1956 *Present:* **Sinnetamby, J., and L. W. de Silva, A.J.**

THAMU PONNIAH, Appellant, *and* VELUPILLAI PONNIAH *et al.*, Respondents

S. C. 522—D. C. Point Pedro, 4717/L

Thesavalamai—Pre-emption—Sale of property in guise of exchange—Ordinance No. 59 of 1947.

Where a co-owner purports to transfer his share of the common property to a stranger in exchange for property belonging to the latter, the Court is entitled to look into the circumstances of the transaction and decide whether or not the alleged exchange is in fact a sale, for the purpose of pre-emption under the law of Thesavalamai.

Quaere, whether even a genuine exchange can be regarded as a sale within the meaning of Ordinance No. 59 of 1947.

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

H. W. Jayewardene, Q.C., with *R. Manikkavasagar*, for Plaintiff-Appellant.

S. J. V. Chelvanayakam, Q.C., with *S. Thangarajah*, for Defendants-Respondents.

Cur. adv. vult.

October 30, 1956. SINNETAMBY, J.—

Plaintiff and the 1st defendant are the co-owners of the two allotments of land described in schedule 1 and 2 of the plaint in extent 6 3/8 lachams V.C and 7 kulis V. C. respectively. In relation to the 6 3/8 lachams called Marakai the 3rd defendant owns a property to the north known as Opiarseemah and another to the south of it. The 7 kulis is to the east of the 3rd defendant's land where she resides and which land is to the south of the 6 3/8 lachams belonging to the plaintiff and his co-owners. The 3rd defendant is not a co-owner of the plaintiff and the 2nd defendant is her husband.

According to the plaintiff's evidence he and the 1st defendant who is his cousin have not been on good terms for about 12 years. There appears to have been some litigation between them and in about 1951 or 1952 the plaintiff suggested to the 1st defendant through third parties that there should be an amicable division of the lands which formed the subject matter of the action. He was unsuccessful and on the 15th September, 1953, he sent to the 1st defendant a notice *1D1 through his* proctor asking for an amicable partition and in default he threatened to institute a partition action. He received no reply and on the 22nd October, 1953, he instituted Partition Case No. 4365. In the meantime, on the

27th September, 1953, the 1st defendant transferred his interest in the lands in question to the 2nd and 3rd defendants and obtained from 2nd and 3rd defendants a share of their land which lies to the north of the land referred to in schedule 1 of the plaint wherein the 1st defendant resides and which has been stated to be 6 3/8 lachams in extent. The deed purported to be a deed of exchange. The consideration is given as Rs. 2,000 on the basis of the value of all the lands dealt with. Plaintiff thereupon instituted the present action for pre-emption. His claim was resisted on the ground that the deed P2 is in fact a deed of exchange and not a deed of sale to which the provisions of Ordinance No. 59 of 1947 can be said to apply. The learned District Judge upheld this contention and the appeal is against his finding.

Ordinance No. 59 of 1947 was introduced " to amend and consolidate the law of pre-emption governing the sale of the immovable property to which the Thesavalamai now applies ". The word " sale " is not defined in the Ordinance and must be deemed to have the same meaning as was given to it before the passing of this Ordinance.

In his petition of appeal the plaintiff submitted that an exchange constituted in reality two sales and that the provisions of the Ordinance would be easily defeated if an exchange is not held to be a sale. Counsel on either side was unable to refer to either any decided case or to a statement in any of the textbooks wherein an exchange has been held not to be a sale for the purpose of pre-emption under the Law of Thesavalamai ; but both Counsel were agreed—and for this proposition there is ample authority—that the Court is entitled to look into the circumstances of the transaction and decide whether an alleged exchange is in fact a sale or not. In view of our finding in regard to the nature of the transaction in this case it is not necessary for us to decide specifically whether a genuine exchange is or is not a sale within the meaning of Ordinance No. 59 of 1947, but as Counsel for the respondents have referred to certain Indian authorities I propose briefly to deal with his contention.

The Law of Pre-emption can historically, according to the text writers, be traced to the Mohamedan law. It did not constitute part of the Hindu law which prevailed in India. At the present moment it has in India become a territorial law applicable also to persons other than Mohamedans and is in force in Bihar, parts of the Punjab and the North Western Provinces. Under the old Muslim law an exchange was one of the requirements which a co-owner must establish before he could establish the right of pre-emption. There was no distinction drawn between a sale and an exchange presumably because in primitive times barter was the only form of sale known. The Agra Pre-emption Act, however, limited the right of pre-emption to the sale as defined in section 54 of the Transfer of Property Act and a genuine exchange has been thereafter held not to be a sale in view particularly of the definition given to a sale in the Transfer of Property Act. An exchange is defined in section 118 of the Transfer of Property Act. The Indian decisions therefore will not be of

much assistance in determining the law applicable in Ceylon and the case cited by learned Counsel for the respondents reported in *A. I. R. 1937 Allahabad 665* proceeds on a consideration of the relevant provisions of sections 54 and 118 of the Transfer of Property Act. An exchange, therefore, though it would not amount to a sale under the Agra Pre-emption Act may well be a sale under the law in force prior to the enactment of the Act. The position in Ceylon seems to me to be no different to the position that existed in India before the enactment of that Act. If therefore any guidance is to be sought from the Indian authorities an exchange should not be regarded as different in any sense from a sale, vide Aggarawala, 6th edition, p. 70.

It is a general principle of the law, as Counsel have conceded, that no matter what designation or name parties give to a transaction a Court is required to inquire into the circumstances and nature of that particular transaction and decide what its legal effect would be. The mere fac, therefore that two transactions are called an exchange would not necessarily make it so. We are satisfied that the facts established in the present case show that the transaction in question in fact constitutes two sales and not an exchange and that therefore plaintiff is entitled to pre-empt.

The learned District Judge in arriving at his conclusion that the transaction was an exchange based his findings upon the following grounds:

> First, he held that the values of the properties transferred on the deed P2 to the first defendant by the third defendant and to the 3rd defendant by the 1st defendant are equal in value and that therefore there was no intention to defeat the objects of the Pre-emption Ordinance.

I do not agree that this inference is necessarily correct. There can be a genuine exchange of property of different values, the difference being adjusted by a money payment. The fact that there is a money payment has been held by the Indian Courts not to affect the nature of the transaction. (Aggarawala, 6th Ed. p. 271).

> The next ground is that the exchange was effected on account of mutual advantage and purely for the sake of convenience of possession.

But this may be equally applicable to sales as well as to exchange of property.

> Finally he relied on the fact that parties immediately entered into possession of the properties exchanged.

This again is something which only shows the genuineness of the transaction. Even in a sale unless it is accompanied by delivery of possession it runs the risk of being regarded as fictitious.

The learned District Judge has not addressed his mind to the relevant facts with which I now propose to deal. There is the admitted enmity existing between the plaintiff and the 1st defendant. The 1st defendant was asked to amicably partition the lands in 1951 and 1952 and decided on this "exchange" only when there was imminent danger of a partition action being instituted as indicated in plaintiff's letter 1D1 of 15/9/53. Almost immediately on receipt of that letter he executed this deed of exchange on 27/9/53. The 2nd defendant states that it was the 1st defendant who started the talk with regard to the exchange and he could not say whether at that time he was anxious to buy the land. The 1st defendant did not get into the witness box and in the circumstances it would not be unreasonable to conclude that at least he expedited the negotiations in question, if he did not in fact start them, when he realised that a partition action was imminent. Another matter not considered by the learned District Judge is the fact that by deed 1D2 entered into earlier the 3rd defendant had sold to the 1st defendant 2 5/6 kulis of the land to the north of 1st defendant's land for the purpose of fixing a well sweep to the 1st defendant's well which was very close to the boundary. If at that time 3rd defendant was anxious to extend his northern boundary some distance away from his kitchen and well he would have exchanged the land he sold to the 1st defendant for a share of the 1st defendant's land to the south of it instead of doing so now. It is therefore difficult to accept 2nd defendant's evidence to the effect that he would not have parted with his wife's share in Opiarseemah but for the transfer of his share of Marakai and the other land of 7 kulis. Had this evidence been accepted as true it certainly would have supported strongly the theory of an exchange. The learned District Judge has not referred to it at all.

Having regard to the state of feelings between the parties the failure to effect an exchange when 1D2 was executed and the execution of P2 only after the threat of a partition action coupled with the fact that 1st defendant did not enter the witness box to satisfy the Court of his intentions makes us come to the conclusion that this deed was not a genuine exchange. We are unable therefore to agree with the findings of the learned District Judge. In our view the 1st defendant went through the subterfuge of an alleged exchange only to defeat the plaintiff's right of pre-emption. We hold that the transaction must be regarded as two separate sales embodied in one document.

We accordingly set aside the judgment of the learned District Judge and allow the appeal with costs in both Courts.

L. W. DE SILVA, A.J.—I agree.

Appeal allowed.