

1952

Present : Gratiaen J. and Gunasekara J.

V. RAMALINGAM, Appellant, and MANGALESWARI,
Respondent

S. C. 21—D. C. Chavakachcheri, 315

Thesavalamai—Pre-emption—Sale of land—Omission to give notice to pre-emptor—Justification.

Plaintiff sought to enforce a right of pre-emption under the *Thesavalamai* by claiming to have a sale of land set aside on the ground that the property had been sold without previous notice to her.

Held, that as plaintiff had no sufficient means to purchase the property at the time it was sold the failure to give her notice of the sale was immaterial.

Velupillai v. Pulendra (1951) 53 N. L. R. 472, followed.

¹ (1951) 2 K. B. 496 at 502.

APPPEAL from a judgment of the District Court, Chavakachcheri.

H. W. Tambiah, with *C. Manohara*, for the 2nd defendant appellant.

N. E. Weerasooria, Q.C., with *C. Renganathan* and *K. Palasunderam*, for the plaintiff respondent.

Cur. adv. vult.

June 25, 1952. GUNASEKARA J.—

The second defendant appeals against the judgment given for the plaintiff in this action to enforce a right of pre-emption under the *Tesavalamai*. The plaintiff and her father the first defendant were co-owners of a piece of land which they had inherited in equal shares under her mother's last will in 1935. The subject of the action is the share inherited by the first defendant. This he mortgaged in July 1936 as security for a debt of Rs. 1,000 and in September 1937 sold to the second defendant for Rs. 1,500. The mortgage bond, which was discharged on the occasion of the sale, describes the debt of Rs. 1,000 as being made up of a sum of Rs. 860 due from the first defendant and his wife (the plaintiff's mother) on a promissory note of April 1933 and a further sum of Rs. 140 borrowed by him later. A fraction of the share bought by the second defendant was sold in August 1947 to the fourth defendant, who is the wife of the third. The learned District Judge holds that the plaintiff was entitled to notice of the sale to the second defendant but had no notice of it, and he has accordingly made order setting aside the two deeds of sale and directing that the half share in question should be conveyed to the plaintiff for Rs. 1,500, which he holds was its market value. A condition of the order, that the plaintiff should deposit this sum in Court on or before the 18th December 1950, has been complied with. The learned Judge has also awarded to the second defendant a sum of Rs. 1,500 as compensation for improvements made by him as a *bona fide* possessor, and this sum too has been deposited in Court by the plaintiff.

The plaintiff, who was born in 1930 and was still a minor when this action was instituted in August 1950, was only seven years old at the time of the sale to the second defendant. It is contended in support of the appeal that her natural guardian, who was the first defendant, was necessarily aware of the sale to the second defendant and that in any event she had no sufficient means to pre-empt the share, and that therefore she is not entitled to have the sale set aside on the ground of want of notice.

The second defendant averred in his answer that "the plaintiff had and has no means to buy the share sought to be pre-empted", and one of the issues tried was as to whether the plaintiff was "a *bona fide* pre-emptor having funds to pay for the purchase of this half share". The learned Judge answered this issue in the affirmative for the reason that she "may still be able to find the funds to pre-empt this share by mortgaging her own share", which he finds has appreciated in value. He holds that it "may be that she has been put up by the first defendant to file this action because the price of lands now is high". The event proved that she was able to raise the necessary funds by the 18th December, 1950, but it seems

to be clear from the evidence that her estate was insufficient for the purpose at the time of the sale by the first defendant to the second in 1937. Her father, the first defendant, was a labourer employed at a mill, and it is unlikely that his seven year old daughter was possessed of any property other than the half share of this piece of land that she had inherited from her mother. According to her own evidence, she had no other landed property but she had been told by Sinnammah, her next friend in this action, that her mother had entrusted to Sinnammah a sum of Rs. 1,000 in cash to be held for her. Sinnammah herself did not give evidence, and there is no evidence from any other source to prove the truth of the information that she is alleged to have given the plaintiff. The learned Judge's own view is that " it is likely that the story that the Next Friend has Rs. 1,000 entrusted to her by the plaintiff's mother is an invention "

As it appears that the plaintiff had no sufficient means to pre-empt the share in 1937 it is immaterial whether she had notice of the first defendant's intention to sell it. As was observed by my brother Gratiaen in the case of *Velupillai v. Pulendra et al.*¹ " 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. "

I would allow the appeal and dismiss the plaintiff's action with costs in this Court and the Court below.

GRATIAEN J.—I agree.

Appeal allowed.

