

1966 *Present* : Sansoni, C.J., and Abeyesundere, J.

AGATHESU and another, Appellants, *and* ULUKESU and 4 others,
Respondents

S. C. 577/63—D. C. Jaffna, 1506/L

*Thesawalamai—Sale by co-owner—Notice to the other co-owners—Can it be waived?—
Release of right to pre-empt—Requirement of notarial execution—Thesawalamai
Pre-emption Ordinance (Cap. 64), ss. 2 (1), 5, 8, 10.*

In an action to set aside a deed of transfer on the ground that the notice prescribed by section 5 of the Thesawalamai Pre-emption Ordinance was not given, defences of estoppel, waiver and acquiescence, assuming that they are applicable, must be proved by clear and unequivocal evidence. Such defences, however, are inapplicable, in view of the prescribed formalities which have to be followed prior to a sale by a co-owner.

Furthermore, a right of pre-emption being a right in land, a release of a right to pre-empt must be notarially executed to be of any force or avail in law.

APPEAL from a judgment of the District Court, Jaffna.

C. Ranganathan, Q.C., with *K. Sivananthan*, for the Plaintiffs-Appellants.

J. D. Aseerwatham, for the Defendants-Respondents.

Cur. adv. vult.

August 2, 1966. SANSONI, C.J.—

The plaintiffs, who are co-owners of the land described in the plaint, sued to have the deed of transfer No. 2963 of 14th June 1961 executed by the 1st defendant (another co-owner) in favour of the 2nd and 3rd defendants set aside on the ground that the notice prescribed by section 5 of the Thesawalamai Pre-emption Ordinance, Chap. 64, had not been given. Admittedly, such notice was not given. The 2nd and 3rd defendants in their answer pleaded that the deed in question was executed at the instance of the plaintiffs, and the plaintiffs were therefore estopped from claiming the right to pre-empt the 1/4 share transferred by that deed. Pleas of waiver and acquiescence were also raised on the same ground.

The learned District Judge held that the impugned deed was executed with the knowledge and approval of the plaintiffs. He further held that the plaintiffs had by their conduct released the 1st defendant from his obligation to offer the shares sold to the plaintiffs in the first instance.

On the facts I am unable to accept the findings of the learned Judge which are not supported by the evidence. Although the 2nd defendant in his evidence said that the plaintiffs agreed to the 1st defendant transferring his 1/4 share to the 2nd and 3rd defendants because the 2nd and 3rd defendants had transferred certain shares of another land to the plaintiffs on deed No. 10393 of 11th March 1957 (D2), this evidence was contradicted by the 1st defendant whom the 2nd and 3rd defendants also called as their witness. The witness was specifically questioned by the Judge on the crucial question whether the plaintiffs were aware that he had agreed to transfer the land to the 2nd and 3rd defendants, and the following questions and answers show that the plaintiffs were not aware of the intended execution of the impugned deed :—

“ Q. Can you say whether the plaintiffs were aware that in lieu of the 2nd and 3rd defendants transferring a share of the land on D2, you had agreed to give your share in the land dealt with on P1, to the 2nd and 3rd defendants ?

A. No.

Q. Why did the 2nd and 3rd defendants re-sell the land to plaintiffs, the land which they had bought two months earlier ?

A. The plaintiff told the 2nd and 3rd defendants that plaintiff's aged parents who were living in the Wannu wished to spend their last days on this land.

Q. Were you present when the conversation between the plaintiffs and the 2nd and 3rd defendants took place ?

A. No, I was not present at this conversation. Later I was present when the 2nd and 3rd defendants re-sold the share they bought on D1 from plaintiffs. I only spoke to the 2nd and 3rd defendants. I did not speak to the plaintiffs. Plaintiffs met me the day before deed D2 was executed. Plaintiffs were not present when I told the 2nd and 3rd defendants that I would transfer to them a share of the land in dispute.

Q. Were the plaintiffs aware of it later ?

A. No.

Q. You did not know what arrangements there were between the plaintiffs and the 2nd and 3rd defendants ?

A. No."

Assuming that defences of estoppel, waiver and acquiescence can arise in a case such as this, those defences must be proved by clear and unequivocal evidence, and that is lacking in this case.

But I would put the case on a higher ground and hold that section 8 of the Thesawalamai Pre-emption Ordinance gives the plaintiffs a right to bring this action even if they were aware of the intended transfer by the 1st defendant to the 2nd and 3rd defendants. A right of action is expressly conferred on a co-owner by section 8 in a case where the provisions of this Ordinance have not been obeyed. Whatever the earlier law may have been with regard to the position of a co-owner who was aware of an intended sale, the Ordinance in words which are absolute and explicit enables a co-owner to enforce the right of pre-emption where the notice required by section 5 was not given. Defences of estoppel, waiver or acquiescence are inapplicable where one finds in an Ordinance such as this prescribed formalities which have to be followed prior to a sale by a co-owner. I do not doubt that the whole object of the Ordinance was to provide a procedure by which a purchaser from a co-owner could ensure that he would get a sound title. Non-compliance with its provisions means that his title is defective and open to attack by another co-owner.

One of the issues raised at the trial was whether the plaintiffs had released the 1st defendant from his obligation to offer his share of the land to them. On the evidence of the 1st defendant which has been quoted above this issue must be answered in the plaintiff's favour. I also take the view that a release of a right to pre-empt must be notarially executed to be of any force or avail in law. A right of pre-emption is a right in land. It is, though conferred by law, as much a right over

land as a right conferred by an agreement *inter partes* to sell land. Section 2 (1) of the Ordinance speaks of it as “the right of pre-emption over such property, that is to say, the right in preference to all others whomsoever to buy the property. . . .”. Section 10 requires an action under Section 8 to be registered as a *lis pendens* in accordance with the provisions of the Registration of Documents Ordinance. Therefore even if on the facts the plaintiffs had purported to release their right to pre-empt, such release would have been void in law as it was not embodied in a notarial document.

I would set aside the decree appealed from and declare that the plaintiffs are entitled to pre-empt the 1/4 share of the land described in the plaint, order that the plaintiffs should deposit a sum of Rs. 3,000/- in Court within 30 days of this judgment being communicated by the District Judge to the parties in open Court, declare deed No. 2963 of 14th June, 1961, null and void, and direct the Secretary of the District Court to issue a Conveyance to the plaintiffs for the 1/4 share on the sum of Rs. 3,000/- being deposited in Court. The plaintiffs-appellants are entitled to their costs in both Courts.

ABEYESUNDERE, J.—I agree.

Appeal allowed.
