

1960 Present: H. N. G. Fernando, J., and T. S. Fernando, J.

M. T. JOSEPH, Appellant, and A. G. R. JOSEPH, Respondent

S. C. 497/1958—D. C. Jaffna, 563/L

Thesavalamai—Pre-emption—Notice of intention to sell—Fictitious price stated therein—Obligation of pre-emptor to tender that price—Thesavalamai Pre-emption Ordinance, No. 59 of 1947, ss. 5, 6, 7, 8.

Where the price stated in a notice published by an intending vendor in purported compliance with the terms of section 5 of the Thesavalamai Pre-emption Ordinance, No. 59 of 1947, is fictitious and does not represent the true market value of the land, section 6 contemplates as a valid tender, for the purposes of the Ordinance, only a tender for the stated price, despite the fact that such stated price is fictitious.

Observations on the unworkability, in the present case, of the machinery provided by the Ordinance.

APPEAL from an order of the District Court, Jaffna.

S. Sharvananda, with *K. Palakidnar*, for respondent-appellant.

C. Ranganathan, with *S. Sivarasa*, for petitioner-respondent.

Cur. adv. vult.

November 14, 1960. H. N. G. FERNANDO, J.—

The appellant in this case is the owner of a one-twentieth share of a land of 10 *lachams*. On or about 18th October 1957, he published a Notice, purporting to be in terms of Section 5 of the Thesavalamai Pre-emption Ordinance No. 59 of 1947 of a proposal to sell his share for Rs. 950. The respondent, a co-owner of the same land, by his Attorney in Ceylon, sent telegraphic money orders for Rs. 950 to the appellant, but followed with a telegram in these terms :—

“Rs. 950 is tendered Telegraphic Money Orders by Rasanayagam (the respondent) co-owner of land. Amount stated fictitious. Market value Rs. 450. Execute transfer immediately. Refund balance. Reply.”

As was only to be expected in the circumstances, his Money Orders were returned to the respondent's Attorney, the reason given being that the telegram only constituted an offer to buy the share at Rs. 450 and not at the price of Rs. 950 stated in the Notice.

The respondent thereupon came into Court with a petition stating that :—

- (a) the amount of Rs. 950 stated in the Notice was fictitious,
- (b) the market value of the land was Rs. 450,
- (c) he had tendered to the appellant the amount stated in the Notice, but the appellant had failed to execute a conveyance in his favour,

and praying in terms of Section 7 of the Ordinance that the appellant be ordered to execute a conveyance in his favour at a price to be fixed by the Court. The learned District Judge, finding that the price of Rs. 950 was fictitious and that the true market value of the share is Rs. 450, made order accordingly. The appeal is against that order.

Section 5 (1) of the Ordinance provides that the Notice must set out the actual price offered, and in view of the Judge's finding, it has to be assumed that the price quoted in the Notice was fictitious. But the question is whether the respondent's tender was in conformity with Section 6, under which a person entitled to the right of pre-emption may "tender the amount stated in such Notice". In my opinion, Section 6 contemplates as a valid tender for the purposes of the Ordinance only a tender for the stated price, despite the fact that such stated price may be fictitious.

The respondent's tender was clearly for an amount less than the stated price, for the telegram precluded the appellant from appropriating the whole sum of Rs. 950 despatched by Money Order: it was therefore not in conformity with Section 6.

Section 7 provides a remedy only to a person who has made a tender under Section 6. That remedy was not available to the respondent who had not made such a tender as Section 6 contemplates. I would therefore hold that his application under Section 7 should have been dismissed.

It might be useful for this Court to state that the machinery provided by the Ordinance has been shown in this instance to be unworkable. When Section 7 permits a person to seek pre-emption at a price to be fixed by the Court on the ground that the price stated in the Notice under Section 5 is fictitious, what is contemplated is that the Court has the power to enable a pre-emptor to obtain a conveyance at a proper price and not at a fictitious price stated by a prospective vendor. But unfortunately, a condition precedent to the exercise of this power is that the pre-emptor should have made a tender under Section 6, which means (as I hold) a tender of the stated price, even though that price may be fictitious. Since the stated price has to be tendered, the relief intended to be provided by Section 7 would in most cases be superfluous; such a tender would ordinarily be accepted and not refused, and the tenderer would then have to buy at the fictitious price.

Counsel for the respondent has argued that the Notice under Section 5 was no Notice at all, because it did not, as required by the Section, specify the actual price offered. I agree with this argument, but it does not assist the respondent in this case. If, after a fictitious price is stated in a Notice under Section 5, a land is sold to a third party, a person having the right of pre-emption may be able to enforce his right under Section 8 on the ground that the Notice was invalid. But so long as the property remains in the ownership of the prospective vendor, no remedy is available except on the basis that a tender duly made under Section 6 had been rejected.

I would set aside the order appealed from. The respondent must pay the costs of this appeal and the costs of his application to the District Court.

T. S. FERNANDO, J.—I agree.

Order set aside.
