1960 *Present :* **Weerasooriya, J., and H. N. G. Fernando, J.**

KANDASAMY *et al.*, Appellants, *and* KUMARASEKARAM *et al.*, Respondents

S. C. 598 (A—B)—D. C. Jaffna, 275/L

Civil Procedure Code—Section 16—Numerous defendants—Permission of Court to sue one or more of them as representing all—Procedure relating thereto.

Sale of immovable property—Unincorporated society or association—Capacity to acquire property—Thesawalamai Pre-emption Ordinance, No. 59 of 1947, s. 8 (1).

(i) Permission given by Court under section 16 of the Civil Procedure Code to sue one or more persons as representing numerous defendants need not necessarily be in express terms if the granting of such permission is otherwise clear, considering the averments in the plaint, the application in the prayer and the order of the Court allowing the application.

Although the notice given by a plaintiff by public advertisement in terms of section 16 of the Civil Procedure Code should, on the face of it, indicate that it is given by or on the order of the Court, failure to state therein that it is given by or on the order of the Court is, at the most, an irregularity which does not warrant a dismissal of the action.

(ii) An unincorporated society, not being a juristic person, has no legal capacity to acquire property. Accordingly, a sale of immovable property in favour of an unincorporated society or association (in the present case the transferee was the " Village Welfare Society, Veemankamam ") cannot pass title if it is not clear whether the transferor meant to benefit the present members of the society as individuals or to benefit the society as a quasi-corporation. In such a case, as there is no " sale ", a co-owner of the property is not entitled to institute an action to enforce a right of pre-emption under section 8 (1) of the Thesawalamai Pre-emption Ordinance.

APPEALS from a judgment of the District Court, Jaffna.

E. B. Wikramanayake, Q.C., with *S. Sharvananda*, for 1st defendant-appellant in 598A and 1st defendant-respondent in 598B.

S. J. V. Chelvanayakam, Q.C., with *V. Arulambalam*, for 2nd-4th defendants-appellants in 598B and 2nd-4th defendants-respondents in 598A.

C. Thiagalingam, Q.C., with *A. Nagendra*, for plaintiff-respondent in both appeals.

Cur. adv. vult.

December 8, 1960. WEERASOORIYA, J.—

The plaintiff-respondent filed this action to enforce his right of pre-emption as a co-owner in respect of an undivided extent of one lachcham out of a land called Vevari which the 1st defendant (the

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appellant in appeal No. 598A) is alleged to have sold to the Village Welfare Society, Veemankamam, on deed No. 1809 of the 27th October, 1955, marked P 9. According to the caption in the amended plaint, the 2nd, 3rd and 4th defendants (who are the appellants in appeal No. 598B) are sued as the president, secretary and treasurer respectively of the Pallai Veemankamam Rural Development Society " on their own behalf and on behalf of the other members of the said Society ". It would appear that the designations " Village Welfare Society, Veemankamam " and " Pallai Veemankamam Rural Development Society " refer to one and the same Society.

Of the numerous issues on which the case proceeded to trial one was whether the plaintiff is a co-owner of the land described in the plaint. Another issue raised the question whether P 9 is a conveyance of a divided or undivided extent of land. Both these issues were decided by the learned District Judge in favour of the plaintiff. No attempt was made at the hearing of the appeal, either by Mr. Wikramanayake who appeared for the 1st defendant, or by Mr. Chelvanayakam who appeared for the 2nd, 3rd and 4th defendants, to canvass the correctness of these findings.

The exercise of the right of pre-emption under the Thesawalamai is now regulated by the Thesawalamai Pre-emption Ordinance, No. 59 of 1947. Section 8 (1) of that Ordinance provides, *inter alia*, that after the completion of any sale prior notice of which was not given under section 5 " the right of pre-emption shall not be enforced except by way of regular action, to which the purchaser shall also be made a party ". In regard to the requirement that the purchaser shall be made a party, certain submissions were addressed to us by Mr. Chelvanayakam that the present action is not properly constituted and is, therefore, not maintainable. According to the averments in the plaint the virtual purchaser is the Pallai Veemankamam Rural Development Society, acting through the 2nd, 3rd and 4th defendants. As the Society has not been incorporated all its members had to be joined as defendants unless the permission of the District Court was duly obtained under section 16 of the Civil Procedure Code for the 2nd, 3rd and 4th defendants alone to be sued on behalf of all the members.

The caption of the plaint as originally filed showed that the 2nd, 3rd and 4th defendants were sued " personally and as President, Secretary and Treasurer respectively of the Pallai Veemankamam Rural Development Society ", but by a subsequent amendment, which was allowed by the District Judge, the words " personally and " were deleted and the caption altered so as to read that the 2nd, 3rd and 4th defendants were sued " as President, Secretary and Treasurer respectively of the Pallai Veemankamam Rural Development Society on their own behalf and on behalf of the other members of the Society ". Further, there was an averment in the plaint that it was necessary to obtain a binding decree against the Society, which consisted of numerous members and the office bearers of which were the 2nd, 3rd and 4th defendants, and the prayer in the plaint included an application that notice of the

institution of the action in terms of section 16 of the Civil Procedure Code be published in an issue of the " Eelakesari " and by beat of tom-tom in Pallai, Tellipallai. The notice that was published is signed by the proctor for the plaintiff, and does not purport to be a notice given by order of the Court. P 20 is a copy of the notice. Mr. Chelvanayakam submitted that the steps taken by the plaintiff did not constitute compliance with section 16 of the Civil Procedure Code in that no permission of Court was obtained for the 2nd, 3rd and 4th defendants to be sued on behalf of all members of the Society. He also submitted that the notice that was published in terms of P 20 was not a notice as contemplated in the section, which requires the notice to be given by the Court.

While the procedure followed does not appear to be in strict conformity with section 16, I am not prepared to hold that no permission was given by the Court in this case for the plaintiff to sue the 2nd, 3rd and 4th defendants on behalf of the members of the Society. The permission need not be in express terms. Considering the averments in the plaint and the application in the prayer to which I have referred, it seems to me that the order of the District Judge allowing the application cannot reasonably be construed otherwise than as amounting to the granting of such permission to the plaintiff. This is confirmed by the fact that the District Judge subsequently allowed the amendment of the caption of the plaint. As regards the notice P 20, I agree with Mr. Chelvanayakam that a notice under section 16 should, on the face of it, indicate that it is given by or on the order of the Court. But, in my opinion, failure to give a notice in such terms is, at the most, an irregularity which does not warrant a dismissal of the action. The question whether any direction should now be given in appeal to rectify the irregularity does not arise in view of the conclusions reached by me in regard to the other points in dispute.

The present action was filed on the basis that notice under section 5 of the Thesawalamai Pre-emption Ordinance, No. 59 of 1947, of an intended sale was not given prior to the execution of P 9. That no such notice was given is not disputed. It is clear that under section 8 (1) of the Ordinance an action will not lie unless there has been a prior completed " sale " of the undivided share or interest in land in respect of which the right of pre-emption is sought to be enforced. The expression " sale " is not defined either in the Ordinance or in the Thesawalamai Regulation (Cap. 51), and its meaning has, therefore to be determined on a consideration of the general law applicable. Under the general law every valid deed of sale requires, *inter alia*, a grantor and a grantee. On deed P 9 the 1st defendant purported to " sell, transfer, make over and convey " to the Village Welfare Society, Veemankamam, for the sum of Rs. 1,250 paid by the Society an extent of one lachcham of the land Vevari. P 9 on the face of it would appear to have been intended as an outright sale in favour of the Society. But it is contended on behalf of all the defendants-appellants that as

the Society is not a juristic person, there is, in the eye of the law, no grantee in P 9 and it did not, therefore, operate as a sale. The issues relevant to this contention are numbered 11 and 12 and are as follows :

" 11. Is the said Society an incorporated body ? "

" 12. If not, can the said deed No. 1809 divest 1st defendant of his title to the said 1 lachcham ? ".

As for issue No. 11, none of the parties seems to have taken up the position at the trial that the Society is an incorporated body, and it is not clear why the matter was raised as an issue at all. That issue was answered in the negative by the District Judge, as it had to be. But although the Society is not an incorporated body the District Judge held on issue No. 12 that deed P 9 passed title in favour of the Society to the property conveyed. This finding was based on the following dictum in the judgment of Basnayake, J. (as he then was) in *Anthony Gaspar v. The Bishop of Jaffna* [1] : " A community of persons can hold property or acquire rights in property. In the same way a community of persons can be beneficiaries under a trust deed ". But, if I may say so with respect, I do not think that the *dictum* amounts to more than that the individual members comprising a community (and not the community as a distinct entity) can hold or acquire rights in property, and that they can also be the beneficiaries under a trust. In my opinion the learned District Judge was mistaken in his finding that title to the property in question passed on P 9 to the *Society*, or that the *dictum* on which he relied gave support to such a finding.

That the Society, not being a juristic person, has no legal capacity to acquire property under P 9 is, I think, not open to argument. Nor did I understand Mr. Thiagalingam, who appeared for the plaintiff-respondent, to contend otherwise. But, in his submission, the designation of the Village Welfare Society, Veemankamam, as the grantee in P 9 should, as a matter of construction of the deed, be taken to comprehend and refer to all the persons who, at the time, were members of the Society and that, therefore, the title to the property conveyed should be held to have passed to all such persons jointly. For this submission he relied on certain English decisions. One of them is *Bourne v. Keane* [2] where among the matters discussed in the House of Lords was whether a bequest in the following terms : " To the Jesuit Fathers, Farm Street, £200 for Masses " was void on the ground that it was given to a monastic body. There was evidence that a community of some thirty members of the Jesuit Order lived at Farm Street. In holding that the gift was not void Lord Buckmaster stressed the fact that the gift was, in terms, to a group of persons, members of a particular community, resident at a named place, and he accordingly construed it as a gift to them individually. This decision is, therefore, not of much assistance in the construction of deed P 9, where the conveyance is expressly in favour of the Village Welfare Society, Veemankamam, and not the members thereof.

[1] *(1949) 52 N. L. R. 230, at 233.*

[2] *(1919) A. C. 815.*

Two cases which appear to be more in point are *Maughan v. Sharpe* [1] and *Wray v. Wray* [2]. In the former case, a deed assigning by way of mortgage certain chattels to the "City Investment and Advance Company" was held to be a conveyance in favour of the two persons who carried on business under that name. In the other case a conveyance of immovable property to "William Wray", being the name under which four persons carried on business, was held to pass title in the property to the four partners jointly. The principle of law which these two cases illustrate is, as stated by Lord Halsbury in *Simmons v. Woodward* [3], that "where you are dealing with a grantee, you may describe that grantee in any way which is capable of ascertainment afterwards; you are not bound to give him a particular name; you are not bound to give his christian name or surname; you may describe him by any description by which the parties to the instrument think it right to describe him". See, also, *Re Erasmus; Johnson v. Bright-Smith* [4], where it was held that a legacy to an unincorporated society or association is good because it is treated as being a gift to the several members of such society or association, who can spend the money as they please subject, however, to any understanding or contract between them as to how the monies so derived are to be expended.

But in regard to devises to voluntary associations Jarman on Wills [5] points out that the difficulty in such cases is to decide whether the testator means to benefit the present members of the society as individuals or to benefit the society as a quasi-corporation. According to Theobald on Wills [6] (the subject is dealt by him as well as by Jarman with reference to testamentary dispositions, but the same reasoning would appear to apply to dispositions *inter vivos*) a bequest to a voluntary association can be construed as in favour of the individual members composing the association only where it is expressed to be for the benefit of the members or where the association is so described as to indicate the members who compose it. He also states that such a devise cannot be made to an uncertain body of persons, and he refers to *Hogan v. Byrne* [7] (an Irish case the report of which is not available to me) where a devise of land to certain monks described as Christian Brothers, who were a numerous body, was held void on the ground that the intention was to vest the land in them as a body corporate, which they were not.

In the present case there is no evidence regarding the composition of the Village Welfare Society, Veemankamam, or the rules governing the admission of members and whether they are even capable of acquiring proprietary rights at all. In the absence of any extrinsic evidence, one is restricted to the terms of P 9 alone, in considering whether there is ground for holding, as Mr. Thiagalingam invited us to do, that, although the grant is expressed to be in favour of the Society,

[1] *(1864) 34 L. J. C. P. 19.*
[2] *(1905) 2 Ch. 349.*
[3] *(1892) A. C. 100, at 105.*
[4] *(1914) 110 L. T. 898.*
[5] *8th ed. 285.*
[6] *11th ed. 115.*
[7] *(1862) 13 Ir. C. L. 166.*

the intended grantees were the individual members of the Society, and that the deed should be so construed. On the available material I am unable to give P 9 such a construction. It seems to me that the only reasonably clear intention in P 9 as regards the passing of title is that it should vest in the Society, on the analogy of a grant to an incorporated body which, however, the Society is not. P 9 cannot, therefore, be held to operate as a sale.

In the event of his main submission, that P 9 should be construed as conveying title to the individual members of the Society, failing, Mr. Thiagalingam suggested for our consideration two alternative constructions. One is that the 2nd, 3rd and 4th defendants (who are referred to by name in P 9 as the president, secretary and treasurer respectively of the Society and as the persons who paid the purchase price of Rs. 1,250 stating that it was the money of the Society) should be regarded as the legal owners of the property, holding it for the benefit of the Society. P 9 contains the following habendum clause: "Therefore, I do hereby declare that the Office bearers of the aforesaid Village Welfare Society (Sangam) may possess and enjoy all hereby conveyed from this date for ever as owned by the aforesaid Society . . . . ." Mr. Thiagalingam relied particularly on the words "may possess and enjoy all hereby conveyed" as vesting the legal title in the office bearers. Such a construction is however, clearly opposed to the express grant in the preceding part of P 9 in favour of the Society, which is also referred to in the habendum clause as owning the property.

The other alternative construction suggested by Mr. Thiagalingam is that if P 9 did not effectively pass title from the 1st defendant (the vendor) there was, nevertheless, a constructive trust under which the legal ownership in the property remained with the 1st defendant while the beneficial interest therein passed to the individual members of the Society. But such a "trust" does not appear to fall within any of the categories of constructive trusts dealt with in Chapter IX of the Trusts Ordinance (Cap. 72). Moreover, I have already stated why I am unable to gather from the terms of P 9 an intention on the part of the vendor to benefit the individual members of the Society. I do not see how, in view of that finding, it is possible to hold in favour of a trust under which the same persons are the beneficiaries. In the circumstances, and as no argument was addressed to us on the point, it is not necessary to decide the further question whether a passing of the beneficial interest alone amounts to a "sale" within the meaning of section 8 (1) of the Thesawalamai Pre-emption Ordinance, No. 59 of 1947, or the Thesawalamai Regulation.

I would, therefore, set aside the judgment and decree appealed from and dismiss the plaintiff's action. As regards costs, Mr. Thiagalingam urged that even though the action is dismissed the plaintiff should not be condemned to pay the costs of trial of the defendants seeing that he succeeded in establishing his co-ownership of the land dealt with in P 9 and also that P 9 is a conveyance of an undivided extent of that

land, both of which matters were strenuously disputed by the defendants at the trial. I think that in the circumstances there should be no order as to costs of trial. The plaintiff will, however, pay to the defendants their costs of this appeal.

H. N. G. FERNANDO, J.—I agree.

Appeals allowed.