IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

SC. Appeal 87/2010

S.C.H.C.C.A.L.A. No. 80/2010
Mallakam District Court
Case No. Land/293/05
Civil Appellate High Court
Jaffna Case No. 39/08

1. Sangarapillai Navaratnarajavel
2. Wife Kangadevi

Both of Puttur East, Puttur.

Plaintiffs

Vs.

1. Kandiah Naganathan
2. Wife Baskaradevi,

Both of Punkadi, Puloli South, Puloli.

3. Arunasalam Varnadevid
4. Wife Santhanayaki
5. Jesudasan Santhirabose

All three of Selvavalavu,
Chunnakam.

Defendants

AND NOW

1. Kandiah Naganathan
2. Wife Baskaradevi,

Both of Punkadi, Puloli South, Puloli.

3. Arunasalam Varnadevid

4. Wife Santhanayaki
5. Jesudasan Santhirabose

All three of Selvavalavu,
Chunnakam.

Defendants-Appellants

Vs.

1. Sangarapillai Navaratnarajavel
2. Wife Kangadevi

Both of Puttur East, Puttu.

Plaintiffs-Respondents

AND NOW BETWEEN

In the matter of an application for Leave to Appeal in terms of Article 154P of the Constitution in the exercise of its jurisdiction granted by Section 5A of the High Court of the Provinces [Special Provisions] Act, No. 54 of 2006.

1. Sangarapillai Navaratnarajavel
2. Wife Kangadevi

Both of Puttur East, Puttu.

Plaintiffs-Respondents-Petitioners

Vs.

SC. Appeal 87/2010

1. Kandiah Naganathan
2. Wife Baskaradevi,
   Both of Punkadi, Puloli South, Puloli.
3. Arunasalam Varnadevid
4. Wife Santhanayaki
5. Jesudasan Santhirabose
   All three of Selvavalavu,
   Chunnakam.

Defendants-Appellants-Respondents

BEFORE : **MOHAN PIERIS PC. CJ.**
SATHYAA HETTIGE PC. J &
EVA WANASUNDERA PC. J

COUNSEL : M.A. Sumanthiran for the Plaintiffs-Respondents-Petitioners.

S. Ruthiramoorthy for the Defendants-Appellants-Respondents.

ARGUED ON : **12.09.2013**

DECIDED ON : **31.03.2014**

* * * * * *

EVA WANASUNDERA, PC.J.

This appeal arises from the Provisions in the Thesawalamai Pre-Emption Ordinance No. 59 of 1947 which is an Ordinance to amend and consolidate the law of Pre-Emption relating to lands affected by the “Thesawalamai”.

Section 4 of the said Ordinance reads:-

> "The right of pre-emption shall not be exercised except in a case where the property which is to be sold consists of an **undivided share** and interest in immovable property, and shall in no case be permitted where such property is held **in sole ownership** by the intending vendor".

Section 2 [1] of the said Ordinance explains that the right of pre-emption over any immovable property subject to the Thesawalamai means "the right in preference to all other persons whomsoever to buy the property for the price proposed or at the market value", given to a class of persons specifically mentioned in that Section. It is a preferential right to buy a property when another person is wanting to sell his or her land. Precisely if A wants to sell his land he has to give notice and/or inform those specific persons who have a preferential right over any others to buy the said land.

Section 2 [1] reads:-

> "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.

The wording in Section 4 plays an important role.

The right of pre-emption applies only when the property proposed to be sold is an **"undivided share".** The right of pre-emption should not apply if such property is held in **"sole ownership by the intending vendor".**

In this case the Plaintiff-Respondent-Appellants [hereinafter referred to as Appellants] claim to enforce an alleged right of pre-emption against the 1st and 2nd Defendant-Appellant-Respondents [hereinafter referred to as 1st and 2nd Respondents] as vendors of 'a sale of land' and against the 3rd, 4th and 5th Defendant-Appellant-Respondents [hereinafter referred to as 3rd, 4th and 5th Respondents] as vendees of that land.

This Court granted leave to appeal on the questions set out in paragraphs 8 (a), (b), (e) and (f) of the Petition dated 10.3.2010. They are as follows:-

8 [a] Have the Learned High Court Judges erred in law in coming to a finding that the Southern part of the land identified as item 4 in the Schedule to the Plaint is divided?

8 [b] Have the Learned High Court Judges erred in law by failing to take cognizance of the fact that the Southern part of the land identified as item 4 in the Schedule to the Plaint is a co-owned land?

8 [e] Have the Learned High Court Judges erred in law by coming to a finding that the Survey Plan bearing the No. 201 surveyed on 3rd July 2004, has divided the co-owned land identified as item 4 of the Schedule to the Plaint?

8 [f] Have the Learned High Court Judges erred in law by failing to take cognizance of the legal authority ***Githohamy Et Al vs. Karanagoda et al*** **56 NLR 250**, which expressly states that, "A plan made at the instance of a co-owner purporting to cause a division of the common land of which the other co-owners apparently had no notice does not form the basis of divided possession. Exclusive possession on the footing of such a plan does not terminate the co-ownership of the land, and no presumption of an ouster can be inferred from such possession"?

The facts pertinent to this appeal are as follows:-

The Appellants instituted action in the District Court of Mallakam against the Respondents to enforce a right of pre-emption under the Thesawalamai Preemption Ordinance after the sale of a land by the 1st and 2nd Respondents to the 3rd, 4th and 5th Respondents. The 2nd Appellant Kangadevi was the owner of the land described in Item 4 of the Schedule in Deed No. 3592 dated 19.3.1983. Paragraph 4 of the said deed imposed a condition on the 2nd Appellant Kangadevi, i.e. that she should transfer the Southern Half of the land described in Item No. 4 of the Schedule to the Deed No. 3592 to her younger sister, the 2nd Respondent Baskaradevi when she becomes of age. On the 2nd Respondent Baskaradevi marrying, the 2nd Appellant Kangadevi transferred "the Southern Half" of the property by way of dowry to the 2nd Respondent under dowry deed 7240 dated 29.08.1988. Thereafter the 1st and 2nd Respondents transferred the said land to the 3rd, 4th and 5th Respondents by Deed No. 3208 dated 19.07.2004. It is this sale of land by Deed No. 3208 which is challenged by the Appellants as a transaction which is subject to pre-emption in Thesawalamai under Ordinance No. 59 of 1947.

I observe that until 29.08.1988, the 2nd Appellant Kangadevi, the sister of the 2nd Respondent Baskaradevi, was holding the "Southern half" of the property in question in trust for and on behalf of the 2nd Respondent Baskaradevi, as stipulated in Deed No. 3592 dated 19.3.1983. Five years thereafter, when the 2nd Respondent Baskaradevi changed her civil status, the elder sister, 2nd Appellant, Kangadevi transferred the "Southern Half" of the property to 2nd Respondent Baskaradevi, quite correctly and dutifully, with specific reference in the Schedule to the Deed No. 7240, **defining the boundaries** to the North, South, East and West and with specific reference to the extent as 14 lachchams. It is observed that this portion of land is registered in a new folio, i.e. Volume/Folio H 677/272 and not in the Volume/Folio as the main land, i.e. H 616/14. For all purposes, the intention of the 2nd Appellant was to pass on a specific area with defined boundaries and a definite extent to the 2nd Respondent. The fact that

a plan was not drawn at the time of the execution of this deed 7240, was not an impediment to the identification of the land conveyed. The 2nd Appellant and the 2nd Respondent, both knew for certain, the portion of land specifically granted by the deed 7240. I am satisfied that the parcel of land conveyed could be clearly identified. It was held in ***Nagaratnam and wife Vs. Sunmugam and Others*** **69 NLR 389** that "an action for pre-emption on the basis of co-ownership is not maintainable in respect of a share of a land which has been possessed and dealt with in divided lots by amicable partition among the share-holders, with each other's knowledge and consent. The absence therefore of a deed or plan of partition is not "decisive". In that case too, the shareholders knew in their minds which portion belonged to them as they had amicably agreed to possess separate parcels of land without any inconvenience of common ownership, even though it was not on paper on a plan or even on a deed.

When a land is co-owned, the Volume/Folio in the registers ordinarily will be the same as attributed to the whole land and maintained continuously for all the transactions of undivided shares of the whole land, at all times. The deeds mention that it is "undivided shares". In the instant case, the land was specifically divided as the "northern half" and the "southern half" and gave boundaries to this specific area mentioning that it is bounded on the north by the 'rest of the land' belonging to the donor the 2nd Appellant.

These facts clearly show that the 2nd Appellant notarially executed a deed of gift declaring that the southern half of the entire land as a separate distinct and divided allotment of land described with metes and bounds belong to the 2nd Respondent and that the northern half is owned by the 2nd Appellant. Both the donor and the donee knew the specific parcel of land given and received and consequently proceeded to register in a different folio in the Land Registry as a separate block of land. It is thus clear that the land was not co-owned any longer after 29.9.1988, the date on which the deed No. 7240 was executed.

Significantly, this separate parcel of land was leased out thereafter by the 2nd Respondent to an outsider by deed No. 3116 dated 8.10.1998 and that was registered in the same new folio H 677/272 followed by another lease executed in 2000 by deed

No. 4079 of 19.7.2000 which again was registered in the new folio H 677/272. The resultant position was that by the year 2000, the said conveyance was understood, accepted and acknowledged as a conveyance specifically dividing the said block of land from the main land in question. It is only in 2004 that the 2nd Respondent sold the land by deed 3208 dated 19.7.2004 to the 3rd, 4th and 5th Respondents and this time too this deed was registered in the same folio H 677/272. The only difference was that the 2nd Respondent prepared a plan to more specifically depict the land in the Schedule of the deed prior to the sale. It is also significant to note that in this survey, that the Northern half of the land belonging to the 2nd Appellant was 17 lachchams in extent and the Southern half of the land belonging to the 2nd Respondent was 16 lachchams.

It is my considered view that there has been no co-ownership at all from the very beginning i.e. from 1988. In the case of ***Sivagurunathan Vs. Visaladchi*** **[1954] 56 NLR 376**, it was held by Justice Gratien that "every co-owner in a co-owned undivided property should be able to exercise or be entitled to exercise plenum dominium over the entirety of the common property". In this case neither the 2nd Appellant nor the 2nd Respondent exercised any dominium on each other's portions of land and therefore there was no co-ownership at all from 1988. At the time the sale was executed in 2004, there was no co-ownership with the "intending vendor".

I therefore answer the questions of law in the negative and conclude that the Appellants did not have a right to exercise the right of pre-emption under Section 2 [1] of the Pre-emption Ordinance No. 59 of 1947 against the 2nd Respondent, the vendor. I dismiss the appeal and confirm the judgment of the Civil Appellate High Court of the Northern Province in Appeal Case No. 39/08 dated 19.2.2010. However I order no costs.

JUDGE OF THE SUPREME COURT

MOHAN PIERIS. PC. CJ.

I agree.

CHIEF JUSTICE

SATHYAA HETTIGE. PC. J

I agree.

JUDGE OF THE SUPREME COURT