1961 *Present :* **Basnayake, C.J., and Sinnetamby, J.**

T. KASINATHAN, Appellant, *and* K. THAMOTHARAM PILLAI and another, Respondents

S. C. 498—D. C. Jaffna, 623/L

Thesavalamai—Pre-emption—Notice of sale by intending vendor—Mode of publication of it—Importance of due publication by prescribed officer—Thesavalamai Pre-emption Ordinance, No. 59 of 1947, ss. 3, 5, 6, 8, 13.

When notice of sale of immovable property is given by an intending vendor in terms of section 5 of the Thesavalamai Pre-emption Ordinance No. 59 of 1947, it is his duty to see that the officer to whom the notice is sent has in fact published it. A notice under section 5 cannot be deemed to have been "given" for the purpose of section 8 if there is a failure on the part of the officer to whom the notice is sent to publish it in the manner prescribed in sub-section 4 of section 5.

APPEAL from a judgment of the District Court, Jaffna.

H. V. Perera, Q.C., with *C. Ranganathan* and *J. V. C. Nathaniel*, for the 2nd defendant-appellant.

C. Thiagalingam, Q.C., with *M. D. Jesuratnam*, for the plaintiff-respondent.

Cur. adv. vult.

July 10, 1961. BASNAYAKE, C.J.—

I have had the advantage of reading the judgment prepared by my brother Sinnetamby, and I agree that this appeal should be dismissed with costs.

Section 3 of the Thesawalamai Pre-emption Ordinance No. 59 of 1947 provides that the right of pre-emption shall not be exercised save in accordance with the provisions of the Ordinance. Section 6 provides that within three weeks of the date of publication of a notice under section 5, any person to whom the right of pre-emption is reserved by the Ordinance, may either tender the amount stated in such notice and buy the property from the intending vendor, or enter into an agreement to buy it. Where, as in this case, a land is sold to a purchaser who has no right of pre-emption without the publication of the notice under section 5, a person who has the right of pre-emption is denied the right conferred on him by section 6; because the publication of the notice is a *sine qua non* for the exercise of the right thereunder. He is then left with the remedy provided by section 8.

2—J. N. R 20259—2,033 (11/61)

In the instant case the plaintiff having been denied the opportunity of exercising his right under section 6, as there has been no publication of the notice under section 5, has taken the course of instituting a regular action as provided in section 8. The ground on which he has done so is that the notice required by section 5 was not given. It has been proved that a notice was signed by the intending vendor before a Notary Public and forwarded by registered post to the Chairman of the Village Committee of Puttur. There is also evidence that the notice was neither registered nor published in the prescribed manner.

Where an enactment requires a person to give notice, the requirement is, in the absence of anything in the context to the contrary, ordinarily satisfied when the notice is posted to or delivered at the address of the person to whom notice has to be given. (See *University of Ceylon v. Fernando*[1].) In the instant case the context is such that a notice under section 5 cannot be said to have been given till the notice is published in the prescribed manner, for, it is upon its publication that the right to pre-emption given by section 6 of the Ordinance may be exercised. Unless a notice is regarded as given only upon its publication a person who has the right of pre-emption would not only be denied the opportunity of exercising his right under section 6, he would also be prevented from pursuing the remedy of a regular action provided in section 8, for, he cannot assert in regard to a statutory notice which he has not seen, in the only place in which the statute says he may find it, that—

(*a*) it was irregular or defective,

(*b*) that the price set out in it was fictitious or not fixed in good faith.

The Ordinance is not designed to defeat those who have a right of pre-emption but to aid them and a construction in keeping with the object of the statute as appearing therefrom is to be preferred.

A notice under section 5 is in my opinion not given for the purpose of section 8 until it is published in the manner prescribed in sub-section (4) of the former section.

SINNETAMBY, J.—

The plaintiff and the 1st defendant are co-owners of the land described in the schedule to the plaint, and in this action the plaintiff seeks to pre-empt the 1st defendant's co-owned share which he sold to the 2nd defendant on Deed No. 2945 of 1st October, 1957. The plaintiff complains that the notice required by section 5 of Ordinance No. 59 of 1947 has not been given by the 1st defendant. All parties are governed by the law of Thesawalamai and both defendants were made parties to the action. Plaintiff also alleged that the consideration of Rs. 3,000 mentioned in the deed of transfer in favour of the 2nd defendant was fictitious, and that the reasonable value of the share owned is Rs. 1,750. The defendant traversed these averments in his answer and pleaded

[1] *(1957) 59 N. L. R. 8.*

that he had given due notice as required by section 5. The learned Judge held with the plaintiff both on the question of notice and on the question of the price holding that the reasonable value of the share in question is Rs. 1,750. He accordingly entered judgment for the plaintiff declaring him entitled to pre-empt the 1st defendant's share of the said land, on his depositing the sum of Rs. 1,750 less Rs. 346, which had been brought into court, and declaring Deed No. 2945 in favour of the 2nd defendant void : he further directed that if the money was not deposited on or before 31st October, 1956, the action was to stand dismissed with costs. Against this finding, the 2nd defendant has appealed.

The main question that was argued before us related to the issue of whether due notice of the intended sale had been given in terms of section 5 of Ordinance No. 59 of 1947. This Ordinance was enacted mainly to formulate a mode of giving notice to other co-owners of the intention of any particular co-owner to sell his undivided share of the co-owned property to an outsider, in order that if so inclined any one of the co-owners may pre-empt and purchase either at the price offered by the prospective purchaser, or, if that price is fictitious, at the reasonable market price. Prior to the enactment of Ordinance No. 59 of 1947, the law required that notice of an intended sale should be given by the intending vendor to his co-owners. What was insisted upon was actual notice, duly communicated. Although at one time there was a question of whether the right to pre-emption under the Thesawalamai existed, the decision of our courts clearly established the existence of such a right ; but difficulties arose in regard to the manner of giving notice of intended sales to co-owners. In the Thesawalamai regulations Chapter 51 part 7 section 1, the form of notice which was recognised in the early days required publication on three successive Sundays at the Church " during which period such persons as mean to have the preference to the land for sale according to the ancient customs of the country are to come forward ". This form of publication has become obsolete and is no longer considered necessary. The difficulty was to formulate and adopt a mode of service, which, until the passing of Ordinance No. 59 of 1947, complied with the essential requirements of the law of Thesawalamai. The courts accordingly were prepared to accept any form of notice, containing the necessary particulars, which was duly communicated by the vendor to the co-owners. The essential requirement was communication to the co-owner. Even in cases where no notice was given, if a co-owner was shown to have been aware of the intended sale, he was not permitted, after the sale, to exercise his right of pre-emption. The Courts took the view that a sale to an outsider would not be set aside if the other co-owners were aware of it, even though the intending vendor did not expressly give them notice. It is to be noted in this connection that though the mode of service contemplated by the old Thesawalamai was expressly declared to be obsolete, what is interesting is the fact that according to it, publication to the world was considered to be the means of giving notice. Subsequent decisions required actual notice of an intended sale to be given to the other co-owners, but the difficulty of

giving that notice increased with the passage of time. This was appreciated by the courts which, from time to time, expressed the need of the legislature stepping in and prescribing a form of notice. I would refer in this connection to the case of *Suppiah v. Thambiah*[1] where the matter is discussed.

In Ordinance No. 59 of 1947, a mode of notice is prescribed which follows the principle embodied in the old Thesawalamai to which I have referred. Publication to the world is prescribed and deemed to be notice to all persons enjoying the rights of pre-emption. It is no longer necessary to give actual notice to each co-owner. It will thus be seen that the essential part of the notice is the publication of it in the manner prescribed. Section 5 lays down the steps that have to be taken to establish that due notice has been given. Sub-section 1 enacts that the notice of an intention to sell to an outsider shall be signed by the intending vendor before a Notary Public and that this notice shall be attested in triplicate : presumably, the requirement that the notice shall be attested in triplicate was intended to enable the Notary to comply with the provisions of the Notary's Ordinance, whereby, he is required to send the duplicate to the Registrar-General, to keep a copy for his protocol, and give the original to the person giving the notice ; but it should be noted that registration of such a notice is not obligatory. Sub-section 2 provides that the notice shall set out the actual price offered and that it is not necessary to disclose the prospective purchaser. Sub-section 3 provides that a certified copy of the notice shall be forwarded by the intending vendor to one of the persons specified in the schedule to the Ordinance, which in this case happens to be the Chairman of the Village Committee of Puttur. The provision that a certified copy should be sent is obviously intended to enable a Notary Public to comply with the provisions of the Notary's Ordinance in regard to the originals. In the present case, however, the Notary is stated to have sent one of the copies which he attested in triplicate, and not a certified copy thereof, to the Chairman of the Village Committee : Counsel for the respondent rightly contended that the original of the notice should have been given to the intending vendor so that it may be annexed to the deed of sale which he executes. Sub-section 4 then provides for the manner of publication. The officer who receives the certified copy is required to record the particulars in a register kept for that purpose and to cause the certified copy to be posted immediately on the notice board of his court or office as the case may be. From this provision it is obvious that the manner of giving notice to the other co-owners is by publication to the world. Although a co-owner intending to sell his share does not give actual notice to his other co-owners, he is, nevertheless, in the eyes of the law, deemed to have given such notice if the provisions of section 5 have been complied with : and, it seems to me, that the most important requirement of the section is the publication on the notice board. Sub-section 5 provides that a certificate

[1] *(1904) 7 N. L. R. 151.*

issued by the officer receiving the notice that it had been duly posted on his notice board is conclusive evidence of the publication of the notice for the purpose of the Ordinance. This sub-section emphasizes the need to post the notice on the notice board and precludes any objection being taken to the validity of the notice if a certificate under this sub-section is produced in a court of law.

In the present case, the evidence of the appellant's proctor Mr. Ambalavanar is that the notarially executed notice, 2D2, of 9th August, 1959, was sent by him to the Chairman of the Village Committee after it had been duly executed in terms of section 5. The notice was sent by registered post according to the proctor, and the evidence of the sub-postmaster, Ramanathapillai, coupled with the documents 2D9 and 2D10, established the fact that Mr. Ambalavanar did send a registered letter to the Chairman of the Village Committee, Puttur, and that it was taken charge of by the Village Committee peon Kanagasabai. These documents, however, do not establish what the contents of that registered letter were. The Chairman of the Village Committee states that he did not see any such notice nor was any such notice posted on the notice board of the Village Committee. The learned trial Judge has accepted his evidence. I see no reason to interfere with that finding. The learned Judge has considered the evidence carefully and I do not propose to disturb it in spite of the fact that there is some evidence of witnesses who are alleged to have seen the notice exhibited on the notice board of the Village Committee. The learned Counsel for the appellant, however, contended that, so far as the intending vendor was concerned, he should not be penalised for the default of persons over whom he has no control : but, what the section requires is something more than merely the performance of that part of its provision which relates to an intending vendor. It is no doubt true that the intending vendor has no control over the parties whose duty it is to make publication in the manner provided ; but, it seems to me, that, if he wishes to avail himself of the provisions of section 5, it is his duty to see that the officer to whom the notice is sent has in fact published the notice. The object of section 5 being to give notice to co-owners, how can it be said that they must be deemed to have received notice without the publication contemplated by sub-section 4 ? It may be that the intending vendor cannot control the action of others, but that is his misfortune and not the fault of his co-owners. Curiously, in this case although the Chairman of the Village Committee was summoned to produce the inward register of letters received, he was not summoned to produce the " register of pre-emption notices " kept under sub-section 4 nor was a request made to him to issue a certificate under sub-section 5. Surely a proctor in the position of Mr. Ambalavanar should know that he ought to obtain a certificate under section 5 to prevent the possibility of another co-owner disputing the validity of the intended sale. If in fact the notice was published, why was it that the certificate under sub-section 5 was not applied for, and why was it that the Chairman was not summoned to produce the register kept under sub-section 4 ?

The present action was obviously brought under the provisions of section 8, for the sale, of which the plaintiff says no " notice has been given under section 5 ", had been completed. Such a right of action in these circumstances is given in sub-section 2 of section 8 on the ground that the notice required by section 5 had not been given. Mr. H. V. Perera, Q.C., for the appellant contended that the expression " notice has been given " means, so far as the vendor is concerned, compliance with the provisions of sub-sections 1, 2 and 3 of section 5 and that failure on the part of the officer to whom the notice is sent to publish it does not amount to failure to *give* notice. He also contended that wherever publication was considered to be a necessary part of the provisions of the Ordinance it expressly said so, as for instance in section 6 (1) and in section 8 (2) (iii). He, therefore, contended that, in as much as the earlier part of section 8 only speaks of notice being either given or not given, it does not include publication. It is to be noted, however, that section 6 (1) and section 8 (2) (iii) deal with computation of time ; and, in computing time, the date from which the computation is to be made is referred to as the day of publication. That is the last act which is required to be done by section 5 for the giving of notice. The framers of the Ordinance no doubt could have used the expression " notice has been given " in place of " publication of the notice " but the expression " publication of the notice " was perhaps used only to pin point the date from which the time has to be computed. Mr. Perera also referred to section 6 (2) in which the expression used is " a sale of which *he* has given notice under section 5 " and contended that the use of the pronoun " he " suggests that the giving of notice was complied with when the intending vendor performs that part of the provisions of section 5 which imposes on him certain duties ; he submitted also that the other provisions of the section do not impose on the intending vendor any obligation and that he should not, therefore, be penalised for the default of others. I cannot, however, agree with this interpretation. After all, the object of this Ordinance was mainly to formulate a manner in which notice had to be given to those entitled to pre-empt. Under the old law this was done by publication in Church. After its repeal, the decisions of the Courts required actual notice to be given. It is inconceivable that the legislature in enacting Ordinance No. 59 of 1947 contemplated anything less than the manner of giving notice which was originally in existence and which subsequently involved actual communication to the co-owners. I think publication is a most necessary step. I am fortified in this view by the words used in sub-section 5 which provides for " the certificate .... that the notice has been duly posted on the notice board shall be conclusive evidence of the publication of the notice for the purpose of this Ordinance ". Further support for this view is to be found in section 13 of the Ordinance which provides for equality of rights of all persons entitled to pre-empt " any share or interest in the property sold *without due publication* of the notice required by section 5". That section, while

it no doubt deals with equality of rights as between co-owners, makes it clear that it is the absence of due publication which gives such persons a right to pre-empt.

In my view, the expression " notice has been given " in section 8 means notice as contemplated by section 5 involving not merely the sending of a certified copy to the proper authorities, but also due publication thereof. Till there has been due publication there has been no giving of notice : there has been only some steps taken in giving the notice. I would accordingly hold that, having regard to the findings of fact by the learned District Judge, there has been no notice given in terms of the Ordinance. For that reason alone the plaintiff is entitled to enforce the right of pre-emption.

In this case, it is significant that, although the witnesses called by the plaintiff alleged that they saw the notice on the notice board, the 2nd defendant himself while giving evidence expressly stated that it was after he saw the notice of sale of this share on the notice board of the Village Committee that he wanted to buy it from Thamotherampillai. Although this item of evidence was overlooked by the learned District Judge and has not been referred to in his judgment, it expressly shows that the notice of sale could not have been given for the alleged prospective purchaser came into existence only after the notice is alleged to have been posted up on the notice board. It supports the finding of the learned District Judge. It is also curious that Kasinathan, the 2nd defendant, called as his witness one Eliathamby, who is alleged to have arranged the sale of the share in dispute to the 2nd defendant and who testified to the fact that he had seen the notice on the notice board of the Village Committee, when recalled, stated in cross examination that it was only one month before the execution of Deed 2D3 of 1st October, 1957, that Thamotherampillai the 1st defendant told him that no one was prepared to buy his share and asked him to persuade the 2nd defendant to buy, and he accordingly arranged the sale and fixed the price about one week later. The document 2D2 is, however, dated 9th August, 1957, which is about two months earlier. Clearly then, if the evidence of this witness is to be believed, the notice is a fictitious one as the 2nd defendant was not in existence as a prospective purchaser at the time of the alleged notice. This fact, though not expressly referred to by the learned Judge, affords very convincing evidence in support of his finding that the notice was not duly published in the manner required by section 5.

In regard to price, I see no reason to interfere with the findings of the learned District Judge. The 2nd defendant, on the evidence led in the case, not having come into existence on the date of the alleged sale, the evidence that he (Thamotherampillai) agreed to buy for Rs. 3,000 must be totally discounted. I would accordingly affirm the findings of the learned District Judge and dismiss the appeal with costs.

Appeal dismissed.