1929.

Present : Akbar J.

VYRAMUTTU *et al.* *v.* PERIYATAMBY *et al.*

327—C. R. Point Pedro, 23,270.

Thesawalamai—Right of pre-emption—Failure to claim right in partition action—Res judicata.

Where in a partition action a party fails to claim a right of pre-emption to which he is entitled with respect to a share of the land,—

Held, that the right of pre-emption was not barred by the decree in the partition action.

THE plaintiffs, who are co-owners of a land, brought this action for pre-empting under the law of Thesawalamai the undivided share which one Walliamma sold to the first defendant-respondent on a deed of 1924. Walliamma had sold the same share in 1918 to the plaintiff's predecessor in title, namely, Sivasidamparam, her brother, by an unregistered deed. The first defendant respondent by registering his deed obtained priority over Sivasidamparam's deed. In D. C. Jaffna, 20,024, Sivasidamparam together with the other plaintiffs brought a partition action with respect to the land, in which the first defendant claimed title to his share for the first time. The plaintiffs unsuccessfully attacked the deed on several grounds and interlocutory decree was entered in the partition action allotting the share to the first defendant. The present action was then instituted by the plaintiffs, pending the partition action, claiming the right to pre-empt the share. The learned Commissioner of Requests dismissed the plaintiffs' action on the ground that they had notice of the sale.

Tisseverasinghe (with *Marikar*), for appellant.—The finding as to the knowledge of the plaintiffs is not borne out by the evidence. The right of pre-emption is not wiped out by the decree in the partition case. It is a right *in rem* and attaches to the land. In *Marikar v. Marikar*[1] it was held that a trust, express or constructive, is not wiped out by a final decree in a partition case. A right of pre-emption should be placed on the same footing. It was not possible for the plaintiff to put forward the right of pre-emption in the partition suit. Counsel cited *Voet, XVIII, 3, 24.*

Croos da Brera (with *Rajakariar*), for respondent.—The appellant is bound by the partition decree. His right to pre-emption should have been put forward before that decree was entered. This right affects the land and differs from a trust. In the latter case it is

[1] *(1920) 22 N. L. R. 137.*

merely an equitable interest and the partition decree sets apart a specific portion of the common land to which this interest applies. In the case of pre-emption it affects title, which must be taken to have been wiped out by the decree (*Silva v. Silva*[1], *Galgamuwa v. Weerasekera*[2]). The question of pre-emption could have been settled in the partition suit and an appropriate order made (*Appuhamy v. Marihamy*[3], *Senathi Raja v. Brito*[4]).

Tisseverasinghe, in reply.

May 21, 1929. AKBAR J.—

This appeal raises an important question on the law of Thesawalamai. The facts are as follows :—

The plaintiffs-appellants are co-owners of a land situated at Alavay and they bring this action for pre-empting under the law of Thesawalamai, by which the parties are governed, the undivided share which one Walliamma sold to the first defendant-respondent on a deed dated 1924. It appears that this Walliamma had sold the same share previously, in 1918, to the plaintiff's predecessor in title, namely, a man called Sivasidamparam, her brother ; but this deed was not registered and the first defendant-respondent by registering his deed in 1924 obtained priority over Sivasidamparam's deed. Sivasidamparam together with the other plaintiffs brought a partition suit in respect of this same land in a D. C. Jaffna, case 20,024. It is stated by the plaintiffs that the first defendant for the first time asserted title to his share when the surveyor came to survey the land in May, 1925. In this partition case the plaintiffs and Sivasidamparam attacked the deed of the first defendant-respondent on several grounds, namely, that it was a deed executed for no consideration, that it was collusively obtained, &c., but as the result of an appeal to this Court the plaintiffs and Sivasidamparam lost their case on this deed as against the first defendant-respondent. Interlocutory decree has been entered in this partition case whereby the first defendant-respondent has been allotted 29/360ths shares of this land by virtue of Walliamma's deed of 1924. Sivasidamparam died in the meantime, and he is represented in this action by the third, fourth, fifth, sixth, and seventh plaintiffs-appellants. The second, third, and fourth defendants-respondents are the heirs of Walliamma, who died before the institution of the partition action. This action is now brought pending the partition action by the plaintiffs claiming the right to pre-empt this share of Walliamma which has been transferred to the first defendant-respondent, who is neither a

[1] *(1910) 13 N. L. R. 87.*
[2] *(1919) 21 N. L. R. 108.*
[3] *(1923) 25 N. L. R. 421.*
[4] *(1922) 4 C. L. R. 149.*

1929.

AKBAR J.

Vyramuttu v. Periyatamby

co-owner nor the owner of the adjacent land with a mortgage over it. At the trial the following issues were framed :—

(1) Was the plaintiff aware of the sale at the time deed No. 6,585 was executed or was he noticed of the sale ?

(2) Can the plaintiff seek to pre-empt the share in view of the fact that he denied the right of Walliamma to any share in the land in D. C. Jaffna, case 20,204 ?

(3) Can the plaintiff maintain this action in view of the interlocutory decree ordering partition and allotting Velauther Periathamby the first defendant an undivided share ?

(4) Market value of first defendant's share now in dispute ?

(5) Were the plaintiffs ready and willing to buy ?

But the learned Judge rejected issues numbers (2) and (3). He has held against the appellants on the first issue and dismissed the plaintiffs' action with costs.

I have read through the evidence and have come to the conclusion that the learned Commissioner's judgment on the first issue is wrong. He has not decided the case on the evidence but on the probabilities of the case. He says in his judgment as follows:— "It is clearly impossible to arrive at a conclusion from the testimony of the witnesses. There are no documents of any kind which are helpful in regard to this issue. One has to rely on the probabilities of this case." If the case is to be decided on the probabilities, it seems to me improbable that Walliamma who was an old woman of 80 years, would have given notice of the sale to the plaintiffs or their predecessors in title when she had already parted with her share in 1918 to her brother Sivasidamparam. The first defendant was an absolute stranger and was in this Island on a holiday from the Federated Malay States. Walliamma's son, Chelliahpillai, was away in India at the time of the transfer to the first defendant-respondent and did not know of the transfer till after his return from India. It is in evidence that Walliamma's deed to the plaintiffs' predecessor in title was not registered, and the first defendant when he bought Walliamma's share which had already been transferred to her brother must have known that this deed was not registered. First defendant's deed must have therefore been a secret transfer and he was hoping to get title by priority of registration. The probability therefore is that no notice was given of the intention of Walliamma to transfer her share to the first defendant. There is definite evidence in this record that no such notice was given. The burden of proof was on the first defendant-respondent and the only evidence he has given is that Walliamma, who is now dead, told him that she told the Police Vidane of Alavay, who is a party to this case, that she wanted to sell her share to the first defendant. This is not notice to the first or second plaintiffs ; on the other hand, there is the definite evidence

of the first plaintiff that he got no notice of the same and that he came to know of the first defendant's claim in May, 1925. This evidence is corroborated by the admission of the first defendant that he claimed his share on his deed before the surveyor. We have further the evidence of Chelliahpillai, who states that he himself was ignorant of this transfer till his return from India.

The learned Judge attaches a great deal of importance to the fact that the first defendant would gain more satisfaction by flourishing the deed after it was registered before the eyes of the plaintiff than by keeping the purchase secret. I cannot understand his reasoning. I must therefore hold that the plaintiff was not aware of the sale to the first defendant-respondent and that he had no notice of the same; I further hold that he only got notice of the deed of 1924 in May, 1925. As this action was filed in February, 1928, the action is not prescribed. The respondents' Counsel has pressed before me the second and the third issues which were rejected by the learned Commissioner. These issues were raised at the instance of the respondents, and as the Judge notes that plaintiffs admitted the facts alleged in these issues I think I ought to give my decision on them too. The respondents' Counsel has urged on these two issues that the interlocutory decree in the partition case (D. C. 20,024) is binding on the plaintiffs and that whatever right of pre-emption the plaintiffs may have had ought to have been asserted in the partition case. For a correct decision of this point it is necessary that I should give my views on what the exact rights of pre-emption are. That there is this right has been held in a series of cases in this Court. I refer to the following cases: *Tillainathan v. Ramasamy Chetty*[1], *Suppiah v. Thambaiah*[2], *Katheresu v. Kasinather*[3].

As Bonser C.J. held in the first case, in the interpretation of the law of Thesawalamai it is quite competent to the Court to follow the rules under the Roman-Dutch law in regard to a similar right and which was known as the *jus retractus legalis*. It will be seen from that case that he consulted Mr. Berwick's translation of Voet.

Book XVIII, title 3, section 24, of Mr. Berwick's translation of Voet is as follows:—"For this right arising from law or usage affects the things themselves, as one involving a prohibition against alienation to the prejudice of the cognates of the last possessor, and such prohibitions imposed by the laws follow the property itself; so that both an action *in rem* and an action *in personam* are available in respect of the *jus retractus*, or according to some a personal action but framed *in rem*. And, moreover, when the right of retraction has once been acquired by a cognate in respect of the first sale, he cannot be deprived of it by the act of a third party, such as by a new contract between the first purchaser and as tranger."

[1] *4 N. L. R. 328.* [2] *7 N. L. R. 151.* [3] *25 N. L. R. 331.*

1929.

AKBAR J.

Vyramuttu v. Periyatamby

It will be seen from this passage that Voet looks upon this right as similar to a *fidei commissum* containing a prohibition against alienation. In section 27 he states that "the effect of retraction is that the retractor enters as completely into the place of the purchaser as if, not the latter, but he himself had from the first been the purchaser of the thing retracted, excepting in this respect, that the purchaser is not liable to restore to the retractor the fruits taken in the interval between the purchase and the demand for retraction and consignation of the price, even though he has not yet consumed them; but has only to restore those which were growing at the latter date ..... ; as also those which—not having been yet separated from the soil at the time of delivery made in pursuance of the purchase—were transferred to the purchaser along with the land and in respect of which the price which has now to be refunded to the purchaser by the retractor had doubtless been increased. For as regards the other fruits gathered in the intervening time by the purchaser and still extant, as the purchaser did not gather these from the land by right of 'possession' in either good or bad faith, but made them his own by right of the 'ownership' which he had in the land by title of purchase . . . . . we cannot rightly extend to this case the rule as to restoring to a '*vindicator*' fruits gathered by a *bona fide* possessor." These passages are of importance, as under the Roman Dutch law the sale to the first purchaser is valid until it is retracted, which is in conformity with the judgment of the Supreme Court in *Katheresu v. Kasinather* (*supra*), in which Mr. Justice Jayewardene approved of the prayer of the plaintiff asking that the purchaser-defendant be ordered to execute a transfer in favour of the plaintiff. The Supreme Court in a series of decisions has held that a land burdened with a *fidei commissum* can be partitioned and that the *fidei commissum* will continue to be attached to the shares allotted by the partition.

In the Full Bench case (*Marikar v. Marikar*[1]) it was held that a trust, express or constructive, was not extinguished by a decree for partition, and would attach to the divided portion which on the partition was assigned to the trustee. If we regard the right of pre-emption as Voet says it should be, it would be as a right which attached to the land and which passed along with the land. It cannot be extinguished by the partition decree. In my opinion it should be so held. Mr. Croos da Brera on behalf of the respondents urged that this point should have been taken in the partition proceedings and that therefore the plaintiffs were estopped by the interlocutory partition decree. Respondents' Counsel has cited the case of *Galgamuwa v. Weerasekera*[2] as an authority in his favour that this right of pre-emption can very well have been asserted by the plaintiffs in the partition case. In the case cited above the

[1] *22 N. L. R. 137.* [2] *21 N. L. R. 108.*

respondents were allowed to intervene to prove that the plaintiff in the partition action held certain shares in trust for them. That was a case of trust, but even so it did not hold that the respondents could not have brought a separate action to assert the trust in favour of them after final decree in the partition case. This is a case of pre-emption, and the passages I have quoted from Voet show that the sale to the purchaser is valid until it is retracted. Even after final decree in the partition case the plaintiffs, it seems to me, are entitled to bring this action. In an action for pre-emption the claim is for a transfer from the purchaser to the retractor, and if the title is confirmed by the partition decree, it is only a confirmation of the title of the purchaser from the original owner. It seems to me that on the ground of convenience it will be inappropriate to raise the issues arising on an action for pre-emption under the Thesawalamai in a partition case. It will be very inconvenient to raise issues on the question of notice and market value of the share in dispute in a partition case. I do not see how an order that the purchaser should execute a transfer in favour of the retractor on payment of the market value can be made in a partition case and the whole case hung up on this side issue before the interlocutory decree is made.

The judgment of the Commissioner is set aside with costs, and I remit the case for the decision of the Court on issue (4), that is, on the market value of first defendants' share now in dispute.

Appeal allowed.