## SUPPIAH *v.* THAMBIAH.

1904.
*March 30.*

*D. C., Jaffna, 2,443.*

Tesavalamai—*Right of pre-emption—Notice of intended sale to those having the right to pre-empt—Ordinance No. 1 of 1842—Ordinance No. 4 of 1895.*

The right of pre-emption according to the *Tesavalamai* of Jaffna still exists, and, though the Ordinance No. 4 of 1895 abolishes publication and Udaiyar's schedule of intended sales, yet a co-owner desiring to sell his share of the land is bound to give reasonable notice to his other co-owners of the intended sale.

Where no notice was given to a co-owner, and he raised an action to have the sale of his co-owner's share to a third party declared void, and he himself entitled to pre-empt it,—

*Held*, that he had a right to such a decree, upon payment into Court of the market value of the share sold.

The sale price is not necessarily the market value.

WENDT, J.—It is desirable that in order to prevent dispute as to the form of notice and consequent litigation, some definite formality should be prescribed by the Legislature.

MIDDLETON, J.—As the *Tesavalamai* imposes a restriction on the sale of land in Jaffna, it affects the rights of any person who assumed to buy it, be he English, Moor or Tamil, resident or not resident in Jaffna.

THE second plaintiff, as the owner of a share of a land situate in Jaffna, claimed in this section the right to have the second defendant's share of the same land sold to her (the second plaintiff) in preference to the first defendant, to whom the second defendant had sold it by a deed executed in Jaffna.

She claimed this right by virtue of the *Tesavalamai* of Jaffna. She alleged and proved that she was, at the date of the sale to the first defendant, living at Colombo, and that the second defendant gave no notice to her of the intended sale.

The defendants denied the second plaintiff's right to pre-empt. It was contended *inter alia* that as the first defendant, the purchaser, was not a Tamil born or resident in Jaffna, he was not bound by the *Tesavalamai*.

The issue adjudicated upon at the trial was whether the law of pre-emption was now in force in Jaffna. The Court below by its judgment of the 24th day of January, 1902, answered the question in the negative and dismissed the plaintiff's action.

The plaintiffs appealed therefrom to the Supreme Court, which by its judgment dated the 7th May, 1903, set aside the judgment of the Court below, holding that the right of pre-emption still exists, and remitted the case for further hearing, with liberty to

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the defendants to raise any other issues which may appear to them desirable. Their Lordships' judgments will be found reported in *6 N. L. R. 359.*

After the second trial, the District Judge (Mr. W. R. B. Sanders) delivered judgment as follows on 3rd November, 1902:—

" This case was sent back by the Supreme Court for further trial and with liberty to the defendants to raise such further issues as might appear to them desirable. At the second trial it was agreed that the second issue originally framed should stand, namely, Are the parties governed by the *Tesavalamai* as far as this transaction is concerned? And one additional issue was framed: Was the second defendant, the vendor, bound to notify to the second plaintiff his intention to sell the land in question? Are the parties governed by the *Tesavalamai?* By regulation 18 of 1886 it was enacted that ' all questions between Malabar inhabitants of the Province of Jaffna or wherein a Malabar inhabitant is defendant shall be decided according to the *Tesavalamai*.

" In this case the plaintiffs and the second defendant are ' Malabar inhabitants of the Province of Jaffna '—in other words, Jaffna Tamils domiciled in the Northern Province or Province of Jaffna; but the first defendant, though a Jaffna Tamil by descent, is not an inhabitant of the Province of Jaffna. He was born in Colombo, and has always lived there. He has never even visited Jaffna. He has no property in the Northern Province, except the lands with which the present action is concerned, as he is not a ' Malabar inhabitant of the Province of Jaffna. ' The action as against him fails entirely from the very nature of the case. The action is one for the cancellation of a deed; it must necessarily fail as against the second defendant also. The defendants must stand or fall together. It was contended for the plaintiffs that in this case the *lex loci rei sitæ* applies; that contention, however, I cannot for a moment unhold. The *lex loci* as regards pre-emption is very strictly local, and applicable only to a certain section of the community, namely, Jaffna Tamils domiciled in the Province of Jaffna. The first defendant, as I have already pointed out, is not a Jaffna Tamil domiciled in the Province of Jaffna. The last issue is, whether the second defendant (the vendor to the first defendant) was bound to notify to the second plaintiff his intention to sell the land in question. I am of opinion that he was not; the Legislature does not declare how notice of an intended sale is to be given. In the absence of any special enactment on the subject, it is clearly conceivable that no mode of giving notice adopted by the vendor would satisfy all the persons claiming the right of pre-emption. One would take

exception to notice being given by beat of tom-tom, another to its being given by advertisement in a newspaper, and so on. Again, what period must elapse between the giving of notice and the sale? As the law does not prescribe how notice is to be given, I hold that the right of pre-emption, though existing, cannot be enforced. On this ground then, and also on the ground that plaintiffs have no cause of action against the first defendant, as he is not a 'Malabar inhabitant of the Province of Jaffna,' I dismiss the action with costs".

The plaintiff appealed.

The case was argued in appeal on 18th March, 1904, before Layard, C.J., and Wendt, J., and re-argued on 22nd March, 1904, before Wendt, J., and Middleton, J.

*Dornhorst, K.C.*, and *Wadsworth*, for appellant, cited Ordinance No. 4 of 1895 and Ordinance No. 1 of 1842; and *4 N. L. R. 328; 6 N. L. R. 356; 1 S. C. R. 98, 102;* D. C., Jaffna, 1,593, *Mutukisna's Tesavalamai, p. 402;* and *Van Leeuwen, p. 324.*

*Ramanathan, K.C.*, for respondent, cited Ordinances No. 18 of 1806 and No. 4 of 1895; and Kotze's *Van Leeuwen, p. 151*; Lorenz's *Vander Keessel, section 645;* and Bruyn's *Grotius' Opinions, p. 575.*

*Cur. adv. vult.*

30th March, 1904. WENDT, J.—

Under the customary law prevailing in Jaffna there were two separate and distinct conditions precedent to alienations of land viz., "publication" and "schedule". The *Tesavalamai*, section 7, describes the mode of publication "formerly" prevailing and the change made by Commandeur Blom. Possibly the Commandeur's "good orders" are those contained in Order No. 27 of the so-called "Seventy-two Orders" promulgated by the Dutch. Order 27 (*Mutukisna, p. 692*) enjoins all those who wish to sell or otty any lands, houses, slaves, gardens, or any other important effects "to procure publication thereof for three weeks in the church nearest such lands, &c., previous to the act, that those who think they have an undoubted claim may be duly informed of the matter and institute proceedings accordingly. Without such publication they shall neither sell nor otty. Moreover the Chattambus and their Ayuthandis, without such publication carefully made for three weeks, shall not execute deeds of sale,

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otty, or other bonds " under pain of forfeiture of office and fine. In 1829 (*Mutukisna, p. 395*) the District Court of Jaffna set aside a deed because " the forms laid down in the *Tesavalamai*, section 7, clause 1, viz., that the intended sale of lands should be publicly announced for three successive Sundays in the parish to which they belong ", had not been observed. In 1840 (p. 415) the same Court held that publication within the parish where the land was situated was all that was necessary, and that " it has never been the practice to publish the sale of lands out of the parish in which they are situated, and could not in fact be done without great inconvenience ". That was a claim for pre-emption by a person living in another district. These cases seem to show that the pronoun " they " in the phrase " (parish) church to which they belong " was understood as applying to the lands and not the parties. The pages of *Mutukisna* are full of cases deciding that publication and schedule are essential for sales, donations, and otties (mortgages) of land, but I find very little stated as to the mode of publication. (Mutukisna's book was published in 1862). In 1855 (p. 266) three weeks' publication, apparently by the Udaiyar, was still held necessary.

The *Tesavalamai* says nothing as to " schedule ". A " schedule " was an extract from the *Tombu* register, showing in whose name the land which it was desired to deal with was registered. (Statement by Supreme Court, *Mutukisna, p. 430*, letter of Mr. P. A. Dyke, dated November 22, 1851, *ibid.* 440). The Udaiyar as " Tombu-holder " granted the " schedule ", and when it became the practice for him to make the necessary publication it may also have become usual for him to state the fact of publication in his " schedule ". Sir Anthony Oliphant, C.J., in a case decided in 1852 and reported in *Mutukisna, p. 451*, was inclined to think that " the practice of granting schedules commenced at the time that stamps for deeds were first introduced in 1806 ", but Mutukisna states in a note (p. 451): " This is an error; the custom of granting the schedule can be proved to have existed from an earlier period. "

In 1842 the Ordinance No. 1 of that year made regulations as to the fees chargeable for schedules, thus recognizing the custom. In 1852 the Supreme Court by a majority held that schedules were necessary for Fiscal's sales as well *(Mutukisna, p. 441)*.

The Ordinance No. 4 of 1895 repeals " so much of the *Tesavalamai* as requires publication and schedule of intended sales or other alienations of immovable property." Now, as already stated, the written Code which usually goes by the name of the *Tesavalamai* contains no provision relating to schedules, but

perhaps the Ordinance uses the term to denote the whole body of "customary law," which I believe is what the word *Tesavalamai* means.

Now the customary law, as will have been seen, does not make publication (much less schedule) a mere accessory to the right of pre-emption. They were formalities required for all dispositions of land, and if it was intended by the Ordinance to do away with the right of pre-emption itself, I should have expected the Legislature to have said so in unmistakeable terms. The right may conceivably exist without any prescribed form of notice to bar it: the person entitled to the right may in any case assert it if he hears of an intended sale before it is carried out. Publication to the world is in this case only a means of giving notice to the particular individuals having the right of pre-emption. The Legislature, having abolished that special mode of giving notice, has not thereby impliedly done away with the necessity for giving notice at all. I think we must hold that reasonable notice must be given. It certainly is desirable that, in order to prevent dispute as to notice and consequent litigation, some definite formality should be prescribed by the Legislature if the right of pre-emption itself is not taken away.

I agree to the order proposed by my brother Middleton.

MIDDLETON, J.—

This was an action brought by the first plaintiff in conjunction with his wife the second plaintiff, who is co-owner of certain lands situate in Jaffna with the second defendant against the second defendant as co-owner and the first defendant as purchaser of the second defendant's share in the said lands, claiming that the second plaintiff be declared entitled to a right of pre-emption on the said lands, and that the transfer by the second defendant to the first defendant, dated the 27th March, 1901, be set aside.

The District Judge on the first hearing held that the right of pre-emption under the *Tesavalamai* had become obsolete and dismissed the plaintiff's action.

Upon appeal this Court was inclined to think that the right of pre-emption still existed, but sent the case back to the District Judge at the suggestion of the Solicitor-General, who represented the defendants, in order that a question as to administration might be dealt with and issues might be raised and decided as to how and to whom the duty of giving notice under the *Tesavalamai*, section 7, paragraph 1, was to be performed.

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The case went back to the District Judge, when it appeared that the question of administration had already been dealt with. An additional issue of law in the following terms was then settled and agreed to: "Was the second defendant bound to notify to the second plaintiff his intention to sell the land in question?"

After argument, no further evidence as to question of notice being tendered, the District Judge again gave judgment holding that, as the law does not describe how notice is to be given, the right of pre-emption, though existing, cannot be enforced, and further that, as the first defendant was not a Malabar inhabitant of the Province of Jaffna, plaintiffs could have no cause of action against him.

The plaintiffs again appealed to this Court.

The first question to be considered is whether the right of pre emption as appearing in the *Tesavalamai* is still in existence. It seems to have been recognized that it existed in 1854 by a judgment of this Court in a case reported in *Muttukisna, p. 563.* Again it was recognized as existing by Chief Justice Bonser in the case reported in *4 N. L. R. 328*, and practically again by Chief Justice Layard and my Brother Wendt in this case as reported in *6 N. L. R. 356.* I think therefore we are bound to hold that this right still exists in the Province of Jaffna.

The Solicitor-General maintained, however, that Chief Justice Bonser was in error, in his judgment reported in *4 N. L. R. 334*, in holding (against the Solicitor-General's contention that Ordinance No. 4 of 1895 had the effect of abolishing all rights of pre-emption) that the *Tesavalamai* contains nothing as to publication and schedule.

It would seem that a custom of the Udaiyar giving a schedule upon the sale of lands in the Jaffna Province was recognized by Ordinance No. 1 of 1842, which gave authority to these officials to charge fees, and made them liable for negligence and misconduct.

This Ordinance was repealed by No. 4 of 1895, which at the same time repealed so much of the *Tesavalamai*..... as requires publication and schedule of intended sales or other alienations of immovable property.

Now, it is true there is nothing about schedules in the *Tesavalamai*, but paragraph 3 of section 7 certainly contemplated the publication of notice of intended sales in the parish churches. The schedule was a custom of the country not prescribed by or known to the compilers of the *Tesavalamai*, although subsequently recognized by Ordinance No. 1 of 1842. I think it is clear then that section 1 of Ordinance No. 4 of 1895 repealed so much of the second part of the first paragraph of section 7 of the *Tesavalamai* as

requires publication of the intention to sell lands in the parish church, and which was initiated during the time of "old Commander Blom of blessed memory", and this is the point contended for by Counsel for the appellants. The Solicitor-General's argument, based on section 3 of Ordinance No. 1 of 1852, which, I think, was used under a misapprehension that Ordinance No. 1 of 1842 repealed a portion of the *Tesavalamai*, therefore falls to the ground.

My own view then is practically that expressed by Chief Justice Bonser in *4 N. L. R. 335*, *i.e.*, that Ordinance No. 4 of 1895 had not the effect of abolishing all rights of pre-emption in the Province of Jaffna, and if it had been intended to have that effect I would have expected the Legislature to say so in plain terms. In my opinion then the right of pre-emption still exists subject to the terms of notice set out in the first paragraph of section 7 of the *Tesavalamai*, and it is necessary, therefore, for a co-owner desiring to sell his share of the land to give a reasonable notice to his other co-owners according to the times specified in that first paragraph. In this case, there is no pretence that any such notice has been given, and the plaintiff, therefore, in respect of second plaintiff's interest as co-owner, would be entitled to an order declaring the sale of the second defendant to the first defendant void upon tender and payment into Court of the market value of the property sold. The market value here is doubtful; it is said not to be the sale price, which in most cases would be the market value. The judgment of the District Judge must therefore be set aside and the case must go back to the District Court for the ascertainment of the market value, and upon payment of that sum into Court the plaintiffs will be entitled to a decree as prayed for.

I think it would not be advisable to *tack* on to the *Tesavalamai* any of the forms or procedure derived from the Roman-Dutch Law in *Van Leeuwen. 2 Kotze's Translation, 151*, as suggested by the Solicitor-General.

As regards the District Judge's point that the first defendant, though a Tamil, is not an inhabitant of the Province of Jaffna, and therefore not subject to the *Tesavalamai*, I would say that the *Tesavalamai* imposes a restriction on the sale of land in the Province of Jaffna which would affect the rights of any person who assumed to buy it, and therefore those of the first defendant, whether he be English, Moor, or Jaffna Tamil, not resident in that Province.

As regards costs, the plaintiffs are, I think, entitled to get their costs of the whole proceedings.