1954 *Present :* **Gratiaen J. and Gunasekara J.**

V. SIVAPIRAGASAM, Appellant, *and* S. VELLAIYAN *et al.*, Respondents

S. C. 328—D. C. Point Pedro, 3,611L

Thesavalamai—*Pre-emption—Effect of partition decree thereon—Mortgagor's rights as against pre-emptor.*

A co-owner's right of pre-emption under the *Thesavalamai* is extinguished by a decree for partition entered in respect of the common property.

Vyramuttu v. Periathamby (1929) 30 N. L. R. 492, overruled.

A co-owner's right of pre-emption cannot defeat the rights of a *bona fide* mortgagee for value whose interests had been created before the right of pre-emption was asserted in a Court of law.

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

N. E. Weerasooria, Q.C., with *C. Renganathan*, for the defendant appellant.

H. V. Perera, Q.C., with *S. Subramaniam*, for the plaintiffs respondents.

Cur. adv. vult.

January 26, 1954. GRATIAEN J.—

This appeal calls for a decision on issues relating to certain aspects of a co-owner's rights of pre-emption under the *Tesawalamai*, and on the question whether, when exercised, they extinguish hypothecary rights acquired by a third party during the interval between the date of the impugned sale and the date of purported pre-emption.

A woman named Mathy, her son Sithambaram and her daughter (the 2nd respondent) were admittedly governed by the *Tesawalamai*. They owned a property in common by right of inheritance from Mathy's husband Kathiram. On 6th June 1945 Mathy and Sithambaram sold some of their undivided shares to Letchumipillai who, jointly with her husband, mortgaged her interests to the appellant by two notarial bonds dated 2nd July 1945 and 7th October 1945.

On 17th October 1945 Letchumipillai and her husband instituted an action for the partition of the common property, joining as parties all the co-owners including the 2nd respondent and her husband the 1st respondent. The appellant was also added for the protection of his hypothecary rights. On 12th December 1947 a final decree for partition was entered *inter partes* whereby a divided portion (hereinafter referred to as Lot 3) was allotted to Letchumipillai subject to the mortgages of 1945 in favour of the appellant ; a separate portion was allotted to the 2nd respondent. No appeal was filed against this decree, and its validity has not been challenged.

On 5th October 1948 the appellant sued Letchumipillai and her husband for the enforcement of the mortgage bonds subject to which she had been declared entitled to Lot 3. A hypothecary decree was entered in his favour on 20th January 1949 ; the property was thereafter duly put up for judicial sale, and on 19th August 1949 the appellant, being the highest bidder, obtained a conveyance of Lot 3.

Under these circumstances, the appellant might well have regarded his ownership of Lot 3 as unassailable ; he had bought the property at a judicial sale in execution of the mortgage decree in his favour, and the title had at least been strengthened (if not made conclusive) by virtue of the partition decree of 12th December 1947. Nevertheless the respondents instituted the present action against him for, *inter alia*, a declaration that their title to Lot 3 was superior to his by virtue of a conveyance dated 14th May 1949 executed in their favour in pursuance of a decree in action No. 2,505 of the District Court of Point Pedro.

The basis of the respondents' claim is that on 24th October 1945, i.e., during the pendency of the partition action which I have previously mentioned, they had filed an action against Letchumipillai and her husband for the enforcement of their right under the *Tesawalamai* to pre-empt the undivided shares of the larger land (including Lot 3) which Mathy and Sithambaram had previously sold to Letchumipillai. On 31st July 1947 a decree was entered declaring the respondents entitled, as against Letchumipillai and her husband, to pre-empt these shares provided that they paid a sum of Rs. 1,125 as consideration for the " substituted purchase " on or before 29th August 1947. This sum was paid before the appointed date and they obtained on 14th May 1949 a conveyance of the undivided shares in the larger land which had previously been common property. In the meantime, the partition decree previously referred to had altered the entire situation.

The learned District Judge, after trial upon certain issues of law, declared the respondents entitled as against the appellant to the entirety of Lot 3. The present appeal is from this judgment.

Ultimately, the dispute resolves itself into the question whether (and if so, to what extent) the conveyance dated 14th May 1949 in favour of the respondents in the pre-emption action prevails over the conveyance dated 19th August 1949 in favour of the appellant in the hypothecary action. The effect of the final decree for partition dated 12th December 1947 is, of course, of considerable relevancy to our decision.

With regard to the respondents' conveyance dated 14th May 1949 executed in pursuance of the decree in their favour in the pre-emption action, it will at once be observed :

(*a*) that the appellant was not a party to that action, and is *prima facie* entitled for this reason to claim that the decree dated 31st July 1947, being *res inter alios acta*, does not affect the hypothecary rights which he had acquired before the action was instituted ;

(*b*) that, by way of contrast, the respondents were without question bound by the final decree entered on 12th December 1947 in the partition action to which they had been joined as parties ; and that this decree (quite apart from the effect of section 9 of the Partition Ordinance) operates as *res adjudicata* between the appellant and the respondents *in so far as the appellant's hypothecary rights over Lot 3 on 12th December 1947 were concerned.*

The effect of a final decree for partition on a co-owner's earlier right to pre-empt an undivided share of another co-owner must now be considered. If a person governed by *Tesawalamai* proposes to sell his undivided interests in the common property to a stranger, he must first offer them to his co-owners at a fair price, and, should he sell his share to a stranger without taking that precaution, any co-owner may within a reasonable time thereafter exercise his right to pre-empt it. (I need not in this context discuss the corresponding rights of heirs or adjacent landowners). The pre-empting co-owner must pay to the stranger either the price previously paid as consideration for the purchase complained of or (if that alleged consideration can be proved to be fictitious) a fair market value assessed by the Court. The principle involved is clear enough. The *Tesawalamai* recognises the pre-emptor's right to exclude strangers from the intimate relationship of joint ownership within the family or community ; at the same time it ensures a fair price for the vendor who has chosen to separate himself from the bond of co-ownership ; and, in addition, the purchasing stranger to whose prejudice the right of pre-emption is exercised is adequately compensated for the loss which he has suffered through his vendor's fault.

A co-owner's right of pre-emption is in truth only a right to pay a reasonable price in exchange for the privilege of excluding strangers from the common property. It cannot logically survive the severance of the bond of co-ownership itself—e.g., after the common property has been partitioned into separate allotments each of which becomes the exclusive property of an individual member of the former group. Once that has taken place, the foundation of any previously acquired right of pre-emption is automatically destroyed. There is no justification for extending the principle of a customary law beyond the purposes which it is intended to serve.

It is pertinent in this connection to quote certain observations of Voet (*18.3.9*) on the scope of the *jus retractus legalis* (i.e., a right created by law or custom and not by agreement) whereby, in the Rhineland and in Delft, a co-owner's right to pre-empt shares sold to a stranger was apparently recognised in former times :—

> " Undoubtedly this right of superseding another who has obtained the ownership in a legitimate mode, being a deviation from the common law and *contrary also to freedom of contract* . . . . must receive a strict interpretation. "

Customary rights of this nature have been regarded as unsuitable for introduction into the general law of South Africa and Ceylon.

I am aware that Akbar J., sitting alone, expressed the opinion in *Vyramuttu v. Periathamby*[1] that, even after the date of a final decree for partition, a *Tesawalamai* co-owner's right of pre-emption continues to attach to the divided lot which has taken the place of the undivided share in what was originally common property. In my opinion, *Vyramuttu's case* was wrongly decided on this point and should be overruled.

The *inter partes* decree for partition entered on 12th December 1947 effectively extinguished as from that date the respondents' right to pre-empt the undivided share in the common property which Letchumipillai had purchased from the 2nd respondent's co-owners; indeed, her title to that share had been wiped out by the decree, and was replaced by a new and unimpeachable title to Lot 3 of which she became the absolute owner subject only to the appellant's hypothecary rights which were expressly reserved by the decree. Letchumipillai's title, and the appellant's hypothecary rights over Lot 3, were protected thereafter from the impact of any claims to "substitution by pre-emption" by a former co-owner of Letchumipillai's vendor. After that date, the respondents were divested of their essential qualification to rely on the special benefits which they had previously enjoyed under the customary law, because they had themselves ceased to be co-owners of the larger land; they had become instead exclusive owners of an allotment adjacent to Lot 3. And it is clear law that, under the *Tesawalamai*, an adjacent owner is not entitled to pre-empt his neighbour's land unless he also enjoys hypothecary rights over it—*Sabapathy v. Sivaprakasam*[2].

There is a further reason for rejecting the respondents' claim. They had instituted their action for pre-emption after Letchumipillai's mortgages in favour of the appellant had been duly registered. In that situation no decree in their favour for pre-emption could operate in derogation of the appellants' previously acquired hypothecary rights except in an action to which the appellant was made a party—so that he could have had an opportunity of challenging the validity of their claim.

A co-owner's right of pre-emption cannot defeat the rights of a *bona fide* mortgagee for value whose interests had come into existence before the right of pre-emption was asserted in a Court of law. Both sets of right can logically and equitably be reconciled without injustice to either.

In *Bodiga v. Nagoor*[3] this Court held, after consideration of the conflicting opinions of the jurists upon the point, that, if a sale is set aside on grounds of *enormis laesio*, the rights of a mortgagee under the purchaser are not extinguished by a decree passed in an action to which he was not a party. If, therefore, the title of a purchaser under a sale which is voidable on the ground of *enormis laesio* is not regarded in Ceylon as a defeasible title (the extinction of which would automatically destroy hypothecary rights based on it) I do not see why the principles enunciated in *Voet 20.6.8.9* should be applied to a title which is liable to pre-emption at the instance of a *Tesawalamai* co-owner. For, as was held in *Karthigesu v. Parupathy*[4], "the right of pre-emption . . . . . is simply a right of *substitution*, entitling the pre-emptor . . . . . to stand in the

[1] *(1929) 30 N. L. R. 492.*
[2] *(1905) 8 N. L. R. 62.*
[3] *(1943) 45 N. L. R. 1.*
[4] *(1945) 46 N. L. R. 162.*

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 vendor's name was rubbed out and the pre-emptor's name substituted in its place ". In such a situation, justice requires that, by the same fiction, the " substituted " purchaser should take over the share subject to real interests created by the original purchaser before he was superseded.

There is no hardship involved in the acceptance of this principle because, in a properly constituted action, the pre-emptor could *either* be substituted as owner subject to the existing mortgage *or* take over the property unencumbered if he prefers to discharge the mortgage by payment. In either event, the price to be paid to the original purchaser would be proportionately reduced. This solution permits the customary rights of a *Tesawalamai* co-owner to be preserved in all their integrity without violating the sanctity of legitimate commercial transactions which, in a developing society, call for just as much respect.

Certain issues of prior registration were also raised at the trial. They too must be answered in favour of the appellant. The doctrine of *lis pendens* cannot adversely effect the appellant's mortgage because it was created before the action for pre-emption was instituted. If, again, one examines the competition between the decree for partition (on which the appellant relies) and the decree for pre-emption (which is the basis of the respondents' claim), the former clearly prevails because the partition action was duly registered before the pre-emption action had commenced. Indeed, Mr. Perera very properly conceded that the appeal must succeed unless we accept the argument that, under the decree for partition, Letchumipillai's title to Lot 3 continued (as Akbar J. suggested) to be defeasible at the instance of a former pre-empting co-owner of the larger land. That submission I have respectfully rejected.

For all these reasons, I would set aside the judgment under appeal and enter a decree dismissing the respondents' action with costs both here and in the court below.

GUNASEKARA J.—I agree.

Appeal allowed.