1911.

Regulation No. 18 of 1806

After the Dutch settlements in Ceylon were ceded to the British, Regulation No. 18 of 1806 was issued declaring as follows:

> "*The Tésawalamai, or customs of the Malabar inhabitants of the province of Jaffna, as collected by order of Governor Simons, in 1706, shall be considered to be in full force*.
>
> *All questions between Malabar inhabitants of the said province, or wherein a Malabar inhabitant is defendant, shall be decided according to the said customs*."

Once Sir Alexander Johnston assumed the Office of Chief Justice in 1814, he had a fresh translation correcting "*the rude English of the Ceylonese (Dutch) translator"*. In **The Dominium of Ceylon – The development of its Laws and Constitution** by Sir Ivor Jennings and H.W. Tambiah [Stevens & Sons Limited; 1952], referring to **Sabapathy v Sivaprakasam** [8 NLR 62] the authors have pointed out that the English translation must be referred to as authoritative since it has been used for over a century. This translation of the Code is now found in the Legislative Enactments as the Thesawalamai Ordinance.

The Matrimonial Rights and Inheritance (Jaffna) Ordinance No. 1 of 1911

The Matrimonial Rights and Inheritance (Jaffna) Ordinance No. 1 of 1911 [*the Ordinance*] was introduced to amend the law relating to the matrimonial rights of the Tamils who were governed by the Thesawalamai with regard to their property and inheritance. While the Ordinance initially comprised of forty sections, Sections 39 and 40 have been repealed and Sections 2 and 5 have been re-numbered as Sections 40 and 39, respectively. The rest of the Sections have been renumbered. These changes to the Ordinance are reflected in the Ordinance that is found in the Legislative Enactments of 1938. I have for convenience, referred the numbers of the Sections and the text as it appears in the said Legislative Enactment.

While it has been stated in **Manikkavasagar v Kandasamy and Others** [supra] that the Ordinance was a *declaratory law* in the sense that it gives statutory validity to the customs of the Malabar inhabitants of the Northern Province embodied in the Thesawalamai, Section 40 provided that, "*So much of the provisions of the collection of customary law known as the Tesawalamai, and so much of the provisions of section 8 of the Wills Ordinance, as are inconsistent with the provisions of this Ordinance are hereby repealed*."

While in terms of Section 2, "*the Ordinance shall apply only to those Tamils to whom the Thesawalamai applies"*, Section 5 provided that, "*The respective matrimonial rights of every husband and wife married after the commencement of this Ordinance in, to, or in respect of movable or immovable property shall, during the subsistence of such marriage, be governed by the provisions of this Ordinance*."

Amendment to the Ordinance in 1947

Several significant amendments were introduced to the Ordinance by the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947 [*the Amendment*] to give effect, as stated in **Sellappah v Sinnadurai and Others** [53 NLR 121 at page 125], to:

> *"… the recommendations contained in the Report of the Thesawalamai Commission dated December 12, 1929 (Sessional Paper III of 1930) and in their Supplementary Report of October 9, 1931 (Sessional Paper I of 1933) with some modifications rendered necessary by the decision of the Supreme Court in the case of Avitchy Chettiar v. Rasamma (35 NLR 313).*"

These included an amendment to Section 2 in terms of which the Ordinance was to now apply *to those Tamils to whom the Thesawalamai applies in respect of their movable and immovable property wherever situate*, as well as to Sections 6, 19 and 20, to which I will advert to later.

The Law relating to Thesawalamai is now found in the Thesawalamai Code and the Ordinance, as amended in 1947.

Classification of Property under the Thesawalamai

As pointed out by Justice Dr. H.W. Tambiah, QC, in **The Laws and Customs of the Tamils of Jaffna** [Revised Edition; Women's Research and Education Centre; 2004; at page 150], in early Hindu Law, property was divided into hereditary property and acquired property. Later, the right of a married woman to own her property separately was recognized and her separate property was called *stridhana*. The Thesawalamai distinguished between hereditary property brought by the husband or wife (*mudusam*), dowry property brought by the wife (*chidenam*), and property acquired by the husband and wife (*thediathetam*).

The fact that mudusam property connotes hereditary property is evident from Section 1 of Part I of the Thesawalamai Code, which reads as follows:

> "*From ancient times **all the goods brought together in marriage** by such husband and wife have from the beginning been distinguished by the denomination of modesium, or hereditary property, when brought by the husband, and when brought by the wife were denominated in the Tamil language chidenam, or by us dowry; **the profits during marriage are denominated tediatêtam, or acquisition**. On the death of the father all the goods brought in marriage by him should be inherited by the son or sons, and when a daughter or daughters married they should each receive dowry, or chidenam, from their mother's property, so that invariably the husband's property always remains with the male heirs, and the wife's property with the female heirs, but the acquisition or tediatêtam should be divided among the sons and daughters alike; the sons, however, must always permit that any increase thereto should fall to the daughters' share*." [emphasis added]

Thus, under the Thesawalamai Code, property was divided into the following three classes:

(1) Mudusam or hereditary property brought into the family by the husband;

(2) Chidenam or dowry brought into the family by the wife; and

(3) Thediathetam or acquisition, being profits accruing to either husband or wife during marriage.

The Ordinance adopted a slightly different mode of classification. While in terms of Section 15, "*Property devolving on a person by descent at the death of his or her parent or of any other ancestor in the ascending line is called mudusam (patrimonial inheritance)*", Section 16 provided that "*Property devolving on a person by descent at the death of a relative other than a parent or an ancestor in the ascending line is called urumai (non-patrimonial inheritance)*." The Ordinance also recognized the right of a wife and husband to own their separate property – vide Sections 6 and 7, respectively.

Definition of Thediathetam Property – Prior to 1911

In **Waliamma v Sandrasegar Modliar Sooper**, referred to in **The Laws and Customs of the Tamils of Ceylon** by H.W. Tambiah [1954; at page 158], it has been stated as follows:

> "*The English and Roman-Dutch Law certainly recognise a community of goods between man and wife, but the Thesawalamai or country law, clearly recognizes a distinct and separate interest – the husband in the property inherited from his father, and the wife in her dowry and inheritance. The only property in which both have a mutual interest and is in common, is the profits arising from each of these respective properties, or what is acquired by their own exertions, during the marriage*."

In **Jivaratnam v Murukesu and Others** [1 NLR 251] decided in 1895, Withers, J stated [at page 253] that:

> "*Chapter IV., section 3, of the [Thesawalami] Code declares that a gift of land to either spouse is to be regarded as separate property of the spouse who has received the gift, though if alienated during the marriage no compensation is to be made out of the other spouse's estate. Only the proceeds (? profits) [sic] of the land are to swell the thediathettum. The same rule is applied to slaves and cattle or anything else which may be increased by procreation, with this difference, that the progeny remains the property of the spouse presented with the original slave or animal."*

Having thereafter referred to several previous cases, Withers, J went on to state as follows [at page 254]:

> "*It really comes to this, that according to the Thesavalamai as interpreted by decisions, the separate property of spouses is that* ***which either party brings to the marriage*** *or acquires during the marriage by inheritance or donation made to him or her particularly, while common property is restricted to the rents, revenue, and income of their separate estate, and what is acquired by the exertions of the spouses."* [emphasis added]

The above paragraph has been cited with approval in **A Handbook of the Thesawalamai** by S. Katiresu [S Ragunath; 1907].

Browne, J went on to state in **Jivaratnam v Murukesu and Others** [supra; at page 255], that, "*The precedents cited by the Solicitor General from pages 182 and 267 [of Mutukistna] certainly show that investments or transmutation of the character of the property will not affect the rights which belong to it in its original character*…"

A different view was expressed in **Ponnamah v Kanagasuriyam** [19 NLR 257]. Although decided by the Supreme Court in 1916, this case relates to the legal position that prevailed prior to the Ordinance. Ennis, J agreed with the District Judge that all property purchased after the date of marriage is presumed to be acquired property under the Thesawalamai until the contrary is proved. This judgment will be examined later when considering the submissions of the learned President's Counsel for the Appellant on the applicability of a presumption.

Thus, under the Code, Thediathetam was limited to property acquired during the marriage from the profits of the separate properties and by the exertions of the spouses. The Code did not consider as Thediathetam, property acquired by the conversion of *mudusam* or *chidenam*, even though such property may have been acquired during the subsistence of the marriage.

Thediathetam Under the 1911 Ordinance

The Ordinance introduced four important sections relating to property that a wife or husband could own.

The first is Section 6 in terms of which "*Any movable or immovable property to which any woman married after the commencement of this Ordinance may be entitled* ***at the time of her marriage****, or, except by way of Tediatetam as hereinafter defined, may become entitled during her marriage, shall … belong to the woman for her separate estate*…"

The second is Section 7 which provided that, "*Any 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, except by way of tediatetam, may become entitled during his marriage, shall, subject and without prejudice to the trusts of any will or settlement affecting the same, belong to the husband for his separate estate. Such husband shall, subject and without prejudice to any such trusts as aforesaid, have full power of disposing of and dealing with such property.*"

The third is Section 19 of the Ordinance which defined Thediathetam as follows:

> "*The following property shall be known as the 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 fourth is Section 20(1), which declared that, "*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.*"

The above Sections therefore set out:

(a) What constitutes the separate estate of a woman married after the commencement of the Ordinance which includes the property that she is entitled to at the time of her marriage;

(b) That the said separate property belongs to her;

(c) The power of disposition that a woman has over such property;

(d) An important limitation in that the ownership contemplated by Section 6 did not extend to Thediathetam property in view of the provisions of Section 20(1) that an acquiring spouse only owns one half of Thediathetam property.

The applicability of Section 19 was considered in **Nalliah v Ponnamah** [22 NLR 198]. In that case, the husband, after the death of his wife in 1917 and the death of their only child in 1918, sought to administer his wife's estate. The husband sought to deduct from the estate, certain sums of monies on the basis that such monies formed part of his mudusam. The husband's position was that before his marriage he had considerable sums of money saved out of his professional earnings, and after his marriage he invested these moneys and other moneys subsequently acquired in bonds and promissory notes. He contended that so much of the money invested as belonged to him before the marriage is his separate property, and need not, therefore, be brought into the testamentary account. The respondent, who was his mother-in-law, objected to the final account being accepted *inter alia* on the basis that the husband is not entitled to any deductions and that all these investments must be regarded as Thediathetam of both spouses as the investment was made during the marriage, and that half of such investments should be included in the deceased's estate.

De Sampayo, J held as follows at page 203:

> "*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 acquisitions should not be considered part of the common property, but*

would partake of the nature of the source from which they sprang. The Acting District Judge, who is a gentleman of great experience, and well versed in Jaffna customs, has, in a well-considered judgment, found that the investments in question to the extent of Rs. 8,000 was traceable to the moneys which had belonged to the husband before the marriage, and that the investments less that sum should alone be considered common property and be liable to be accounted for in the testamentary accounts. This finding of fact and the ruling of the learned District Judge are, in my opinion, quite right and just."

The argument that was presented before the Supreme Court was that whatever might be the correct interpretation of the original Thesawalamai, the meaning of Mudusam and Thediathetam has been altered by the Ordinance and therefore the husband's professional earnings before marriage, not being property devolving on him by descent, were not part of his mudusam, and that the investments on bonds and promissory notes, wherever the money came from, were property acquired for valuable consideration during marriage, and, therefore, was Thediathetam.

Rejecting the said argument, De Sampayo, J held as follows at page 204:

"*Mudusom does, in general, mean property devolving by descent, and this, perhaps, was its sole meaning in the ancient days when unmarried sons and daughters could not acquire anything for themselves, but what they acquired belonged to the parents, and would come back to them on the death of the parents.* ***But this custom as to disability has long since become obsolete, and sons and daughters can now acquire for themselves before marriage****, and such property has been considered their mudusom. Else under what other class would such property fall? It cannot be thediathetam since the acquisition is not made during the subsistence of the marriage. Then, again, the expression "property acquired for valuable consideration" in section [19] well applies to acquisitions by purchase and the like, but is wholly inappropriate to investments of money on loans. The truth appears to be that Sections [15] and [19] of the Ordinance are not, and do not purport to be, exhaustive definitions of mudusom and thediathetam. They, I think, are intended to be only general explanations of the Tamil words. The provisions of the Ordinance which are*

most relevant to the present question and determine the rights of husband and wife to property acquired before marriage are those contained in sections [6] and [7], which declare such property to belong to the man or woman, as the case may be, for his or her separate estate. 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 that in view of the principle of the decisions on this point, the property would receive the character of the money invested, and would not be regarded as thediathetam. This is much more the case when the investments take, as in this instance, the shape of loans of money on bonds or other instruments." [emphasis added]

An expanded definition of Thediathetam was given in **Seelachchy v Visuvanathan Chetty** [supra]. In that case, Sangarapillai, whose parents were both Tamils of Jaffna came to Colombo and traded in cigars. In October, 1881, he went to Jaffna and married the plaintiff, who was Tamil and a native of Jaffna. At the time of the marriage he was not possessed of any immovable property or any hereditary property. After marriage, while Sangarapillai continued his trading activity in Colombo, the plaintiff continued to remain in Jaffna.

Sangarapillai acquired immovable properties both in Colombo and in Jaffna, including the property in dispute at Bankshall Street in 1894 through the profits made in his business. In 1906, Sangarapillai donated the property to his eldest son, Nagalingam. Sangarapillai died in 1910, leaving a will, by which he left his properties to his wife. During 1912 and 1918, Nagalingam executed several mortgages over the said land. Due to non-payment, the bond was put in suit by the mortgagee, and decree was entered in his favour against Nagalingam. Upon execution of the decree, the property was purchased by the defendant. In September 1920, Sangarapillai's wife filed action on the ground that as the property was bought by her husband during the subsistence of the marriage, half of it became her own at the time of the acquisition, and that Nagalingam became entitled only

to half the property and therefore, the defendant's right to one half of the property is invalid.

Chief Justice Bertram, at pages 100 and 101, held as follows:

> *"The Tesawalamai Code was compiled at an age when the people of Jaffna, who were more or less agriculturists, were residing, both in fact and in law, in Jaffna and were "inhabitants" of Jaffna. Times changed, means of communication with other parts of the world became possible, and these "inhabitants" went to several parts of Ceylon and also to distant countries, but still maintained their relationships with their home, and constructively continued to be "inhabitants" of Jaffna and governed by the Code of Tesawalamai.*
>
> *Though the customs mentioned in the Code related to the usages and habits of people actually resident in Jaffna, some of the expressions used in the Code may be applicable, and have been made applicable, both by Statute as well as by judicial decisions, to a wider extent.*
>
> *For instance, the term thediathetam originally was intended to convey the meaning profits acquired. A husband brought his inherited or mudusom property, and a wife brought her dowry property. They both cultivated the lands and fields. Any profits they gained became common, and was known as thediathetam. In olden times, and even at the present day in many places, both husband and wife, and often the children too, joined in cultivating the fields and gardens and earned their living. It is possible that neither Isaaksz nor the sensible modeliars of old had in their minds any thought of the Jaffna inhabitant making money outside Jaffna by his own exertions, unaided by his wife, and getting profits and acquiring property. But the term thediathetam is wide enough to embrace this mode of acquisition, and the objection of Mr. Tisseverasinghe, for the defendant, that in this case the property bought by Sangarapillai in his own name cannot be said to come within the meaning of the term thediathetam under the Tesawalamai cannot, therefore, be sustained. In my opinion, all property acquired by either of the spouses during marriage must be held to be thediathetam or acquired property*."

Change in Position – Avitchy Chettiar v Rasamma

The question whether a property acquired by a woman who marries after the Ordinance came into operation and during the subsistence of the marriage, but out of her dowry, formed Thediathetam property, was re-agitated before a Divisional Branch of three Judges of the Supreme Court in **Avitchy Chettiar v Rasamma** [35 NLR 313].

Garvin, ACJ referring to the definition of Thediathetam in Section [19], held as follows at pages 316 and 317:

> "*If this property falls within either of the two heads (a) or (b) of section [19], then clearly it would be liable to be taken in execution in this case since it is liable "to be applied for payment or liquidation of debts contracted by the spouses or either of them". No question arises here as to profits arising during the subsistence of the marriage. The sole question is whether the premises in question are of the character of the property which is declared by section [19](a) to be thediathetam. Now if the words of that sub-section be given their ordinary effect it would seem that there were two conditions which property claimed to be thediathetam must satisfy, first that it was acquired for valuable consideration by husband or wife, and secondly that it should have been acquired during the subsistence of the marriage.*
>
> *The property which is claimed in this case by Rasamma by virtue of the deed No. 1,669 of November 3, 1924, was acquired for valuable consideration and it was acquired during the subsistence of the marriage. It was urged, however, that notwithstanding the provisions of this section property acquired for valuable consideration provided by the spouse who had acquired it out of funds which formed part of his or her separate estate was not thediathetam but remained his or her separate property. Counsel relied strongly upon the case of Nalliah v. Ponnammah [22 NLR 198] in which a Bench of two Judges (De Sampayo J. and Schneider A.J.) upheld a similar contention and expressed themselves in language which indicates that they held the view that property acquired by a spouse out of funds which formed part of his separate estate "would receive the character of the money invested and*

would not be regarded as thediathetam". In view of this judgment it became necessary to have the matter argued before a larger Bench.

The question before us must, it seems to me, be settled by the interpretation of the language of the legislature. So far as it relates to the matter now before us these words are as follows: "Property acquired for valuable consideration by either husband or wife during the subsistence of marriage". These very general words are followed by no words of limitation nor of exception. Indeed, very similar words appear in the very next section which declares that "the thediathetam of each spouse shall be property common to the two spouses" – and then by way of explanation – "although it is acquired by either spouse and retained in his or her name". Once again emphasis is laid upon the fact that property acquired for valuable consideration during the subsistence of the marriage is thediathetam, notwithstanding that "it is acquired by either spouse and retained in his or her name". Indeed, if any question of ascertaining the intention of the legislature arises, the words of section [20] would seem to indicate the intention that notwithstanding that the property was the separate acquisition of one of the spouses it came within the definition of "thediathetam" so long as it was an acquisition for valuable consideration made during the subsistence of the marriage.

Garvin, ACJ at page 318 went on to state as follows:

Whatever the law may have been prior to this enactment it is beyond question that where a matter has to be determined in accordance with its provisions the law prior thereto must be treated as repealed. Section [40] states that "so much of the provisions of the collection of customary law known as the Thesawalamai ... as are inconsistent with the provisions of this Ordinance are hereby repealed", and moreover the Ordinance itself purports to be an Ordinance "to amend the law relating to the Matrimonial Rights of the Tamils who are now governed by the Thesawalamai with regard to property and the law of Inheritance"..."

"*It only remains therefore to interpret the language of the legislature as it appears in section 19. The meaning of the words used is clear and there is no reason to*

suppose that the legislature did not intend that these words should be interpreted in their plain and ordinary sense. Indeed, it is quite impossible to find any justification for expanding the section by the addition of words which would exclude from the subjects of property which appear to be caught up by the section all property acquired by either spouse for consideration provided by him or her from a separate estate.

In the case before us the premises were acquired for valuable consideration during the subsistence of the marriage and therefore falls within the definition of thediathetam."

In terms of **Avitchy Chettiar v Rasamma**, any property acquired for valuable consideration during the subsistence of a marriage was Thediathetam. This marked a major point of deviation from the previous view that the source of the funds determined whether property acquired during the subsistence of a marriage was Thediathetam or not.

As pointed out by Chief Justice Sharvananda in **Matrimonial Rights of Tamils Governed by Thesawalamai** [(1993) 1 BALJ 41 at page 44], *"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."*

In **Sellappah v Sinnadurai and Others** [supra; at page 126], the Supreme Court, referring to the above departure from the traditional view, has pointed out that the Commission appointed in 1929 to recommend amendments to the Ordinance had taken the opportunity "*to make some modifications rendered necessary by the decision in Avitchy Chettiar v Rasamma (supra) with intent to give a clear definition of the separate property of each of the partners of a marriage based on well-established custom and to remove the ambiguity which led to the decision in the case of Avitchy Chettiar v Rasamma (supra).*"

Definition of Thediathetam in terms of the Amendment

Accordingly, by the Amendment in 1947, Section 19 was repealed and replaced with the following:

> "*No property other than the following shall be deemed to be the thediatheddam 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*."

In **Kumaraswamy v Subramanium** [56 NLR 44 at page 47], Gratiaen, J stated thus:

> "*The new section 19 gives a definition of tediatetam "which restores for the future the more traditional conception of tediatetam which had been unmistakably, even though carelessly, altered by legislative intervention in 1911" – Akilandanayake v Sothinagaratnam and Others [(1952) 53 NLR 385 at 397]. Accordingly, property which would previously have constituted tediatetam within the meaning of the principal Ordinance in accordance with the ruling in Avitchi Chettiar's case [(1933) 35 NLR 313], must, if acquired on or after 4th July, 1947, be regarded as "separate property"*."

The above view has been confirmed by the Privy Council in **Subramanium v Kadirgarman** [72 NLR 289].

As pointed out by Justice Dr. H.W. Tambiah, QC in **The Laws and Customs of the Tamils of Jaffna** [supra; at page 172], the amendment in 1947 to Section 19 restored the class of property that could be classified as Thediathetam to what prevailed prior to the enactment of the Ordinance. Sections 6 and 7 which defined what comprises the separate

property of the wife and husband, respectively, were also suitably amended by the deletion of the words, "*except by way of tediatettam as hereinafter defined, may become entitled during her marriage*" and the substitution therefor, of the words, "*or 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*", thus making it clear that property acquired during a marriage with the proceeds coming from the separate estate of a spouse shall continue to form part of his or her separate estate and shall not be Thediathetam.

Accordingly, where the wife's dowry or Mudusam property was sold and a new property was bought during the subsistence of the marriage with the proceeds for such acquisition coming from the said dowry or mudusam property, the acquired property retained the original character of the property sold and remained the property of the wife. Such acquired property was not regarded as Thediathetam. In other words, whether property purchased during the subsistence of a marriage for valuable consideration was Thediathetam depended entirely on the source of the funds that were used in the acquisition of such property. This amendment therefore plays a pivotal role in deciding whether a presumption exists that a particular property is Thediathetam, as submitted by the learned President's Counsel for the Appellant, and in determining on whom lies the burden of proof in this appeal.

<u>The Necessity for a Wife to Obtain the Consent of the Husband to Transfer Immovable Property</u>

While there is no dispute between the parties that Shanmuganathan had consented to his wife Renukadevi transferring the said property to the Respondents, I would, for the sake of completeness, very briefly refer to the provisions of the Ordinance that require such consent.

Section 6 of the Ordinance, having set out what constitutes the separate estate of a woman, goes on to state as follows:

> "*… Such woman shall … have as full power of disposing of and dealing with such property by any lawful act inter vivos without the consent of the husband in case of movables, or* ***with his written consent in the case of immovables****, but not otherwise, or by last will without consent, as if she were unmarried.*" [emphasis added]

Section 6 therefore contains an important limitation in that the written consent of the husband was required for a valid transfer of any immovable property owned by a married woman subject to Thesawalamai, irrespective of whether such property was Thediathetam or separate property. As pointed out by Chief Justice Bonser at the turn of the 20th century [(1901) 2 Brown's Reports 362], the rationale for requiring the consent of the husband was "*to protect the married woman and prevent her being inveigled into some foolish disposition of the property and perhaps cheated of it. It is supposed that the husband would protect the interests of his wife and see that she does not do anything foolish*".

In **Vijayaratnam v Rajadurai and Others** [69 NLR 145 at page 147], Tambiah, J, referring to the power of the husband to give such written consent, held that it arises from the husband's marital right to manage the Thediathetam of his wife during the subsistence of the marriage and that it is an essential feature of the community in almost all its forms that the husband should be the manager of the common property.

Even though Section 6 was amended in 1947 to reflect the amendments made to the definition of Thediathetam in Section 19, the requirement for a wife to obtain the written consent of the husband in the disposition of her immovable property, stands. The present position therefore is that while a married woman retains full ownership of her separate property, she is not competent to transfer her immovable property without her husband's written consent. Any disposition of such immovable property without the written consent of her husband will be void.

The Right of a Non-Acquiring Spouse to Own Half of Thediathetam

The crux of the Appellant's argument was that even though the property was acquired in the name of Renukadevi, Shanmuganathan owned one half of the property by virtue of the said property being Thediathetam. Although the learned President's Counsel for the Respondents did not dispute the basis of the above argument of the Appellant, it being the current position of the law as set out in **Manikkavasagar v Kandasamy and Others** [supra], I would, once again for the sake of completeness, briefly set out the applicable provisions of the law that confers on a spouse the right to own one half of Thediathetam property of the other spouse, and the evolution thereof.

I shall commence with Section 20 of the Ordinance, which, prior to the Amendment, read as follows:

> *"(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*.
>
> *(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 this 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 a marriage or a separation a mensa et thoro, each spouse shall take for his or her own separate use one-half of the joint property aforesaid*."

Thus, irrespective of whether a property is purchased in the name of one spouse, if that property falls within the description of Thediathetam, the non-acquiring spouse shall own half of that property.

In **Seelachchy v Visuvanathan Chetty** [supra; at page 121], Garvin, AJ in his minority opinion held as follows:

"*It is not disputed that under the Tesawalamai there is community between spouses in all property acquired by either during the subsistence of the marriage…*

Property so acquired, which as such becomes subject to community, is designated thediathetam. What is the nature of this community? Does title to property acquired by one of the spouses vest equally in the other, as in the case of spouses subject to the communio bonorum of the Roman-Dutch law, or does the title remain in the spouse who acquired it, subject to the equitable right of the other spouse to take his share? Under the latter system a formal conveyance of immovable property to the wife will immediately, upon the execution of the conveyance, vest the title in both spouses. It was suggested that under the community known to the Tesawalamai the spouses in relation to property subject to that community stood in exactly the same position as the members of a commercial partnership. That is to say, that the title to property standing in the name of one partner remained in that partner alone, though as regards the other members of the partnership his position was that of a trustee. For this proposition no authority was cited. Though I can find no local decision which explicitly declares the community subsisting between spouses subject to the Tesawalamai to be in this respect identical with that known to the Roman-Dutch law, there are indications that that position was never doubted."

Referring to the provisions of Section 20, Garvin, J went on to state [at page 122] as follows:

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

If this view of the law be correct, these premises at the time of acquisition by Sangarapillai vested by operation of law equally in his wife."

In **Manikkavasagar v Kandasamy and Others** [supra; at page 19], it was held as follows:

"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 … In Seelachchy v. Visuvanathan Chetty 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…

In Ponnachchy v. Vallipuram (25 NLR 151) 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…

The view that the non-acquiring spouse automatically becomes entitled to [half] share of thediathetam was accepted in Kumaraswamy v. Subramaniam (56 NLR 44). 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."

Section 20 was repealed and replaced by the Amendment in 1947 with the following, which on the face of it, was a radical departure from the concept of community of interest in Thediathetam property:

"*On the death of either spouse one-half of the thediatheddam which belonged 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*."

One would immediately see that the new Section only provided for what would happen to Thediathetam property after the death of the acquiring spouse and that too, where such spouse died intestate, and that the new Section did not contain any provision as to the incidence of Thediathetam during the lifetime of the spouses.

In **Kumaraswamy v Subramaniam** [supra], the issue arose whether a wife who died after the Amendment owned half share of the Thediathetam property acquired by the husband prior to the Amendment. Referring to the new Section 19 introduced by the Amendment, Gratiaen, J held as follows at page 47:

> *"Accordingly, property which would previously have constituted tediatetam within the meaning of the principal Ordinance in accordance with the ruling in Avitchi Chettiar's case [(1933) 35 NLR 313], must, if acquired on or after 4th July, 1947, be regarded as "separate property"*.
>
> *The repeal of the old section 20 and the substitution of the new section 20 have the following effect:*
>
> *(a) if either spouse acquires tediatetam property on or after 4th July, 1947, no share in it 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 tediatetam property of the acquiring spouse continues to vest exclusively in the acquiring spouse; the new section 20 has no application because the tediatetam of the acquiring spouse never "belonged" to the non-acquiring spouse."*

Justice Dr. H.W. Tambiah, QC, in **The Laws and Customs of the Tamils of Jaffna** [supra; at page 172] expresses a similar view that after the amendment came into force, property acquired by a spouse was his or her Thediathetam and half did not vest on acquisition with the non-acquiring spouse but if it was undisposed of on death, the other spouse became an heir to half.

But in **Manikkavasagar v Kandasamy and Others** [supra], Chief Justice Sharvananda held that the above "*enunciation [of Gratiaen, J] was not necessary for the decision of the case and was obiter dictum*", a view which has also been expressed by Chief Justice H.N.G. Fernando in **Annapillai v Eswaralingam and Others** [62 NLR 224 at page 226]. Chief Justice Sharvananda went on to state that the new Section 20 does not alter the position that a non-acquiring spouse owns one half of the Thediathetam property of the acquiring spouse. The argument that as the original Section 20 has been repealed, one cannot look back to the customary law of Thesawalamai or to the repealed Section 20 for the nature of Thediathetam but one must decide the rights of parties on the basis that the new Section 20 is exhaustive of the law relating to Thediathetam was rejected by Chief Justice Sharvananda, for the following reasons, at pages 22 and 23:

a) Section 20, as introduced in 1911, is declaratory of the customary law of Thesawalamai and it enacts in statutory language the fundamental concept of Thesawalamai that Thediathetam of each spouse shall be property common to the spouses and both shall be equally entitled thereto.

b) The provisions of the old section 20 are not inconsistent with any provisions of Thesawalamai and does not change or alter the incidents attaching to Thediathetam as found in the Thesawalamai. Section 40 of the Ordinance therefore does not apply, as Section 20 only re-states the customary law relating to Thediathetam, and the provisions of the Thesawalamai as are not inconsistent with the provisions of the Ordinance survive to supplement the latter.

c) That part of the customary law of Thesawalamai dealing with the incidents of Thediathetam are not affected by the repeal of old Section 20 and the repeal of Section 20 does not have the effect of obliterating the customary law of Thesawalamai.

d) As the customary law survives the repeal of the declaratory provision, the incidents of Thediathetam referred to in the old Section 20 continue to attach to the Thediathetam as defined by the new section 19.

e) 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.

f) 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.

The above view expressed by Chief Justice Sharvananda has been criticized by Justice Dr. H.W. Tambiah, QC, in **The Laws and Customs of the Tamils of Jaffna** [supra; at page 174]. He takes the view that, (a) the law of Thediathetam ceased to be governed by custom when it was codified by the Dutch and when Sir Alexander Johnston translated it, with modifications and enacted it as the Regulations of 1806; (b) Thediatettam now has a statutory definition; and (c) by the amendments made to Sections 19 and 20, the concept of one half of Thediathetam property acquired by one spouse belonging to the other spouse has been abolished. However, as I have already noted, there was no dispute between the parties that if the said property was in fact Thediathetam property of Renukadevi, that Shanmuganathan owned one half, and hence, the necessity to re-visit the reasoning in **Manikkavasagar v Kandasamy and Others** [supra] on this issue does not arise in this appeal.

This brings me to the core issue that needs to be answered in this appeal.

On whom does the burden of proof lie to establish that a property is Thediathetam?

The Appellant obtained an *ex-parte* judgment and decree against Shanmuganathan and in order to satisfy such decree, it was open for the Appellant to obtain a writ of execution to seize property belonging to Shanmuganathan. The Appellant did move the District Court in that regard except that, as far as the Appellant was aware, the property that was seized did not belong to Shanmuganathan but to his wife. That was however not an impediment in view of the present position of the law that a property classified as

Thediathetam shall belong in equal share to the spouses. It appears that the Appellant became aware that Renukadevi had transferred the said property to the Respondents only after the Fiscal seized the property. Irrespective of the said transfer, in order to succeed with his claim that the said property is liable for seizure to satisfy the debt owed to him by Shanmuganathan, **it was imperative for the Appellant to establish that the said property was in fact Thediathetam**, and that Shanmuganathan continued to own one half share as he had not signed Deed No. 2326 as a transferor. This obligation on the Appellant is consistent with Sections 101 and 102 of the Evidence Ordinance, which are set out below:

Section 101

> "*Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*
>
> *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person*."

Section 102

> "*The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side*."

As expressed in the maxim *ei incumbit probatio, qui dicit, non qui negat*, the burden of proof lies on him who affirms, and not upon him who denies - cited in **Rodrigo v. Central Engineering Consultation Bureau** [(2009) 1 Sri LR 248] and followed in **Dehiwattage Rukman Dinesh Fernando v Union Apparel (Pvt) Ltd** [SC Appeal No. 19/2015; SC minutes of 28th October 2021], **Brandix Apparel Solutions Limited (Formerly Brandix Casualwear Ltd) v Kachchakaduge Frank Romeo Fernando** [SC Appeal 60/2018; SC Minutes of 5th May 2022] and **Kanthi Fernando v W. Leo Fernando (Maddagedara) Estates Company Limited** [SC Appeal (CHC) No. 84/2014; SC minutes 24th January 2024].

It is the Appellant who claimed that the property that was seized was Thediathetam and therefore one half of the property belonged to Shanmuganathan. If he failed to establish this fact, the Appellant would fail. Thus, the burden of proving that the property that was seized in fact is Thediathetam was entirely on the Appellant. Illustration (b) of Section 101, reproduced below, supports the above position:

> *"A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts, and which B denies to be true. A must prove the existence of those facts*."

The fact that the Appellant was fully aware of the evidentiary burden that was placed on him is borne out by the issue raised by him in this regard in the District Court.

Burden of proof as laid down in Manikkavasagar vs Kandasamy and Others

The question with regard to the burden of proof was considered in detail by this Court in **Manikkavasagar vs Kandasamy and Others** [supra]. In that case, the petitioner had married Ramanathan Thuraiappah on 21st January 1961. He had died on 29th June 1973, intestate and issueless, leaving his widow, the petitioner. The 1st - 6th respondents were his sisters and brothers and his deceased brother's two children. All parties were governed by the Thesawalamai.

The estate of the deceased consisted *inter alia* of an allotment of land at Clifford Place, Colombo 3, valued at Rs. 19,000.00. The wife claimed that the entire estate of her husband was Thediathetam, and that she was entitled to 3/4th share of the same. She conceded the balance 1/4th to the respondents. The respondents on the other hand claimed that the Clifford Place property was "separate property" of the deceased and hence the entirety of it devolved on the respondents as intestate heirs, without any co-sharing with the petitioner.

This Court, having considered the definition of Thediathetam under the Code, the Ordinance and the Amendment, held as follows at page 15:

"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...

Sections 6 and 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…

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."

What this Court has done in **Manikkavasagar** is to consider the provisions of Section 19 of the Ordinance in accordance with the aforementioned provisions of the Evidence Ordinance. The current legal position therefore is that if any person wishes to prove that a property is Thediathetam, he / she must establish that the property was acquired by a spouse during the subsistence of the marriage for valuable consideration, and that such consideration did not form or represent any part of the separate estate of that spouse, or that such consideration formed the profits from the separate estate of that spouse arising during the subsistence of the marriage.

The learned President's Counsel for the Appellant submitted that the decision of this Court in **Manikkavasagar** is *per incuriam* and should not be followed. It was his position that even though Chief Justice Sharvananda recognises that there is a presumption that property acquired during a marriage is Thediathetam, he mistakenly goes on to hold that the said presumption has been repealed by the Ordinance, though impliedly.

The existence of a presumption has been discussed in **Ponnamah v Kanagasuriyam** [supra]. It involved a dispute between husband and wife married before the Ordinance as to what constitutes joint property, where Ennis, J stated as follows, at page 257:

> " … *the learned Judge has held that* ***all property purchased after the date of marriage is presumed to be acquired property under the Tesawalamai until the contrary is proved****. The case in Muttukristna's Tesawalamai, at page 30, seems to support that contention, and also in Katiresu's Tesawalamai two cases are cited for the same proposition.* ***The presumption would appear to be correct****, because at the time when the Tesawalamai was written it would seem that a son, before marriage and during the lifetime of his father, could not hold for himself any property gained or earned by him during the time of his bachelorhood; it all belonged to his father. So that on the marriage the property brought together, which is dealt with in section 1 of the Tesawalamai, would be, on the side of the husband, such property as the son had received as a gift from his father, or, if his father had been dead at the time, had inherited from him,* ***and purchases after that would presumably be made from the profits which section 1 distinctly says are acquired property***." [emphasis added]

Though Ennis, J held that the presumption appears to be correct, it is clear that he said so based on the customs and decisions that existed prior to the Ordinance.

In **Manikkavasagar vs Kandasamy and Others** [supra], the Court of Appeal had relied upon, and followed, the above judgment in holding that the Clifford Place property was Thediathetam property. Having referred to the judgment of the Court of Appeal, Chief Justice Sharvananda stated as follows, at page 15:

> *"I do not agree with this process of reasoning. The Court of Appeal was in error in applying the ruling re [sic] 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."

Any such presumption that may have existed under the Thesawalamai Code has been superseded by the developments that have been referred to in **Nalliah v Ponnamah** [supra]. While the argument of the learned President's Counsel for the Appellant may have succeeded pursuant to the judgment in **Avitchy Chettiar v Rasamma** [supra], the new definition of Thediathetam introduced by the Amendment in 1947, read together with Sections 6 and 7, as amended, have replaced the customary position that prevailed under the Code and has put to rest the issue as to what comprises Thediathetam and thereby the fact that there exists no presumption that a property is Thediathetam merely for the reason that it was purchased during a marriage for valuable consideration. I am therefore unable to agree with the submission of the learned President's Counsel for the Appellant that there exists a presumption that all property acquired during a marriage for valuable consideration is Thediathetam.

The position that prevails today as to what is Thediathetam is contained in Section 19, in terms of which only the following property shall be deemed to be the Thediathetam of a spouse:

(a) 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.

(b) Profits arising during the subsistence of the marriage from the separate estate of that spouse.

The learned President's Counsel for the Appellant submitted further that the issue of whether a property is Thediathetam arises mostly between spouses, who are in a better position to discharge the burden, and that it is impossible for the Appellant to prove that the property is Thediathetam since he is only a judgment creditor of Shanmuganathan and a complete stranger. While that may be so, it is a burden that the Appellant has undertaken and therefore is required to satisfy in order to succeed.

This brings me to the next submission of the learned President's Counsel for the Appellant. It was submitted that in view of the provisions of Section 106 of the Evidence Ordinance, which provides that "*When any fact is **especially within the knowledge** of any person, the burden of proving that fact is upon him*" [emphasis added], the burden has shifted to the Respondents to prove that the said property is not Thediathetam.

Applicability of Section 106 of the Evidence Ordinance

E.R.S.R. Coomaraswamy, in his treatise **The Law of Evidence** [Volume 2, Book 1 at page 263], has stressed that Section 106 contemplates facts **especially** within the knowledge of a party. Referring to the judgment in **Ram Bharosey v Emperor** [AIR (1936) All. 835], the author goes on to state as follows:

> "*The words 'especially' would seem to indicate that the facts must in their nature be such as to be within the knowledge of the accused or the party to a civil case concerned and no one else; for example, his own intention in doing an act, as in illustration (a) or the fact that he purchased a railway ticket, although he was subsequently found to be without one, as in illustration (b) to Section 106. It has no application to cases where the fact in question, having regard to its nature, is such*

as to be capable of being known not only to an accused or party to a civil case, but also by others, if they happened to be present, when it took place. It cannot be invoked, for example, to make up for the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused.

The word 'especially' means facts that are pre-eminently or exceptionally within his knowledge. If knowledge of certain facts is as much available to the prosecution, on exercise of due diligence, as to the accused, the facts cannot be said to be 'especially' within the knowledge of the accused."

In **Sanitary Inspector, Mirigama v Thangamani Nadar** [55 NLR 302], Nagalingam, ACJ held as follows:

"*When the section refers to a fact as being especially within the knowledge of a party, the term "especially" there means "almost exclusively" if not "altogether exclusively" within the knowledge of a party, and not that the fact is one within the knowledge of the one party as well as of the other*."

The question that I must therefore consider in order to apply the provisions of Section 106 to this appeal is, has the Appellant established that the Respondents had an *almost exclusive* knowledge that the said property is Thediathetam? It is common knowledge that the Respondents are only purchasers of the property that belonged to Renukadevi. Whether Renukadevi purchased the said property with the consideration for such purchase coming from her separate estate or whether the consideration was provided by the profits earned during her marriage with Shanmuganathan are not matters that will be within the knowledge of the Respondents. Nor has the Appellant placed any material before the District Court to establish that the Respondents had *almost exclusive* knowledge of this fact. As much as the Appellant may not have the resources to establish that the said property is Thediathetam, the Respondents too do not have the knowledge that is contemplated by Section 106. The Respondents therefore are in no better position than the Appellant. I therefore cannot agree with the submission of the learned President's Counsel for the Appellant.

In the above circumstances:

(a) I am of the view that the burden of proving that a property is Thediathetam is on the party who claims it to be so;

(b) I am in agreement with the finding that has been arrived at by the learned Judges of the High Court on this issue.

Has the Appellant discharged the burden of proof?

The next issue that I must consider is whether the Appellant has discharged the burden of proof cast on him by law.

In the application made under Section 241, the Appellant claimed that Shanmuganathan, who had been known to him for a long time, is a Chartered Accountant by profession and was engaged in property development, while his wife, Renukadevi was not employed and was a housewife. He had submitted further that "*the property that was seized in execution of the decree was purchased by the judgment-debtor with his own money although the deeds of transfer were executed in favour of his wife*". This position was echoed in his evidence before the District Court, with the Appellant stating that it is Shanmuganathan who has financed the purchase of the said property, although purchased in the name of Renukadevi. The Appellant however has not presented any material to substantiate this position. The two deeds by which Renukadevi purchased the said property does not specify the source of the consideration for such purchase. It was the evidence of the 1st Respondent that the land was purchased from Renukadevi and that Shanmuganathan too had signed the deed. In cross examination, it had been suggested that the land belonged to Renukadevi and her husband in equal share but that suggestion has been denied. The Respondents had led the evidence of the Attorney-at-Law who attested Deed No. 2326 by which the Respondents had purchased the said property, but no useful evidence has been elicited during cross examination to support the position of the Appellant.

Taking into consideration the totality of this evidence, I am of the view that the Appellant has failed to present any material to establish that the property that was seized in execution of the decree is Thediathetam and has therefore failed to discharge the burden of proof cast on him.

The learned President's Counsel for the Appellant also submitted that Shanmuganathan had signed Deed No. 2326 only in order to give his consent to Renukadevi transferring her half share and not in order to sell his share. The necessity to consider this argument does not arise in view of the conclusion I have reached that the Appellant has failed to establish that the said property is Thediathetam.

Conclusion

Taking into consideration all of the above, I answer the three questions of law as follows:

1) Have the learned High Court Judges erred in law in coming to a finding that the person claiming that certain property is Thediathetam property should establish his stance? **No**.

2) Have the Learned High Court Judges erred in law in coming to a finding that the Appellant failed to prove that the said property is Thediathetam property? **No**.

3) Have the learned High Court Judges erred in law in coming to a finding that the Appellant failed to prove in the District Court that the said property is Thediathetam property? **No**.

The judgment of the High Court is accordingly affirmed. The appeal of the Appellant is dismissed, without costs.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena, PC, J
I agree.

JUDGE OF THE SUPREME COURT

A.L. Shiran Gooneratne, J
I agree.

JUDGE OF THE SUPREME COURT