1948 *Present :* **Soertsz S.P.J. and Canekeratne J.**

SARAVANAMUTTU *et al.*, Appellants, *and* VALLIPURAM *et al.*, Respondents.

S. C. 178—D. C. Jaffna, 1,570.

Thesavalamai—Transfer by co-owner—Option to re-purchase—Action for pre-emption of another share by transferee—Is he a co-owner ?

A person who takes a transfer of a share from a co-owner, subject to the condition that he should re-transfer it on payment of a certain sum within a certain time, is a co-owner and entitled to the right of pre-emption under the Thesavalamai.

[1] *(1885) 29 Chancery Division 331.*

APPEAL from a judgment of the District Judge, Jaffna.

N. E. Weerasooria, K.C., with *H. W. Tambiah*, for the plaintiffs, appellants.

F. A. Hayley, K.C., with *C. Renganathan*, for the first and second defendants, respondents.

S. J. V. Chelvanayagam, K.C., with *V. Kandasamy*, for the third defendant, respondent.

Cur. adv. vult.

February 19, 1948. SOERTSZ S.P.J.—

This was an action instituted by the appellants seeking to pre-empt a certain share of a land which the 1st and 2nd respondents had sold to the 3rd respondent by deed P3 dated May 29, 1944. All the parties concerned in this action are agreed that the 2nd appellant, who is the wife of the 1st appellant, and the 1st and 2nd respondents are co-owners of the land in question, and that, as a co-owner, the 2nd appellant would have the right to pre-empt any share sold by the other co-owners to a stranger without notice to her.

The questions that arise for consideration on the appeal are : (*a*) Was the 2nd appellant given or had she notice that the 1st and 2nd respondents were going to sell their share of the land ? (*b*) Was the 3rd defendant a stranger ? Although the first question is one of pure fact, I feel constrained to differ from the finding of the trial Judge on that question. He appears to have misdirected himself by overlooking or, at least, by not appreciating sufficiently certain dates relevant to the consideration of that question. His view was that " although she (*i.e.*, the 2nd appellant) may not have had specific notice of the actual sale on P3 did have notice that the half share of this land which belonged to the 2nd defendant was to be sold . . . . The reason why the 2nd plaintiff did not want to buy the share of the land in question at the time it was for sale was because she did not have enough money. The 2nd plaintiff and her husband had mortgaged almost all the lands they had to raise a loan of Rs. 2,000 in order to buy another bit of land ". Now, the date of the mortgage referred to by the trial Judge in the passage I have quoted from his judgment is 14th August, 1943, and the purchase of the land, to buy which the appellants raised money on that mortgage, was the 19th of August, 1943, whereas, according to the witness Nallatamby, whose evidence the Judge preferred to that of the 2nd appellant, he informed the 2nd appellant's father, in the presence of the 2nd appellant herself, of the proposed sale first in December, 1942, and for the second time in July, 1943, both dates being earlier than the mortgage and the sale I have already referred to.

It seems clear that Nallatamby was guilty of prevarication when he stated that when he saw the 2nd appellant in July, 1943, she told him that they had purchased lands to the value of Rs. 4,000 or Rs. 5,000. The learned Judge has found that " the half share of the land in question would have been valuable to the plaintiffs ". I agree and, in my opinion, it is most improbable that they would not have preferred to buy it

rather than the other land. This land was their residing land. I have no hesitation in rejecting Nallatamby's evidence. I hold that the 2nd appellant had no notice whatever.

In regard to the second question, the 2nd appellant, in order to succeed, must show that the 3rd respondent is a stranger. Who, then, is a stranger for the purpose of the matter in hand ? Part VII. (I.) of the Thesawalamai answers that question by clear implication and shows that a stranger is a person other than an heir, a partner, or " neighbour whose grounds are adjacent to his (*i.e.*, the seller's) land and who might have the same in mortgage should they have been mortgaged ". Quite clearly, the 3rd respondent is not within either category 1 or category 3. Is he a partner under category 2 ? Numerous decisions of our Courts have interpreted the word " partner " in this context as synonymous with the word co-owner, *e.g.*, the case of *Ponniah v. Kandiah*, 21 N. L. R. 327, at page 329, and that interpretation is inveterate and must now be taken as settled. Even so, the appellants contend that the 3rd respondent was not a co-owner inasmuch as she obtained on the transfer deed 3D1 " only a qualified interest " in a one-eighth share of this land because the vendors had stipulated for a re-conveyance to some of them of the interest conveyed within a period of five years, and only a part of that period had elapsed at the time the 1st and 2nd respondents conveyed the share, now in question, to her. The learned trial Judge upheld this contention. For my part, I have given this question very careful consideration and I have reached a conclusion different from that of the trial Judge. No doubt, as he observes, " if the 3rd defendant be regarded as a co-owner who has the right to pre-empt before the period during which the vendors on 3D1 are entitled to claim re-conveyance has elapsed, what would be her position if the vendors on 3D1 claim a re-conveyance and the 3rd defendant grants it ? There would be, then, the anomalous position of a person who was having a defeasible title to a share of a land, having been allowed to pre-empt another share and gaining an advantage over the actual co-owners, and later such person divesting himself of the earlier share of the land which conferred on him the right to pre-empt ". But it is not an infrequent experience of courts of law that anomalous results flow from strict operations of the law. To adduce one apposite instance, there is the case of *Ponniah v. Kandiah* to which I have already referred. The plaintiff in that case claimed pre-emption on the ground that he was an heir of the 2nd defendant's wife who acquired by way of " thediethetam " a half share of an interest in the land in question in that case which her husband bought during the subsistence of the marriage. The plaintiff's claim to heirship was questioned by the defendant inasmuch as his wife was still alive and, although she had no children at the time, might well have children and might even dispose of her share by will, and the plaintiff's claim to heirship was contingent upon the defendant's wife dying childless and intestate. Nevertheless, de Sampayo J. held that the word " heirs " in part VII, 1 of the Thesawalamai, was used " in a special sense ", that is to say to mean " persons who would be heirs if the owners should *now* die "; for if it meant persons who have become heirs by the death of the owner, it would be absurd to speak of them as being entitled to pre-emption in respect of

property alienated by the owner "during his or her life-time". In the result, then, in that case, the position was no less anomalous in that a person with only a "spes successionis" was held entitled to pre-empt. Situations like these which are apt to disturb one's sense of logical consistency are bound to arise when different systems of law have to be worked together. The 3rd respondent's position—co-owner or stranger—must, I think, be determined with reference to the titles as they exist at the time that question arises. At that time, in this case, the 3rd respondent was, by virtue of 3D1, entitled to and possessed of an undivided one-eighth share of this land, that is, in other words, she was a co-owner. Her predecessors' title to that one-eighth had been extinguished; all that was left to them being such a potential interest as the contract for re-conveyance gave them. That being so, the sale now impeached was not a sale to a *stranger*, and there being no preference in favour of any of the claims of persons entitled to pre-empt, as was held in *Ponniah v. Kandiah*, the plaintiff's case fails.

We were referred to certain passages in Agarawala's *The Law of Pre-emption*, particularly, to paragraph 29 of page 64 (6th edition). But what is stated there depends for its validity on the view taken by the Mohamedan Law in regard to the legal content of a sale subject to what is called an "*option*". I am unable to see what jurisdiction there can be, when we are examining a case under the law of pre-emption as conceived by the Thesawalamai, to æquiparate a sale with an option under the Mohamedan Law to a sale with a stipulation for a re-conveyance within a certain period under the Roman-Dutch Law. Our Common Law is the Roman-Dutch Law and the legal implications of 3D1 must be ascertained with reference to that Law.

I would, therefore, dismiss the appeal. In regard to costs, the question that almost exclusively occupied the time and attention of the trial Court was the question of notice. On this question, the appellant has succeeded and, therefore, I am of the opinion that the respondents should not have the costs of the trial. I would allow them half the costs of appeal.

CANEKERATNE J.—I agree.

Appeal dismissed.