1966 *Present :* **Tambiah J., and Manicavasagar, J.**

T. PONNUDURAI and 2 others, Appellants, *and*
S. SITHAMPARAPILLAI and another, Respondents

S. C. 92/64—D. C. Point Pedro, 6030

Thesawalamai Pre-emption Ordinance (Cap. 64)—Sections 2 and 13—Meaning of the words "persons who in the event of the intestacy of the intending vendor will be his heirs"—Jaffna Matrimonial Rights and Inheritance Ordinance—Inheritance thereunder—Misjoinder of parties and causes of action.

Where two co-owners who were subject to Thesavalamai brought an action to pre-empt an undivided share of a land which had been sold by another co-owner to his sister while his children were still alive—

Held, that the sale to the sister was unassailable because a sister of a co-owner is an heir within the meaning of Section 2 of the Thesawalamai Pre-emption Ordinance. According to that Section, co-owners and all persons who can potentially become heirs of the vendor at the moment of his death intestate, and who are enumerated in sub-section 2, are entitled to the right of pre-emption, and there is nothing in the words of Section 2 which point to an order of precedence or preference amongst those who are enumerated as persons entitled to the right of pre-emption. This interpretation is strengthened by the provisions of Section 13.

Markandu v. Rajadurai (58 N. L. R. 394) not followed.

Held further, that when two or more co-owners are co-plaintiffs in an action for pre-emption, there is a misjoinder of parties and causes of action.

Thangammah v. Kanagasabai (51 N. L. R. 500) not followed.

APPEAL from a judgment of the District Court, Point Pedro.

C. Ranganathan, Q.C., with *V. Arulambalam*, for the Defendants-Appellants.

S. Sharvananda, for the 1st Plaintiff-Respondent.

Cur. adv. vult.

October 9, 1966. TAMBIAH, J.—

The plaintiffs brought this action to pre-empt a half share of the land described in the schedule to the plaint on the basis that they were entitled to an undivided ½th share of the land and that the 1st defendant by deed No. 339 of 1/4/1957 marked P1, sold without notice to them an undivided half share to the 2nd and 3rd defendants-appellants. The plaintiffs contended that they were only liable to pay Rs. 4,000 as

consideration, being half of the consideration of Rs. 8,000 mentioned in the deed, for the reason that the said deed which dealt with the entire land could convey only a half share.

Several issues were framed and after trial the learned District Judge entered judgment for the plaintiffs as prayed for with costs. The defendants have appealed from this order.

It is common ground that the third defendant is the sister of the first defendant. Mr. Ranganathan contended that in this case no action for pre-emption would lie since the transfer was to the sister of the vendor who is an heir within the meaning of section 2 of the Thesawalamai Pre-emption Ordinance (Cap. 64). He also contended that since the first plaintiff and the second plaintiff were each entitled to ¼th share, each of them had a separate cause of action and there is a misjoinder of parties and causes of action. On these two grounds he urged that the action should be dismissed.

It is sufficient to deal with the first point raised in appeal. Pre-emption is traceable to a state of society in which the family owned a property in common. In such a society co-sharers would have all been members of the family and the purpose of pre-emption was to see that land was not alienated to strangers and to stop the intrusion of outsiders which would naturally have been resented by the other members of the family. The law relating to pre-emption is found in ancient codes, such as the Code of Hamurabi. The Jews also had this concept. It may be that they borrowed the law of pre-emption from the Babylonians (*vide* verses 24–34 in the Chapter of Leviticus). Pre-emption is found in many customary laws of India. Although the view has been expressed that the law of pre-emption in the customary laws of India is the result of the impact of Muslim law, one finds traces of pre-emption in customary laws which were unaffected by the Muslim law.

Before the Thesawalamai Pre-emption Ordinance was enacted, the Law of pre-emption was found in the Thesawalamai Code which enacted that " when any person has sold a piece of land, garden, etc., to a stranger without having given any previous notice thereof, to his heirs or partners and to such of his neighbours, whose grounds are adjacent to his land and who might have the same in mortgage, should they have been mortgaged, such heirs, partners and neighbours are at liberty to claim or demand the preference of such land" (*vide* Thesawalamai Code VII. 1).

The word " heirs " in this context must necessarily mean persons who would become intestate heirs on the death of the intestate vendor. In view of the uncertainty of life, it is not possible to determine who are one's heirs excepting at the moment of one's death. However, in *Ponniah v. Kandiah* [1] de Sampayo J. took the view that the word " heirs " in the

[1] *(1920) 21 N. L. R. 397.*

Thesawalamai Code really meant persons who would be the intestate heirs if the transferor died at the moment of transfer. In the course of his judgment he said (vide *supra* at 328) :

> " The word I think refers to persons who would be heirs if the owner should now die, just as in England the eldest son of a person still living is commonly spoken of as his " heir " or " heir-at-law " and the right of pre-emption is given to heirs in that sense to be enforced presently against the owner."

With due respect, I wish to state that I do not agree with this view. The word " heirs " in section VI. 1 of the Thesawalamai Code connotes a group of persons, who would be potential heirs of the vendor at the time of his death. Be that as it may, the question for decision is whether the third defendant is an heir within the meaning of section 2 of the Thesawalamai Pre-emption Ordinance (Cap. 64).

The Thesawalamai Pre-emption Ordinance was enacted to give effect to the recommendations of the Thesawalamai Commission. In the course of their report the Commissioners said : (vide Supplementary Report of the Thesawalamai Commission, Sessional Paper I, page 6) :

> " In the Thesawalamai common law, the vendors, co-owners, heirs and owners of adjacent land are entitled to a right of pre-emption in respect of the land that he proposes to sell and in regard to which they stand in one of these relationships."
>
> " We are of opinion that the right should not be allowed to owners of adjacent lands but that it should be restricted to co-owners and *to those who would be heirs of the vendor up to the third degree in the case of intestacy.*"

Thus, it is clear that the Commissioners in their report envisaged that all persons who could potentially become heirs at the moment of the death of the vendor were entitled to the right of pre-emption.

The report of the Commissioners has been implemented in unambiguous language. Section 2 of the Thesawalamai Pre-emption Ordinance enacts—

> " (1) When any immovable property subject to the Thesawalamai is to be sold, the right of pre-emption over such property, that is to say, the right in preference to all other persons whomsoever to buy the property for the price proposed or at the market value, shall be restricted to the following persons or classes of persons :
>
> (*a*) the persons who are co-owners with the intending vendor of the property which is to be sold, and
>
> (*b*) the persons who in the event of the intestacy of the intending vendor will be his heirs.

(2) For the purposes of this Ordinance, the term "heirs" *means* all descendants, ascendants and collaterals upto the third degree of succession, and includes—

(*a*) children, grandchildren and great-grandchildren;

(*b*) parents, grandparents on both the paternal and the maternal sides and great-grandparents on all sides;

(*c*) brothers and sisters whether of the full or of the half blood;

(*d*) uncles and aunts, and nephews and nieces, both on the paternal and the maternal sides, and whether of the full or of the half-blood.

Section 2 (2) defines the term "heirs". It states that the term "heirs" *means* all descendants, ascendants and collaterals up to the third degree of succession and includes the persons set out in paragraphs 2 (*a*) to (*d*).

When a statute says that a word or phrase shall "mean" and not merely that it shall "include" certain things or acts, "the definition is a hard and fast definition, and no other meaning can be assigned to the expression than is put down in the definition" (*vide* per Esher M.R. in *Gough v. Gough* [1]; *vide* also *Bristol Tram Co. v. Bristol* [2]; Stroud's Judicial Dictionary, Vol. III, 3rd Edition, p. 1765).

Mr. Sharvananda contended that the phrase "in the event of intestacy of the intending vendor" clearly shows that the heirs referred to in section 2 are the persons who would be intestate heirs at the time the transfer took place. He therefore urged that one has to look into the law governing intestate succession applicable to those who are governed by Thesawalamai and determine who will be the heirs if the vendor had died at the moment of transfer. He argued that, otherwise, the words intestate heirs would be meaningless. For this proposition he relied on the ruling in the case of *Markandu v. Rajadurai* [3]. In the course of his judgment in that case, Sansoni, J. (as he was then), said (at 395):

"Now if one were to substitute for the word "heirs" in section 2 (1) (*b*) the definition appearing in section 2 (2), the result would be unintelligible. Again, section 2 (1) (*b*) does not read "the persons who are the heirs of the intending vendor": if it did, the substitution of the persons mentioned in the clause defining "heirs" would provide the result for which Mr. Ranganathan contends. Obviously, the heirs contemplated in section 2 (1) (*b*) are those persons whom de Sampayo, J., referred to as "persons who would be heirs if the owner should now die". It is for that reason, I think, that the word "heirs" in section 2 (1) (*b*) is qualified by the phrase "in the event of the intestacy of the intending vendor": and it is for that reason that

[1] *(1891) 2 Q. B. 665.* [2] *59 L. J. Q. B. 449.*

[3] *(1957) 58 N. L. R. 394.*

one cannot include all those persons falling within the clause defining the term "heirs" simpliciter as persons who have the right of pre-emption."

With due respect, I am unable to agree with the views expressed in this dictum. The use of the phrase "in the event of the intestacy of the intending vendor" in section 2 (1) (*b*) was intended to shut out testate heirs. If a person left his property by will to a person, then the devisee becomes the testate heir. The customary laws of the Tamils did not recognise testate succession. Therefore when the Dutch codified the Thesawalamai, testate heirs had no place and were not entitled to pre-empt. As stated earlier the historical reason for the preservation of the law of pre-emption in the Thesawalamai was to see that property did not pass to strangers but was kept within the family. The phrase "persons who in the event of intestacy of the intending vendor will be his heirs" in section 2 (1) (*b*) of the Thesawalamai Pre-emption Ordinance refers to a group including all persons who could be potential heirs under the law of intestate succession at the time of the death of the vendor.

In the present case, there is evidence that the vendor has two children but there is no certainly that at the time of death of the vendor they could be alive. If they are not alive at the time of death of the vendor and if the third defendant survives him, she would then become his heir.

The definition found in section 2 (2) of the term "heir", which means all descendants, ascendants and collaterals of the third degree of succession, leaves no alternative for any other construction to be placed on the word "heirs". The legislature intended to give the right of pre-emption to all categories of persons who could potentially be regarded as heirs at the time of the death of the vendor and who are enumerated in section 2 (*a*) to (*d*). This canon of construction is strengthened by the wording in section 13 of the Thesawalamai Pre-emption Ordinance which enacts :

"All co-owners and heirs within the meaning of section 3 shall be deemed to have *an equal right to pre-empt any share* or interest in property sold without due publication of the notice required by section 5, and *there shall be no preference or precedence among them :*

Provided, however, that in the event of any competition among such co-owners and heirs, the court may accept the highest offer made by any of them, if such offer is also larger than the actual price paid or the market value, whichever of these is the larger."

In view of the fact that all heirs within the meaning of section 3 are deemed to have "equal right to pre-empt" any share or interest in property, the Legislature clearly contemplated a group of persons who could become potential heirs at the time of the death of the vendor and

not the particular heir or heirs, who would succeed had the vendor died at the time of the transfer. The proviso further states that in the event of any competition among the heirs, the court may accept the highest offer made by any of them and there shall be no *preference or precedence among them.* This again shows that the Legislature was referring to a competition among various grades of heirs set out in section 2 (2) of the Pre-emption Ordinance. In the event of competition it is enacted that there shall be no *preference or precedence among them.* The use of the words "preference or precedence" show that persons who are further removed from the vendor in the family tree were equally entitled to the right of pre-emption as those who are more closely related to him.

It is a well known rule of interpretation that where the words of an enactment are clear a court should give effect to them and should not legislate by introducing words which are not found in the statute (vide Craies on Statute Law, 5th Ed. p. 103). In the course of his judgment in the case of *Markandu v. Rajadurai* [1] Sansoni, J., (as he was then) was put to the necessity of introducing words into the Thesawalamai Pre-emption Ordinance in order to give a construction to section 2 of that Ordinance. In the course of his judgment he said (vide at page 395) :

> "My view, then, is that persons who claim to come within section 2 (1) (*b*) must first satisfy the condition that they would be heirs of the intending vendor if he should then die intestate : that condition having been satisfied, they must also satisfy the condition that they are descendants, ascendants or collaterals within the third degree of succession. Only in this way can full effect be given to all the words of section 2 (1) (*b*) and section 2 (2)."

With due respect, I am unable to agree that condition No. 1 should be satisfied before a person could ask for pre-emption. Condition No. 1 is not found in the Thesawalamai Pre-emption Ordinance and to read it as if it is part of the statute would be to give an unduly restrictive interpretation.

The interpretation placed in the case of *Markandu v. Rajadurai* (supra) is an undue restriction on the rights of persons who are clearly entitled to pre-empt under the Thesawalamai Pre-emption Ordinance. When the Thesawalamai Pre-emption Ordinance speaks of persons who "in the event of intestacy of the intending vendor will be his heirs", it is not permissible to construe the word "heirs" in this context "*as heirs at the time the transfer took place*". If it is appreciated that persons who are entitled to pre-empt belong to a group of persons who could potentially be heirs at the time of the death of the vendor, section 2 of the Pre-emption Ordinance becomes intelligible. Therefore I hold that the first defendant has transferred to his sister, the third defendant,

[1] *(1957) 58 N. L. R. 394.*

who herself is entitled to pre-empt under section 2 (1) of the Thesawalamai Pre-emption Ordinance. Therefore this action does not lie and should be dismissed.

In view of this finding it is not necessary to decide the question as to whether there is a misjoinder of parties and causes of action. But in view of its importance it is necessary to refer to this point which was raised in appeal.

The right of pre-emption is based on a cause of action. In order to appreciate the precise cause of action, it is necessary to distinguish between a primary right and a remedial right. In dealing with the law of pre-emption that the primary right vested in a person who is entitled to pre-emption has been stressed in a number of judgments of the Indian Courts. In *Sanwell Das v. Gul Parshad*[1] Justice Chatterji said :

> " I consider the right of pre-emption as a substantive and primary right which is possessed by, or interest in the pre-emptor, and imposes a corresponding obligation on the vendor of the property which is the subject of pre-emption."

When this primary right is infringed by the vendor who sells to a stranger without conforming to the law of pre-emption, a remedial right arises to the person who is entitled to the right of pre-emption, to come to a court of law and ask for this right. But to claim a remedial right a plaintiff should have a status of a person competent to claim pre-emption.

In this case the right of each of the plaintiffs to claim pre-emption is a separate right. But there was an infringement of these rights and each had a separate cause of action. Therefore when the plaint was filed there has been a misjoinder of parties and causes of action.

Mr. Sharvananda relied on the ruling in *Thangammah v. Kanagasabai*[2] for the proposition that in the case of pre-emption there is a joint cause of action. In dealing with this point in that case, Nagalingam J. said (vide *supra* at p. 504) :

> " The next point for consideration is whether the action is bad by reason of the joinder of the two plaintiffs. It is said that as each of the plaintiffs is entitled to a 1/4th share, each has a separate cause of action. Section 11 of the Civil Procedure Code expressly permits all persons to be joined as plaintiffs in whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative in respect of the same cause of action. Several plaintiffs, therefore, in whom the right to relief exists jointly or severally can unite in the same action, so that it is immaterial to consider whether the plaintiffs are entitled to the relief they seek jointly or severally, for in either case a joinder is permissible. The point to be ascertained, however, is

[1] *(1909) 4 Indian Cases 179.*

[2] *(1949) 51 N. L. R. 500.*

whether the relief claimed by the several plaintiffs is in respect of the same cause of action. This leads one to a consideration of the nature of the rights of the co-owners *inter se* in regard to the right of pre-emption.

The right of pre-emption is one that is conferred by law upon co-owners and must be deemed to be based upon an implied contract whereby the co-owners are jointly bound to one another, and the co-owners in this view of the matter become joint contractors in regard to the enforcement of this obligation. If the contract is joint, then there can be no objection to several joint contractors instituting a single action to enforce their rights."

With due respect, I am unable to agree with the last paragraph of this dictum. The law of pre-emption is not based on any contract implied or expressed. It is now found as a statutory provision. As stated earlier, it was intended to preserve the property among the members of the family. Therefore it would not be justifiable to find an implied contract among co-owners or heirs who are entitled to pre-empt. It may well be that one of the persons who are entitled to pre-empt may not care to buy the property. Each person who is entitled to pre-empt therefore has a distinct cause of action. Therefore when the plaint was filed there was a clear misjoinder of parties and causes of action.

Mr. Sharvananda contended that this objection fails as it has not been raised before the hearing. He also contended that during the course of the action the second plaintiff has transferred his interest in the land to a third person. As the second plaintiff has ceased to be a co-owner he has lost his status to maintain this action for pre-emption and his cause of action had ceased to exist. Further, even when there is a misjoinder of parties and causes of action a court is given the discretion to give an opportunity to the plaintiffs to strike out the name of a plaintiff and regularise the action. (vide dictum of de Sampayo, A.C.J. in *Kanagasabapathy v. Kanagasabai* [1]). In view of the fact that the second plaintiff's cause of action has ceased to exist there is no misjoinder of parties and causes of action. Therefore the second point raised in appeal by Mr. Ranganathan fails.

However, in view of my finding on the first point raised in appeal, I set aside the order of the learned District Judge and dismiss the plaintiff's action with costs in both courts.

MANICAVASAGAR, J.—

I have read the opinion of my brother, Tambiah, on the two questions argued at the hearing, and I agree for the reasons stated in his judgment that this appeal should be allowed, and the plaintiff's action dismissed with costs here and in the original court.

[1] *(1923) 25 N. L. R. 173 at 175.*

Nevertheless, I wish to state my views on the submission of Mr. Sharvananda, that the words, " persons who in the event of the intestacy of the intending vendor will be his heirs ", in Section 2 (1*b*) of the Thesawalamai Pre-emption Ordinance (Cap. 64, Revised Edition, 1956), is referable only to those persons who at the time of sale will be the vendor's intestate heirs, according to the law of inheritance.

Before I consider this submission, it is necessary to note certain relevant facts. The 1st defendant by deed P1 sold to the 3rd defendant and her husband, the 2nd defendant, the land which is the subject of the action, and in which he had undivided interests : neither of the vendees were co-owners, but the 3rd defendant is the sister of the vendor. The vendor has two children, both born before the sale. The plaintiffs were co-owners of the land when the action was instituted, but the 2nd plaintiff has since parted with his interests.

In the event of the vendor dying intestate, his children will be amongst his first heirs, under the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 58), whatever be the nature of the inheritance, and are preferred to his sister, the 3rd defendant, who will succeed only if the children, and their descendants, and the parents of the vendor fail. Mr. Sharvananda's argument is that at the time of the sale, the children being alive, the 3rd defendant could not have succeeded to the vendor's inheritance, if he died intestate, and therefore the 3rd defendant had no right of pre-emption : he submitted that the plaintiffs as co-owners had this right, and therefore the judgment of the original court should be sustained.

A consideration of Section 2 (1*a* and 1*b*) does not justify the limitation placed on the word " heirs " by counsel. The right of pre-emption is given to two classes of persons, viz., co-owners with the intending vendor, and those who will be the heirs of the vendor in the event of his dying intestate, and Section 2 defines, and enumerates those who would fall into the category of heirs.

By this special definition, the heirs who are entitled to pre-empt are only the persons mentioned in the section, and they are not exhaustive of the persons who would be entitled to succeed to the inheritance on an intestacy ; to cite one instance, the deceased's spouse who is an heir *ab intestato* is not included in the class of persons designated as heirs in the Pre-emption Ordinance : nor is the order of succession in the event of an intestacy prescribed in the Jaffna Matrimonial Rights and Inheritance Ordinance followed in the Pre-emption Ordinance. It is significant that Section 2 (2) refrains from stating that the right to pre-empt should be exercised in accordance with the order of succession regulated by the law pertaining to intestacy. The distinction I have pointed out is relevant, for the right to pre-empt is not given to all heirs *ab intestato*, in order of succession, at the time of the sale, but only to those who I may describe as all the " potential heirs " enumerated in Section 2 (2). There

is nothing in the words of this section which point to an order of precedence or preference amongst those who are enumerated in the section as persons entitled to the right of pre-emption. Indeed Section 13 puts co-owners, and all heirs within the meaning of Section 2 (2) on a footing of equality, encourages competition amongst them, and provides that the court should accept the highest offer, even though it be more than the market value of the land, or the actual price paid by the vendor.

I am of the opinion that the word " heirs " in Section 2 (1*b*) should be given a much wider meaning, so as to include all those persons specified in Section 2 (2), and not limited only to the heir who will succeed on an intestacy.

In this view of the matter, the 3rd defendant is an heir, entitled to the right of pre-emption.

Appeal allowed.