

1918.

*Present: Ennis J.*KATIRASAPILLAI v. KANAGASABAI *et al.*

138—C. R. Kayts, 3,372.

Tesawalamai—Pre-emption—Share of well and right to lead water.

The defendant sold his land and "the share of well lying in the eastern boundary land and the right of water-course for leading water" without giving the plaintiff (the owner of the eastern boundary land) notice of such intended sale. Plaintiff brought this action for pre-emption of the land sold, together with the share of well, &c.

Held, that under the *Tesawalamai* an action for pre-emption did not lie under the circumstances.

PLAINTEFF was the owner of an extent of 7½ lachams on the eastern side of a land called Chekkathikaladu in extent 16½ lachams, excluding a share of the well on this portion and also the right of water-course from the well to the remaining portion of the land. The second defendant, who was the owner of the remaining portion of the land, with the share of the well on the plaintiff's land and the right of water-course therefrom, sold her land, &c., to the third defendant without giving notice of the intended sale to the plaintiff. The plaintiff deposited in Court the sum of Rs. 70, for which the second defendant sold her interests, and brought this action for pre-emption.

The Commissioner of Requests (A. E. Christoffels, Esq.) dismissed the action. The plaintiff appealed.

Balasingham, for the appellant—Under section 7 of the *Tesawalamai* the plaintiff, who is entitled to a share of the well, is entitled to a right to pre-empt the share of the well. [Ennis J.—The words in section 7 are "heirs, partners, and owners of land who hold mortgages over adjoining lands." But the plaintiff is not a partner.] The term "partner" has been always understood to mean co-owners, and not partners in the strict sense of the term.

It may be that as to the adjoining land (apart from the well) the plaintiff has no right to ask for pre-emption. But the plaintiff has a right to ask for pre-emption of the share of the well. The plaintiff and the second defendant are clearly co-owners in respect of the well. It may be hard on the defendant if the plaintiff insists on his right to pre-empt the share of the well alone. He therefore offers to buy the land also. The deed of sale to third defendant conveys "whole of this land, share of well lying in the eastern boundary land, and the right of water-course." This clearly shows that as regards the well the parties are co-owners. But even if the defendant has only a servitude over the plaintiff's land, even then the parties are in the nature of co-owners. The defendant has one of the elements which go to make up the full right of ownership (*dominium*). He is therefore in strict law a co-owner.

The right claimed is not an unreasonable one. The defendant suffers no loss by sale to the plaintiff, but, on the other hand, the plaintiff will be seriously inconvenienced if a neighbour has this right over his land. If a low-caste man becomes owner of a share of the well, the plaintiff will not be able, under existing social conditions (which we cannot ignore), to use the well.

Counsel cited 4 *N. L. R.* 328; 6 *N. L. R.* 356; 7 *N. L. R.* 151; 8 *N. L. R.* 62; 3 *Tam.* 52; *Muttukishna* 529; 536, 560, 558.

Arulanandan (with him *Joseph*), for respondent, not called upon.

Cur. adv. vult.

July 18, 1918. ENNIS J.—

This was a claim for pre-emption of certain land in Jaffna. The learned Commissioner of Requests dismissed the action, and the plaintiff appeals.

The plaintiff is the owner of land upon which there is a well. A share in the well, and a right to lead water from it for the purposes of irrigation, belongs to the defendant, an adjoining owner.

By section 7 of the *Tesawalamai* (English translation) heirs, partners, and owners of land who hold mortgages over adjoining lands have the right of pre-emption. Mr. Balasingham urged that the English translation of the *Tesawalamai* is incorrect, and that it originally stood "heirs, partners, adjoining owners, and mortgagees," but he concedes that the English translation is now accepted as the law, as decided in the case of *Sabapathy v. Sivaprakasam*.¹ His contention now is that the plaintiff is in the position of a "partner," although even here he contends that the translation should be "co-owner." The argument is that ownership consists of a group of rights, and that if any one of these rights is held by another, there is a case of co-ownership. Mr. Balasingham contends that the *Tesawalamai* extends to all such. According to this

¹ (1905) 8 *N. L. R.* 62.

1918.

*Katirasa-
pillai v.
Kanagasabai.*

1918.

ENNIS J.

*Katirasa-
pillai v.
Kanagasabai*

argument a lessee would fall under the definition, and would not be able to assign until he had given notice of his intention to the lessor, who would have the right of pre-emption. Both the counsel in this case agree that there is no such custom in Jaffna.

Mr. Balasingham was not able to cite any authority in support of his proposition, or to point to anything in the *Tesawalamai*, except the word "partner" in section 7. I am unable to hold that the term is sufficiently explicit to extend the right of pre-emption to the extent to which the proposition would lead. The plaintiff claims the right of pre-emption, because the adjoining owner had the right to draw water (or lead water) from a well on the plaintiff's land. It is conceded that the right would not extend to the purchase of the adjoining land, but it is contended that the right of pre-emption extends to the purchase (and extinction) of the water right, and, as it would be inequitable to extinguish the water right without offering to buy the adjoining land, an offer to do this is made. I cannot hold, in the absence of proof, that the right of pre-emption extends further than convenience allows, and the extinction of a water right might be highly inconvenient. In my opinion the customs collected under the *Tesawalamai* must all be read in the light of convenience rather than by any theory of positive law. The *Tesawalamai* refers merely to the necessity of a notice to allow of the right of pre-emption being exercised. It does not deal specifically with the custom of pre-emption itself, and hence one cannot expect to find mention of exceptions which would cause inconvenience.

I dismiss the appeal, with costs.

Appeal dismissed.