1951 *Present* : **Gratiaen J. and Gunasekara J.**

VELUPILLAI *et al.*, Appellants, *and* PULENDRA *et al.*, Respondents

S. C. 462—D. C. Vavuniya, 831

Thesavalamai—*Pre-emption—Sale of land—Failure of notice to pre-emptor—Right of pre-emptor to have the sale set aside.*

In an action instituted by a Thesavalamai " heir " to set aside a sale of land on the ground that the property had been sold without notice to him, in breach of his right of pre-emption—

Held, that it is fundamental to the cause of action in such a case that the pre-emptor should establish by positive proof that, had he in fact received the requisite notice, he would and could have purchased the property himself within a reasonable time rather than permit it to be sold to a stranger.

APPEAL from a judgment of the District Court, Vavuniya.

C. Suntheralingam, with *C. Renganathan* and *V. K. Palasuntheram*, for the 1st and 2nd defendants appellants.

E. B. Wikramanayake, K.C., with *V. Arulambalam*, for the plaintiff respondent.

Cur. adv. vult.

July 26, 1951. GRATIAEN J.—

The plaintiff, who is a young Jaffna Tamil, is the son of the 3rd and the 4th defendants, and was sent by his parents to England in 1945 to study engineering. He was not possessed of independent means and his father has throughout maintained him and paid for his education. Before the plaintiff completed his studies in England, his parents arranged a marriage for him with a young lady of their community in Jaffna. The date fixed for the marriage was 15th September, 1947, and his father remitted the necessary funds to enable him to sail for Ceylon by s.s. " Worcestershire " on 29th July. He arrived in Ceylon about 20th August, and his marriage was solemnized on the appointed date. Shortly afterwards he returned by air to England, unaccompanied by his bride, on 8th October, 1947. His wife joined him later, and when this action was filed on 17th May, 1948, he was still in England.

The bride's parents gave their daughter a cash dowry of Rs. 50,000 which they deposited in her name in a Ceylon Bank. The plaintiff continued at all material times to be supported by his father.

It is now necessary to examine the financial position during the relevant period of the 3rd defendant, Mr. T. M. Sabaratnam, who is a proctor of the Supreme Court. He needed funds to meet the expenses of his son's wedding. He was also actively engaged in standing as a candidate for Parliament. The polling date was 9th September, 1947, shortly after the plaintiff had temporarily returned to the Island. He possessed some immovable property in the district, and a series of documents produced at the trial made it clear that he was compelled from time to time to dispose of them in order to meet his urgent commitments. The present action relates to one of these transactions.

On 12th July, 1947, he and his wife the 4th defendant sold the property in dispute to the 1st defendant and the 2nd defendant for Rs. 3,500 in terms of the deed of conveyance 1D1. Whether he required this money in connection with the expenses of the forthcoming wedding or of the impending elections or for both purposes is not quite clear. It is significant, however, that a remittance of £75 which he sent to the plaintiff in England about this time was acknowledged by the letter P4 shortly before sailing for Colombo.

The consideration of Rs. 3,500 does not seem to have proved sufficient to meet the 3rd defendant's immediate difficulties. On 29th September, 1947, he and his wife sold another land for Rs. 3,000 to a person outside his family. This transaction took place between the date of the wedding and the date of the plaintiff's return by air to England at a cost of £120 (*vide* P6 of 10th August, 1947). In 1948 two further lands were sold to strangers for an aggregate cost of only Rs. 1,000.

The plaintiff instituted this action on 17th May, 1948, (i.e. over 10 months after the transaction took place) to exercise his right of pre-emption under the Thesawalamai in respect of the land conveyed to the 1st and 2nd defendants by his parents on 12th July, 1947. He complains that his parents, in derogation of his rights as an " heir ", had sold the property to " strangers " without notice to him, and that he only became aware of the transaction " about two months after the execution of the

deed "—i.e., about the date of his wedding. He pleads that he "*had always been ready and willing* to buy the said land at its market value in the event of the 3rd and 4th defendants wishing to sell it ". He accordingly deposited in Court Rs. 3,500, being the agreed market value of the property, and asked for a decree that the property should be conveyed to him.

After trial the learned District Judge entered a decree in favour of the plaintiff.

I shall assume for the purposes of this appeal that, although the plaintiff has not given evidence on his own behalf, the learned Judge was right in holding that he had no notice and was not otherwise aware of the execution of 1D1 at the time when it took place. In the result, there has been at least a technical violation of his right of pre-emption under the Thesawalamai. But that does not conclude the matter. He was in law entitled to *reasonable notice* of his parents' purpose to sell the property, *Suppiah v. Thambiah* [1], and it cannot be suggested that, having failed to receive such notice, he could *at any time thereafter* exercise the right of pre-emption. On the contrary, it is fundamental to the cause of action such as is alleged to have arisen in this case that the pre-emptor should establish by positive proof that, had he in fact received the requisite notice, he would and could have purchased the property himself within a reasonable time rather than permit it to be sold to a stranger. Indeed, the burden of proving this fact was rightly undertaken by the plaintiff when his counsel agreed to the following issue being framed at the trial:—

> " (2) Even if issue (1) is answered in the negative, was the plaintiff ready and willing to purchase the said land ? "

A would-be pre-emptor cannot claim to be in a better position by not receiving notice of the intended sale than he would have been if he had received such notice.

I have considered the evidence on this issue with care, and I am satisfied that the plaintiff has not discharged the burden which he undertook. As I have already pointed out, the plaintiff himself gave no evidence on his own behalf. The 3rd defendant supported the case of his son. He admitted however that on 10th July, 1947, the plaintiff had no independent means, and that he " did not entertain the idea that his son would pre-empt any of the lands which he had sold ". When he was asked to explain how, in these circumstances, a formal notice of the intended sale could have achieved any *practical* results, he merely expressed the opinion that " his aunt or his grandmother would have advanced moneys to him if he asked for it ". If this was true, it would have been a simple matter for the plaintiff to have called one of these ladies to prove that this opinion was justified. And even then there is no proof that it would have occurred to the plaintiff to apply to either of them for the necessary funds to enable him to purchase this property.

The 3rd defendant's suggestion, if tested, does not seem to me to bear examination. The plaintiff, according to his pleadings, had notice of the impugned sale about 10th September, 1947. He was in Ceylon at the

[1] *(1904) 7 N. L. R. 151.*

time, and he had access to his aunt and to his grandmother. Can it be doubted that, if he genuinely desired to pre-empt at that time, he would have protested against the transaction and tendered the money provided by his accommodating relations so as to secure the property himself? On the contrary, he seems to have been well content to permit his impecunious father to dispose of yet another ancestral property on 27th September, 1947, when a sum of £120 was needed to send him back to England to continue his studies there. It was only several months later that the sum of Rs. 3,500 became available to qualify him for the role of an injured heir who desired to pre-empt a portion of the family estate. It must be remembered in this connection that the *reasonableness* of the notice to which he was entitled must be measured by the urgency of his father's need for funds at the relevant time. Placed as Mr. Sabaratnam was in July, 1947, with the combined demands which the forthcoming marriage and the political campaign were making upon his very slender resources, time was surely of the essence of the pre-emptor's claim to supersede a stranger.

In my opinion issue 2 should have been answered in the negative, and I would set aside the judgment appealed from. The plaintiff's action must be dismissed with costs, payable jointly and severally by the plaintiff and by the 3rd and 4th defendants to the 1st and 2nd defendants.

GUNASEKARA J.—I agree.

Appeal allowed.