

1949

Present : Gratiaen J.

SARAVANAMUTTU, Appellant, and MURUGESU, Respondent

*S. C. 53—C. R. Jaffna, 17,668**Thesavalamai—Co-owners—Pre-emption—Lis pendens—Prior registration.*

The principles of *lis pendens* and prior registration are applicable to decrees entered in respect of two competing pre-emption suits.

A PPEAL from a judgment of the Court of Requests, Jaffna.

H. W. Tambiah, with *S. Sharvananda*, for the 1st defendant appellant.

C. Thiagalingam, with *V. Arulambalam*, for the plaintiff respondent.

Cur. adv. vult.

November 30, 1949. GRATIAEN J.—

The first defendant and the second defendant in the present action are brothers of the plaintiff, although little love seems to have been lost between them in recent years. Each brother owned an undivided share in certain property in Puttur in the Jaffna Peninsula. It is common ground that the parties are governed by the Thesawalamai.

Early in 1944 an acrimonious litigation in which various members of the family had taken part resulted in a decree for costs being entered in favour of the plaintiff against the second defendant. He caused the second defendant's share in the common land to be seized in execution of his unsatisfied decree—but only to discover that he had been circumvented by a sinister device. The second defendant, in violation of the plaintiff's rights of co-ownership under the Thesawalamai, had secretly sold (or purported to sell) this share to an accommodating stranger named Nallathamby. This left the plaintiff, who was thus frustrated for the time being in his dual capacity of co-owner and creditor, no option but to institute action No. 16,666 of the Court of Requests of Jaffna on 13th September, 1945, to have the clandestine sale to Nallathamby set aside and to compel vendor and vendee to transfer the property to him in recognition of his right of pre-emption. *Lis pendens* was duly registered on the same day. The action was as hotly contested as all the others had been. Judgment was ultimately entered in favour of the plaintiff in December, 1946, and in terms of the decree a conveyance was executed transferring the share to the plaintiff on 28th March, 1947.

One would normally have expected that finality had at long last been reached in the dispute between the parties. But once again the plaintiff discovered that his resourceful kinsman had not exhausted his aptitude for strategic counter-measures. The first defendant's aid had been solicited, and on 25th September, 1945 (twelve days after action No. 16,666 had commenced its tedious career) the first defendant filed action 16,684 in the same Court against the second defendant and Nallathamby claiming the same rights of pre-emption as the plaintiff had done. The action was conducted with the utmost secrecy. *Lis pendens* was not registered, and the plaintiff had no knowledge of the conspiracy to defeat his rights. On this occasion, however, the second defendant and Nallathamby had discarded their customary zeal for contentious litigation. They consented to judgment in favour of the first defendant at the earliest possible opportunity. On 15th November, 1945, the decree was hastily registered in the correct folio. Eleven days later the transfer in favour of the first defendant was executed and was also duly registered. In the meantime the litigation to which the plaintiff was a party was being bitterly contested without any notice to him or to the Court that the defendants had already parted with the property in dispute. As I have already stated, the plaintiff's action was not concluded until December, 1946.

The plaintiff now claims a declaration that the conveyance of 28th March, 1947, in his favour has priority over the first defendant's deed of November, 1945, (a) by reason of the prior registration of the *lis pendens* in action No. 16,666 (b) because the decree in favour of the first defendant and the deed executed in pursuance thereof formed part of a fraudulent and collusive transaction between the first defendant, the second defendant and Nallathamby and could not, in any event, prevail over the plaintiff's conveyance. The learned Commissioner of Requests accepted both these submissions, and gave judgment for the plaintiff as prayed for with costs. The present appeal is from this judgment.

In my opinion the view taken by the learned Commissioner on both points is clearly right. Mr. Thambiah contends that the allegations of fraud and collusion have not been pleaded or proved with sufficient particularity. I cannot agree. This is a case in which the facts, as I have narrated them, speak very eloquently for themselves, and the whole transaction is so deplorably suspicious that one finds it quite impossible to find some charitable explanation for the behaviour of the defendants and of Nallathamby. Indeed, none of these gentlemen gave evidence in the lower Court, and no attempt of any kind was made at the trial to remove the suspicions which the uncontradicted facts must necessarily create in the minds of reasonable men.

This issue really disposes of the case. As the other issue was fully argued before me, however, I shall deal shortly with the submissions of learned Counsel. Mr. Thambiah argues that as the rights of co-owners to claim pre-emption under the Thesawalamai are equal and co-existent, which they undoubtedly are (*Ponniah v. Kandiah* ¹), the second defendant was entitled during the pendency of action No. 16,666 to convey his share to the first defendant who was also a co-owner with rights of pre-emption which were no less valid than those of the plaintiff. This view was certainly taken by the majority of a Full Bench of the High Court of Lahore in *Mool Chand v. Ganga Lal* ² where it was decided that although the rule of *lis pendens* applies to pre-emption suits, it does not affect the validity of a voluntary sale effected during the pendency of a pre-emption suit to a person possessing a right of pre-emption equal to that of a pre-emptor. I must confess that I entertain doubts as to the extent to which the learned opinions of the Indian Courts in pre-emption cases may be regarded as applicable to the difficult problems which arise for consideration in connection with the customary personal laws governing the inhabitants of the Jaffna Peninsula. This is, however, a question of academic importance, as the matter is now regulated in this country by the provisions of Ordinance No. 59 of 1947. Be that as it may, the present action is concerned not with the respective rights *simpliciter* of pre-emptors, but with a competition between two decrees of the same Court declaring separate persons to be entitled to conveyances of identical interests in land. In that state of things, the issue must I think be decided by reference to the principles of *lis pendens* and prior registration. Whatever may have been the rights of the plaintiff and the first defendant as rival claimants to pre-empt, I am content to say that their rights under their respective decrees are concluded by the fact that although the decree of the plaintiff was later in point of time he is entitled to priority because he had taken the precaution to register his *lis* whereas the first defendant had not done so.

For these reasons I dismiss the appeal with costs and make order affirming the judgment of the learned Commissioner of Requests."

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Appeal dismissed.

¹ (1920) 21 N. L. R. 327.

² A. I. R. (1930) 356.