[IN THE PRIVY COUNCIL]

1961 *Present :* **Lord Morton of Henryton, Lord Radcliffe, Lord Denning, Lord Morris of Borth-y-Gest, Mr. L. M. D. de Silva**

MANGALESWARI (a minor, appearing by her next friend Sinnamma), Appellant, *and* V. SELVADURAI and others, Respondents

PRIVY COUNCIL APPEAL NO. 10 OF 1958

*S. C. 21—D. C. Chavakachcheri, 315*

*Thesavalamai—Pre-emption—Land owned in common by father and daughter—Daughter a minor—Sale of his share by father to a stranger without notice to daughter—Right of daughter to have the sale set aside—Point of time at which cause of action arises—No onus on pre-emptor to show that she had sufficient money at time of sale—Natural guardian's knowledge of sale—Imputation of it to minor—Applicability of Roman-Dutch Law and Muslim Law principles of pre-emption.*

Neither the Roman-Dutch Law nor the Muslim Law is part of the law of Thesavalamai, but, in regard to a question relating to pre-emption, it is permissible to derive assistance from the law obtaining in those systems when it is not in conflict with the principles of Thesavalamai.

In an action to enforce a right of pre-emption under the law of Thesavalamai in respect of an undivided half share of a certain land which had been sold by the co-owner in September, 1937, without notice to the pre-emptor—

*Held*, (i) that it is not fundamental to the cause of action in such a case that the pre-emptor should establish by positive proof that, had he in fact received the requisite notice, he had sufficient means to purchase the property at the time it was sold.

*Velupillai v. Pulendra* (1951) 53 N. L. R. 472, overruled.

(ii) that the point of time at which the cause of action arose was the time at which the pre-emptor came to know of the sale. This could be a considerable time after the sale and still further from the time at which the pre-emptor should have received notice.

(iii) that where the pre-emptor is a minor and the vendor is his natural guardian, the vendor's knowledge of the sale should not be imputed to the pre-emptor.

APPEAL from a judgment of the Supreme Court reported in *(1952) 55 N. L. R. 133.*

The plaintiff (born in 1930) and her father the first defendant inherited as co-owners in equal shares a certain land under the last will of her mother who died in 1935. In September, 1937, the first defendant sold his half share of it to the second defendant who in turn sold the property to the third and fourth defendants. The plaintiff as a co-owner fell into the category of persons entitled to pre-empt under the

Thesavalamai. The second, third and fourth defendants did not fall into this category. The plaintiff did not become aware of the sale till January, 1950.

The present action was instituted by the plaintiff (through her next friend) in August, 1950, to enforce her right of pre-emption in respect of the undivided half share that was sold by the first defendant in 1937. She prayed that the deed of conveyance executed by the first defendant in favour of the second defendant be set aside and that the first defendant be ordered to execute a deed of transfer in her favour on payment of due consideration.

*Stephen Chapman, Q.C.*, with *John Stephenson, Q.C.*, for the plaintiff-appellant.

*Gilbert Dold*, with *J. B. Baker*, for the respondents.

*Cur. adv. vult.*

April 26, 1961. [*Delivered by* MR. L. M. D. DE SILVA]—

The appellant, a minor at the time but now a major, instituted this action through her duly appointed next friend in the District Court of Chavakachcheri on the 30th August, 1950 to enforce a right of pre-emption under the law of Tesawalamai in respect of an undivided half share of a certain land. It is agreed that the law of Tesawalamai is applicable to the rights of parties in this case. She prayed that a deed of conveyance executed by the first respondent in favour of the second respondent be set aside and that the first respondent be ordered to execute a deed of transfer in her favour on her bringing into Court a sum of Rs. 1,500, which was the consideration paid by the second respondent to the first on the deed, or other sum as the Court might fix.

The learned District Judge entered judgment in her favour on the 28th November, 1950 giving her time till the 18th December, 1950 to deposit a sum of Rs. 1,500 in Court. She has deposited in Court the said sum of Rs. 1,500 and a further sum of Rs. 1,500 determined by the District Judge to be payable as compensation for improvements.

The Supreme Court (Gunasekara, J. with whom Gratiaen J. agreed) set aside the said judgment and dismissed the action. The present appeal is from that order.

The appellant (born in 1930) and her father the first respondent inherited as co-owners in equal shares the property in question under the last will of her mother who died in 1935. In September, 1937 the first respondent sold his half share of it to the second respondent who in turn has sold the property to the third and fourth respondents. The appellant as a co-owner falls into the category of persons entitled to pre-empt under the Tesawalamai. The second and third and fourth respondents do not fall into this category. It has been stated by the appellant in evidence, and found by the learned District Judge, that she did not become aware of the sale till after the institution of a certain

partition action (the details of which are not material to this case) on the 10th January, 1950. This finding has not been challenged on this appeal or elsewhere.

The Tesawalamai is a body of customary law obtaining among the inhabitants of the Northern Province of Ceylon. Its origin has been the subject of some controversy. It was collected and put into writing at the instance of the Dutch Governor Simons in 1706 and, after the British occupation, given the force of law by Regulation 18 of 1806 which as amended by Ordinance No. 5 of 1869 is now Chapter 51 of the Legislative Enactments of Ceylon (Vol. II, p. 49). Part VII relates to pre-emption. There have been subsequent amendments but these were subsequent to the date of the sale mentioned above and have not been invoked by the parties in the Courts in Ceylon.

Under the Tesawalamai any of several persons (among them co-owners as stated above) falling into a defined category had on any proposed sale of a land to a person outside the category the right to demand that the property be sold to him on the same terms and conditions as on the proposed sale. Notice had to be given to all persons in the category or else the sale was liable to be defeated by any one of them. The position was correctly stated in the judgment of the Supreme Court in *Kathiresu v. Kasinather*[1] thus :—"The Tesawalamai itself declared the form of notice to be given where a co-owner has the right of pre-emption. But by Ordinance No. 4 of 1895, so much of the Tesawalamai as requires publication and schedules (these were prescribed formalities) of intended sales of immovable property was repealed. But this Court held in *Suppiah v. Thambiah*[2] that notwithstanding the abolition of publication and schedules of intended sales, the liability of a co-owner desiring to sell his share of a land to give reasonable notice to his other co-owners of the intended sale still survived."

It was further held in *Kathiresu v. Kasinather* and approved in *Mailvaganam v. Kandiah*[3] "that a person who has knowledge of an intended sale by a co-owner of his share and does not offer to exercise his right of pre-emption cannot thereafter bring an action for pre-emption and that the burden of proof is on the defendant to prove that he either gave formal notice or that the plaintiff had knowledge of the intended sale ".

Their Lordships are of opinion consistently with views expressed by the Supreme Court of Ceylon in various decisions that where no notice has been given before the sale a cause of action accrues to a pre-emptor on his gaining knowledge of the sale to have it set aside and the property transferred to him on the same terms as those on which the sale had taken place. This principle while it stood created no doubt a serious difficulty in making sure that a proposed transfer of land would be sound. Amending legislation has been passed in 1947 to meet this and other difficulties arising from the Tesawalamai in dealing with land.

[1] *(1923) 25 N. L. R. 331 at p. 332.* [2] *(1904) 7 N. L. R. 157.*
[3] *(1930) 32 N. L. R. 211 at p. 213.*

The Supreme Court allowed the appeal of the respondents and dismissed the action on the basis of the case of *Velupillai v. Pulendra* [1] decided two years earlier by the same judges in which it was held " it is fundamental to the cause of action such as is alleged to have arisen in this case that the pre-emptor should establish by positive proof that, had he in fact received the requisite notice, he would and could have purchased the property himself within a reasonable time rather than permit it to be sold to a stranger ". On an examination of the evidence in the present case they came to the conclusion that the appellants' estate was insufficient for the purpose (of a purchase) at the time of the sale by the first respondent to the second in 1937. For these reasons they dismissed the action.

It is necessary now to examine whether the view expressed in *Velupillai v. Pulendra* is sound. It has been urged by counsel for the appellant and not challenged by counsel for the respondent that there is nothing in the statutory provisions of the Tesawalamai or in previous decisions of the Supreme Court which supports the view mentioned. In such circumstances the Courts in Ceylon have derived assistance sometimes from the Roman Dutch Law and sometimes from the Muslim Law relating to pre-emption. There has been a difference of opinion as to which system should be resorted to. It was held by the Supreme Court in the case of *Karthigesu v. Parupathy* [2] : " Pre-emption as it prevails in British India owes its origin entirely to Mahomedan Law and the provisions in the Tesawalamai (Legislative Enactments, Volume 2, Chapter 51, Part 7) may be due to the early occupation of North Ceylon for a time by Mahomedans or the later occupation by the Malabars who had themselves come under Mahomedan influence in India. The decisions of the Indian Courts on questions of pre-emption may, therefore, be taken as guides so far as such decisions are not affected by Statutes or the personal law governing persons of Islamic faith."

But it was held in *Sabapathypillai v. Sinnatamby* [3] that " where the Tesawalamai is silent the Roman Dutch Law is applicable ". This view has also been expressed in other cases.

Counsel for the appellant argues, correctly in their Lordships' opinion, that there is nothing in either system which supports the view expressed in *Velupillai v. Pulendra* and that on the contrary there is a certain amount which appears to be inconsistent with it.

It appears to their Lordships that neither the Roman Dutch Law nor the Muslim can be regarded as part of the law of Tesawalamai but that it is permissible to look at the law obtaining in those systems, to ascertain the reasoning which underlies the principle of pre-emption as it is to be found in them in dealing with various problems ; and, when not in conflict with the principles of Tesawalamai as established in Ceylon and otherwise appropriate, to borrow such rules and concepts as seem best suited to the situation in Ceylon.

[1] *(1951) 53 N. L. R. 472 at p. 474.* [2] *(1945) 46 N. L. R. 162 at p. 163.*
[3] *(1948) 50 N. L. R. 367.*

Grotius Book III Chapter XVI section 10 (Lee's Translation of the Jurisprudence of Holland by Hugo Grotius p. 379) says :

> " 10. The right of recall must be instituted within a year of the sale or, at all events, within a year of its coming to the knowledge of the person asserting the right, as to which he may be put to his oath."

He does not say that the pre-emptor must show he was able to produce the money necessary for pre-emption at the time of the sale, or at the time it comes to his knowledge.

Voet in his commentary on the Pandects (Berwick's Translation p. 61) founding himself upon Tiraquellus says :

> " A renunciation of the right of retractus is indeed not to be inferred merely from one having refused to purchase the thing when offered to him by a cognate ; for many circumstances might dissuade him from an immediate purchase, for example, less astuteness on the part of the cognate (vendor) than on that of the extraneous purchaser, which might make it more to the advantage of the latter to avail himself of the right of retractus after it has been already purchased than to be himself the first purchaser ; want of ready money which however he might be able to procure within the year allowed for the exercise of the right ; and many others. Tiraquellus *De retractu gentilit.* §1. *gloss.* 9 *n.* 145. Nor is renunciation to be inferred from the circumstance of his having been present at the sale and remaining silent ; for such silence is rather to be attributed to his knowledge that his right would last for the term of a whole year or other period defined by statute."

Retraction (or naesting) was the name given in Roman Dutch Law to pre-emption.

It will be seen that under the Roman Dutch Law a pre-emptor was in a position much more privileged than under the law of Ceylon. There is nothing in the Roman Dutch Law which directly or indirectly supports the view on which the judgment of the Supreme Court rests.

Their Lordships have been referred to various passages in the works of Mulla, Wilson and Tyabji which satisfy them of the negative proposition that there is nothing in the Muslim Law which supports directly or indirectly the view of the Supreme Court. They will make reference to a passage which appears in Wilson's Anglo Muhammadan Law (sixth Edition p. 415 Article 387):

> " It is not necessary according to Muhammadan Law but it is sometimes required by the local wajib-ul-arz [local record of rights p. 66 ib] that the owner of property should give notice to the persons having the right of pre-emption before selling it to a stranger. Under the Muhammadan Law the right cannot be lost by delay in making the demand until the existence of a binding contract has actually

come to the knowledge of the pre-emptor ; where notice is required by the wajib-ul-arz the right is lost unless the pre-emptor replies to the notice within a reasonable time after receiving it, offering to purchase at the price asked, or at a price to be settled in accordance with the provisions of the wajib-ul-arz."

There is no indication in this passage or elsewhere that if the property is sold without notice the pre-emptor asserting his right to pre-emption in an action must " establish by positive proof that had he in fact received the requisite notice, he could and would have purchased the property himself rather than permit it to be sold to a stranger " and no indication of anything which resembles what has just been said in any way.

It appears from what has been said that there is nothing in the Roman Dutch Law or the Muslim Law which can be said to support the principle upon which the judgment of the Supreme Court rests. The passages quoted tend on the whole to be opposed to such a principle. As already stated there is nothing in the statute law or in the decisions of the Ceylon Courts which has a bearing on it. Their Lordships are of opinion that it must be held that the principle does not form part of the law in Ceylon. The Supreme Court in laying down the principle observed : " A would be pre-emptor cannot claim to be in a better position by not receiving notice of the intended sale than he would have been if he had received such notice. " On the other hand it has to be noted that the point of time at which the cause of action arises in the case of a sale without notice is, as already stated, the time at which the person deprived of his rights as a pre-emptor comes to know of the sale. This may be a considerable time after the sale and still further from the time at which he should have received notice. Had he received notice and did not possess the necessary money at the time he might have raised it. It would not be just to insist that he should establish facts which might well have existed some considerable time before the action but of which it might at the time of action be difficult to obtain evidence in a convincing form ; for instance a person who might at the relevant time have assisted the pre-emptor with money might be dead or, if alive, his evidence could be criticised on the ground that he is saying he would have done something which he was never called upon to do in the past and would not be called upon to do in the future.

It was argued that the vendor being the father of the minor was her natural guardian and that his knowledge of the sale should be imputed to her. The Supreme Court did not decide this question as the view discussed above taken by it was sufficient to dispose of the case. Their Lordships do not find it necessary to consider the general question as to the circumstances if any under which notice to a natural guardian can under the law of Ceylon be said to be notice to a minor sufficient to bind him (or her). They are of opinion that notice to, or the knowledge of, a natural guardian as interested as the first respondent could not be imputed to the appellant.

The Muslim Law while recognising the doctrine of pre-emption does not look upon it with favour. Thus Tyabji says at p. 724 " Pre-emption is not favoured by the law " and further " The right of shaffa (pre-emption) is but a feeble right as it is a disseising another of his property merely in order to prevent apprehended inconveniences ". In Ceylon it was said rightly by the Supreme Court in 1923 in the case of *Kathiresu v. Kasinather* (above) " The right of pre-emption imposes a serious fetter on an owner's right of free disposition of property, and the facts have to be carefully scrutinized before a co-owner is allowed to set aside a sale on such a ground." In the case of *Velupillai v. Pulendra* (above) the Supreme Court was no doubt quite rightly scrutinizing the circumstances closely, but with all respect their Lordships cannot find sufficient material upon which the view expressed by it can be sustained.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal should be allowed, the decree of the Supreme Court set aside and the decree of the District Court restored. The costs in the Supreme Court and on this appeal must be paid by the 2nd to 11th respondents. The 1st respondent filed no answer and raised no opposition at any stage of the case.

*Appeal allowed.*