Present : Jayewardene A.J. 1923.

KATHIRESU *et al. v.* KASINATHER *et al.*

178—C. R. Mallagam, 3,023.

Tesawalamai—*Pre-emption — Knowledge of intended sale — Formal notice.*

A person who has knowledge of an intended sale by a co-owner of his share, and does not offer to exercise his right of pre-emption under the *Tesawalamai*, cannot thereafter bring an action for pre-emption.

The burden of proof is on the defendant to prove that he either gave formal notice or that the plaintiff had knowledge of the intended sale.

THE second plaintiff-appellant was the owner of an undivided half share of a piece of land. The first defendant-respondent was the owner of the other undivided half share. The first defendant sold his share in the land referred to with six other lands to the second defendant.

The second plaintiff sued both defendants, claiming to exercise her right of pre-emption on the ground that the sale to the second defendant-respondent was without any notice to her, that the plaintiffs-appellants were ready and willing to deposit in Court the market value of the said share which they assessed at Rs. 125 or any other sum which the Court may order and that the sale was in collusion between both the defendants-respondents.

The second defendant-respondent filed answer alleging that notice of sale was given to the plaintiffs-appellants by both the defendants-respondents, that the plaintiffs-appellants declined to buy it, and that the market value of the said half share was Rs. 250.

The case was heard on the following issues :—

(1) Was notice of sale by the first defendant of the land in question given to the second plaintiff ?
(2) What is the market value of the land ?
(3) Were plaintiffs aware of the sale ?

The learned Commissioner (R. H. Bassett, Esq.) dismissed the plaintiffs-appellants' case, with costs.

Arulanandam, for the plaintiffs, appellants.—Several lands were sold for Rs. 1,000. No particular price was fixed for the land. It is not, therefore, likely that the vendor gave any notice to the plaintiff of the intended sale.

1923.

Kathiresu v. Kasinather

[JAYEWARDENE A.J.—Are you entitled to pre-empt when several lands are sold for a consideration like this ?]

The market value has to be ascertained. The plaintiffs did not receive any notice from the vendor. It is for the vendor to prove that he did give notice. Counsel referred to *Suppiah v. Thambiah*,[1] *Kanekamuttu v. Thamar*.[2]

James Joseph, for defendant, respondent, argued on the facts.

September 19, 1923. JAYEWARDENE A.J.—

This is an action for pre-emption. The plaintiffs and the first defendant were co-owners in half shares of a land called Narankuthevanseema. The first defendant sold his half share, along with six other lands, to the second defendant by deed No. 879 of December 1, 1922. The plaintiffs complain that the first defendant, without giving them an opportunity of exercising the right of pre-emption, which they are entitled to under the *Tesawalamai*, sold the land to the second defendant. They tender a sum of Rs. 125, which they say is the value of the half share, and asks that the first defendant be ordered to execute a transfer in their favour. The second defendant filed answer, alleging that the plaintiffs were aware of the sale, and received due notice of it before the land was sold to him. The main issues tried were, whether notice of sale was given to the plaintiffs, and whether plaintiffs had knowledge of the sale *aliunde*. The *Tesawalamai* itself declared the form of notice to be given where a co-owner has the right of pre-emption. But by Ordinance No. 4 of 1895, so much of the *Tesawalamai* as requires publication and schedules of intended sales of immovable property was repealed. But this Court held in *Suppiah v. Thambiah* (*supra*), that notwithstanding the abolition of publication and schedules of intended sales, the liability of a co-owner desiring to sell his share of a land to give reasonable notice to his other co-owners of the intended sale still survived. What would be a reasonable notice was not defined, and Wendt J. suggested that to prevent disputes as to form of notice and consequent litigation, the Legislature should prescribe some definite formality. This has not been done, and in *Kanekamuttu v. Thamar* (*supra*) Ennis J. held that no formal notice was required, but where a co-owner had knowledge of the intended sale, he cannot complain of any want of reasonable publication of the intention to sell. The plaintiffs have, therefore, to prove that they received no formal notice and had no knowledge of the sale, or I should say that the burden was on the defendants to prove that they either gave the plaintiffs formal notice or that the plaintiffs had knowledge of the intended sale and did not offer to exercise their right of pre-emption. In this case the plaintiffs undertook the burden. The right of pre-emption imposes a

[1] *(1904) 7 N. L. R. 157.* [2] *(1918) 21 N. L. R. 213.*

serious fetter on an owner's right of free disposition of property, and the facts have to be carefully scrutinized before a co-owner is allowed to set aside a sale on such a ground. In this case the evidence is very conflicting, but the learned Commissioner has come to the conclusion that the plaintiffs did receive notice. He also points out that the action is not *bona fide*, but is made at the instigation of one Swaminathan. In the circumstances, I see no reason to interfere with his finding, and I dismiss the appeal, with costs.

Appeal dismissed.