

1948

*Present : Canekeratne J.*

SABAPATHYPILLAI, Appellant, and SINNATAMBY, Respondent

*S. C. 65—C. R. Point Pedro, 382**Thesawalamai—Where silent—Recourse to Roman-Dutch law.*

As regards pre-emption in Thesawalamai, where the Thesawalamai is silent the Roman-Dutch law is applicable.

**A**PPPEAL from a judgment of the Commissioner of Requests, Point Pedro.

*N. Kumarasingham*, for the defendant appellant.

*H. W. Thambiah*, for the plaintiff respondent.

*Cur. adv. vult.*

June 22, 1948. CANEKERATNE J.—

This is an appeal by the defendant from a judgment declaring the plaintiff entitled to pre-empt the shares of certain lands. By deed P1, dated January 8, 1944, one Alvatti transferred these shares to the defendant. In his answer the defendant pleaded the purpose for which the transfer was made and excepted to the jurisdiction of the Court.

There were six issues framed at the trial, the first and second are the only issues material for the purposes of the appeal. The answer to issue 1, which relates to the value of the lands which are the subject-matter of the action, is thus stated :—Rs. 200 for the purpose of this case. Mr. Thamabih contends that the principles relating to pre-emption of the Mahomadan law in India are applicable to this case. With all due respect to the learned Judge who decided the case referred to in the judgment, I venture to think that one should resort to the Roman-Dutch law wherever the Tesawalamai is silent, because (a) a customary law is a deviation from the general or common law and the common law applies in all cases except where the customary law is in operation, (b) even if there was a rudimentary conception of pre-emption among the inhabitants of Jaffnapatam before the advent of the Dutch,<sup>1</sup> there can be no doubt that the rules found in the compilation by the Dutch Dissawe had been influenced by the principles of the Roman-Dutch law and in the course of nearly half a century the forms and principles of Dutch Jurisprudence became gradually introduced. Paviljoen, Commandeur of Jaffnapatam, in his Instructions in 1665 states "The natives are governed according to the Customs of the country if these are clear and reasonable, otherwise according to our laws".<sup>2</sup> "The laws and customs of Jaffnapatam" were composed by the Dissawe Claas Isaaksz after an experience of thirty-five years in that province :

<sup>1</sup> Cf. the silence of *De Queyroz—the Conquest of Ceylon (Translation by Fr. Perera)* p. 53; *Balasingham, Laws of Ceylon, Vol. I., 136.*

<sup>2</sup> *Balasingham, op. cit. p. 157.*

it was sent with a letter dated January 30, 1707, to the Governor. The Dutch version was in the same year translated into Tamil (the appendix to the translation of Van Leeuwen's Roman-Dutch law published in England, p. 741, pp. 773-777). Pre-emption, *jus retractus*, was a recognised right in the Roman-Dutch law. It arose from convention (e.g., agreement of parties) or from a provision of the law (i.e., independently of contract). In the latter case the right arose under a variety of heads: it was available to co-owners (*sociis*), to adjoining proprietors, to mortgagees of immovable property, to cognates, thus it may be exercised by a son of the vendor, or the heir of a deceased vendor, whether a son or a more remote cognate. Section VII of this Collection (Cap. 51 of the Ceylon Legislative Enactments) contains the provisions relating to pre-emption. It seems that in the Dutch and Tamil versions the right was available to four classes of persons: the heirs of a vendor, a vendor's partners, neighbours whose grounds are adjacent to the vendor's land, mortgagees of the land.<sup>1</sup> This bears a close resemblance to the four classes of persons who could exercise the right under the Roman-Dutch law. The English translation, which is the one in force now, allows the right to the first and second classes above mentioned and to "neighbours whose grounds are adjacent . . . and who might have the same in pawn". The "previous notice" that has to be given by a vendor is referred to in paragraph 1. The intention to sell was made known on three successive Sundays at the Church: a similar practice seems to have been prevalent in some parts of Holland (Grotius, Introduction, 3-16-6). A sale passes the vendor's title to the purchaser but as the sale was in derogation of the right of the retractor, he can take steps to avoid the sale and have the property transferred to him. The act of the vendor is voidable as against the retractor; the previous sale is not, according to Van Leeuwen, obliterated as though it had never taken place. (*Censura Forensis* 1-4-21-27; but cf. Voet 18-3-27).

A Surveyor who made a valuation of these shares on a commission from Court gave evidence at the trial: the shares were worth, according to him, a sum of Rs. 731/45 at the time of the valuation, September, 1947; he asserted that in 1944 these shares were worth more than the present value. He was not cross-examined by the plaintiff. In *Suppiah v. Tambiah*<sup>2</sup> it was decided that the retractor must pay the market value of the land. This is a decision of a Bench of two Judges and is binding on me. Sometimes value is spoken of as the best price which can be obtained for the land.<sup>3</sup> The tendency in Ceylon has been to take the value of the land, or the market value. This would be the price which any one would give for the land at a public auction (not a compulsory sale), the price which an able and willing purchaser would give for the land. The cost of the same land to the purchaser is nothing more than a factor in determining the value of the land. The question often is what the person from whom the land is taken will lose by having it taken from him.

<sup>1</sup> *Sabapathy v. Sivaprakasam* (1905) 8 N. L. R. 62 at p. 63.

<sup>2</sup> (1904) 7 N. L. R. 151.

<sup>3</sup> *Seneviratne v. Sabapathy*, 2 *Times of Ceylon Reports*, 139. Cf. *Sitamparampillai v. Navaratnam* (1944) 46 N. L. R. 212.

The evidence shows that the shares of these lands were worth much more than Rs. 300 and the Court of Requests had no jurisdiction to decide this case. There remains the question whether the case can be transferred at the present stage under section 10 of the Civil Procedure Code to a District Court. The position taken up at the hearing was that there was such a power, and Counsel for the respondent did not raise any objection to the exercise of the power. I am not sure that the power of transfer referred to in that section can be exercised incidentally in the course of the hearing of an appeal: but nothing that is stated in this judgment should be taken to prejudice any right the respondent may have to make a proper application for a transfer, if he is so advised, to the Supreme Court.

The action cannot be maintained in the Court of Requests and the judgment of the lower Court is set aside. The appellant is entitled to the costs of appeal and to half the costs of the trial.

*Appeal allowed.*

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