1946 *Present :* **Nagalingam A.J.**

MURUGESU, Appellant, *and* **THAMBIPILLAI** *et al.*, Respondents.

223—C. R. Jaffna, 16,666.

Res judicata—*Action for pre-emption under* Thesawalame—*Previous action under Civil Procedure Code, s. 247, between same parties in respect of same property—Cannot operate as bar—Civil Procedure Code, ss. 207, 247.*

Where a vendee of certain lands brings an action under section 247 of the Civil Procedure Code against his vendor and a person who holds a decree against the vendor asking for a declaration that the lands are not liable to be seized and sold under the decree in favour of the decree holder, judgment given in favour of the vendee cannot operate as *res judicata* in an action subsequently brought by the decree holder against the vendor and vendee claiming a right of pre-emption in respect of the same lands. The cause of action that gives rise to an action to pre-empt is entirely independent of and totally unconnected with the cause of action giving rise to a 247 action.

APPEAL from a judgment of the Commissioner of Requests, Jaffna.

N. Kumarasingham, for the plaintiff, appellant.

No appearance for the defendants, respondents.

Cur. adv. vult.

November 25, 1946. NAGALINGAM A.J.—

This is an action under the Thesawalame by the plaintiff, whom I shall refer to hereafter as the pre-emptor, to pre-empt certain lands described in the schedule to the plaint which he alleged had been transferred by the 1st defendant, the vendor, to the 2nd defendant, the vendee, in derogation of the plaintiff's right, and the only point for decision on appeal is whether the action is barred by certain proceedings had between the parties in an earlier case.

The history of and the facts relating to the earlier case are as follows. The pre-emptor and another by virtue of a decree entered in their favour against the vendor, the judgment-debtor, had caused the Fiscal to seize the lands in question. Prior to the date of seizure the vendor had parted with his interests in favour of the vendee who preferred a claim which was dismissed. The vendee thereupon instituted a 247 action against the decree holders of whom, it will be remembered, the pre-emptor was one, and the judgment-debtor, the vendor, for a declaration that the lands were not liable to be seized and sold under the decree in favour of the decree holders. The pre-emptor and his co-decree holder unsuccessfully contended that the deed by the vendor to the vendee was in fraud of creditors and by the decree in that action it was declared that the lands were not liable to be seized and sold under the decree.

It has been argued successfully before the learned Commissioner of Requests that the pre-emptor not having prayed by way of reconvention for a declaration of his right to pre-empt in the 247 action, when he filed his answer, and not having obtained an adjudication thereon at that stage, that decree operates as a *res adjudicata* and that the pre-emptor cannot in consequence maintain the present action. This view has been reached upon a consideration of the explanation to section 207 of the Civil Procedure Code. Under that explanation it is only " Every right of property . . . . or to relief of any kind which can be claimed, set up or put in issue between the parties to an action in the *cause of action for which the action is brought* " which becomes on the

passing of the decree a *res adjudicata* whether it be actually so claimed, set up or put in issue or not in the action. Sufficient stress cannot be laid on the importance of the words I have italicised for otherwise the effect of the explanation would be lost. What was the cause of action of the vendee in instituting the 247 action against the pre-emptor and others ? It was that land admittedly belonging to him had been unlawfully seized by the Fiscal at the instance of the pre-emptor and his co-decree holders and the relief that the vendee claimed was a declaration that the lands were not liable to seizure and sale. The pre-emptor resisted the claim of the vendee on the ground that the deed had been executed in fraud of creditors and claimed a declaration that the deed be set aside and the lands are liable to seizure and sale.

The defence thus set up properly put in issue between the parties not only the right of the pre-emptor to have the dominium of the property revested in the judgment-debtor but also the relief he claimed to have it declared that the properties were bound and executable under the decree, and both these matters had direct relation to the cause of action upon which the vendee came into Court. Can it be said that the right of pre-emption claimed by the pre-emptor was a right to property or relief of any kind in the remotest degree connected with the cause of action set out in the 247 action ? Could the pre-emptor have claimed the right to pre-empt by way of reconvention ? His right, if any, was not only against the vendee, the plaintiff in the 247 action, but in a larger measure against the judgment-debtor, his co-defendant. Had the right to pre-empt been in fact claimed in the 247 action by the pre-emptor, could the matter have been adjudicated upon without the judgment-debtor, the defendant, being afforded an opportunity of filing his defence to the claim thus set up ? The issues that arise upon a claim to pre-empt are entirely foreign to those that arise in a 247 action. The cause of action that gives rise to an action to pre-empt is entirely independent of and totally unconnected with the cause of action giving rise to a 247 action. In fact a Court trying in the course of the same action issues in regard to a 247 action and an action for pre-emption would be trying two independent suits, and to say the least, it would be embarrassing, not to say confusing.

I am therefore of opinion that the right to pre-empt could not properly and legitimately have been interposed in the 247 action as it cannot be said to be either a right of property or relief which could have been claimed, set up or put in issue between the parties in the 247 action. It therefore follows that the failure to have counter-claimed in the 247 action the right to pre-empt cannot be deemed to be a bar. As this is the only basis upon which the plaintiff's action has been dismissed, I set aside the judgment of the lower Court and enter decree for the plaintiff in terms of his prayer to the plaint with costs both in this Court and the Court of Requests.

Appeal allowed.