

1962

*Present* : Basnayake, C.J., Sansoni, J., Herat, J.,  
Abeyesundere, J., and Silva, J.

JEGANATHAN, Appellant, *and* RAMANATHAN *and* another,  
Respondents

*S. C. 68/57—D. C. Jaffna, 307/L*

*Thesavalamai—Action for pre-emption—Plaintiff's financial ability to buy—Proof not necessary—Maintainability of action by way of regular procedure—“ Cause of action ”—Thesavalamai Pre-emption Ordinance, ss. 3, 5, 6, 8—Civil Procedure Code, s. 8.*

In an action for pre-emption under the Thesavalamai Pre-emption Ordinance the plaintiff need not establish that, if the prescribed notice had been given, he had sufficient means, at the material time, to buy the share which he was entitled to pre-empt.

The cause of action in an action for pre-emption is the failure or omission of the vendor to give the notice required by law.

**A**PPEAL from a judgment of the District Court, Jaffna.

*C. Ranganathan*, for Plaintiff-Appellant.

*H. V. Perera, Q.C.*, with *S. Sharvananda*, for 4th and 5th Defendants-Respondents.

*Cur. adv. vult.*

October 25, 1962. BASNAYAKE, C.J.—

The question for decision in this appeal is whether in an action for pre-emption the plaintiff must prove that at the material time he had the means to buy the share which he was entitled to pre-empt.

Shortly the facts are as follows : The parties to this action are Jaffna Tamils to whom the Thesawalamai and the Thesawalamai Pre-emption Ordinance apply. The plaintiff and three others, Sivaneswary, Ranganathan and Parameswary, were the children of Vannithamby Aiyathurai and Vethanayagam. Of these Sivaneswary was given in marriage with a dowry. Upon the death of Vethanayagam, the plaintiff, Ranganathan the 1st defendant, and Parameswary the 3rd defendant, inherited the land called Aaladyvayal in extent 25 laachchams V.C. The 1st defendant, the 3rd defendant, and her husband, the 2nd defendant Senathirajah, on 2nd October 1955, without giving the plaintiff, who was then a minor of the age fifteen years, notice of their intention or proposal to sell, sold for a sum of Rs. 4,800 their undivided 2/3rd share to Kanapathy Ramanathan the 4th defendant and Kanapathy Sinnathamby the 5th defendant, persons not entitled to the right of pre-emption.

The 1st, 2nd and 3rd defendants did not contest the action. The defence of the 4th and 5th defendants was that the plaintiff who was a minor at the material date was aware of the execution of the deed of sale in favour of the 4th and 5th defendants and that he was not willing to buy, nor was he in a position to do so. The case was fought on the footing that it is a good defence to an action to enforce the right of pre-emption on the ground that notice of sale was not given to prove that the plaintiff had not the means at the relevant time to purchase even if notice had been given.

At the trial the following issues were suggested by counsel and adopted by the trial Judge. The 1st issue was suggested by the plaintiff's counsel, and the 2nd, 3rd and 4th issues by the contesting defendants' counsel :—

“ 1. Had the plff the financial ability or means to purchase an undivided share of the land referred to in the plaint at the time of the transfer to the 4th and 5th defts ?

2. Was the plff ready and willing to buy the 2/3rd share at the time of the sale to the 4th and 5th defts ?

3. Have the 4th and 5th defts effected improvements to the said land after their purchase ?

4. If so, what amount has (*sic*) the 4th and 5th defts spent on such improvements ? ”

The learned District Judge dismissed the plaintiff's action on the ground that he neither had the means to buy the shares of the other co-owners nor was ready and willing to do so. He states in the course of his judgment—

“ The surveyor's evidence and the evidence of the 4th deft would show that prior to the purchase, i.e., on 1.10.55 this land was surveyed and the plff assisted in the survey. That means the plff had knowledge of this sale in favour of the 4th and 5th defts. He does not, however, appear to have taken any step to get this share transferred in his name. I do not think, therefore, that the plff was ready and willing to purchase this share at that time.”

The decision of the learned District Judge appears to have been based on the decision of this Court in the case of *Velupillai v. Pulendra*<sup>1</sup> wherein Gratiaen J. stated :

“ ..... 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.”

<sup>1</sup>(1951) 53 N. L. R. 472.

This view was followed in the later case of *Ramalingam v. Mangaleswari*<sup>1</sup> wherein Gunasekara, J. stated :

“ As it appears that the plaintiff had no sufficient means to pre-empt the share in 1937 it is immaterial whether she had notice of the first defendant's intention to sell it.”

The Privy Council in appeal in *Mangaleswari v. Selvadurai*<sup>2</sup> reversed the decision in *Ramalingam v. Mangaleswari* (*supra*) and dissented from the view taken in *Velupillai v. Pulendra* (*supra*). After citing a passage from Wilson's Anglo Muhammadan Law the judgment of the Board proceeds (P. 93) :

“ 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.”

The cases above referred to are all cases which occurred before 1st July 1948, the date on which the Thesawalamai Pre-emption Ordinance came into operation. The rights decided in those cases fell to be determined by the law as it existed before that date. Section 3 of the Thesawalamai Pre-emption Ordinance provides that the right of pre-emption shall not be exercised save in accordance with the provisions of that Ordinance. A notice as prescribed by the Ordinance is a pre-requisite to the exercise of the right of pre-emption, for, section 6 provides—

“ ..... 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 this 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.”

Till the publication of a notice under section 5 those who are under the Ordinance entitled to pre-empt are not entitled to take the prescribed steps in the exercise of their right because of the provision in section 3 that the right of pre-emption shall not be exercised save in accordance with the provisions of the Ordinance. A person who sells without giving the prescribed notice not having set in motion the machinery provided by the Ordinance for the exercise of the right of pre-emption cannot get over the statutory consequences of his failure except in accordance with the statute. It does not enable him to plead as a defence to an action to pre-empt that even if he had given the notice the plaintiff would not have purchased as he had not the means to do so. The Ordinance has not altered the obligation of a vendor to give notice but it has prescribed a new mode of giving notice of intention or proposal to sell.

<sup>1</sup> (1952) 55 N. L. R. 133.

<sup>2</sup> (1961) 63 N. L. R. 88.

Learned counsel for the respondents submitted that the plaintiff was not entitled to maintain the present action as he had no cause of action. He further submitted that section 8 of the Ordinance provides that the right of pre-emption shall not be enforced except by way of regular action, and that no regular action can be instituted under our Civil Procedure Code unless there was a cause of action, and that in a case where the plaintiff is unable to prove that he had the means to purchase the share or interest in question if notice had been given he would have no cause of action. The grounds, on which under section 8 (2) an action may be instituted, he submitted, were not the cause of action.

We find ourselves unable to uphold the submission of learned counsel. The ambit of the expression "cause of action" as defined in the Code is wide enough to include the failure or omission of the vendor to give the notice required by law. The obligation to give to those entitled to pre-empt the opportunity of doing so is implicit in the law and the failure to give them that opportunity by giving the prescribed notice can rightly be regarded as a refusal to fulfil that obligation. A person entitled to pre-empt has the right in preference to those who are not entitled to do so to buy the property for the price proposed or at the market value. The sale to a person not entitled to pre-empt without giving to those entitled to do so the opportunity of deciding whether they will exercise their right to purchase or not is a denial of their right of pre-emption. It is not for the vendor to decide whether those entitled to pre-empt will exercise their right or not. It is for them to decide whether they will do so when the opportunity prescribed by law is given to them. All actions to enforce the right of pre-emption before 1st July 1948 was by way of regular procedure; for the reason that section 8 of the Civil Procedure Code provides that, except actions in which it is specially provided therein that proceedings may be taken by way of summary procedure, every action shall commence and proceed by a course of regular procedure as prescribed in that code. If under the law as it existed before July 1948 an action by way of regular procedure to enforce the right of pre-emption was maintainable in a case in which, without giving notice to those entitled to pre-empt, a co-owner sold his share or interest to a person not entitled to pre-empt and no proof that the plaintiff would and could have purchased, if notice was given, was necessary the fact that section 8 expressly declares that the right of pre-emption shall not be enforced except by way of regular action cannot make any difference.

The learned District Judge was wrong in holding that the plaintiff in an action under the Ordinance must establish that if the prescribed notice had been given he would and could have purchased the land. We therefore—

(a) set aside his judgment and declare the plaintiff entitled to pre-empt the 2/3rd share of the land described in the plaint and order that he should deposit in Court the sum of Rs. 4,800 within thirty days of this judgment being communicated by the District Judge to the parties in open Court,

(b) declare null deed No. 3660 of 2nd October 1955 attested by T. Gunaratnam, Notary Public, and

(c) direct the Secretary of the District Court to execute a conveyance of the 2/3rd share in favour of the plaintiff upon the sum of Rs. 4,800 being deposited in Court.

The plaintiff is entitled to the costs both here and below.

SANSONI, J.—I agree.

HERAT, J.—I agree.

ABEYESUNDERE, J.—I agree.

G. P. A. SILVA, J.—I agree.

*Appeal allowed.*

