1945 *Present:* **Wijeyewardene J.**

KARTHIGESU, *et al.*, Appellant, *and* PARUPATHY, *et al.*, Respondents.

265—C. R. Point Pedro, L. 123.

Thesawalamai—*Action for pre-emption—How subject matter of action should be valued—Jurisdiction.*

An action for pre-emption, being merely an action to assert the right to be substituted in the place of the vendee, should be valued on the basis of the sum of money the plaintiff should offer for that substitution.

The sum which the pre-emptor should offer to pay the vendee is the price stated in the deed of transfer except where the court has reason to believe that the price so given is fictitious in which case the pre-emptor will have to pay the market value which will be invariably the sum that the Court determines to have been actually paid by the vendee.

APPEAL from a judgment of the Commissioner of Requests, Point Pedro.

H. W. Thambiah (with him *J. N. David* and *K. A. Sivasubramaniam*) for the plaintiffs, appellants.

No appearance for the 1st and 2nd defendants, respondents.

A. S. Ponnambalam for the 3rd defendant, respondent.

Cur. adv. vult.

March 13, 1945. WIJEYEWARDENE J.—

The second plaintiff, wife of the first plaintiff, is entitled to an undivided one-sixth share of a land called Sempadu. The first and second defendants who were entitled to an undivided one-fourth share of the same land sold their share to the third defendant by P2 of June 24, 1940, for Rs. 300. The plaintiffs filed this action on June 10, 1943, to have it declared that the second plaintiff was entitled to pre-empt the share conveyed to the third defendant.

The claim of the second plaintiff was contested on two grounds, viz:—

(*a*) that the second plaintiff had been given notice of the sale and was otherwise aware of it;

(*b*) that the Court of Requests had no jurisdiction to entertain the action as the value of the one-fourth share in June, 1943, was over Rs. 300.

The Commissioner of Requests held on the first ground in favour of the plaintiffs but dismissed the action, as he assessed the value of the one-fourth share at the time of the institution of the action at Rs. 380 and held that the Court of Requests had no jurisdiction.

There does not appear to have been any earlier case in which the courts have been asked to consider how the subject matter of an action for pre-emption should be valued.

The question that has often been discussed in pre-emption cases both here and in India is whether the sum which the pre-emptor should offer to pay the original vendee is the price mentioned in the deed of transfer or the market value of the share of the land in question. It may be taken as settled by those decisions that the pre-emptor should pay the price stated in the deed except where the court has reason to believe that the price so given is fictitious in which case the pre-emptor will have to pay the market value which will be invariably the sum that the court determines to have been actually paid by the original vendee (*vide Mailvaganam v. Kandiah* [1] and *Jagat Singh v. Baldeo Prasad*) [2]. The principle underlying these decisions appears to me to be found in the following passage in the judgment of Mahmood J. in *Gobind Dayal v. Inayatullah* [3]:—

> " The right of pre-emption is not a right of *re-purchase* either from the vendor or from the vendee, involving any new contract of sale; but it is simply a right of *substitution*, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. It is, in effect, as if in a sale-deed the vendee's name were rubbed out and the pre-emptor's name inserted in its place ".

That principle was adopted in *Tejpal v. Girdhari Lal* [4].

It may be observed at this stage that pre-emption as it prevails in British India owes its origin entirely to Mahomedan Law and the provision in the Thesawalamai (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.

I would base my decision in this case on the principle mentioned above. An action for pre-emption being merely an action to assert the right to be substituted in the place of the vendee, should be valued on the basis of the sum of money the plaintiff should offer for that substitution. That amount in this case would be Rs. 300. The Court of Requests would have jurisdiction therefore, even though the share would be worth more than 300 at the time of the institution of the action.

The plaintiffs failed to frame a clear issue in the lower Court with regard to the question now decided by me, and I would take that into consideration in the order I propose to make as to costs.

[1] *(1930) 32 N. L. R. 211.*
[2] *A. I. R. (1921) All. 290.*
[3] *(1885) 7 Allahabad 775 at p. 809.*
[4] *(1908) I. L. R. 30 All. 130.*

For the reasons given by me I set aside the judgment of the Commissioner and direct that in the event of the plaintiffs depositing in court a sum of Rs. 300 before April 11, 1945, a decree be entered—

(*a*) declaring the second plaintiff entitled to pre-empt the share referred to in deed P2;
(*b*) setting aside and cancelling P2 and declaring it null and void;
(*c*) ordering the first and second defendants to execute a conveyance in favour of the plaintiffs;
(*d*) granting the plaintiff costs of the appeal.

If the sum of Rs. 300 is not deposited as aforesaid I direct decree to be entered dismissing the plaintiffs' action with costs of appeal and in the Court of Requests.

Appeal allowed.