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TILLAINATHAN *et al. v.* RAMASAMY CHETTY *et al.*

D. C., Jaffna, 1,684.

Tesavalamai of Jaffna—Right of pre-emption—Adjacent landowner—Mortgagee.

It is questionable whether under the *Tesavalamai* of Jaffna an adjacent landowner, who is not a mortgagee of the land in respect of which the right of pre-emption is claimed, can claim that right.

Where a husband, who was not himself an adjacent owner, associated himself with his wife and mother-in-law, who were owners of adjacent lands, as plaintiffs in an action for pre-emption, and sought to exercise the right of purchase, though his wife had never claimed to exercise it herself,—

Held, that the action, though brought in the name of the husband, wife and mother-in-law, was in fact the husband's action only, and that he was not competent to maintain it.

THE first plaintiff in this case was the husband of the second plaintiff and the son-in-law of the third plaintiff, and they sued the two defendants as vendor and vendee of a property situated in Jaffna, which the plaintiffs alleged should have been sold to them by the defendant in preference to the second defendant.

The right of pre-emption thus claimed under the *Tesavalamai* of Jaffna appeared to rest on the following allegations. The second plaintiff and her mother, the plaintiffs, were owners of a property which adjoined the first defendant's property at Vannarpannai in Jaffna; that by reason of the second and third plaintiffs being the adjoining landowners of the first defendant's said land, they had and still have a right of pre-emption to purchase the said land whenever the first defendant wished to sell it; that in violation of the right of pre-emption the first defendant secretly, and without any notice to the plaintiffs, transferred the land in question to the second defendant by deed dated 12th February, 1899; that as soon as the plaintiffs became aware of the execution of the said deed, they preferred through the first plaintiff the claim of the second and third plaintiffs to pre-empt the land; that the defendants have refused to entertain their claim, and that the plaintiffs have the right to avoid the sale to the second defendant and to have the land conveyed to the second and the third plaintiffs, on their paying the sum for which it had been sold to the second defendant.

The plaintiffs brought into Court the sum of Rs. 12,000, being the price which the second defendant had paid to the first defendant for the land.

The prayer of the plaintiffs was, (1) that second and third plaintiffs be declared entitled to the right of pre-emption in respect

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of the said land; (2) that the deed granted by the first defendant to second defendant be cancelled and set aside; and (3) that the first defendant be ordered to convey to the second and third plaintiffs the said land upon receiving payment of Rs. 12,000 for the benefit of the second defendant.

The first defendant did not appear. But the second defendant pleaded that there was no law or custom of pre-emption obliging him to forego the benefit of the deed in his favour; that even if the custom of pre-emption once existed in Jaffna, it had become obsolete; that as adjoining proprietors the second and third plaintiffs were not entitled to any notice of the sale of the property in question; and that, in fact, the first and third plaintiffs had known that it was for sale, and that the second defendant had informed the first and third plaintiffs of his intention to buy the land.

On the trial day the issues settled were the following:—

(1) Had plaintiffs the option of buying the land?

(2) If plaintiffs had no notice previous to the sale, are they entitled to exercise the right of pre-emption?

(3) Is the law of pre-emption still in force in Jaffna?

After argument, plaintiff's counsel called the plaintiff and one witness and closed his case.

For the defence the first defendant and two other witnesses were called.

The District Judge gave judgment for plaintiff.

The second defendant appealed.

Rámanáthan, S.-G. (with him *Van Langenberg, Tiru-Navuk-Arasu, H. J. C. Pereira,* and *Allan Drieberg*), for appellant.—The plaintiffs rely upon the *Tesavalamai* of Jaffna, which word literally means the *country customs* of Jaffna. They have all been codified and are given at length at the end of the third volume of the Revised Edition of the Ordinances published in 1895. The correspondence on the subject as given there would appear to show that Governor Simons had instructed the Disave of Jaffna named Claas Isaaksz to inquire into the laws and customs of the Tamils in Jaffna and to reduce them to writing; that Disave Isaaksz drew them up in Dutch, had the Dutch copy translated into Tamil, and submitted the translation to a committee of twelve "sensible Mudaliyars" of the Province for their perusal and examination; that they certified that the "composition perfectly agrees with the usual customs prevailing "at this place," and that they confirmed the translation.

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[BROWNE, A.P.J.—As to the English translation, Chief Justice Sir Alexander Johnston seems to have made it from the Dutch.] Yes. The Regulation 18 of 1806 provides that the *Tesavalamai*, as collected by order of Governor Simons in 1706, shall be considered to be in full force. Sir Alexander Johnston's English translation is the one our Courts are used to, and a copy of it is included in Mutukistna's work on *Tesavalamai*. The English translation differs from the Tamil translation in regard to the point which arises for decision in this case, viz., who are entitled to pre-emption, and in what circumstances such title arises. The first paragraph of section 1 of chapter 7 of Sir Alexander Johnston's English translation runs as follows:—" Formerly when any " person had sold a piece of land, garden, or slave to a stranger " without having given previous notice thereof to his heirs " or partners and to such of his neighbours when grounds are " adjacent to his land, and who might have the same in mortgage " should they have been mortgaged, such heirs, partners, and " neighbours were at liberty to claim or demand a preference of " becoming the proprietors of such lands."

Preference is here given first to heirs, second to partners, and third to adjacent neighbours who are mortgagees.

The Tamil translation, however, gives the right of pre-emption to four classes of persons, viz., heirs, partners, adjacent neighbours, and mortgagees. In the present case the claim of the plaintiffs is as adjacent neighbours only. The *Tesavalamai* in Dutch is not available to the profession, and Chief Justice Johnston's English translation must be preferred to the Tamil translation rendered by some unknown person and submitted to the twelve Tamil chiefs for consideration. If Chief Justice Johnston's English translation is to guide us, plaintiffs' claim would fail, because they have not shown themselves to be both adjacent owners and mortgagees. [BONSER, C.J.—Is this right of pre-emption foreign to the Roman-Dutch Law?] No. From *Van Leeuwen* (Kotze's translation), *p. 151*, sections 4 and 5, *Vanderkeesel* (Lorenz's translation), *p. 215*, section 659, and *Grotius's Opinions* (Bruyn's translation), *p. 575*, pre-emption would seem to have existed in Holland as local custom. And it is remarked by those writers that the right of *naasting* or *jus retractus*, as it was called, conflicts with free commerce and is contrary to the Common Law. Any one who claims this right must, according to them, prove the custom and swear that he exercises it on his own right, and in some places it is necessary also to prove that the money wherewith he exercises the right is his own (*Vanderkeesel*, section 659). Plaintiff has failed to prove that he is a

mortgagee next neighbour, or that the second and the third plaintiffs claim a *jus retractus* with their own money; or, indeed, what the custom in Ceylon is at the present date.

Governor Simon's *Collection of Customs in Jaffna*, section 7, paragraph 1, makes the right of pre-emption exercisable only if previous notice of the sale had not been given to the parties concerned. The previous notice, it says, was given to those who resided in the same village one month before the sale; to those who resided in the same Province but out of the village, three months; to those who lived in another Province, six months; and to those who resided abroad, one year. It goes on to say that the custom as to previous notice underwent a change during the time of Commandeur Bloom, when it was considered sufficient notice if the intentions of the seller were made known on three successive Sundays at the church to which the sellers belonged. This form of notice was also abandoned in favour of publication by beat of tom-tom in the village, and certificate of such publication under the hand of the Udaiyar of the village. This certificate, commonly called the Udaiyar's schedule, had to be presented to the notary before the conveyance could be made. The Ordinance No. 1 of 1842 refers to this publication and schedule, but Ordinance No. 4 of 1895 abolished publication of intended sales by beat of tom-tom and the schedule of the Udaiyar. Consequently it is submitted that, as part of the custom relating to pre-emption has been abolished, the remaining part has also been abolished.

Whether abolished or not, there is no proof that second and third plaintiffs want the land for themselves, and they have not gone into the box to swear to the fact that they desire to exercise the right of pre-emption, or that the money needed for such exercise comes out of their own pocket. The first plaintiff, however, has deposed as follows:—"I claim a right of pre-"emption.....first defendant never told me of the sale. I asked "him to transfer the land to me. The Rs. 12,000 deposited in "Court is money I borrowed for the purpose. It is my money. "I want to buy this land for myself." It is quite certain that the first plaintiff is taking advantage of his position as husband of the second plaintiff and son-in-law of the third to acquire a right to which he is not entitled, for under the *Tesavalamai* there is no community of property between husband and wife. Each has a separate estate, and the first plaintiff should not be allowed to make a cat's-paw of the second and third plaintiffs. Even if he had a right to pre-empt, it is proved that he had notice of the intended sale and had no money at the time to buy the property.

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Wendt (with him *Sampayo*), for respondent.—The custom cannot be said to be obsolete because it has been reduced to writing. In terms of the custom the first defendant should have given one month's notice, which he did not. It is true that the Ordinance No. 4 of 1895 abolishes publication by beat of tom-tom and the Udaiyar's schedule, but necessity for notice of some sort in cases of pre-emption has not been expressly taken away, and therefore it was the duty of the first defendant, as adjacent proprietor, to give notice to his next neighbour, who are the second and third plaintiffs. [BONSER, C.J.—Is there any case decided by this Court where pre-emption has been conceded to a near adjacent owner? BROWNE, A.J.—Yes. *Vallinachen v. Amenai Muttu* (*Mutukistna, 402*).]

That was decided in 1835, but in page 459 we have a case decided in 1853 by the District Judge of Jaffna, who doubted whether an adjacent owner who had not got a mortgage on the land had a right to claim pre-emption. [BONSER, C.J.—I see at *p. 377* of *Marshall* the Supreme Court also said that " it would seem that " the right only existed where the party claiming it held a " mortgage or some other claim upon the land."] The Tamil translation makes no room for doubt on this point, and it has the sanction of the Tamil chief who were requested to revise it. Second and third plaintiffs being Tamil ladies could not well go into a witness box to swear to facts which they had deputed to their relative to swear to. Any doubt that may be created by the particular words which the first plaintiff uttered in the witness box is removed by the prayer in the plaint, which asks for a conveyance in the name of the second and third plaintiffs.

Rámanáthan, S.-G., in reply.

BONSER, C.J.—

This is an action by a husband and wife, the wife's mother joining as plaintiff, against two persons as defendants, to assert the right known as the right of pre-emption to a certain land situate in Jaffna. The first defendant was the owner of this land and on the 12th February, 1899, he conveyed it to the second defendant in consideration of a sum of Rs. 12,000. The second and third plaintiffs, that is, the wife of the first plaintiff and her mother, are the owners of land adjacent and contiguous to the land sold, which is the subject of this action. Within a month of the sale this action was commenced, claiming on behalf of the second and third plaintiffs the right of pre-emption, and asking to have the conveyance that had been executed by the first defendant in

favour of the second defendant cancelled, and the first defendant ordered to convey the land to the second and third plaintiffs. The first plaintiff brought the Rs. 12,000 into Court to show his *bonâ fides*. The District Judge made a decree ordering the conveyance to be cancelled, and directing the first defendant to convey the land to the first and second plaintiffs, the husband and wife, the third plaintiff not having appeared at the trial or taken any steps to prosecute the action.

The defendants have appealed on three grounds: first, that the right of pre-emption recognized by the *Tesavalamai* has been repealed by Ordinance; secondly, that if the right of pre-emption mentioned in the *Tesavalamai* still exists, the plaintiffs, who are merely adjacent landowners, are not entitled to it; thirdly, that even if they are entitled as adjacent landowners, the action is not a *bonâ fide* one by adjacent landowners, but merely an action by the first plaintiff, the husband, who is not himself an adjacent landowner.

To deal with the first point, as to the general right of pre-emption. That depends upon section 7 of what is known as the *Tesavalamai*, which is a collection of the ancient customs of the Tamil inhabitants of the Province of Jaffna. Early in the last century, a Dutch Governor of Ceylon, Mr. Simons, thought it desirable that these customs should be collected and put into an authoritative shape, and he, accordingly, employed a gentleman called Isaaksz to undertake that task.

In 1707 Isaaksz submitted a Code to the Governor, who caused it to be translated into Tamil from the original Dutch. The translation was revised by a number of Tamil headmen. After the Code had been revised the Governor made an order giving it the force of law, and directed authenticated copies to be sent to the various Courts of Justice for their guidance. In 1806, after the cession of the Dutch settlements in this Island to the British Crown, a regulation was issued by the local Government declaring that this Code of Customs, commonly known as the *Tesavâlamai*, should be considered to be in full force, and that " all questions between the Malabar* inhabitants of the Province of Jaffna, or in which a Malabar inhabitant was a dependent," should be decided

* " Malabar " is a corruption of " Malai-varam " (mountain-side), the country along the Western Ghauts of India. When the Dutch, who had visited Western India, arrived in Ceylon and found the Tamils here to be somewhat identical in religion with the Hindus of the Malabar Coast of India, they called them Malabar inhabitants, meaning settlers from the Malabar Coast. But the Tamils in Ceylon came from the eastern coast (called by the Dutch the Coromandel Coast), and are different from the people of Malaivaram or Malaiyalam in point of language and social institutions. Hence, it is an error to speak of the Tamils as Malabars.—ED.

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according to that Code. We have not a copy of the original Dutch document, but in 1814, the then Chief Justice, Sir Alexander Johnston, caused the Code to be translated into English, inasmuch as the Dutch language was dying out in this Island; and this translation, which is published by Government in our collection of Ordinances, has always been regarded by our Courts as authoritative.

Section 7 of that translation states that "formerly when "any person had sold a piece of land, garden, or slave, &c., to a "stranger without having given previous notice thereof to his "heirs or partners, and to such of his neighbours whose grounds "are adjacent to his land, and who might have the same in "mortgage should they have been mortgaged, such heirs, part-"ners, and neighbours were at liberty to claim or demand the "preference of becoming the proprietors of such lands," and previous notice of such intended sale was to be given to persons of the above description,—to such as resided at the village, one month; to such as resided in the same Province, but out of the village, three months; and so on. The Code goes on to say that the old custom was, that if the period expired without the person interested taking any steps the sale was considered valid. Then it states that the way of giving notice had undergone an alteration in the time of a previous Dutch Governor, who had given orders that, instead of notice being given to the individual interested, a general notice should be sufficient, and that no land whatever should be sold until the proposed sale had been published on three successive Sundays in the church of the parish, during which period those persons who wished to exercise their preference or right of pre-emption were to come forward. This practice of giving notice on three successive Sundays before the sale would seem to have fallen into desuetude, for a custom grew up of what was called publication and schedule. The headmen of the district in which the land to be sold was situate notified the proposed sale by beat of tom-tom, and afterwards gave to the parties what was called a schedule, which was a certificate that notice of sale had been duly given.

This practice had no statutory authority, but in 1842 it was recognized by statute, and the fees to be charged by the headmen were regulated and fixed. Subsequently the question was raised whether a sale without this previous publication and certificate was valid, and there are conflicting decisions of this Court on the point. Accordingly, in 1895 the Legislature proceeded to repeal the Ordinance of 1842, and to repeal "so much of the "*Tesavalamai* as requires publication and schedule of intended "sales or other alienations of immovable property." It is rather

difficult to understand what the Legislature meant by this, because the Code contains nothing relating to publication and schedule. The Legislature seems to have thought that this custom, which had grown up subsequently to the compiling of the Code, was contained in the Code. It was contended by the Solicitor-General that this Ordinance No. 4 of 1895, to which I have just referred, had the effect of abolishing all rights of pre-emption which had up to that time existed in the Province of Jaffna. It is not necessary, in the circumstances of this case, to decide this question, but I must say that I consider that it is anything but clear that the Ordinance was intended to have any such effect. That it was intended to have any such effect seems incredible, for in such case one would expect the Legislature to have stated the intention in plain terms. It would have enacted that, from and after the passing of that Ordinance, no right of pre-emption would be recognized by law in the Province of Jaffna.

Then we come to the second question, which is whether a person can claim under the *Tesavalamai* the right of pre-emption simply as being a contiguous landowner. In considering this question, it seems to me that we ought to bear in mind what is said by Voet in regard to a similar right which existed under the Roman-Dutch Law, and which was known as the *jus retractus*. He says, " We should observe, however, that no one can arrogate to himself the *jus retractus legalis*," that is to say, the right of pre-emption arising by law as distinguished from that created by contract, " unless he can show that the right of retraction on the " same ground as that on which he desires to exercise it, or one " plainly similar to it, is firmly established by the law or custom " of the place in which the immovable property is situated, for " undoubtedly the right of superseding one who has obtained the " ownership (*dominium*) in a legitimate mode, being a deviation " from the Common Law and contrary to the rescript of the " Emperors and also to freedom of commerce, and being a " departure from the general precepts or commutative justice, " must receive a strict interpretation " (Mr. Berwick's translation of *Voet, XVIII. 3. 9*). Is it then firmly established that this right of pre-emption was exercisable by contiguous landowners? The *Tesavalamai* says in the English version that it is exercisable by " such of his neighbours whose grounds " are adjacent to his land and who might have the same in " mortgage." If that is a correct representation of the Code, it would seem that the mere ownership of adjacent lands did not invest their owner with this right of pre-emption. He must have something more: he must have a further interest in the

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land itself, that of a mortgage. But it is suggested that this English version does not represent accurately the Dutch original, for the Tamil version which was produced to us is in quite different terms. There appears to be no doubt that the Tamil version gives the right to neighbouring landowners and usufructuary mortgagees. But I do not think that we should be justified in coming to the conclusion that this English version, which was issued in 1814 under the authority of this Court, was erroneous, merely because the Tamil version differs from it.

What has been the practice of the Courts in respect to this question? No case seems to have come before this Court except on one occasion, and that was so far back as 1834. There is a note of this case in Chief Justice *Marshall's Judgments, p. 377*, and it seems to have been a case of a claim by a plaintiff to pre-emption merely on the ground of his being the owner of adjacent land, and the District Judge gave judgment for the plaintiff, but in appeal the Supreme Court sent the case back to have further inquiries made on certain points indicated in its judgment. In the course of its judgment the Supreme Court observed, that " from the *Tesavalamai* as appended to *Van* " *Leeuwen's Commentaries, p. 763*, it would seem that the right " only existed where a party claiming it held a mortgage or some " other claim upon the land." So that, as far back as 1834, this Court doubted whether a claim merely on the ground of contiguity could be maintained. There are several judgments of the District Court of the Province of Jaffna reported in Mutukistna's book, in which this question has been dealt with. In 1833 and 1835 Mr. Price, Judge of the District Court of Jaffna, held that an adjacent landowner had the right of pre-emption, and he again decided in the same way in 1842. But in 1853, in a case before Mr. Birch, in the Court of Requests of Mallagam, that Commissioner recorded his doubts whether an adjacent landowner who is not a mortgagee of the land had the right of pre-emption. So that it would seem that this question is not one that is free from doubt. It seems to me that it is impossible to hold that the right is one that can be described as firmly established.

But assuming for a moment that an adjacent landowner has such a right, yet, in the present case, I am not satisfied that the first and second plaintiffs are entitled to retain their decree. It seems to me that the action was not an action by an adjacent landowner, but was really the action of the first plaintiff and the first plaintiff alone, who had no connection with the adjacent land except through his wife. He was not an adjacent landowner himself. The wife, who was an adjacent landowner, never

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made any claim except in the shape of the plaint in this action: she had never claimed to exercise the right of purchase, nor had anybody claimed it on her behalf. The claim was made by the first plaintiff in his own right. The first plaintiff. when he went into the witness box at the trial, said, " I claim the right of " pre-emption over this land. I have deposited Rs. 12,000, and I " wish to buy the land." Later on he says, " I want to buy this " land for myself;" and the witnesses for the defence, who are not contradicted on this point, speak of a conversation with the first plaintiff, in which he asserted his right and stated that he wished to buy this land.

That being so, I think that this action is the husband's action, and that he was not competent to maintain this action. All that he was entitled to do was to assist his wife in bringing this action, if she *bonâ fide* wished to assert her right to pre-emption. I do not think that she wished to exercise this right of pre-emption on her own account.

The appeal should be allowed.

BROWNE, A.J., agreed.