

1930

Present : Dalton J. and Akbar J.

MAILVAGANAM v. KANDIAH

116—*D. C. Jaffna, 25,372.*

Tesawalamai—Right of pre-emption—Offer to buy at lower price than that offered by another.

A party having the right of pre-emption under the *Tesawalamai* is not entitled to assert the right by offering to buy the land at a lower price than that which another purchaser is willing to pay.

A PPEAL from a judgment of the District Judge of Jaffna.

Hayley, K.C. (with him *Nadarajah*), for first defendant, appellānt.

N. E. Weerasooriya (with him *Subramaniam*), for plaintiff, respondent.

October 17, 1930. DALTON S.P.J.—

The plaintiff brought this action to be declared entitled to pre-empt a land, four and half lachams in extent, which has been sold by the second defendant to the first defendant at the price of Rs. 2,500, which, he states, is the market value. The right is claimed under the provisions of section VII. of the Tesawalamai. The defendants did not contest the right of plaintiff to pre-empt, but plead that plaintiff's agent, his mother, was given notice of second defendant's intention to sell, offered up to Rs. 600 a lacham only, whereupon first defendant bought the property for Rs. 3,500, which was the market value of the land.

Plaintiff has been absent for some years in the Malay States, and his mother, who is a co-owner in the plaintiff's land, looks after his interests in Ceylon. First defendant, who was also a neighbouring landowner, wanted to obtain the land he purchased to extend his cigar factory.

The trial Judge has found as a fact and on the evidence it seems to me it was, a correct finding, that the first defendant did buy the land from the second defendant for the sum of Rs. 3,500, in other words, that it was a genuine transaction. Then, however, he goes on to state that the market price has been inflated and deliberately over-stated to meet possible litigation, the value of the land at the time of the sale being only Rs. 2,700. It was somewhat difficult to reconcile that latter conclusion with his finding as to the consideration paid, but in my opinion, the latter conclusion is not justified by the evidence.

Plaintiff has the right of pre-emption which in itself is a serious fetter on the owner's right of free disposal (*Kathiresu v. Kasinather*¹). He cannot go further and try to dictate to the owner what price the latter is to take. If the owner, as here, enters into a genuine transaction with another party, who is prepared to pay more than the person who has the right to pre-empt is prepared to pay, the latter cannot quarrel with the transaction.

I might point out in this case that although there is a quantity of evidence to show the "market price" of surrounding land, no one seems to have been asked what is the value of the land in dispute, nor is there any evidence to show what kind of land it is or whether there are any buildings on it. It is stated however to be in a thickly populated and congested locality where, according to the Udaiyar, the price of land is rising daily.

A genuine sale of the land taking place at Rs. 3,500, the District Judge was not entitled to hold that the land was only worth Rs. 2,700. The worth would no doubt differ in the eyes of different people. There is evidence to show that the plaintiff's mother was told by the second defendant of his intention to sell and refused to go beyond Rs. 550 a lacham. She was not called to controvert the evidence on that point, although it was clearly pointed out in the pleadings what the defence would be on the matter of notice.

The first defendant being prepared to pay the sum of Rs. 3,500 which the second defendant, the owner, was willing to accept, plaintiff had the right of pre-emption at that figure. That is the value of the property so far as the right of pre-emption is concerned. His representative declined to go beyond about Rs. 2,700. In his plaint plaintiff asks that he should have a conveyance for the sum of Rs. 2,500. In my opinion his action must fail for the reasons stated.

¹ 25 N. L. R. 331.

In the event of this Court holding that plaintiff's right to pre-empt could only be exercised on payment of Rs. 3,500, his counsel stated he was prepared now to pay that amount, and asked that a conveyance to him be ordered, if the Court was against him on the other points, on payment by him of the sum of Rs. 3,500. This request clearly cannot be granted. Plaintiff sought to bring this action on the footing set out in his plaint, impugning the transaction between the defendants, and he must stand by the attitude he then took up. The appeal must be allowed with costs, the decree entered being set aside and plaintiff's action being dismissed with costs.

AKBAR J.—

In this action the plaintiff-respondent claimed a right to pre-empt a land which was sold by the second defendant to the first defendant-appellant at the rate of Rs. 800 per lachcham. This land was mortgaged by the second defendant to the plaintiff by bond P 1 for Rs. 500 and at the date of the transfer the debt amounted to Rs. 784 and some cents. The plaintiff's right of pre-emption arises in his capacity as an adjacent landowner holding a mortgage. The case when to trial on two issues, namely :—

1. Did plaintiff get notice or was he aware of the intended sale of the property referred to in paragraph 4 of plaint by second defendant to first defendant ?

2. What is the market value of the land ?

The District Judge gave judgment in favour of the plaintiff ordering that on his depositing in Court the sum of Rs. 2,700 (which sum he held to be the true market value of the land at the time of the sale to the first defendant) less the amount due on the mortgage bond, within two weeks from the date of judgment, the second defendant was to execute a deed in favour of the plaintiff and the deed in favour of the first defendant was declared null and void and the defendants were ordered to pay the costs. In pursuance

of this order the plaintiff deposited this sum. It is significant that in this case the plaintiff sues through his brother and attorney, he himself being away in the Federated Malay States. At the time of the sale the plaintiff and his brother were absent in the Federated Malay States and the land was looked after by their mother. The evidence for the plaintiff clearly discloses that their mother came to know of the sale about the time of sale and that she in fact sent the Udaiyar to make an offer. According to the Udaiyar he asked the second defendant if he would sell the land and the second defendant told him that he had already arranged to sell to the first defendant and that he asked him the price and was told that he had sold it at Rs. 550 a lachcham. The Udaiyar made no offer on behalf of plaintiff's mother because he was told by the second defendant that he had already agreed upon a price and that he could not withdraw from it.

It will be noticed that the first issue was in the alternative whether the plaintiff got notice or whether he was aware of the intended sale of the property. The plaintiff himself has not given evidence denying that he knew of the intended sale nor has his mother been called. Nor has any reason been given for the failure to call her to contradict the evidence given on behalf of the first defendant that the plaintiff's mother knew that the second defendant was intending to sell the land and that the second defendant went and asked her to buy, and that she told the second defendant that she was not prepared to buy nor to pay more than Rs. 550 for a lachcham. It was held by this Court in the case of *Kathiresu v. Kasinather*¹ 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

¹ 25 N. L. R. 331.

either gave formal notice or that the plaintiff had knowledge of the intended sale.

It is significant that the first issue was framed in accordance with this decision, because the plaintiff and his brother were both away in the Federated Malay States for many years leaving their property to be managed by their mother. The Udaiyar's evidence and the evidence led on behalf of the defendants show that many people in the village knew of the intended sale by the second defendant and that the Udaiyar in fact was authorized to make an offer which he did not make. Under section 106 of the Evidence Ordinance, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The fact that the plaintiff did not know of the intended sale before the sale was a matter especially within his knowledge and the burden of proving this fact was on him. He has not chosen to give evidence himself. I think in all the circumstances the defendant has done all that he can reasonably be expected to prove in a case of this kind and that the burden shifted to the plaintiff and that he has not discharged this burden. The real cause of action in this case on behalf of the plaintiff appears to be his desire to assert his right of pre-emption only if he can buy the property at a lesser rate than the one at which the property was actually sold by the second defendant to the first defendant; that I take as the reason why the 2nd issue was also framed as one of the issues in this case. On this issue the District Judge has held that the face value in the deed of sale by the second defendant to the first defendant was fictitious and that the real value of the land was Rs. 2,700. He came to this conclusion on the values of certain properties in the vicinity. A careful examination of these instances does not seem to support the District Judge's finding because more particulars are required before the District Judge could have come to the conclusion that

the fair and reasonable value of this land at the time of the sale was Rs. 600 per lachcham. The evidence on the contrary seems to show that the sale by the second defendant to the first defendant was a *bona fide* one and that the price Rs. 3,500 was the actual price paid for the sale. It seems unreasonable that a person who is entitled to claim the right of pre-emption should offer to buy the piece of land at a lesser price than the one which another purchaser is willing to offer. If this second offer is of course fraudulent in the sense that it was meant to prevent the pre-emptor from exercising his rights of pre-emption it would of course be different, but where the evidence points to a *bona fide* sale, as in this case, there is no reason why a person in the position of the plaintiff should forcibly assert his right to pre-empt and claim to pay a lesser sum than the one which the second defendant has actually got as a result of a *bona fide* sale. In all the circumstances of the case it seems to me that the District Judge's finding was wrong. I am of opinion that the plaintiff had notice of the intended sale and that he refrained from making an offer because he was not prepared to pay the price which the first defendant had paid to the second defendant. The District Judge's judgment and decree should therefore be reversed and plaintiff's action dismissed with costs in both courts.

Appeal allowed.