

1965 Present : H. N. G. Fernando, S.P.J., and Sirimane, J.

T. S. NAGARATNAM and Wife, Appellants, and V. N.
SHANMUGAM and 3 others, Respondents

S. C. 18/1962—D. C. Point Pedro, 6425/L

Thesavalamai—Amicable partition of land without a deed—Pre-emption cannot then be claimed on basis of co-ownership.

An action for pre-emption on the basis of co-ownership is not maintainable in respect of a share of a land which has been possessed and dealt with in divided lots by amicable partition among the shareholders, with each other's knowledge and consent. In such a case, the absence of a deed or plan of partition is not decisive.

APPEAL from a judgment of the District Court, Point Pedro.

C. Thiagalingam, Q.C., with S. Sharvananda and K. Palakitnar, for the 3rd and 4th Defendants-Appellants.

C. Ranganathan, Q.C., with K. Thevarajah, for the Plaintiffs-Respondents.

E. R. S. R. Coomaraswamy, with S. Sittampalam, for the 1st and 2nd Defendants-Respondents.

Cur. adv. vult.

December 21, 1965. H. N. G. FERNANDO, S.P.J.—

The question which arose in this action for pre-emption is whether the 3rd and 4th defendants became entitled under their deed No. 2164 of 25th September 1958 to a divided portion of land, or else only to an undivided interest in a larger land. The learned District Judge had preferred the latter alternative, and on that basis declared the plaintiffs entitled to the right of pre-emption of the interest conveyed by the deed.

The larger land, as now depicted in the Plan X filed and on record was originally owned by one Vairathai. By P1 of 1920, Vairathai donated to her grand-daughter Perianayagam, the 2nd Plaintiff, an undivided one-third share of the larger land. Thereafter by P2 of 10th September 1929, Vairathai donated to her niece Kaveriammah another undivided one-third share of the larger land described as being of an extent of two and a quarter lms. Finally, by deed No. 10175 of 21st October 1929 (3D5), Vairathai donated to her son Vairamuttu, of the larger land, a "one-third share on the East in extent according to possession three-quarter lm., bounded on the East by the property of Perianayagam, on the West by the property of Perianayagam and on the South by Lane".

It is indisputable that 3D5 conveyed the outstanding interest which remained to Vairathai, and which prior to the conveyance consisted of an undivided one-third share. But the description of what was conveyed purports to refer to the Eastern defined portion equal to approximately one-third of the entire extent of the larger land, the portion being bounded on the West by land of Perianayagam.

The next relevant deed is 3D1, also dated 21st October 1929. This was a mortgage by Kaveriammah (the donee on P2) of the interest conveyed to her a few weeks earlier. But the description of that interest was significantly different from that adopted in P2. The property was at this stage described thus: "on the Western side the one-third share in extent three-quarter lms. bounded on the East by the property of Perianayagam."

It will thus be seen that in the two deeds of 21st October 1929 :

(1) Vairathai's outstanding one-third share was described as a divided portion on the East, and Kaveriammah's one-third share was described as a divided portion on the West, and

(2) the one-third share conveyed in 1920 (by P1) to the second plaintiff was now referred to as being the land on the West of the Eastern portion and on the East of the Western portion, or in other words as the land lying between the Eastern portion and the Western portion. The claim of the defendants is that the larger land became at this stage divided into three separate lots.

It suffices for present purposes to refer to two other deeds. The mortgage bond 3D1 was put in suit, and Kaveriammah's interest was sold in execution.

The Fiscal's conveyance 3D12 of 1932 was in favour of Sivakamasunderam, wife of S. Nagamuttu, and the description of the property conveyed was "an extent of three-quarter lm. being the Western one-third share" of the larger land. By P3 of 1936 the second plaintiff executed a conditional transfer of the interests conveyed to her on P1. The description of that interest in P3, differing completely from that in P1, was "according to possession a one-third share by amicable partition

joining with the shareholders in extent $13\frac{5}{12}$ Kules bounded on the West by the property of Sivakamipillai wife of Nagamuttu". This reference to property on the West is clearly a reference to the interest of Kaveriammah which had in 1932 passed by 3D12 to "Sivakamasunderam, wife of Nagamuttu".

The learned District Judge has held that the larger land is still held in undivided interests. But in so doing he failed to take account of several indications that there had been in fact an amicable division into three separate Lots. Thus :—

- (a) All the deeds, save 3D12, were attested by the same Notary. In 1920 (P1) and on 10th September 1929 (P2), the Notary had described undivided interests. But on 21st October 1929, in 3D5 and 3D1 respectively, he described Vairathai's outstanding one-third interest and Kaveriammah's one-third interest as divided Lots separated by the property of the second plaintiff.
- (b) When 3D5 purported to convey the Eastern divided Lot to Vairamuttu, Kaveriammah's husband was an attesting witness to the deed.
- (c) When Kaveriammah mortgaged her interest by 3D1 that interest was described as a divided three-fourth lms. on the West, being bounded on the East by the second plaintiff's land. The second plaintiff was herself a party to the mortgage, as surety, and Vairamuttu, who had acquired his interest by 3D5 on the same day, was an attesting witness. What was conveyed to a stranger after the sale in execution of the mortgage decree by 3D12 was a divided Lot.
- (d) The second plaintiff now claims that the land was never divided, but this claim is negatived by her participation in the mortgage 3D1 of the divided Lot and especially by her conveyance P3 of 1936 of her own interest, the description of which expressly mentions her possession of a specified portion by amicable partition among the shareholders. I need add only that the second plaintiff participated in several subsequent transactions which purported to recognise a division of the larger land into three separate Lots.

The learned District Judge thought that the absence of a deed or plan of partition was decisive. But in this case, each of the three persons, who might otherwise have been regarded as owners of undivided interests, purported to deal with divided-Lots, and did so with each other's knowledge and consent.

The deeds to which I have referred in one or more of which the three original shareholders (second plaintiff, Kaveriammah and Vairamuttu) joined as parties or witnesses, clearly establish an agreement on or before 21st October 1929 for a division into three separate Lots and a subsequent recognition of the fact and mode of division. The statements in

the many deeds to which the second plaintiff was a party are binding admissions of that division. She cannot now claim pre-emption on the basis of co-ownership.

For these reasons, I would allow this appeal and dismiss the plaintiffs' action with costs in both Courts.

SIRIMANE, J.—I agree.

Appeal allowed.
