1954 *Present :* **Gratiaen J. and Fernando A.J.**

T. SHIVAGURUNATHAN *et al.*, Appellants, *and* VISALADCHI *et al.*, Respondents

S. C. 482–483—D. C. Jaffna, 1,105 L

Thesavalamai—*Pre-emption*—"*Partners*"—*Requirement of* plenum dominium—*Cap. 51, Part 7, s. 1.*

A person whose title to a share in a common property is limited by rights of occupation enjoyed to his exclusion by someone else is not a "partner" within the meaning of section 1 of Part 7 of the *Thesavalamai* (Cap. 51) and is not entitled, therefore, to claim rights of pre-emption. In this context the word "partners" is necessarily confined to co-owners who exercise (or are at least entitled to exercise) *plenum dominium* over the common property.

APPEALS from a judgment of the District Court, Jaffna.

H. V. Perera, Q.C., with *C. Shanmuganayagam*, for the 3rd to 6th defendants, appellants in No. 482.

S. J. V. Chelvanayakam, Q.C., with *C. Renganathan*, for the 7th and 8th defendants, appellants in No. 483.

C. Thiagalingam, Q.C., with *H. W. Tambiah* and *S. Sharvananda*, for the plaintiffs respondents.

Cur. adv. vult.

June 21, 1954. GRATIAEN J.—

This was an action for pre-emption under the *Thesawalamai*. The plaintiffs claimed to have purchased an undivided 1/2 share of two properties by P 14 dated 17th August 1943 subject to a life-interest in their predecessor-in-title Arunachalam. Three months later, Arunachalam conveyed his life-interest to them by P 15 dated 24th November 1943.

The plaintiffs' complaint was that the 7th and 8th defendants had purchased the remaining half-share of the properties *either* from the 4th and 6th defendants (by P 18 dated 21st November 1943) *or* from the 1st and 2nd defendants (by P 8 dated 22nd November 1943). They were presumably uncertain as to whether the title to this share had in truth belonged to the purported vendors under P 18 or to the purported vendors under P 8, but they claimed that in either event the conveyance had been executed without notice to them in derogation of their rights as "partners" under the *Thesawalamai*. They accordingly asked for a decree for pre-emption (binding on both groups of purported vendors) whereby, on payment of such consideration as may be fixed by the Court, they should be substituted as purchasers of this share in the place of the 7th and 8th defendants who were admittedly "strangers".

The learned District Judge entered a decree (1) declaring the plaintiffs entitled to pre-empt the share conveyed to the 7th and 8th defendants under P 8 dated 22nd November 1943 (i.e. on the basis that it was the 1st and 2nd defendants who previously had title to this share), (2) declaring that the 4th and 6th defendants had no title which they could have conveyed under P 18.

I shall assume (without deciding) for the purposes of this appeal that the learned Judge's findings as to title were correct. We are also bound by an earlier judgment of this Court (reported in *51 N.L.R. 500*) rejecting the plea that this action was bad for misjoinder of parties and causes of action.

Mr. Chelvanayakam submitted for our consideration the argument (which was supported by Mr. Perera) that, even upon the basis of the learned Judge's findings, the plaintiffs did not possess at the relevant date (i.e. 22nd November 1943 when P 8 was executed) the requisite qualifications entitling them to exercise rights of pre-emption under *Part 7 section 1* of the *Thesawalamai* (Cap. 51). Admittedly they were

not the " heirs " of either group of vendors who had purported to sell a share of the property to the 7th and 8th defendants ; nor were they adjacent landowners with hypothecary rights over the common property. The only question, therefore, is whether on 22nd November 1943, by virtue of the earlier conveyance P 14 dated 17th August 1943 in their favour, they were " partners " who could impugn the sale of the share to a " stranger " by the other " partners ". I have already pointed out that their title to that property was at that time subject to the rights of Arunachalam who (according to the learned judge's findings) in fact continued to exercise them until he transferred his life-interest to the plaintiffs *after the date of the impugned sales.*

The question is whether a person whose title to a share in a common property is limited by rights of occupation enjoyed to his exclusion by someone else is a " partner " within the meaning of *Part 7 Section 1* of the *Thesawalamai.* The view which I have formed is that in this context the word " partners " is necessarily confined to co-owners who exercise (or are at least entitled to exercise) *plenum dominium* over the common property. Voet has explained why the Roman Dutch law has rejected the *jus retractus legalis* (based on custom)—because " it is a deviation from the common law and also to freedom of commerce " (18.3.9) ; in another passage, he describes it as " a thing odious or at least not to be aided by favourable interpretation ". In Ceylon, as I observed in *Sivapiragasam v. Vellaiyan* [1], there is no justification for extending the principle of a customary law (under the *Thesawalamai*) *beyond the purposes which it is intended to serve.*

The rights of pre-emption recognised by the *Thesawalamai* trace their origin to the methods of cultivation originally adopted by the persons whom it governed. If an owner desired to sell his property, his " heirs " had a prior claim to purchase it so that it might continue to be enjoyed and cultivated for the benefit of the family as a unit. Similarly, co-owners could, by exorcising their right of pre-emption, exclude " strangers " from the intimate relationship of the co-parcenary group. Again, the only form of mortgage known to the *Thesawalamai* was a transaction whereby the creditor possessed and enjoyed his debtor's land (or share) until the loan was repaid ; for that reason, the mortgagee neighbour was entitled to pre-empt the land rather than permit it to go to a stranger. In each instance, therefore, the underlying principle is perfectly clear. I am therefore satisfied that a person who himself has no present right to claim admission within the " community " lacks the essential qualification for demanding the exclusion of some other " stranger " from the enjoyment (by purchase) of co-proprietary rights.

From a practical point of view, a member of a co-parcenary unit of cultivators would always know who precisely were the " partners " in the enterprise whereby they collectively enjoyed the profits of the common property by their joint exertions. But, particularly in former times when no modern system of registration of titles was in force, persons subject to the *Thesawalamai* would have found it virtually impossible to trace the identity of strangers claiming interests in the common property (short of full co-proprietorship) who had not previously been admitted

[1] *(1954) 55 N. L. R. 300.*

into the group of co-sharers. Indeed, I doubt if transactions whereby a man who purchased a share in land subject to a life-interest in favour of someone else were ever contemplated at a time when these customary laws were first introduced into the province of Jaffna. I conceive therefore that the rights of pre-emption preserved by the *Thesawalamai* should not be extended so far as to meet situations which were entirely foreign to that system of law.

Nagalingam J. has pointed out in the earlier appeal in this case (*51 N.L.R. 500*) that a co-owner's right of pre-emption under the *Thesawalamai* " must be deemed to be based upon an implied contract whereby the co-owners are jointly bound to one another, and the co-owners in this view of the matter become joint contractors in regard to the enforcement of this obligation ". This analysis admirably suits a system of cultivation whereby persons work together on the common land and share the profits accruing from their joint exertions, each of them recognising the desirability of ensuring that, if possible, the " partnership " based on mutual confidence should be preserved as an entity even if one of its members desires to break away. But the theory of an implied contract would be reduced to an absurdity if we were to assume that it equally applies to persons like the plaintiffs who were in fact complete strangers to the actual " partnership ". I fail to see how a true " partner " can reasonably be required by custom to give notice of his intentions to an implied quasi-" partner " of whose rights he was totally unaware.

In my opinion, the facts which the plaintiffs claim to have established at the trial themselves destroy the foundation of their cause of action, and for this reason I would allow both appeals and dismiss the plaintiffs' action with costs in both courts. The plaintiffs did not possess the requisite qualifications for pre-empting the 7th and 8th defendants' share on 21st or 22nd November, 1943, and it is therefore unnecessary to adjudicate upon the other disputes as to title which arose at the trial.

FERNANDO A.J.—

I agree. I would like to add that *Selvaratnam v. Sabapathy* [1], which was cited for the respondents, does not deal with the question now under consideration. That was a case where the claim of the plaintiffs to be co-sharers was disputed on the ground that, their mother being yet alive, they were not entitled to the share claimed by them and therefore not entitled to a right of pre-emption. Reference was made to *section 9 of Part I* of the *Thesawalamai* and to the custom that the sons divide the acquired property of the parents when the latter become incapable by age of administering it. It was held that in accordance with this custom the plaintiffs had become entitled to their mother's share in the property, and their duty to maintain her did not disentitle them to the right of pre-emption. In that case, unlike in the present one, the plaintiffs had title and possession unqualified by the reservation in favour of someone else of a life-interest in the property. They were *de facto* " partners " of the other co-owners in a very complete sense.

Appeals allowed.

[1] (*1924*) *2 Times 139.*