Present: De Sampayo J.

1920.

PONNIAH *v.* KANDIAH *et al.*

248—C. R. Point Pedro, 18,562.

Tésawalamai—*Pre-emption—Claim by co-owner, who is also an heir—Preference—"Heir."*

Section VII., sub-section 1, of the *Tésawalamai* enumerates three classes of persons who are entitled to pre-emption, namely, (1) heirs, (2) partners or co-owners, and (3) adjacent landowners who have a right of mortgage. There is no preference among these classes, but they are all equally entitled, nor is there anything in the *Tésawalamai* to support the notion that a person coming under any two of the classes has a right of pre-emption preferential to a person who comes under one class only.

The term "heirs" explained.

THE facts are set out in the judgment.

Balasingham, for the third and fourth defendants, appellants.—The plaintiff is not an heir of the second defendant, nor even of second defendant's wife. A brother is not an heir in the sense in which children are heirs. The term "heir" is not to be applied to mean any relation who, in the absence of immediate heirs at the death of a person, will become his heir. Plaintiff is a grandson of one Walliammai, and the second defendant is a son of Walliammai's brother. Such a remote relation cannot be said to be an heir of the second defendant.

There is nothing in the *Tésawalamai* to show that a relation who is a co-owner has a better right to ask for pre-emption than one who is only a co-owner.

Arulanandan, for the plaintiff, respondent.—It has been held that a co-owner who is a relation has a better right than a person who is only a co-owner. Otherwise there will not be any method of choosing between the three classes of persons who are entitled to pre-emption. Counsel cited *Muttukisna, pages 524, 533, and 534.*

Balasingham, in reply.

Cur. adv. vult.

January 15, 1920. DE SAMPAYO J.—

This is an action for the exercise of the right of pre-emption under section VII., sub-section 1, of the *Tésawalamai*. The second defendant was by right of purchase under deed dated September 25,

1920.

DE SAMPAYO J.

Ponniah v. Kandiah

1913, entitled to an undivided 3/16 share of the land in question and by deed dated January 4, 1919, he sold it to the first defendant. The plaintiff alleging that he was by virtue of deed dated June 21, 1893, entitled to 3/8 of 1/8 share of the land, and also that he was heir-at-law of the second defendant's wife Walliammai, who is the plaintiff's sister, brought this action to have it declared that he had the right of pre-emption in respect of the 3/16 share sold by the second defendant to the first defendant, and to have a conveyance made in his own favour on his paying the sum of Rs. 40, which, according to him, was the market value of the share. He made the appellants, who are the third and fourth defendants, parties to the action on the ground that they also claimed a right of pre-emption, and had brought the action No. 18,576 against the first and second defendants to compel a conveyance of the land to them. The first and second defendants did not contest the case, but there appears to be no dispute that the second defendant sold his share to the first defendant without any notice to the plaintiff or to the third and fourth defendants. The third and fourth defendants filed answer denying that the plaintiff was entitled to any share in the land, and alleging that they were entitled to an undivided share. It was admitted at the trial that the third and fourth defendants-appellants were entitled to a share. There was no admission of the plaintiff's right to any share, nor was any evidence called by him to establish any such right, but the case has been decided on the assumption that he had a right to a share. As regards the plaintiff's claim on the ground of heirship to the second defendant's wife Walliammai, it appears that the share in question was purchased by the second defendant during the subsistence of his marriage with Walliammai, who is still alive, and that as acquired property it fell into the marriage community, and that, therefore, Walliammai became entitled to a half of that share. It appears, further, that the second defendant and his wife Walliammai have at present no children, and that the plaintiff would, if Walliammai died intestate, get their half by inheritance. I think the appellants are right in contending that, so far as the right of pre-emption as heir is concerned, the plaintiff is not entitled to pre-empt the whole share. The objection of the appellants, however, is wider. They contend that Walliammai being still alive it is impossible to say that the plaintiff is her heir. But I think the word " heirs " are used in section VII., sub-section 1, of the *Tésawalamai* in a special sense. If it meant persons who have become heirs by the death of the owner, it would be absurd to speak of them as being entitled to pre-emption in respect of property alienated by the owner during his or her lifetime. The word I think refers to persons who would be heirs if the owner should now die, just as in England the eldest son of a person still living is commonly spoken of as his " heir " or " heir-at-law, " and the right of pre-emption is given to heirs in that sense to

be enforced presently against the owner. In my opinion the plaintiff comes within the description of heirs, and, so far as that is concerned, is a person who would, *cæteris paribus*, be entitled to the right of pre-emption. But, assuming the plaintiff to be heir of the second defendant's wife and to be part owner with the second defendant, has the plaintiff a right of pre-emption preferential to that of the appellants, who are only part owners with the second defendant ? The Commissioner has given effect to the plaintiff's claim on that footing. I do not think that this is sound. Section VII., sub-section 1, of the *Tésawalamai* enumerates three classes of persons who are entitled to pre-emption, namely, (1) heirs, (2) partners or co-owners, and (3) adjacent landowners who have a right of mortgage. There is no preference among these classes; they are all equally entitled. Nor is there anything in the *Tésawalamai* to support the notion that a person coming under any two of the classes has a right of pre-emption preferential to a person who comes under one class only. The Commissioner, however, says that the authorities cited make it clear that the plaintiff as heir and co-owner has a preferential right. The cases cited from pages 524, 533, and 534 of *Muttukisna*, if they have any relevancy, are not of any value, being the judgments of the lower Court, and not of the Appellate Court. In the first case the plaintiff was proprietor of half the land, and the second defendant, to whom the first defendant sold his interest, was the husband of the first defendant's niece, and the Judge held that by reason of the connection between the defendants the plaintiff could not claim pre-emption. I do not think that this judgment, which goes far beyond anything contended for in the present case, can be considered right. In the next case the defendant was a co-owner, and happened also to be a relation of his vendor, and he being one of the class of persons mentioned in the *Tésawalamai*, the judgment was justified without any emphasis being laid on the relationship. In the last case, where the purchaser appears not to have belonged to any of the classes, the judgment which decreed pre-emption in favour of the plaintiff, who was an adjoining landowner, does not help the argument on behalf of the plaintiff in this case. In my opinion the plaintiff, if he be a co-owner—a fact which is still to be proved—has no preferential right as against the third and fourth defendants, and his action, so far as these defendants are concerned, must fail.

The appeal is allowed, with costs in both Courts.

Appeal allowed.